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The demise of unlisted bearer shares paves the way for some hard-fought legal battles!

As no action was taken by the referendum deadline, the amendment bill of 21 June 2019 stipulating the end of bearer shares in unlisted companies came into force on 1 November 2019.

Accordingly, companies whose share capital does not comprise listed or intermediated securities have been given a deadline of six months to convert their bearer shares into registered shares. This deadline expires on 1 May 2020 (new Article 622 para. 2ter).

Companies having listed or intermediated bearer shares must have an entry made in the register of commerce within a period of eighteen months, that is by 1 May 2021 (Article 2 of the transitional provisions of the amendment bill), to the effect that their share capital comprises securities of this type.

If the company has not fulfilled its obligations within the above period of eighteen months, its bearer shares will be converted into registered shares de jure, with application to both their membership and ownership effect (Article 4 para. 1 of the transitional provisions). To the extent that the Memorandum and Articles of Association have not been adapted to reflect this conversion, the company's entry in the register of commerce will include a note to the effect that the company's documentation contains details which are inconsistent with the entry (Article 4 para. 2 of the transitional provisions).

The Memorandum and Articles must be updated accordingly at the time of their next amendment, at the latest. In the intervening period, and until this change has been duly made, no amendments to the Memorandum and Articles of Association will be entered in the register of commerce (Article 5 paras. 1 and 2 of the transitional provisions).

The new legislation provides, however, for significant variants in relation to the regime and the effects of this conversion, which seem very likely to generate some epic legal battles. Indeed, according to Article 6 of the transitional provisions, with regard to bearer shares converted into registered shares, if their owner(s) has/have not complied with the obligation to report the beneficial owner in accordance with Article 697(i) of the Swiss Code of Obligations under the old law, these shareholders' membership rights will be suspended and their ownership rights foregone. The board of directors is responsible for ensuring that this prohibition, which must be duly entered in the share register, is complied with.

Shareholders affected by these provisions nevertheless have one last chance to have their status as shareholders recognised if, by 31 October 2024 at the latest (that is within a period of five years from the amendment bill's entry into force), they commence proceedings in this regard, at their own expense, before the court for the company's registered office, if they can demonstrate that the company has agreed in advance to these proceedings and can prove their status as shareholder (Article 7 paras. 1 and 2 of the transitional provisions). In the event that the court grants this application, the shareholders will regain their status with ex nunc effect, that is without retrospective effect (Article 7 para. 3 of the transitional provisions). When the above period of five years expires, where the holder of bearer shares converted into registered securities has not complied with the obligation under Article 697(i) of the old law, the shares become permanently null and void and the rights of shareholders are lost. These shares are converted into the company's own shares (Article 8 para. 1 of the transitional provisions).

Lastly, on a more lenient note, lawmakers have stipulated, in Article 8 para. 2 of the transitional provisions, that if shareholders who have failed to comply with their reporting obligation and have taken no action within the five-year period, can demonstrate that their shares “have become null and void through no fault of their own”, such shareholders may claim compensation from the company. This right must be invoked against the company within a period of ten years following the date when the shares became null and void. The claimant for this compensation must then prove not only that he was not at fault (negligence does not constitute fault) but also that he was a shareholder at the time when the shares became null and void. The amount of compensation owed corresponds to the true value of the share at the time it was converted unless this value is lower at the time when the claim is filed.

This paragraph 2 of Article 8 of the transitional provisions of the amendment to Federal legislation of 21 June 2019 paves the way for extensive legal battles between company and claimant. Indeed, according to the wording of this transitional legislative provision, it is the shareholder who is the claimant and not the beneficial owner. Moreover, compensation can only be denied on the basis of fault, not negligence. Additionally, the true value of the shares rendered null and void in this way will have to be demonstrated, both at the time they were converted and on the date when the claim for compensation against the company was filed. Lastly, in all cases, compensation is not payable if the company does not have freely available shareholders’ equity enabling it to pay such compensation.

The amendment bill imposes significant obligations on the board of directors of unlisted companies having bearer shares. The board of directors must therefore take immediate steps, engaging specialist company law advisers, if it is to avoid incurring civil liability.

Lastly, this amendment bill contains a major revision to legislation in relation to shortcomings in company organisation, which is an issue we will return to in a subsequent article.

Christophe Wilhelm – 15 November 2019

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