

Newsletter 1/20

WENGERPLATTNER

Corporate and Commercial - June 2020

Developments with respect to shareholder and LLC member disclosure requirements and partial elimination of bearer shares

Authors: Dr. Oliver Künzler, Suzanne Eckert

To combat money laundering and the financing of terrorism, disclosure obligations were introduced already on 1 July 2015. On 1 November 2019, these disclosure obligations were clarified in part and new criminal sanctions for the event of non-compliance with them entered into effect. In addition, bearer shares were eliminated in part.

! Content of the revised law as at 1 November 2019:

- **Clarification of the disclosure requirement pertaining to beneficial owners, particularly in situations involving multi-level shareholding structures.**
- **New criminal sanctions for failure to respect the disclosure requirement or in the event of failure to maintain the register of beneficial owners or the share register in accordance with the regulations.**
- **Elimination of bearer shares except if the company has listed equity securities on a stock exchange or its bearer shares are structured as intermediated securities.**

Developments with respect to shareholder and LLC member disclosure requirements and partial elimination of bearer shares



Dr. Oliver Künzler

Partner of the Corporate and Commercial practice group
oliver.kuenzler@wenger-plattner.ch,
Attorney at Law



Suzanne Eckert

Senior Associate on the Corporate and Commercial practice group team
suzanne.eckert@wenger-plattner.ch,
Attorney at Law

The new 'Federal Act on the Implementation of Recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes' entered into force on 1 November 2019. This Act includes certain clarifications with respect to issues relating to the disclosure requirement that arose in practice since 1 July 2015 with the entry into effect of the 'Federal Act for Implementing the Revised Financial Action Task Force Recommendations of 2012' (we reported on this in the 1/17 Wenger Plattner Newsletter), but also a tightening in the form of criminal sanctions. In addition, the admissibility of bearer shares was severely restricted. Both shareholders and LLC members as well as members of boards of directors and managing directors risk civil and criminal penalties if they, due to a lack of knowledge of the applicable law, fail to comply with their disclosure obligations and obligations to maintain registers.

Clarification of the disclosure obligation with respect to natural persons who have a beneficial interest

Since 1 July 2015, the following has applied (Art. 697j (1) CO): Any person who alone or by agreement with third parties acquires shares in a company whose shares are not listed on a stock exchange, and thus reaches or exceeds the threshold of 25 per cent of the share capital or votes, must within one month give notice to the company of the first name and surname and the address of the natural person for whom it is ultimately acting (the beneficial owner). The same disclosure obligation applies with respect to LLC capital contributions (Art. 790a CO).

If a natural person acquires a package of shares, it has been clear since 1 July 2015 that this person is required to disclose either that they are the beneficial owner of the package or to disclose the identity of the natural person for whom they act in a fiduciary capacity. Numerous questions arose, however, in the cases in which a partnership or a legal entity that is part of a multi-level shareholding structure (e.g. group of companies) acquired a package of shares. Clarity on this issue has now been provided (Art. 697j (2) CO): If the shareholder is a legal entity or partner-

ship, the natural person that controls the undertaking in analogous application of Art. 963 (2) CO must be reported as a beneficial owner. Pursuant to Art. 963 (2) CO, a person

controls an undertaking if they

- directly or indirectly hold a majority of votes in the highest governing body;
- directly or indirectly have the right to appoint or remove a majority of the members of the supreme management or administrative body; or
- are able to exercise a controlling influence based on the articles of association, the foundation deed, a contract or comparable instruments.

Now, the mere possibility of exercising control is thus enough to trigger the disclosure requirement. If the shareholder potentially subject to the disclosure requirement, when tracing back the chain of its owners, comes across a natural person, it can, as a rule of thumb, check whether this natural person, if they were a legal entity, would be required to include the shareholder in their consolidated accounts. If the answer to this is affirmative, this natural person must be reported as a beneficial owner.

'The company is required to maintain its registers properly. If it fails to comply with this requirement, this will constitute an organisational defect and will, in addition, be punishable by a fine.'

Shareholders or partners who violate their disclosure obligation will likewise be punishable by a fine.'

Listed company within a multi-level shareholding structure

If the shareholder subject to the disclosure requirement is a listed company, if the shareholder itself is controlled by a listed company, or if the shareholder itself controls a listed company, and if, in other words, there is a controlling listed company at any level in the group of companies as defined in Art. 963 (2) CO, the shareholder subject to the disclosure requirement need only give notice of the name and registered office of this listed company (Art. 697j (3) CO).

Notice that there is no natural person or listed company to report

If, pursuant to Art. 697j (1) and (2) CO, there is no natural person to report and also no listed company to report pursuant to Art. 697j (3) CO, the shareholder is now required to report this fact to the company whose shares it acquired, in the form of a notice that there is no natural person or listed company to report.

