

FATF Recommendations

Modifications of the Swiss Code of Obligations

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Status of parliamentary debates

The Financial Action Task Force (FATF), an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions, of which Switzerland is a member since 1990, has developed a series of Recommendations that are recognised as the international standard for combating money laundering, the financing of terrorism, and the proliferation of weapons of mass destruction. They form the basis for a coordinated response to these threats to the integrity of the financial system and help ensure a level playing field. First issued in 1990, the FATF Recommendations were revised in 1996, 2001, 2003 and most recently in 2012 to ensure that they remain up to date and relevant, and they are intended to be of universal application. Switzerland is due to be subject to an Evaluation in March / April 2016 (tentative date).

On 13 December 2013 the Swiss government submitted a bill to parliament incorporating into Swiss law the 2012 FATF Recommendations. Seven topics are dealt with in the Bill one of which is of particular interest to corporate law practitioners, namely increased transparency requirements for Swiss corporate bodies and for holders of bearer shares (economic beneficiaries or nominees).

On 9 September 2014, the reform cleared the second hearing of the Upper House of parliament and though divergences exist on various aspects of the other topics, the text of the Bill with respect to the modifications of the Swiss Code of Obligations (CO) is now definitive, barring FATF non-compliant amendments concerning thresholds for announcements and barring the prospect of a referendum at the end of the legislative procedure.

Salient points of the reform

The main features are the following:

A. New obligations for shareholders, holders of participations, partners and custodians

1. Companies limited by shares (Ltd; SA; AG), Limited liability companies (LLC; Sàrl; GmbH) and Co-operatives (Coop; Genossenschaften) are subject to the same or to similar

- obligations (art. 686, 697i to 697m CO for Ltd companies; art. 790a, 814 CO for LLCs, art. 837, 898 CO for Coops).
2. Buyers of bearer shares not traded on the stock market must disclose to the company their identity and address within thirty days of the acquisition of the shares (art. 697i CO).
 3. Buyers of bearer shares not traded in the stock market whose participation in the company reaches or exceeds 25% of the share-capital or of the voting rights must disclose to the company within a month the identity and address of the person(s) on account of whom they are acting. Any modifications thereof must be reported (art. 697j CO).
 4. If the bearer shares are intermediated securities in accordance with the Federal Act on Intermediated Securities (FISA; RS 957.1), the holders need not disclose their identities and addresses. In these cases the company designates a custodian, located in Switzerland, where the shares are deposited or registered in the principal register (art. 697j par. 3 FISA).
 5. Companies must hold a register of shareholders and of beneficial owners (art. 697l CO). The General assembly of the company may provide however that the disclosures be made to a financial intermediary as defined by the federal Anti-Money Laundering Act (AMLA; RS 955.0). The board of directors appoints the financial intermediary and informs the shareholders (art. 697k CO). The financial intermediary must keep the company informed at all times about the bearer shares for whom the prescribed announcements have been made and for whom the identity of the beneficial owners has been established (art. 697k CO). Once appointed, the financial intermediary is responsible for holding the list and for keeping the records (art. 697l CO).
 6. In all circumstances, the lists of shareholders, holders of participations, partners and beneficial owners must be accessible in Switzerland (art. 697l par. 5, 718 par. 4, 747 par 2 and 790 par. 5 CO).
 7. Pursuant to art. 46 par. 3 and 46a par. 1 of the Collective Investment Schemes Act (CISA; RS 951.31), company shareholders of SICAVs whose shares are not traded on the stock exchange are also subject to the obligations provided for in art. 697l and 697j CO.

B. Consequences of the violation of obligations

1. Pursuant art. 697m CO, so long as a shareholder doesn't comply with his obligations to disclose pursuant to art. 697i and 697j CO, he can neither receive dividends nor exercise any corporate rights (voting rights for instance).
2. If the said shareholder omits to comply with his obligations within the month following the acquisition of his shares, his patrimonial rights are cancelled. If he complies at a later date with his obligations, he retrieves his patrimonial and corporate rights from that date (art. 697m par. 3 CO).
3. Pursuant to the new provisions of the Swiss criminal code (SCC; RS 311.0), art. 327 and 327a CO, persons who have intentionally not complied with the obligations of disclosure or of keeping a register of shares, participations or partners

in accordance with art. 697i par. 1, 697i par. 3, 697j par. 1, 686, 697l, 790, 790a and 837 CO shall be liable to a fine.

4. It should be noted that a person who doesn't keep the register of the shares of a SICAV correctly shall be liable to a maximum CHF 500'000 fine.

C. Transitional provisions and entry into force

1. As from the date of entry into force, all existing companies have two years to modify their articles of association.
2. The law is likely enter into force on 1 January 2016.

Impact

Incorporating Ltds with bearer shares will be considerably less attractive when the law enters into force. Shareholders not willing to be disclosed to other shareholders or the company will need to ensure that the general assembly of the company elects to appoint a custodian mandated to hold and keep the share register.

Conclusion

By incorporating the FATF Recommendations revised in 2012 into Swiss law, parliament has greatly enhanced the transparency of property relationships, diminished the risks related to financial crimes and reinforced the integrity of the Swiss financial marketplace.

For any questions, please do not hesitate to contact your usual Deloitte advisor or one of the specialists listed in the newsletter.

Best regards,

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