

# Disposal of shares in private companies after introduction of universal dematerialisation



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The Law of 30 August 2019 significantly amended the Commercial Companies Code and other laws. **(1)** The main change regards the general dematerialisation of shares in private joint stock companies and limited joint stock partnerships. The amendment will enter into force on 1 January 2021.

## Dematerialisation

Although the dematerialisation of shares is uncommon, this phenomenon is not unknown in Polish law. At present, shares are dematerialised (in principle obligatory) in the cases specified in Article 5(1) of the Law on Trading in Financial Instruments of 29 July 2005. **(2)** Therefore, dematerialisation includes public companies, **(3)** which are mainly listed on the Warsaw Stock Exchange. In addition, the regulations introduce a new type of company into the Polish legal system (as of 1 March 2020) – namely, simple joint stock companies. Moreover, the regulations state that the shares of simple joint stock companies need not be presented in a document.

Thus, dematerialisation means that a security is not in the form of a paper document or other tangible medium, but that it functions only as a record in a relevant register. **(4)** The existing dematerialisation of shares in public companies is closely related to the institution of a securities depository (ie, a system of registering dematerialised securities, including securities accounts). Shares, as dematerialised securities (ie, financial instruments), exist as records in these securities accounts.

The amending law will establish a register of shareholders, which has already been provided for in relation to simple joint stock companies. Shareholders of private companies must be disclosed in this register. However, pursuant to the amending law, private companies will be able to choose between the shareholders' register and the depository system that is applicable to public companies (in such a case, the dematerialisation of shares and the consequences thereof will be regulated by the Law on Trading in Financial Instruments – the new Article 328(11)(2) of the Commercial Companies Code). Shares of the same company cannot be registered simultaneously in the shareholders' register and the depository of securities.

## Key changes for private companies

The amending law concerns private companies, which will be significantly affected. First, there will be a separation of the share rights attached to shares from the share document, which is the essence of the dematerialisation of securities. Second, there will be a need to establish registers of shareholders (in accordance with the amending law,

registers are created and maintained by investment companies). Third, the institution of the shares book in which shareholders of nominative shares(5) were previously disclosed will be liquidated. Fourth, shareholders will lose their anonymity, which is a consequence of the obligation to disclose shareholders in the register. However, the register will be open only to a given company and its shareholders (new Article 328(5) of the Commercial Companies Code). Fifth, a person entered on the shareholders' register will be considered a shareholder of the company, and in the case of the registration of shares in the depository system, a person on whose account the shares of a private company have been registered. Sixth, there will be a fundamental change in the rules governing trading in shares. The latter issue will be the subject of further reflection.

### **Trading in shares before amendment**

A brief description of the current rules regarding trading in shares of private companies must be preceded by a basic distinction between nominative and bearer shares. Nominative shares are those which relate to a specific person (their name and surname or company name is included in the share document issued by the company). These persons are entered in the shares book and are considered shareholders of the company from this moment on. Bearer shares are not linked to a specific person and legitimise each of their holders. A holder of bearer shares is considered a shareholder of the company. The type of shares determines the rules of its disposal. The transfer of nominative shares takes place through a written statement either on the share document itself or in a separate document, and requires the transfer of the nominative shares (Article 339 of the Commercial Companies Code). The transfer of bearer shares requires the transfer of ownership of the document, which requires the bearer shares to be issued (Article 921(12) of the Civil Code). Simplification of the rules of trading in bearer shares exposes the circulation function of securities.

### **Trading in shares after amendment**

Pursuant to the new Article 328(1) of the Commercial Companies Code, shares need not be in the form of a document. Shares of a private company are subject to registration in the shareholders' register, unless the company decides to register them in the depository of securities. According to the new Article 328(9)(1) of the Commercial Companies Code, the acquisition of shares or the establishment of a limited right *in rem* on it takes place at the moment of making an appropriate entry in the shareholders' register. The regulation does not differentiate between nominative and bearer shares (hereinafter referred to collectively as 'registered shares'). At the same time, Article 339 of the Commercial Companies Code was repealed, which is now of key importance for determining the rules of trading in shares, determined by the type of shares (nominative or bearer). Thus, the amendment will result in the unification of the rules of share trading.