Three-month period in which to give notice of any changes in relation to the beneficial owner

The legislation has now clarified that the shareholder subject to the disclosure requirement must give notice to the company within three months of any change to the first name or surname or to the address of the beneficial owner (Art. 697j (4) CO).

Civil and criminal penalties for the company or its board of directors or management board

Since 1 July 2015, every company limited by shares and LLC is required to maintain, in addition to the share register, a register of the beneficial owners notified to the company, and to retain the documents on which the notice is based for a period of ten years following deletion of the person from the register (Art. 697l CO). Failure to properly maintain the share register or the register of beneficial owners is now regarded as a defect in the organization

of the company (Art. 731b (1) (3) CO). If there is a defect in the organisation of the company, any shareholder or LLC member, creditor or the commercial registrar may request the court to order the required corrective measures.

Any wilful failure to maintain the share register or register of beneficial owners in accordance with the regulations and any violation of the related company law obligations is now punishable by a fine pursuant to Art. 327a SCC (to a maximum of CHF 10,000). Pursuant to Art. 29 SCC, a special obligation of a legal entity, the violation of which establishes criminal liability, will be attributed to a responsible natural person, in this case the members of the board of directors or the LLC management board. Improper maintenance of the register of cooperative members is now likewise punishable.

Civil and criminal penalties for shareholders and LLC members

Any breach of the disclosure requirement regarding beneficial owners will result in a suspension of the membership rights of the shareholder or member subject to the disclosure obligation. Pecuniary rights may only be exercised following compliance with this requirement and any pecuniary rights arising in the interim, particularly rights to dividends, will lapse (Art. 697m CO).

Shareholders or members who wilfully fail to comply with their disclosure obligations are now liable to a fine (maximum amount CHF 10,000, Art. 327 SCC).

Restriction on the admissibility of bearer shares

As an additional step to implement the internationally required complete identification of bearer shareholders, bearer shares, since 1 November 2019, are now only admissible in two exceptional cases, namely where the company has equity securities listed on a stock exchange or the bearer shares are structured as intermediated securities and deposited with a custodian

Practical recommendations

For members of boards of directors and managing directors of an LLC:

- Ensure that the share register and the register of notified beneficial owners are properly maintained.
- *For companies with bearer shares:* Notify the commercial register office of the exception that applies for your company or immediately request the general meeting to amend the articles of association to eliminate bearer shares.
- *For companies holding interests:* Verify whether your company has complied with any potential disclosure requirement with respect to natural persons who are beneficial owners of it and whether this information is current, to your knowledge, or whether instead, there is a listed company in the chain of ownership that can be reported or notice may be given that there is no natural person or listed company to report.

For natural persons who are registered shareholders or LLC members, without themselves being beneficial owners of these shareholdings:

- Verify whether there is a disclosure obligation (in effect since 1 July 2015) that applies to you with respect to natural persons who are beneficial owners of your interests and whether you have complied with this obligation.

For bearer shareholders:

- Identify yourself to the company at once and disclose the beneficial owners of your shares if you have not already complied with these disclosure requirements.

in Switzerland or entered in the main register (Art. 622 (1bis) CO).

Existing companies with bearer shares that fall under one of the two exception clauses must report the exception to the commercial register for entry by 30 April 2021 at the latest. As of 1 May 2021, any bearer shares that still exist, that do not fall under an exception clause, will by law be converted to registered shares and this legal conversion will be recorded in the commercial register. As long as the company limited by shares has not amended its articles of association to take account of this conversion, the commercial register office will reject any application to register any other amendment to the articles of association.

The automatically converted bearer shares retain all characteristics such as nominal value, extent to which they are paid up, voting rights and property rights. As previously, their transferability is also not restricted. If the company previously issued registered shares in addition to bearer shares, the automatic conversion may result in the converted bearer shares forming their own class of shares. In order to avoid this and the ambiguity generally associated with an automatic conversion, we recommend that all companies with bearer shares amend their articles of association at a general meeting as soon as possible, but in any event prior to 30 April 2021.

Dispossession of non-disclosed bearer shares

Bearer shareholders who have notified the company of their identity by 30 April 2021 must be registered in the share register by the company. The membership rights of shareholders who fail to comply with their disclosure obligations will be suspended and any pecuniary rights will lapse. The board of directors must ensure that these shareholders are also effectively unable to exercise their rights. After 1 May 2021 until 31 October 2020 at the latest, such shareholders will need to make a court application for registration in the share register. This will require the prior consent of the company and proof of their status as a shareholder. If shareholders are also derelict in failing to meet this final deadline, they will lose all their shareholder rights and their shares will become null and void. These shares that are null and void shares will be replaced by the company's own shares.