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The Impact of the Revised FATF Recommendations on Swiss Corporate Law and Particularly on Bearer Shares

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Bearer shares; Beneficial ownership; Due diligence; Financial intermediaries; Money laundering; Switzerland; Transparency

Introduction

The regulatory recommendations and legislative activities, which were intensified all over the world particularly after the break-out of the recent financial crisis, led to an array of legislative proposals, the impact of which goes beyond the scope of banking and financial law.[1] Since the vast majority of Swiss banks are corporations (*Aktiengesellschaften*—"AG"), the impact on corporate law of international regulatory standards may not be disregarded either.[2]

Based on the recommendations of the Financial Action Task Force ("FATF"), which were fundamentally reviewed between 2009 and 2012,[3] and in order to fix some overdue shortcomings as stated during the FATF's evaluation of Switzerland back in 2005, the Swiss Government initiated consultation procedures on a preliminary Bill for a new Federal Act for Implementing the Revised FATF Recommendations.[4] These consultations were part of a major revamp of the Swiss financial centre policies, which historically resulted in particular from international pressure in the aftermath of the terrorist attacks on the United States in 2001 (9/11) and the outbreak of the financial crisis in 2007. While the former led to more stringent anti-money laundering provisions in order to fight terrorism financing, the latter resulted in a new regulatory and supervisory architecture.[5]

This article will outline the ensemble of measures proposed by the Swiss Government, describe the results of the consultation procedure and focus on the impact of the new Federal Act for Implementation of the Revised FATF Recommendations on corporate law, particularly on bearer shares.

Initial legislative proposal and results of the consultations

In February 2013, the Swiss Government published an initial legislative proposal on combating money laundering and on enhanced due diligence requirements.[6] It included two elements: (1) the implementation of the revised international recommendations on combating money laundering and terrorist financing; and (2) extended due diligence requirements for financial intermediaries regarding the acceptance of potentially untaxed assets. Therewith, the Swiss Government wanted to underline its intention to preserve the moral integrity of the Swiss financial centre.[7] Beyond that, the Federal Department of Finance was instructed to prepare the appropriate legal adjustments regarding the freezing of the assets of terrorists and terrorist organisations in connection with the implementation of the Revised FATF Recommendations.[8]

While the enhanced due diligence requirements targeted financial intermediaries and called for a risk-based assessment, which aims at preventing the acceptance of untaxed assets, the proposal regarding the anti-money laundering recommendations included a variety of measures also in the area of corporate law, such as: (1) disclosure obligations for holders of bearer and registered shares of unlisted companies and extension of the due diligence requirement for establishing the identity of the beneficial owner; (2) a duty to verify the identity of politically exposed persons ("PEPs") together with risk-based due diligence requirements; (3) the introduction of qualified tax fraud as a predicate offence to money laundering and an extension of existing predicate offences; (4) controversial cash payment limitations (threshold being at CHF 100,000); and (5) a more effective and simplified reporting system for financial intermediaries.[9]

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[1] H. Schöchli, "Bargeldverbot ab 100 000 Franken" (December 14, 2013), *Neue Zürcher Zeitung*, *http://www.nzz.ch/wirtschaft/wirtschaftspolitik/bargeldverbot-ab-100-000-franken-1.18204338* [Accessed June 3, 2014].
[2] P. Nobel, "Der Stand des Aktienrechts — ein Überblick" [2013] SZW 129.
[3] See FATF Reccommendations, *http://www.fatf-gafi.org/topics/fatfrecommendations/documents/internationalstandardsoncombatingmoneylaunderingandthefinancingofterrorismproliferation-thefatfrecommendations.html* [Accessed June 3, 2014].
[4] P. Nobel, "Entwicklungen im Bank- und Kapitalmarktrecht" (2014) 110 SJZ 12; State Secretariat for International Financial Matters (SIF), *http://www.sif.admin.ch/dokumentation/00509/00510/00622/00624/00868/index.html?lang=en* [Accessed June 3, 2014].
[5] Thomas G. Albert, "Swiss Financial Centre Strategy is Being Applied — Consultations on Revised Anti-Money Laundering Recommendations and Enhanced Due Diligence Requirements" (2013) 8 J.I.B.L.R. 331.
[6] Swiss Federal Department of Finance, *http://www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=en&msg-id=47934%26%2341%3B* [Accessed June 15, 2014]; Finanz und Wirtschaft, "Bald keine Inhaberaktien mehr?" (February 27, 2013), *http://www.fuw.ch/article/bald-keine-inhaberaktien-mehr/* [Accessed June 3, 2014].
[7] SIF, *http://www.sif.admin.ch/dokumentation/00513/00772/index.html?lang=en&msg-id=47934* [Accessed June 18, 2014].
[8] SIF, *http://www.sif.admin.ch/dokumentation/00513/00772/index.html?lang=en&msg-id=47934* [Accessed June 18, 2014].
[9] Federal Department of Finance, *http://www.news.admin.ch/message/index.html?lang=en&msg-id=47934* [Accessed June 18, 2014].

