

The End of Bearer Shares in Switzerland?

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On 17 January 2018, the Swiss Federal Council published a draft bill which proposes the conversion of bearer shares into registered shares by operation of law and thereby would abolish bearer shares. The draft legislation aims at implementing certain recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum). More specifically, the draft bill addresses, amongst others, the concerns raised in Global Forum's Peer Review relating to Switzerland regarding the transparency of ownership of bearer shares. The wording of the contemplated legislation is currently subject to a legislative consultation process and expected to be discussed in Parliament in winter 2018. Any respective changes in Swiss law are not to be expected before 2019.

The concept of the bearer share has been of legal and political concern for over a decade. In preliminary draft legislation in connection with the revision of Swiss company law, the Swiss Federal Council had in 2015 already once proposed abolishing bearer shares, but the idea was rejected during the consultation process.

Upon increasing international pressure and in order to implement the Financial Action Task Force (FATF) recommendations of 2012, Switzerland introduced new reporting obligations for shareholders and the company's obligation to keep a register of the owners of bearer shares as well as of the companies' beneficial owners (art. 697i et seq. of the Swiss Code of Obligations) in 2015. Based on these revisions, Swiss law currently stipulates that the acquirer of non-listed bearer shares must report name and address to the company within a month from acquisition or will otherwise not be able to exercise certain shareholders' rights (most notably the right to dividends and voting rights) during the duration of non-compliance. Furthermore, the holder of bearer shares must identify himself and present respective identification documents to the company. These provisions have led to an assimilation of the bearer shares and registered shares and the once valued characteristics of bearer shares – the anonymity and easy transferability – have been considerably reduced.

Part of the Global Forum's ongoing investigations relate to the current Swiss regulation according to which the acquirer of bearer shares who is non-compliant with regard to the

reporting obligations, may later choose to report the required information to the company and may then exercise the shareholders' rights again (however, it needs to be clarified that capital rights such as dividend rights remain forfeited for the time period of non-compliance).

The draft bill attempts to address this issue by formally abolishing the bearer shares. The proposed bill includes a provision according to which bearer shares (regardless of whether issued in a certificate or not) will convert into registered shares upon the bill's entry into force. At such time, the company would also have to hold a complete register of all notified owners of bearer shares and those holders of bearer shares who have not notified the company have 18 months to do so. The holders of bearer shares who do not comply with this obligation within the mentioned timeframe will automatically lose all rights to such held bearer shares; such bearer shares will become null and void and the paid in share capital will be assumed by the company.

Based on the proposed bill, the board of directors would have to request that all holders of bearer shares hand in their bearer shares for them to be destroyed. In case of non-registered bearer shares that become null and void after 18 months, the board of directors will have to issue treasury shares in their place. Due to holding restrictions of treasury shares, the board of directors may be obligated to sell or cancel some or all of these newly obtained treasury shares.

While the proposed transparency measures may make identifying the shareholders more easy for a company, the envisioned consequences for holders of bearer shares who do not comply within the 18-month period are drastic and take on the form of expropriation, especially considering the proposed provisions apply to willful and negligent non-compliant shareholders alike. Swiss (group-)companies with outstanding bearer shares as well as the holders of such shares are well advised to keep track of the ongoing legislation process regarding the proposed bill in order to be prepared to take the necessary actions if and once the proposed bill should be passed and enter into force. The ongoing legislative consultation will last until 24 April 2018 and it is currently estimated that any change in the statute will not enter into force before 2019.

It is also worth noting that the draft legislation will introduce fines for companies breaching their obligation to keep a register and for the shareholders breaching their reporting obligations. Furthermore, Swiss legal entities will additionally be required to own an account with a bank in Switzerland. In this way, the legal entity will fall under the scope of the Swiss Anti-Money Laundering Act (AMLA) and an indirect control by financial intermediaries will be ensured. In this context, financial intermediaries will be given a right to inspect the legal entities' registers.

The end of bearer shares in Switzerland would in any event send a strong signal to the Global Forum and the international community. It remains to be seen whether Switzerland will join the club of other important financial centers, such as UK, Singapore, Hong Kong, Belgium, Isle of Man, Austria and USA, which have also abolished bearer shares and, if so, under which legal framework and obligations to companies and shareholders.

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