

A step towards transparency: bearer shares need to be registered

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By voting the bill No. 6625 on 16 July 2014 which became the law of 28 July 2014 regarding the immobilization of bearer shares, published in the Luxembourg Official Gazette (Mémorial) A No. 161, p. 2484 and seq., the Luxembourg law maker achieved its intention to comply with international standards on anti-money laundering obligations and expects to ensure a better transparency of those shareholdings of commercial companies and investment companies and funds which have issued or will issue bearer shares.

The purpose of the law of 28 July 2014 regarding the immobilization of bearer shares and the holding of the registers of registered shares and bearer shares (the "Law") and voted on 16 July 2014 is to adapt Luxembourg's legislation to the requirements of the Financial Action Task Force (the "FATF") and the Global Forum on Transparency and Exchange of Information for Tax Purposes regarding the identification of the holders of bearer shares by amending certain provisions of the law of 10 August 1915 on commercial companies, and the law of 5 August 2005 on financial collateral agreements.

Within the context of the 40 recommendations, the FATF advises Member States to take measures to prevent the use of legal persons for money laundering or terrorist financing purposes. One of the recommendations concerns the transparency of legal persons and the use of bearer shares. In effect, whereas Luxembourg corporate law allows shares in public companies limited by shares ("sociétés anonymes" or "SA"), European companies ("SE") and corporate partnership limited by shares ("sociétés en commandite par actions" or "SCA") to be in the bearer form, the FATF recommended taking appropriate measures to ensure the transparency of the shareholders in those type of companies which issued bearer shares. This recommendation includes investment companies in the form of an SA or an SECA. Luxembourg intends to comply with this recommendation by setting up an immobilization system for bearer shares under which these shares will be deposited with a financial institution or a professional intermediary.

The Law will ensure transparency of the shareholding and availability of information about the holders of bearer shares particularly for legal and tax authorities.

Scope – commercial companies and investment companies and funds

The Law applies to Luxembourg SAs, SEs and SCAs. It also applies to investment companies, particularly investment companies with variable capital ("SICAV"), investment companies with fixed capital ("SICAF"), risk capital investment companies ("SICAR"), which are incorporated in the form of an SA or SCA, specialized investment funds ("FIS") and common investment funds with transferable securities ("FCP") for which the management company issued bearer instruments.

The exemption initially provided by the bill No. 6625 for bearer shares listed on a regulated market issued by SAs and SCAs was not upheld, and therefore, these shares are subject to the immobilization procedure of the Law.

Immobilization procedure of bearer shares

The Law provides that the bearer shares must be deposited with a professional depositary appointed by the management body of the company which issued the bearer shares. The professional depositary will have to keep a register including all the relevant information for the identification of the bearer shareholders. The register must be kept in Luxembourg.

Any rights attached to bearer shares can only be exercised once the shares are deposited with the professional depositary and all relevant information is recorded in the register held by it.

Under the Law, the following persons may be appointed as professional depositaries: credit institutions, private portfolio managers, distributors of UCITS units, PFS, Luxembourg lawyers (Lists I and IV), notaries, auditors, and certified accountants. The professional depositaries must be established in Luxembourg and are subject to the requirements of regulations on the fight against anti-money laundering and terrorist financing. They are also supervised either by the Commission de Surveillance du Secteur Financier or by other professional associations. The depositary may not be a shareholder of the issuer of the bearer shares.

In fact, the Law sets up a “registration procedure” for bearer shares, which has a similar flavour to the existing regime of registered shares. However, there are certain differences: the main difference is that the register of bearer shares is not freely accessible to shareholders of the issuer and a shareholder may only consult information regarding its own bearer shares, without having access to any other information regarding all the other shareholders.

Transparency and accessibility of shareholding documents

The professional depositaries have to keep a register, which contains:

- a precise designation of each shareholder with an indication of the number of shares;
- the date of filing; and
- a record and date of any transfer or conversion into registered shares.

The register must be kept in Luxembourg for ease of access by the competent Luxembourg authorities.

The professional depositaries are also subject to all the obligations imposed by the legislation on the fight against anti-money laundering and terrorist financing.

Ownership and transfer of bearer shares

In the new regime, the ownership of the bearer shares is established by their registration in the register of bearer shares. This is a change from the former regime whereby the ownership is established simply by the possession of the share certificates.

The transfer of bearer shares will be perfected by an acknowledgment of the transfer registered on the same register. The depositary can, to this end, accept any document or notification acknowledging the property transfer between the assignor and the assignee.

The Law provides that the depositaries shall not be dispossessed of bearer shares except in a number of limited situations (transfer to its successor if the depositary ceases its activity, to the issuer if bearer shares are converted into registered shares, are repurchased by the issuer, are amortized in the share capital of the issuer).

Pledge on bearer shares

The Law also modifies the law of 5 August 2005 on financial collateral agreements. Any pledges on financial instruments in the form of bearer shares deposited with a depositary must be recorded in the margin of the register of the bearer shares.

Criminal penalties

The Law provides for criminal penalties (fines) against directors of companies which issued the bearer shares, who do not comply with the obligations to maintain the register of bearer shares and do not appoint a depositary in compliance with the Law (EUR 5,000 to EUR 125,000) and the professional depositaries in the case of breach of their obligations resulting from the Law (EUR 500 to EUR 25,000).

Effective implementation

The Law was published on 14 August 2014 in the Luxembourg Official Gazette (Mémorial) and comes into force after 3 days following its publication (i.e., 18 August 2014).

The management body of the companies that issued bearer shares before the effective date of the Law must appoint a professional depositary within 6 months of the Law entering into force. In addition, such shares must be deposited within 18 months of the effective date of the Law.

Failure to deposit the bearer shares within 6 months of the effective date will result in the automatic suspension of the voting rights of the non-deposited shares and rights to dividend will be deferred until their effective immobilization. Such shares will not count when establishing a quorum for attendance and the casting of votes. If there is still no immobilization after 18 months following the effective date of the Law, the non-deposited bearer shares must be cancelled by capital reduction.

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