The consultations, which lasted until July 2013, resulted in a broad approval of the legislative proposal in order to strengthen the credibility, attractiveness and stability of the Swiss financial centre.[10] It was, however, in general stipulated that the measure should be more in step with practice and that the level of regulation should be competitive with regard to the other leading financial centres.[11]

Hence, in September 2013 the Swiss Government accepted that it should review its proposal by introducing so-called "technical" amendments to the Bill, while maintaining the original course. Taking into consideration the results of the consultation procedure, the Swiss Government suggested three amendments.[12] With respect to bearer shares and in addition to the original proposal, it suggested the introduction of an alternative measure of transparency if the bearer shares are deposited in a dematerialised form with a third party (by way of an electronic registration). As regards the introduction of qualified tax fraud as a predicate offence to money laundering and the extension of existing predicate offences, it was agreed to examine the possibility of introducing the predicate offences (excluding the proposal regarding indirect taxes) into the Swiss Criminal Code instead of the criminal law regarding tax offences. Thereby, this reform should not interfere with the pending revision of the criminal law regarding tax offences. Finally, as regards the reporting system in case of money laundering suspicions, the burden for the financial intermediaries should be limited by introducing a deadline for the analyses to be performed by the Money Laundering Reporting Office Switzerland ("MROS").

The Proposed Federal Act for Implementing the Revised FATF Recommendations

In December 2013, the Swiss Government adopted the proposal for the Federal Act for Implementing the Revised FATF Recommendations, together with the relevant dispatch on the implementation of the Act.[13] The proposal took into account the results of the consultation procedure, as anticipated in September 2013 (see above). The proposed Bill is still centred on three topics: transparency regarding bearer shares, introduction of predicate offences in the tax area, and the money laundering reporting system for suspicious activities.

Background

Besides the international pressure in the aftermath of the terrorist attacks on the United States in 2001 (9/11) and the outbreak of the financial crisis in 2007, the amended FATF Recommendations together with the organisation's evaluation report of Switzerland of 2005, and the even more challenging peer review performed by the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) were decisive drivers which in fact caused the Swiss Government to act.[14]

Switzerland still remains in phase I of the Global Forum's peer review, together with a list of countries with financial centres which are less sophisticated and competitive.[15] In order to proceed to phase II and thereby to avoid any adverse consequences, Switzerland is required to fully eliminate at least one of three complaints: (1) the lack of transparency regarding bearer shares; (2) the too restrictive requirements for identifying the relevant taxpayers and holders of information as part of an effective exchange of information; and (3) the relatively low number of signed double tax treaties according to the OECD standards on exchange of information.[16] The Swiss Government confirmed in an answer to a parliamentary interpellation that the transparency requirement regarding bearer shares should be implemented in order to reach phase II of the Global Forum's peer review.[17]

Corporate law aspects

During the last years, Swiss corporations have increasingly issued bearer shares; there are nowadays approximately 50,000 corporations in total.[18] Because of this trend and major discrepancies between the cantons regarding the issuance of bearer shares, there was a need to provide for transparency through legislative adjustments, according to the Swiss Government.[19]

Back in 2005, a government proposal even envisaged the abolition of bearer shares in order to be in full compliance with the FATF Recommendation No.33 of 2003, which aimed to prevent money laundering activities by (mis-)using bearer shares.[20] But the results of the consultations were fundamentally critical.[21] The current proposed Bill focuses on transparent notification requirements for non-listed legal entities, also in order to improve communication between shareholders.[22] A so-called grandfathering clause, whereby no new bearer