The new Article 328(9) of the Commercial Companies Code does not specify the form of a legal act transferring or encumbering shares. It specifies only the moment in which the effect of acquiring shares or establishing a limited property right on it occurs. This moment occurs when an appropriate entry is made in the shareholders' register. Notably, pursuant to the new Article 328(4) of the Commercial Companies Code, the entity maintaining the shareholders' register makes an entry therein at the request of the company or a person who has a legal interest in making an entry (Paragraph 1 of the code). This person is the purchaser of the shares and the entitled party under the limited property right. As a rule, before the entry in the shareholders' register, the entity maintaining the register notifies a person whose rights are to be deleted, changed or encumbered by the new entry to the register. The information obligation will not arise if such a person has consented to the entry. Seemingly, such consent will most often be given in the agreement transferring or encumbering the shares. Notably, in accordance with the existing wording of the shareholders' register, the person entitled to make an objection to the planned entry in the shareholders' register does not have the right to object to the planned entry therein, which is different from the current regulation of entries in the share register. Pursuant to Article 328(4)(5) of the Commercial Companies Code, the entity maintaining the shareholders' register examines the content and form of the documents justifying the entry, but is not, as a rule, obliged to examine the legality and authenticity of the documents justifying the entry, including the signatures of the seller of shares or persons establishing a limited right *in rem* in the shares.

In most cases, the basis for transferring the shares or establishing a limited substantive right on it is an agreement. The agreement should be concluded in writing for evidentiary purposes. The conclusion of an agreement concerning registered shares alone is not sufficient for their acquisition. A necessary condition is to make an appropriate entry in the shareholders' register. This corresponds to Article 7(2) of the Law on Trading in Financial Instruments, which

concerns the rules of the disposal of dematerialised securities within the meaning of this law (eg, shares in public companies). The aforementioned provision stipulates that the agreement obliging to transfer dematerialised securities transfers these securities on making an appropriate entry in the securities account.

## Comment

The amendments come into force on 1 January 2021. The amended Commercial Companies Code maintains the traditional division into nominative and bearer shares, although this division is determined by the existence of documentary (material) carriers of share rights, and these will be completely removed from trading as a result of the amendment. The amendment aims to eliminate the existing differences between both types of share and:

- introduce a unified system of trading in all shares of private companies. The form of the acquisition or establishment of a limited right *in rem* on them takes place on entry in the shareholders' register, both with respect to nominative and bearer shares;
- enter all shares in the shareholders' register – bearer shareholders are no longer anonymous to the company and other shareholders;
- determine a shareholder's legitimacy in the company – a person that has been entered on the register is considered a shareholder. Until now, a holder of bearer shares and a person entered into the shares book has been considered a shareholder in the company; and
- eliminate substantive substrate of both nominative and bearer shares.

Considering the above observations, the question of whether there is any sense in maintaining a conceptual distinction between nominative and bearer shares remains. The only difference between these shares seems to be that only nominative shares can be preferential (eg, as regards dividends or voting). Therefore, it should be sufficient to use the notions of preferential and ordinary shares. If any differences between the existing types of share are obliterated, the current requirement under Article 351(1) of the Commercial Companies Code – according to which preferential shares, except for non-voting shares, should be nominative – appears enigmatically and it is not known how it should be expressed in practice and what purpose it should serve.

*For further information on this topic please contact Mirosław Cejmer or Jacek Becker at Kubas Kos Galkowski by telephone (+48 22 206 83 00) or email (miroslaw.cejmer@kkg.pl or jacek.becker@kkg.pl). The Kubas Kos Galkowski website can be accessed at [www.kkg.pl](http://www.kkg.pl).*

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## Endnotes

(1) Journal of Laws 2019, Item 1798.

(2) Consolidated text of 9 November 2018, Journal of Laws 2018, Item 2286.

(3) Pursuant to Article 4(20) of the Law of 29 July 2005 on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organised Trading and Public Companies (consolidated text of 22 February 2019, Journal of Laws 2019, Item 623), a 'public company' is understood as a company in which at least one share is admitted to trading on a regulated market or introduced to trading in the alternative trading system in Poland.

(4) M Romanowski and A Szumański, *System prawa prywatnego. Tom 18 – prawo papierów wartościowych*, Warsaw 2016, p 114.

(5) The term 'nominative shares' will be understood as the shares that are strictly connected to a defined entity – that is, the entity is named on the document of the share. According to the amendment, both types of share (nominative and bearer) will be dematerialised and disclosed in the appropriate register. Thus, both types of shares are in practice registered shares by virtue of the Law of 30 August 2019, which amended the Commercial Companies Code and other laws. In view of this, the traditional translation of the Polish term *akcja imienna* as 'registered share' is inappropriate. Thus, shares which are connected to the defined entity should be described as nominative shares.

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Mirosław Cejmer



Jacek Becker