

NOTARIAT AM ALSTERTOR

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NOTARE

Client Information on the List of Shareholders

With the German Act to Modernize the Law Governing Limited Liability Companies and to Combat Abuses (*Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen [MoMiG]*) the most comprehensive reform in the more than 100 year-old history of the law governing limited liability companies came into force on 1 November 2008. This reform introduces many advantages for such companies, but also necessitates many changes to previous practice.

The changes particularly affect the importance of the list of shareholders (Sections 16 and 40 of the Limited Liability Companies Act (*GmbHG*):

1. Increased importance of the list of shareholders to the status and powers of shareholders

According to the amended version of Section 16 of the Limited Liability Companies Act, in relation to the Company only he who has been entered as such on the list of shareholders included in the Commercial Register is deemed to be a shareholder. If possible, this list should be filed electronically and be examinable online.

If a shareholder or changes having occurred with regard to him have not yet been entered on the list of shareholders and the list has not yet been included in the commercial register, the shareholder will not (yet) be considered to be a shareholder vis-à-vis the company, i.e. he may not, for example, exercise his shareholder rights, particularly voting rights.

Legal acts performed by the shareholder concerned with regard to the corporate relationship will be absolutely invalid.

Matters initially may only be different in specific cases of sale (with the relevant factors of uncertainty) since in such cases legal acts are (only) provisionally invalid and are deemed valid from the beginning (only) if the list of shareholders is included in the commercial register without undue delay after performance of the legal act. Therefore, such legal acts should as far as possible be performed only after the list of shareholders has been included in the commercial register (inspection under www.handelsregister.de) or expressly under and by presenting and attaching a corresponding power of attorney of the seller or its provisional participation.

2. Acquisition in good faith

Moreover, in certain circumstances, it is now possible to acquire shares in a GmbH in good faith if the seller has been incorrectly entered as owner of the share on the list of shareholders included in the commercial register for at least three years.

For this reason every shareholder should as a precaution assure himself at regular intervals of the content of the list of shareholders included in the commercial register and if applicable make an objection (inspection under www.handelsregister.de).

Beyond the narrow scope of application of the new provision, acquisition in good faith of (for instance, of non-existent, falsely denominated or not freely transferable) shares is still not possible.

3. Notary's involvement

Finally, a provision has been introduced that notaries must draw up and file a new list of shareholders whenever changes occur to the identity of the shareholders or to the extent of their participation if the notaries were involved in the change.

This notarial list of shareholders must be provided with the notarial confirmation that the changes evident from such list correspond to the deed drawn up and that the list otherwise fully corresponds to the content of the list last included in the commercial register.

Hence follows that before recording share purchase agreements, shareholders' resolutions and similar measures the notary mandatorily

- must inspect the last list of shareholders deposited with the commercial register,
- requires from the interested parties the confirmation that the content of this list last deposited actually corresponds to the current participating relationships.

If these conditions are satisfied, it further must be ensured that the (new) contentwise correct list of shareholders has also actually been included in the commercial register in due form, i.e. was made available to be called up through the electronic portal of the registry courts.

4. Increased requirements to be satisfied by the "Geschäftsführer" (*managing directors*)

The "Geschäftsführer"(and/or the shareholders) accordingly also have to carry out similar obligatory inspections and preparatory measures when shareholders' resolutions in which the notary was not involved are prepared and/or recorded.

For example, a resolution concerning the appropriation of profits may be invalid in future if the list of shareholders has not been kept correctly and included in the commercial register properly.

That is why it is urgently recommendable to inspect the list of shareholders prior to every shareholders' resolution!

Moreover, the "Geschäftsführer" are obliged to draw up and file without undue delay a new list of shareholders meeting the requirements of the MoMiG whenever changes have occurred in which the notary was not involved (after 1 November 2008). This may, for example, be cases of inheritance, splitting and consolidation of shares, changes to personal data, etc.

"Geschäftsführer" who act in breach of such obligations may render themselves liable to damages under Section 40 paragraph 3 of the GmbHG in the form of the MoMiG.

Conversely, the shareholder concerned is obliged to notify the changes to the "Geschäftsführer" and to furnish (qualified) proof of these (e.g. presentation of an inheritance certificate, of an opened notarial last will, deeds certified by a public notary or certified register excerpts). It would seem that the "Geschäftsführer" are entitled in principle to refuse to change the list of shareholders until such proof has been presented or if there are legitimate doubts.

5. Changed content for lists of shareholders to be filed in future

The requirements as to the content of the lists of shareholders to be filed in future have been modified as well. For instance, in future the shares must be given serial numbers (even if there is only one share) and, if applicable, individualized by briefly indicating their history. It is recommendable to allocate a new number when a change occurs (for example, share no. 2 becomes no. 3 and no. 4 and not, for instance, no. 2a and no. 2b).

6. General inspection requirements

Please note that according to our varied experience the lists of shareholders deposited with the commercial register

- are partly not yet examinable electronically (this concerns lists of shareholders filed prior to 1 January 2007)
- often do not yet satisfy in their contents the requirements existing after 1 November 2008
- in many cases are also factually incorrect (for instance, are out of date or incomplete). There are various reasons and causes for this.

That is why we recommend – even if there is currently no need for action – checking the present list of shareholders which has been deposited and drawing up and filing electronically an up-to-date "modern" list of shareholders.

We are at our disposal for any queries, inspections, drafting and the electronic filing.

Notice: This client information contains merely non-binding general recommendations. It is no substitute for personal counselling in the individual case. All liability for the accuracy of the content of this client information is excluded.