[10] SIF, *http://www.news.admin.ch/message/index.html?lang=en&msg-id=50108* [Accessed June 18, 2014].
[11] SIF, *http://www.news.admin.ch/message/index.html?lang=en&msg-id=50108* [Accessed June 18, 2014].
[12] As regards the following summary: SIF, "Report on the results of the consultation procedure (February 27 — July 1, 2013)" (September 2013).
[13] SIF, *http://www.news.admin.ch/message/index.html?lang=en&msg-id=51377* [Accessed June 18, 2014].
[14] M.F. Huber, A.S. Bartz and C. Maeder, "Blickpunkt International" (2013) 68 StR 879.
[15] Countries such as Botswana, Brunei, the Dominican Republic, Guatemala, Lebanon, Liberia, the Marshal Islands, Nauru, Niue, Panama, Trinidad and Tobago, the United Arab Emirates and Vanuatu; see Huber et al., "Blickpunkt International" (2013) 68 StR 879.
[16] Global Forum on Transparency and Exchange of Information for Tax Purposes, "Peer Review Report of Switzerland — Phase 1: Legal and Regulatory Framework", *http://www.oecd.org/tax/transparency/peerreviewreportofswitzerland-phase1legalandregulatoryframework.htm* [Accessed June 3, 2014].
[17] Curia Vista, 13.3391 — Dringliche Interpellation "Schweizer Finanzplatz unter Druck", *http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20133391* [Accessed June 3, 2014].
[18] *Dispatch regarding the implementation of the revised 2012 recommendations of the Groupe d'action financière (GAFI)*", p.615.
[19] "Dispatch regarding the implementation of the revised 2012 recommendations of the Groupe d'action financière (GAFI)", pp.615–616.
[20] H.U. Vogt and M. Baschung, "Wie weiter im Aktienrecht nach der Annahme der Volksinitiative 'gegen die Abzockerei'?" [2013] GesKR 47.
[21] SIF, Explanatory report "Umsetzung der 2012 revidierten Empfehlungen der Groupe d'action financière" (2013), p.8.
[22] Vogt and M. Baschung, "Wie weiter im Aktienrecht nach der Annahme der Volksinitiative 'gegen die Abzockerei'?" [2013] GesKR 47.

shares could have been issued after the entry into force of the law, was not deemed to be a necessary option given the current proposed Bill.[23] The Swiss Government took the opportunity to extend the obligation to register foundations with the register of commerce through an amendment to the Swiss Civil Code in order to cover all foundations, including religious and family foundations.[24]

In the following, this legal analysis will focus on the improved transparency requirements regarding legal entities and bearer shares and on the more stringent obligations for financial intermediaries to identify the beneficial owners of legal entities.

Transparency requirements regarding legal entities and bearer shares

The proposed Federal Act for Implementing the Revised FATF Recommendations offers four different options to corporations issuing bearer shares[25]: (1) disclosure of the shareholder's identity and the identity of the beneficial owners of the shares if a shareholder has a stake of 25 per cent or more in the voting rights or share capital; (2) disclosure of the shareholder to a financial intermediary as defined in the Anti-Money Laundering Act; (3) the issuance of bearer shares in a dematerialised form; or (4) simplified conversion of bearer shares into registered shares.[26]

At the same time, transparency regarding registered shares (in case of corporations) or quotas (in the case of limited liability companies—*Gesellschaften mit beschränkter Haftung*—"GmbH") will be increased.

Intentional non-compliance with the reporting or registration duties will be sanctioned with a fine.[27]

Notification duty of the shareholders to the company

It is provided in the proposed Bill that whoever acquires bearer shares of a non-listed corporation will have to report the purchase to the company within a month and will have to disclose their identity by disclosing name, legal domicile or the address; any change needs to be reported as well.[28] Furthermore, the buyer needs to provide evidence of the ownership of the bearer shares and submit a copy of an official document, or in the case of legal entities of an excerpt from the register of commerce or an equivalent foreign certificate.[29] Already existing owners of bearer shares shall fulfil their notification duty within six months.[30]

