BANKING & FINANCIAL SERVICES - SWITZERLAND

Reporting of beneficial ownership: impact on listed companies

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Background

Swiss law rules that the ultimate beneficial owners of a Swiss corporation must be disclosed to the company.(1) The legal framework was enacted in 2015 and implemented recommendations of the Financial Action Task Force. It gave rise to controversial discussions. A major concern was that in certain situations, it was unclear from the perspective of both the shareholders and the company who should be reported by the shareholders and recorded in the register of beneficial owners to be maintained by the company as the beneficial owners.

To remedy these practical deficiencies and provide for greater legal security, Parliament enacted a revision of the disclosure provisions. The new legal framework streamlines the notification obligations. Simultaneously, it provides for stricter penalties for non-compliance. The revised law also to a large extent prohibits the use of bearer shares for Swiss corporations.

This article outlines the notification obligations for Swiss corporations with registered shares, when either the target company or the acquirer is listed or when the target company has issued its shares as registered securities. In the limited cases where bearer shares are still allowed to be used, additional disclosure obligations apply.

Simplified disclosure obligations and exemptions

According to Article 697j of the Code of Obligations, anyone who (alone or together with third parties) acquires 25% or more of the shares or voting rights in a Swiss corporation must notify the company of the name(s) and address(es) of the beneficial owner(s) for which they ultimately act. The beneficial owner is always a natural person. If the beneficial owner is unknown to the acquirer, it must enquire in order to determine such beneficial owner. However, certain reliefs apply in the event of listed companies or if the target company has issued registered securities (for further details please see "Reporting of beneficial ownership in private equity transactions").

In certain cases, the beneficial owners cannot be determined or there may not be any beneficial owner in the sense of Article 697j of the Code of Obligations at all. If there is no beneficial owner, this fact must be notified to the target company. However, if (despite respective research work) the beneficial owners cannot be determined or if it is unclear whether there are beneficial owners in the sense of Article 697j of the Code of Obligations, it is nonetheless recommendable to report the top executive officer of the acquiring company, in order to mitigate the risk of a lack of notification.

Listed companies as target or acquirer and intermediated securities

Thus, the key question of the notification is the identification of the relevant beneficial owners. Although the situation appears straightforward if either the target company or the acquirer is listed as well as in the presence of intermediated securities, there are certain particularities in these cases.

Listed target company

No beneficial owner notification must be made if the target company is listed at a stock exchange in view of the reporting obligations under the Financial Market Infrastructure Act (FMIA) or the respective foreign legislation which in general require the disclosure of the beneficial owner. The transparency created by such reporting

obligations is deemed sufficient.

Thus, a private equity buyer need not file a separate beneficial owner notification in addition to the notification to the company under the FMIA or the respective foreign legislation in case of a public-to-private transaction at the point in time of the acquisition. However, the target company will have to keep a beneficial owner register. The law does not state that the acquirer must file a beneficial owner notification once the target company's listing ends. However, it is ultimately the acquirer's responsibility to disclose the relevant beneficial owners. Thus, in order to prevent potential penalties (see below), it seems recommendable to proceed to a beneficial owner notification after a de-listing, in order to ensure that the target company disposes of the correct and up-to-date information on the relevant beneficial owners.

Listed acquirer

If the acquiring company, an entity controlling it or an entity controlled by it is a corporation listed at a stock exchange, only this fact and name and the legal seat of the acquirer must be reported. Again, the FMIA's disclosure requirements are deemed sufficient.

The situation of listed private equity houses (eg, BlackRock) will need to be assessed on a case-by-case basis (ie, depending on the concrete investor base and investment structure in a particular case, this relief may be unavailable).

Intermediated securities

No notification must be made if the acquired shares are issued as intermediated securities and (in the event of securities) held by, or (in the event of value rights) registered in the main registry of, a Swiss depositary.

Mostly listed or large corporations with a certain number of shareholders make use of the possibility to issue intermediated securities. However, if following the acquisition, the intermediated securities are withdrawn from the (central) securities depository and thus *de facto* converted into 'ordinary' shares, the private equity acquirer should file a beneficial owner notification at this point in time for the reasons outlined above.

Beneficial owner notification and register

The notification must be made within 30 days after the acquisition of the shares. Non-compliance with this provision has severe consequences (see below).

Based on the notifications that it receives, the company must keep a register of its beneficial owners. The register must include the names and the addresses of the beneficial owners. It can be kept separately or included in the share register (eg, by adding a column indicating the beneficial owners in addition to the formal shareholdings). The register, the notifications and their annexes must be accessible at any time in Switzerland.

Penalties

Non-compliance with the revised provisions regarding the disclosure of beneficial owners is subject to potentially severe penalties. The most important penalties are the following:

- As long as a due beneficial owner notification is not made, the shareholder cannot validly exercise its membership rights (particularly its voting rights in the shareholders' meeting).
- If the beneficial owner notification is not made within 30 days, the financial rights (particularly the dividend rights) pertaining to the shares which arise before the notification is eventually made are forfeited.
- If the company does not properly keep the register about the beneficial owners notified to it, a shareholder, a creditor or the commercial registry office can require the competent court to "take the necessary measures". In particular, the court can set a deadline to the company to comply with its obligations or (as a means of last resort) order the opening of bankruptcy proceedings.
- Those who intentionally do not proceed to the beneficial owner notification may be fined according to Article 327 of the Penal Code. Thus, private equity buyers must consider that non-compliance with the disclosure obligations may expose their representatives to penal prosecution.

Beside formal penalties, non-compliance with the disclosure obligations can also lead to a series of practical issues. For instance, if a board member (or an entire board) is elected by a shareholder that is unentitled to vote, the question will arise of whether contracts signed by such person (or approved by such board) are valid. This underlines the need to carefully comply with the notification obligations.

For further information on this topic please contact Alexander Vogel or Christian Rebell at Meyerlustenberger Lachenal by telephone (+41 44 396 91 91) or email (alexander.vogel@mll-legal.com or christian.rebell@mll-legal.com). The Meyerlustenberger Lachenal website can be accessed at www.mll-

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Endnotes

(1) For further information on private equity please see "Reporting of beneficial ownership in private equity transactions".

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