

# Legal News

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## Abolishment of bearer shares and introduction of new criminal offences for shareholders and companies

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### 1. Background

On 21 November 2018, the Federal Council adopted the communication to parliament on the implementation of the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes for phase 2 in Switzerland. The recommendations must be implemented to prevent Switzerland from being included on the EU's list of non-cooperative countries, thus avoiding harmful countermeasures by other countries. The deadline for a referendum passed on 10 October 2019 without any such referendum being called; the new provisions entered into force on 1 November 2019.

### 2. Limited permissibility of bearer shares

One of the main changes is that bearer shares will in future only be permitted under certain conditions (Art. 622 para. 1<sup>bis</sup> new OR): Bearer shares must either be structured as intermediated securities and deposited with a custodian in Switzerland designated by the company or entered in the main register in accordance with the Intermediated Securities Act, or the issuing company must have listed its equity securities on a stock exchange. If one of these two exceptions applies, then the exception must be registered with the Commercial Register (Art. 622 para. 2<sup>bis</sup> new OR).

If no exception applies, the bearer shares have to be converted into registered shares. Both the entry of the exception in the Commercial Register and the conversion of the bearer shares into registered shares must take place within 18 months since the new provisions came into force, which means no later than 30 April 2021. If the conversion is not carried out before this date, the shares will automatically (and compulsorily) be converted in accordance with Art. 4 para. 1 and 2 of the transitional provisions (TP), and the entry in the Commercial Register will be amended ex officio by the Commercial Register Office. In this case, the company has to modify its articles of association the next time they are amended (Art. 5 para. 1 TP). Until this modification is made, the Commercial Register Office will reject all requests to register further amendments of the articles of association (Art. 5 para. 2 TP). If a company issues bearer shares after 1 May 2021 and no exception applies in accordance with Art. 622 para. 1<sup>bis</sup> new OR, the company is considered to have a defective organisation in accordance with Art. 731b para. 1 (4) new OR and the company might be subject to proceedings due to a defective organisation pursuant to Art. 731b new OR.

### 3. Shareholders' entitlement to be registered in the share register

Following the conversion, shareholders who have met their reporting obligation in accordance with Art. 697i of the previous version of the Swiss Code of Obligations will be registered in the share register (Art. 6 para. 1 TP). Shareholders who have not yet met their reporting obligation may, with the prior consent of the company, submit a request to the court to be registered in the share register during five years from the date the new law entered into force (Art 7 para. 1 TP). Until this date, their membership rights are suspended and their property rights forfeited (Art. 6 para. 2 TP). After the five-year period, the shares of unreported shareholders become null and void and are replaced with own shares, which leads to the result that the affected shareholders lose all of their rights associated with the shares; shareholders whose shares have become null and void through no fault of their own may file a claim against the company. Such claims must be submitted within 10 years after the shares have become null and void (Art. 8 para. 1 and 2 TP).

### 4. Ascertainment of the reporting obligation in accordance with Art. 697j new OR

Art. 697j new OR and Art. 790a new OR specify who is considered a beneficial owner and what information has to be reported if the shareholder is a legal entity or a listed company. If the shareholder is a company, every natural person who controls the shareholder in analogous application of Art. 963 para. 2 OR must be reported to the company as a beneficial owner. If there is no such person, the shareholder has to inform the company of this fact. If the shareholder is a listed company, if it is controlled by such company in accordance with Art. 963 para. 2 OR or if it controls such

company in this sense, it only needs to report this fact as well as the listed company's name and registered office (Art. 697j para. 3 new OR).

### 5. Introduction of penalty provisions

The new law stipulates a fine of up to CHF 10,000 for shareholders who do not meet the reporting obligations in accordance with Art. 697j para. 1 to 4 OR or Art. 790a para. 1 to 4 OR (Art. 327 new StGB). In addition to the omission to submit a report, incorrect reporting and omission to file a notification of a change are also punishable, whereby conditional intent is sufficient. A fine of up to CHF 10,000 will also be imposed on anyone breaching the obligations to maintain the share register and the register of the beneficial owners (Art. 327a new StGB). Thus, breaches of obligations may now no longer lead to corporate responsibility alone, but may in future also constitute criminal offences. Companies which fail to comply with the obligations to maintain the required registers may be subject to proceedings for organisational defects and, as a final sanction, to judicial dissolution (Art. 731b para. 1(3) in conjunction with Art. 731b para. 1<sup>bis</sup> new OR).

### 6. Conclusion

To ensure compliance with the new legal provisions and thus avoid criminal penalties, we recommend that companies immediately ensure that they are maintaining all required company registers in accordance with legal provisions, and to make sure that no shareholders exercise the rights associated to their shares in breach of the reporting obligation. In addition, we advise to structure existing bearer shares as intermediated securities or to convert them into registered shares and to make the necessary entries in the Commercial Register. EY would be happy to help you with the measures that need to be taken in this respect.

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