Moreover, any legal or moral person who acquires shares of a non-listed company, be it alone or in agreement with a third party, will have to report the full name and the address of the ultimate beneficial owner if the stake exceeds 25 per cent of the share capital.[31] Any change of name or address of the ultimate beneficial owner will have to be reported.[32] The duty to disclose the identity of the ultimate beneficial owner also applies in the case of registered shares and in the case of partners in limited liability companies. For the sake of simplification and in order to minimise costs, however, the duty to disclose registered shares and financial interests of partners in limited liability companies shall not be applied retroactively, but only in the case of new acquisitions.[33]

On the company's side, a duty to keep a register of the owner of bearer shares and of all ultimate beneficial owners shall be introduced within two years after the entry into force of the proposed Bill.[34] The register shall not only include the name and the address of the owner of bearer shares or of the ultimate beneficial owner; the nationality and the date of birth shall be listed as well.[35] All documents that have been submitted to the company regarding the owner of bearer shares or regarding the ultimate beneficial owner shall be retained for a period of 10 years after the deletion of a person from the register.[36] Also, the register and the underlying documents need to be stored in a secure place, as instructed by the liquidator of the company or by the register of commerce, for a period of 10 years upon deletion of the company from the register of commerce.[37] The register needs to be accessible from Switzerland at any time[38]; however, if a financial intermediary has been designated (see section below), this person will be in charge instead of the company.[39]

The membership rights related to the shares, including any financial entitlement, remain silent until the shareholder has fulfilled its reporting duties; otherwise, the financial entitlements are forfeited.[40] In the case of

[23] SIF, Explanatory report, "Umsetzung der 2012 revidierten Empfehlungen der Groupe d'action financière" (2013), p.9.
[24] New art.52(2) of the Swiss Civil Code (CC); Federal Council, "Basic information, Dispatch and bill for a federal act for implementing the revised recommendations of the Financial Action Task Force of 2012", p.2.
[25] "Dispatch regarding the implementation of the revised 2012 recommendations of the Groupe d'action financière (GAFI)", p.616.
[26] SIF, *http://www.news.admin.ch/message/index.html?lang=en&msg-id=51377* [Accessed June 18, 2014].
[27] Swiss Criminal Code (SCC) new art.327 and 327a. According to art.106 SCC the maximum amount would be CHF 10,000.
[28] Code of Obligations (CO) new art.697i; P. Lutz, "Vorlage betreffend Umsetzung der 2012 revidierten GAFI-Empfehlungen: Erste Analyse der Auswirkungen auf den Anwalt als Finanzintermediär" (2014) 2 *Anwaltsrevue* 62.
[29] CO new art.697i.
[30] Transitory Provisions new art.3.
[31] CO new art.697.
[32] CO new art.697j(2).
[33] Federal Council, "Basic Information, Dispatch and bill for a federal act for implementing the revised recommendations of the Financial Action Task Force of 2012", p.2.
[34] Transitory Provisions new art. 2.
[35] CO new art.697l (1) and (2).
[36] CO new art.697j(3).
[37] CO new art.747(1).
[38] CO new art.727(2).
[39] CO new art.697j(3) and (4).
[40] CO new art.697m(1) and (2).

late notification, the financial entitlements may only be asserted as of the moment of notification.[41] It is the board of directors' duty to make sure that no shareholder exercises any rights unless the notification duties have been fulfilled.[42] For this reason, it is foreseen that at least one local signatory of the company needs to have access to this register.[43]

This option shall only be introduced for non-listed companies, since the respective duties of notification for listed companies are already foreseen in the Federal Act on Stock Exchanges and Securities Trading[44].

Possibility of notifying a financial intermediary instead of notifying the company

According to the proposed Bill, the general shareholders' meeting shall have the competence to resolve that notification of the owner of bearer shares and of the ultimate beneficial owner (see section above) shall not be made to the company but to a financial intermediary in the sense of the Anti-Money Laundering Act.[45] The Anti-Money Laundering Act defines a financial intermediary as a person who on a professional basis accepts or holds on deposit assets belonging to others or who assists in the investment of transfer of such assets.[46] Mere advice does not constitute a financial intermediation; the possibility to dispose of assets belonging to others is decisive.[47]

The board of directors of the company appoints the financial intermediary and informs the shareholder respectively.[48] The financial intermediary has a duty to inform the company the notification was made and if the ownership is evidenced.[49]

This option allows for the preservation of the privacy of the owners of bearer shares and of the ultimate beneficial owner towards the company, but the envisaged transparency for anti-money laundering purposes is nevertheless ensured.

