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Reporting beneficial ownership

On July 1 2015, a new Swiss law entered into force, which implements the recommendations of the international *Groupe d'action financière* (GAFI) aimed at preventing money laundering and tax evasion. According to the new legislation, any person or entity acquiring (including via primary subscription) – alone or in concert with third parties – shares representing 25% or more of the share capital or voting rights in a non-listed Swiss stock corporation, must notify the corporation of the name and address of the ultimate beneficial owner of the acquiring entity (article 697j of the Code of Obligations – the CO). The deadline for notification is one month from closing the acquisition. Later changes regarding the name or address of the beneficial owner must also be disclosed. Identical reporting obligations exist regarding limited liability companies.

Interestingly, the new rules impose a reporting obligation on the acquiring entity although it may not know who its ultimate beneficial owners are. According to the federal government's explanatory notes regarding the draft legislation submitted to parliament, the acquiring entity must undertake inquiry efforts and make the notification to its best knowledge. If the acquirer simply makes a notification without knowing its beneficial owner it risks sanctions of non-compliance.

As there is no case law on the new regulations yet, their interpretation remains uncertain.

Who must be disclosed

While the new article 697j CO states that the beneficial owner to be reported must be a natural person, it is silent on who quali-

fies as beneficial owner in holding structures. This ambiguity has caused a debate among legal scholars and practitioners about who shall be disclosed as beneficial owner of an acquisition company – indirectly – held by a private equity fund to acquire a Swiss target company.

In the authors' view, in line with the European Union's interpretation of the GAFI rules (directive 2015/849) the natural person(s) exercising actual control over an entity should be considered as beneficial owner in the sense of the provision. In standard private equity setups, the general partner (GP) usually controls the decisions of the fund and the acquisition company. Therefore, the individuals ultimately controlling the GP are the beneficial owners of the acquisition company in the sense of the new legislation and should be disclosed.

If these individuals cannot be determined, the authors believe that the top executive officer of the GP, respectively of its ultimate shareholder, may be reported (the CEO, chairman of the board or other person, depending on the structure).

A different reporting obligation may exist depending on the specific circumstances. If, for instance, based on the actual contractual setup in place, a limited partner (LP) can exercise control over the fund (instead of, or together with, the GP), the individuals controlling such LP should be disclosed as beneficial owners (instead of the GP or in addition to it).

Register obligation of the company

Based on the new article 697l CO, the target company must maintain a register of the beneficial owners disclosed to it and keep all of the supporting documents. Such register must be accessible in Switzerland by a director or officer with signatory power and residing in Switzerland.

Sanctions

If an acquiring entity does not comply with its disclosure obligation regarding beneficial owners, its voting rights in the Swiss com-

pany are suspended until notification is made. Further, the acquiring entity's right to dividends (and repayment of capital) is irrevocably forfeited for the period until disclosure is made. The company could reclaim any dividends paid out prior to a notification. This could become particularly relevant in a bankruptcy of the company and may impact dividend recaps. The board of a Swiss company must procure that no shareholder exercises voting rights or receives dividends while violating its disclosure obligation. Board members that do not comply with this duty may become liable for damage caused, which is again primarily relevant in a bankruptcy scenario.

Bearer shares

If a company has issued bearer shares all shareholders and any acquirer of shares face additional disclosure obligations. In case portfolio companies still have bearer shares issued, they are advised to convert them into registered shares to avoid unnecessary administrative burden.

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