Bär & Karrer Briefing
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Reporting of Beneficial Ownership in Swiss Private Equity Acquisitions

As part of a new Swiss legislation aimed at preventing money laundering and tax evasion, any entity acquiring 25% or more of a non-listed Swiss company must inform the latter regarding the acquiring entity's beneficial owner and update such information in case of changes.

In standard private equity structures, the administrative burden of the new legislation can be minimized by implementing a practicable solution compliant with the rules: As typically the General Partner takes the relevant decisions regarding the fund and its portfolio companies, the individuals controlling the General Partner (respectively controlling the ultimate shareholder of the General Partner) should be disclosed as beneficial owners. If such individuals cannot be determined, the top executive officer (chairman or CEO) of the General Partner, respectively of its ultimate shareholder, may be disclosed.

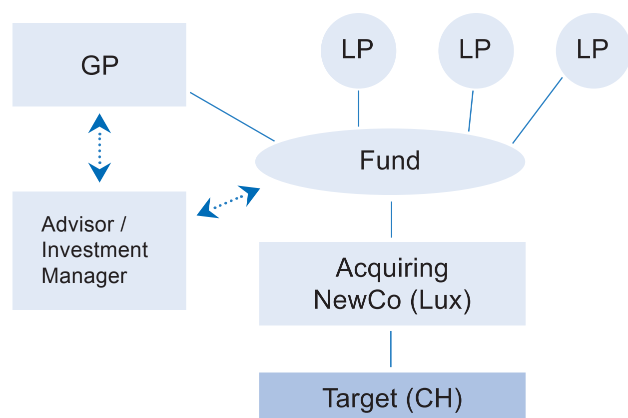
Background

On 1 July 2015, a new Swiss law entered into force to implement the recommendations of the international Groupe d'action financière (GAFI) aimed at preventing money laundering and tax evasion. The new provisions go beyond what would have been required to comply with the GAFI recommendations.

As part of the new legislation, entities acquiring 25% or more in a non-listed Swiss company must disclose their beneficial owner to the latter. The aim of the rule is to ensure that the company knows its substantial beneficial owners and can quickly relay such information to governmental authorities upon their request.

This Briefing summarizes the most relevant aspects of the new notification obligation in typical private equity structures. For general considerations on the new GAFI regulation (including possible requirements to amend existing articles of associations), please refer to the Bär & Karrer Briefing of June 2015. We would like to point out that there is no case law yet on the GAFI regulations and that the courts may adopt interpretations that differ from our viewpoint.

Typical Private Equity Structure



Notification Obligation of Acquirers

According to the new article 697j of the Swiss Code of Obligations ("CO"), any person or entity acquiring (including via primary subscription) – alone or in concert with third parties – bearer or registered shares representing 25% or more of the share capital or voting rights in a non-listed Swiss stock corporation, must notify to the latter the name and address of the ultimate beneficial owner of the acquiring entity. The deadline for the notification is one month from closing of 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 explanatory notes of the federal government regarding the draft legislation submitted to parliament, the acquiring entity has to 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.

Who Must be Disclosed as Beneficial Owner?

While article 697j CO states that the beneficial owner to be reported must be a natural person, it remains silent on who qualifies as beneficial owner in holding structures. This ambiguity caused a debate among legal scholars and practitioners about who shall be disclosed as beneficial owner of an acquisition company ("AcquiCo") – indirectly – held by a private equity fund to acquire a Swiss target company (and of the AcquiCo itself if it is a Swiss Company). In short, the following approaches are discussed:

- As long as the private equity fund has more than 20 investors, no beneficial owner must be disclosed, based on an analogous application of art. 66 para. 1 of the FINMA ordinance regarding AML (GwV–FINMA) and art. 38 para. 1 of the banking professional standards regarding duties of care (VSB16). Similarly, no beneficial owner must be reported if the indirect owner of the AcquiCo is a publicly listed company. In this case, stock exchange laws already provide for disclosure obligations (analogous application of art. 4 para. 1 of the Swiss AML Act).
- Beneficial owner is an (indirect) investor (or several acting together) that holds on each level of the group structure at least 25%; i.e. an uninterrupted chain of minimum 25% stakes down to the AcquiCo.
- Beneficial owners are investors that – alone or acting together – indirectly hold 25% or more of the target company (multiplication of share-holdings) and at least factually exercise a certain control over the same. If such threshold is not met, no beneficial owner needs to be reported.
- In standard private equity setups, the individuals controlling the General Partner ("GP"), respect-ively controlling the ultimate shareholder of the GP, should be disclosed as beneficial owners. If it cannot be determined who such individuals are, the top executive officer of the GP, respectively of its ultimate shareholder, may be reported.

Our View regarding Private Equity Setups

While the above approaches all base on valid arguments, we consider the last solution to be the most appropriate in a typical private equity context: In line with the interpretation of the GAFI rules by the European Union (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 GP usually controls the decisions of the fund and the AcquiCo. Hence, in our view the individuals ultimately controlling the GP are the beneficial owners of the AcquiCo in the sense of the new legislation and should be disclosed. If such individuals cannot be determined, the top executive officer of the GP, respectively of its ultimate shareholder, may be reported instead in our view (CEO, chairman of the board or other persons, depending on the structure).

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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).

The above solution has the advantage that – unlike in the other approaches – a beneficial owner is reported in any case. Should a court in the future take a different stance on who must be disclosed as beneficial owner, the AcquiCo can still claim that it reported in good faith the persons it considered as beneficial owners rather than not having disclosed any beneficial owner at all.

Register Obligation of the Company

Based on new art. 697l CO, the target company (and a Swiss AcquiCo) must maintain a register of the beneficial owners disclosed to it and keep all supporting documents. Such register must be accessible in Switzerland by a director or officer with signatory power and residing in Switzerland (art. 718 para. 4 CO).

Sanctions

If an acquiring entity does not comply with its disclosure obligation regarding beneficial owners, its voting rights in the Swiss company are suspended until notification is made (art. 697m para. 1 CO).

Further, the acquiring entity's right to dividends (and repayment of capital) is irrevocably forfeited for the period until disclosure is made (art. 697m para. 2 and 3 CO). Any dividends paid out prior to a notification could be reclaimed by the company; which could primarily become relevant in a bankruptcy of the latter 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 (art. 679m para. 4 CO). Board members not living up to this duty may become liable for damage caused, which is again primarily relevant in a bankruptcy scenario.

It may be noted that parliament decided – against the proposition of the federal government – not to introduce criminal sanctions for violations of the disclosure obligation under art. 697j CO.

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, we recommend to convert them into registered shares to avoid unnecessary administrative burden.

Christoph Neeracher
christoph.neeracher@baerkarrer.ch
T: +41 58 261 52 64

Luca Jagmetti
luca.jagmetti@baerkarrer.ch
T: +41 58 261 52 62

Zurich
Bär & Karrer AG, Brandschenkestrasse 90, CH-8027 Zurich,
T: +41 58 261 50 00, F: +41 58 261 50 01, zurich@baerkarrer.ch

Geneva
Bär & Karrer SA, 12, quai de la Poste, CH-1211 Geneva 11,
T: +41 58 261 57 00, F: +41 58 261 57 01, geneva@baerkarrer.ch

Lugano
Bär & Karrer SA, Via Vegezzi 6, CH-6901 Lugano,
T: +41 58 261 58 00, F: +41 58 261 58 01, lugano@baerkarrer.ch

Zug
Bär & Karrer AG, Baarerstrasse 8, CH-6301 Zug,
T: +41 58 261 59 00, F: +41 58 261 59 01, zug@baerkarrer.ch

www.baerkarrer.ch