



## Corporate Law Newsletter

# Good Bye to Bearer Shares: New Notification Requirements for Shareholders of Private Companies

### Introduction

In connection with the implementation of the recommendations of the Financial Action Task Force (FATF), several amendments were proposed to the Code of Obligations, Insolvency Law, Criminal Law, Money Laundering Law etc. The revisions particularly introduce a new notification requirement for shareholders of privately held companies and introduce sanctions for the violation of these notification requirements. These new requirements apply also to non-voting shares (participation certificates).

### Notification of Acquisition of Bearer Shares

Whoever acquires bearer shares in a company not listed on a stock exchange has the obligation to notify the company within one month of the acquisition. The notification must include the number of acquired shares, and the name and the address of the acquirer.

The acquirer must identify him/herself with an official picture ID or in the case of companies with a commercial register excerpt or similar document. Changes in the name and address must be notified to the company as well.

An exception to the shareholder notification requirement applies in the case of book entry securities with a Swiss custodian. In this case the owners of the shares are identified through the intermediary.

### Notification of Acquisition of 25% of the Share Capital or Voting Rights and of Beneficial Owner

Whoever alone or acting in concert with others acquires 25% of a company's share capital or voting rights of a company that is not listed on a stock exchange must inform the company within one month of the acquisition and must also identify the beneficial owners. The notification must include the number of acquired shares, and the names and the addresses of

the beneficial owners. Any subsequent changes to the names and addresses of the beneficial owners must be notified to the Company. Only natural persons can be beneficial owners.

### Register for Owners of Bearer Shares and for Beneficial Owners

Under the revised law, the company must maintain a register of the owners of bearer shares and of the beneficial owners of bearer shares and registered shares notified to the company. The register is not public; neither shareholders of the company nor third party have a right to inspect the register.

The register of the owners of bearer shares must contain the names and address as well as the citizenship and the birth date of the owners of bearer shares (in the case of individuals) and the number of the shares. The register of the beneficial owners contains the name and address of the beneficial owners.

It is possible to maintain a combined register for the legal and for the beneficial owners or to combine the register of beneficial owners with the share register for registered shares.

### Access to Registers in Switzerland

The company's share register as well as the register for owners of bearer shares and the beneficial owners notified to the company must be accessible from Switzerland at all times. The purpose of this clause is to make these registers available to the authorities at the registered company domicile.

Furthermore all documents in relation to the entry of a shareholder must be kept for a period of ten years after the deletion of the respective person from the registers.

The requirement to have the registers accessible in Switzerland applies also to listed companies. Where



the share register is maintained by a third party abroad, which is often the case for company's listed outside of Switzerland, it must be assured that the share register is available at all times in Switzerland as well.

The law does not specify, how the registers must be maintained in Switzerland. In our view an electronic copy on the company's servers or with a designated third party in Switzerland should suffice to satisfy the access requirement.

#### **Swiss Board Member or Director Required**

A Swiss company is required to have a Swiss resident board member or a Swiss resident executive officer (*Direktor*). According to the practice of the Commercial Registers in Switzerland, this requirement could be met by authorized signatories irrespective of whether they are a member of the board or an executive officer. Such persons must have access to the share register and the register for owners of bearer shares and of the beneficial owners.

#### **Sanctions for Violation of Notification requirement**

The obligation to notify the company of the acquisition of bearer shares and of the beneficial owners (if the threshold of 25% of the share capital or voting rights is exceeded) is placed on the shareholder itself.

The membership rights (voting rights etc.) attached to shares are suspended for the shareholders who do not fulfil their notification obligations.

The financial rights, i.e. rights to dividends or liquidation proceeds may be claimed only once the shareholder has fulfilled its notification obligations.

Should a shareholder not fulfil the notification obligations within a period of one month from the acquisition of the shares, the shareholders' financial rights (right to dividends or liquidation proceeds etc.) are forfeited. Upon notification, such shareholder may only claim the financial rights declared or resolved upon thereafter.

#### **Board of Directors Required to Assure Compliance**

The board of directors must assure that no shareholder exercises any shareholders' rights if the notification obligations have not been fulfilled. At the occasion of a general meeting, the board of directors may therefore proceed on its own with a verification of the shareholders notification obligations.

Where the registers are kept by a financial intermediary, such intermediary is under an obligation to provide the board of directors with the necessary information. The participation of shareholders that have not fulfilled their notifications obligations at a general meeting, can lead to the general meeting being challenged by other shareholders.

#### **Group Companies Under Joint Control**

The notification obligations outlined above also apply to companies under a joint control such as subsidiaries. However, where the ultimate parent company is a company listed on a stock exchange, we are of the view that the obligation to notify the beneficial owner and respective sanctions introduced by this new law should not apply.

It would appear to be against the purpose of the law which was to prevent money laundering and the financing of terrorist activities to impose upon wholly owned subsidiary companies of a listed company stricter notification obligations than on the listed company itself. In our view for wholly owned subsidiary companies of a listed company it will be sufficient to state in the register of beneficial owners that the company is a direct or indirect wholly owned subsidiary of the listed company.

For privately held companies however the ultimate beneficial owners controlling directly or indirectly 25% or more of the ultimate holding company's share capital or voting rights must be notified and registered by its subsidiaries or its financial intermediary.

#### **Transitory Provisions**

The new provisions enter into effect on July 1, 2015.

Owners of bearer shares must fulfil their notification obligations upon entry into force of the new act. Failure to do so by the end of 2015 will lead to a forfeiture of their financial rights. Companies with bearer shares are therefore well advised to implement a register for the owners of bearer shares as well as a register for the beneficial owners and to notify the shareholders accordingly.

For companies with registered shares or limited liability companies (GmbH), the notification requirement is triggered only in the case of a change in the direct shareholdings after July 1, 2015.

However, given the members of the board of directors obligation to assure compliance, it is advisable also in the case of registered shares or a GmbH to implement the new rules already in advance, by either



adding a separate section for the ultimate beneficial owner to the shareholders register or in the case of a GmbH the register of quotas or by maintaining a separate register for the ultimate beneficial owners.

Given the drastic consequences in case of a failure to notify such an implementation already at an early stage may help to prevent shareholders from inadvertently forfeiting their rights.

August 28, 2015

Arlette Pfister and David Känzig

For further information please contact:

Arlette Pfister ([a.pfister@thouvenin.com](mailto:a.pfister@thouvenin.com)) or

David Känzig ([d.kaenzig@thouvenin.com](mailto:d.kaenzig@thouvenin.com))

**THOUVENIN rechtsanwälte compact**

THOUVENIN rechtsanwälte is an innovative and partner-centred law firm with more than three decades of experience in business law. Our experienced corporate law team advises on a wide range of contentious and non-contentious issues related to corporate law, restructuring, financing as well as mergers and acquisitions. Members of our corporate team are ranked by Chambers & Partners and legal 500.

More detailed information and further corporate law Newsletters can be accessed at [www.thouvenin.com](http://www.thouvenin.com)