Décision du conseil d'administration acceptant des crypto-actifs en apport de capital

Dr Alexander Ressos, TEP
Attorney-at-Law (Switzerland and Germany),
Solicitor (England & Wales and Hong Kong)
Of Counsel, KGP Legal LLC
alexander.ressos@kgplegal.com.sg
www.ressos.com.sg

Le droit suisse des sociétés admet les apports en nature lors de la fondation ou d'une augmentation de capital si l'actif peut être porté au bilan, s'il peut être transféré à la société et s'il est réalisable. L'apport doit être décrit dans les statuts et vérifié par un réviseur agréé.[1] Les registres du commerce de Zoug et de Zurich acceptent comme apports en nature le bitcoin, l'ether et les jetons liquides dont le cours est publié, en retenant une évaluation à la date de l'apport assortie d'une décote prudente pour tenir compte de la volatilité. Le droit singapourien des sociétés permet d'émettre des actions contre une contrepartie non monétaire sans exigence légale d'évaluation. Les administrateurs (directors) doivent toutefois s'être assurés que la contrepartie est suffisante, et l'ACRA (Accounting and Corporate Regulatory Authority, l'autorité d'enregistrement des sociétés) exige que sa valeur soit indiquée.[2] La décision ci-dessous concerne une SA suisse. La décision des administrateurs singapouriens est plus courte. Elle est résumée ensuite.

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Resolution of the Board of Directors of [Name] AG, Zug, of [date].
1. The Board notes that [contributor] proposes to contribute [number] [Bitcoin / Ether / tokens] (the "Contributed Assets") to the Company against the issue of [number] registered shares with a nominal value of CHF [amount] each in the capital increase resolved by the general meeting on [date]. 2. The Board notes the valuation report of [valuer] dated [date], valuing the Contributed Assets at CHF [amount] on the basis of the volume-weighted average price on [exchanges] over the [thirty] days preceding [date], less a discount of [x] per cent for volatility and liquidity, and resolves to apply a contribution value of CHF [amount], being not more than the value so determined. 3. The Board approves the contribution in kind agreement between the Company and the contributor dated [date], under which the Contributed Assets are transferred to a distributed ledger address controlled by the Company, with the private keys held in accordance with the Company's key management regulation. 4. The Board approves the founders' / capital increase report under Art. 635 CO describing the nature and condition of the Contributed Assets, the appropriateness of the valuation and the transfer mechanism, and notes the audit confirmation of [auditor] under Art. 635a CO. 5. The Board confirms that the Contributed Assets are freely transferable, that they can be shown as an asset in the Company's balance sheet, that they are not subject to any encumbrance, and that the contributor has confirmed the source of the Contributed Assets to the satisfaction of the Company's compliance function. 6. The Board resolves to amend the articles of association to record the contribution in kind as required by Art. 634 para. 2 CO and to file the application for registration with the Commercial Register of the Canton of Zug. 7. The Board instructs [name] to execute the transfer confirmation once the Contributed Assets have been received at the Company's address and the transaction has reached finality on the relevant ledger.

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La décision des administrateurs singapouriens constate l'attribution envisagée d'actions contre une contrepartie non monétaire ainsi que l'appréciation des administrateurs selon laquelle cette contrepartie est suffisante au regard d'une méthode d'évaluation indiquée. Elle constate ensuite le transfert des jetons vers le portefeuille de la société, le dépôt auprès de l'ACRA de la déclaration d'attribution (return of allotment) mentionnant la contrepartie et la confirmation de l'origine des fonds par la fonction compliance. Aucune attestation de réviseur n'est requise. La voie singapourienne est donc plus rapide, mais elle fait peser le risque d'évaluation entièrement sur les administrateurs.

Perspective zougoise

Le registre du commerce de Zoug traite des apports en nature en crypto-actifs depuis 2017 et sait ce qu'il attend : une évaluation à une date située quelques jours au plus avant le dépôt, un transfert vers une adresse contrôlée par la société et une attestation de vérification sans réserve. Si le dossier est complet, vous pouvez compter sur une inscription dans un délai de deux semaines. Le risque pratique tient à l'évolution du cours entre l'évaluation et l'inscription. Si le cours tombe sous la valeur d'apport, le réviseur peut refuser son attestation. C'est pourquoi les praticiens prévoient une décote et fixent la date d'évaluation aussi tard que possible.

Notes

1. Art. 634 CO (apports en nature), dans sa teneur en vigueur depuis le 1er janvier 2023 ; art. 635 et 635a CO (rapport de fondation et attestation de vérification) ; la pratique des registres du commerce suisses en matière d'apports en crypto-actifs est examinée dans la partie P, chapitre II. ↩
2. Companies Act 1967, section 63 (émission d'actions) et section 68 (contrepartie) ; voir partie P, chapitre III. ↩

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Author contact: Dr Alexander Ressos, TEP · contact@ressos.com