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What to do if the company cannot find its shareholders?

This situation may arise, for example, if the Board of Directors has allowed a certain period of time to elapse before updating the share register, if certain shareholders have died and their heirs have not announced themselves, in the case of unreported changes of address or even in the case of a merger or restructuring of the share capital.

This situation must be carefully managed by the Board of Directors, which has the duty to keep the register of shareholders and thus to know the relevant information on the company's shareholders (name, address, number and type of shares, dates and reasons for the transfer, beneficial owners). The Board of Directors will be in a difficult position if it finds that it no longer has this information, for example on the eve of the convening of a general meeting or in the case of due diligence in the event of an acquisition. Such deficiencies may lead to the nullity of the general meeting, or even its cancellation, or to the failure of the transaction and therefore also to the liability of the board of directors.

It should be noted that Swiss law has recently abolished bearer shares. These have been converted into registered shares as of April 30, 2021. In this case, the holders must identify themselves to the Board of Directors by October 31, 2021 at the latest. If they have not done so within this period, their shareholder rights are suspended. After this date, the old bearer shares whose holders have not announced themselves will be cancelled and replaced by the company's own shares. The law thus requires the holders of these old bearer shares to register with the Board of Directors, failing which the rights attached to these shares are suspended or even cancelled. The Board of Directors can therefore simply wait and see.

This is not the case for registered shares. If the holders of registered shares cannot be found, or if there are gaps in the above-mentioned essential information about them, the Board of Directors must proactively carry out all the necessary searches to find or restore them. The Board of Directors has a major role to play in this case. It cannot be content to remain passive. If its research remains unsuccessful, it must initiate the procedure for the cancellation of the registered shares whose holder is unknown or doubtful. This is a long and tedious legal procedure leading to the cancellation of the concerned registered shares and either their replacement by new shares which the company can dispose of, or by the reduction of its share capital in proportion to the shares thus cancelled. A general meeting in ordinary form will be required to decide on the allocation of these shares to the company, within the legal limits. A general meeting in the authenticated form will have to be held in order to adapt the articles of association in case of a reduction of the share capital. In case of inaction of the board of directors, a shareholder or even a creditor may request the competent court to take the necessary measures to remedy the situation.

It should also be mentioned - very briefly - that holders of registered shares can prove their status as shareholders by their entry in the register of shareholders if the company has not issued any shares. The new shareholder must then submit a written transfer document to the board of directors. If the company has issued share certificates, the presentation to the board of directors of the security paper mentioning the new shareholder on the back of the security (endorsement) is decisive. In the event of a contradiction between the endorsed share certificate or the deed of transfer produced and the register, the entry on the share certificate or the written deed produced will prevail, the register of shareholders only providing a rebuttable presumption of shareholder status.

In any event, we strongly recommend that every board of directors, especially in this period of transformation of bearer shares into registered shares, does not remain inactive and carefully identifies the essential information about the company's shareholders. If there are gaps in this information, it is the Board's responsibility to initiate the necessary searches as quickly as possible, and even to initiate the necessary cancellation procedures. It is only in this capacity that the board of directors can exonerate itself from its responsibility in this matter.

Source : <https://www.wg-avocats.ch/en/news/company-law/company-cannot-find-shareholders/>