How new Swiss AML-Regulation affects the non-listed M&A-Business

Driven by the revision of the international AML-Regulations of the Financial Action Task Force (FATF/GAFI) and the OECD Global Forum, the Swiss Legislator stipulated new reporting obligations for shareholders of non-listed companies in the Swiss Code of Obligations ("**CO**"), set into force on 1 July 2015. These obligations aim to eliminate AML-risks emerging from a lack of transparency of legal entities.

Due to its harsh sanctions (in particular, suspensions of voting rights and forfeiture of property rights) the non-compliance with these obligations may also lead to substantial consequences in connection with M&A transactions.

Shareholders' Obligations

Acquirers of bearer shares must disclose their identity to the company within 30 days after the share transfer (art. 697i para. 1 CO). This obligation is triggered upon acquisition of a single bearer share, as well as bearer participation certificate (=non-voting shares). As the statute's wording is not precise, to date it is unclear whether the grant of a usufruct or pledge is to be considered as an acquisition as well. The report has to contain a proof of ownership as well as a proof of identity. For the latter individuals must provide a copy of an official identity document; legal entities must submit an extract form the Swiss commercial register (art. 697i para. 2 CO).

Shareholders of both bearer and registered shares who reach or exceed a threshold of 25% of the share capital or voting rights must report the identity of its beneficial owner(s) also within 30 days of the share transfer (art. 697j para. 1 CO). It is sufficient to submit the (first and sur-)name and the address; the report must however not include a proof of identity or share ownership. Due to a lack of clarity of the statute, the exact determination of the person(s) to be reported is not fully clear, in particular in complex ownership structures or the involvement of foundations, trusts, funds or similar entities. The obligation to report the beneficial owner applies share corporations (*Aktiengesellschaft, AG*) and *mutatis mutandis* to limited liability companies (*Gesellschaft mit beschränkter Haftung, GmbH*). According to the statute, the threshold triggering a reporting obligation may also be reached (or exceeded) by way of agreement with third parties. With respect to the existing disclosure obligation under financial market laws, shares listed on a Swiss or foreign stock exchange are not subject to these reporting obligations.

Sanctions

Non-compliance with these reporting obligations is sanctioned with suspension of the shareholders' (membership) rights (in particular voting right) (art. 697m para. 1 CO) and the shareholders' (property) rights (in particular right to receive dividends) (art. 697m para. 2 CO). The sanctions do not require any intent or negligence. After expiration of the mentioned reporting period, the property rights forfeit immediately. A delayed reporting

does not revive already forfeited property rights but entitles the shareholder to future membership and property rights (art. 697m para. 3 CO).

Companies' Obligations

Sanctions must be enforced by the company's board of directors (art. 697m para. 4 CO). In particular the company must not allow non-compliant shareholders to participate at any shareholders' meetings and must not grant them any property rights.

Art. 697l para. 1 and 2 CO obliges the company to maintain a register of reported bearer shareholders and beneficial owners. As counterpart of the reporting obligations this register constitutes the heart of the newly integrated AML-regulation. According to the legislator's intention, such register provides access to ownership information for AML-prosecuting authorities and making it impossible for money launderers to act anonymously through legal entities. The register must therefore be accessible in Switzerland at any given time (art. 697l para. 5).

Relevancy regarding M&A-Business

As the failure to keep records of the bearer shareholders and beneficial owners may not directly result in any responsibility for company its board of directors, allowing non-compliant shareholders to exercise membership or property rights may have severe consequences for the company and its board of directors.

Resolutions of the shareholders' meetings may be challenged if persons not authorized to participate have a significant influence on the shareholders' decisions (art. 691 para. 3 CO). This means, for example, that in the context of a merger, a shareholders' resolution may be subsequently declared void, causing the merger to be undone by court decision. Even though a deficient shareholders' resolution may be remedied by another resolution after the relevant shareholders have met their reporting obligations, the completion of the applicable transaction remain at risk.

Further, the company is obliged to reclaim all unduly granted property rights (e.g., dividends) to failing shareholders. Therefore a seller in an M&A transaction may face substantial claims if he has not complied with his reporting obligations and the members of the board of directors can be held personally liable if they do not enforce such claims.

In view of the above and in case of involvement of a Swiss legal entity in an M&A transaction, the (legal) due diligence must thus include verification of compliance with the shareholders' and companies' obligations pursuant to the new reporting obligations under Swiss law. In addition to the due diligence and for further legal certainty, also the share purchase agreement should address these potential risks (e.g., undertaking of the buyer not to enforce any claims against the seller in connection with the reclaim of dividends).