Dematerialised bearer shares

According to the Federal Act on Intermediated Securities, securities and, hence, also bearer shares may be deposited with a central securities deposit, whereby the respective rights are credited to a securities account.[50] However, the holders of these securities accounts are usually not the shareholders, whose personal securities account is held with their own bank, which holds directly or indirectly an own securities account with another securities deposit.[51] Since a bank has legal KYC duties according to the Anti-Money Laundering Act in order to identify the identity of their contractual partners, i.e. the shareholder, the Swiss Government's view is that there is no need to additionally disclose the identity of the shareholder towards the company, since the information may be requested from the bank directly.[52]

Simplification of the conversion into registered shares

Finally, as the fourth and last option, it is provided in this proposed Bill that the general shareholders' meeting may resolve the conversion of bearer shares into registered shares with the majority of the votes cast; the articles of incorporation may not provide for a higher threshold.[53]

Identification of the beneficial owner

The FATF Recommendation No.10 provides that financial intermediaries need to systematically identify the beneficial owner of a business relationship and verify the identification according to a risk-based approach.[54] The Anti-Money Laundering Act does not formally provide for this requirement, even though the principle is broadly recognised and applied in Switzerland.[55] Hence, the proposed Bill suggests amending the Anti-Money Laundering Act by including a general duty to identify the ultimate beneficial owners of unlisted companies or of affiliates in which these companies have a qualified stake.[56] If the ultimate beneficial owner may not be identified, the identity of the leading member of the highest body of a legal entity shall be identified.[57]

Concluding observations

The international endeavours towards a more regularised and supervised financial system have led the Swiss Government to revamp the Swiss financial centre policies. The measures as provided in the proposed Bill will preserve the moral integrity and the international reputation of Switzerland as a leading financial centre with a leading financial industry.

[41] CO new art.697m(3).
[42] CO new art.697m(4) CO.
[43] NCO new art.718(4) CO.
[44] "Dispatch regarding the implementation of the revised 2012 recommendations of the Groupe d'action financière (GAFI)", p.616.
[45] CO new art. 697k(1).
[46] Anti-Money Laundering Act (ALMA) art.2(3).
[47] The Swiss Financial Market Authority (FINMA) defined the general quantitative criteria for financial intermediaries in the Ordinance on the professional execution of financial intermediation; Lutz, "Vorlage betreffend Umsetzung der 2012 revidierten GAFI-Empfehlungen" (2014) 2 *Anwaltsrevue* 61.
[48] CO new art.697k(2).
[49] CO new art. 697k(3).
[50] Federal Act on Intermediated Securities (FAIS) art.6.
[51] "Dispatch regarding the implementation of the revised 2012 recommendations of the Groupe d'action financière (GAFI)", p.617.
[52] "Dispatch regarding the implementation of the revised 2012 recommendations of the Groupe d'action financière (GAFI)", p.617.
[53] CO new art.704.
[54] Federal Council, "Basic information, Dispatch and bill for a federal act for implementing the revised recommendations of the Financial Action Task Force of 2012", p.2.
[55] Federal Council, "Basic information, Dispatch and bill for a federal act for implementing the revised recommendations of the Financial Action Task Force of 2012", p.2.
[56] Federal Council, "Basic information, Dispatch and bill for a federal act for implementing the revised recommendations of the Financial Action Task Force of 2012", p.2.
[57] Lutz, "Vorlage betreffend Umsetzung der 2012 revidierten GAFI-Empfehlungen" (2014) 2 *Anwaltsrevue* 61, 62.

While this rather practical legislative approach may well be seen as appropriate in order to avoid any further damage to the reputation of the Swiss financial industry, the rationale behind a transparent shareholder may be considered as a rather controversial evolution. The French translation of the word corporation—*société anonyme*—shows the original understanding of the legal entity, and bearer shares were the purest ambassador of privacy in corporate law. The priorities have shifted, though, from privacy to transparency in order to combat criminality. While these endeavours are important and well intentioned, even tighter regulations might lead the legislator to reconsider the balance between privacy and security, also taking into account the costs of implementation.