

**Restrictions of bearer shares :
Legal certainty needed!**

Deutsches Aktieninstitut appreciates the opportunity to contribute to the ongoing consultation of the Financial Action Task Force (FATF) on amendments to Recommendation 24 on the transparency and beneficial ownership of legal persons.

Deutsches Aktieninstitut represents large German non-financial companies, whose perspective is taken in the response below. Our contribution will be confined to potential amendments of Recommendation 24 on bearer shares:

Question of FATF consultation paper:

Should bearer shares and bearer share warrants without any traceability be subject to additional controls as set out in amendments to paragraph 14 of the Interpretive Note? Is the draft glossary definition sufficiently clear to avoid inadvertently applying excessive controls to traceable and legitimate uses of such instruments? If there remains undue controls, how should this be mitigated?

Response:

1. Impact assessment needed

As previously stated, we regret that the proposed measures still lack an underlying impact assessment that explains (with empirical evidence) why bearer shares pose an elevated money laundering risk that requires regulatory action. For instance, from our point of view as representatives of traders in goods, the money laundering risks are connected to the operating business, not however to the issuance of bearer shares. Regulatory focus should thus rather be drawn to areas that have been identified as being particularly vulnerable to money laundering activities. It should also be assessed whether alleged risks connected to bearer shares are present across all industry (financial and non-financial) sectors, or whether the potential issue is limited to a specific area.

Secondly, no explanation is provided as to why the restrictions suggested would help the combat against money laundering. Would such restrictions facilitate the detection of money launderer? Why would such restrictions prevent money laundering?

Because of the lack of a proper impact assessment, we also miss proportionality reflections on whether other measures being less drastic would be equally suited to fight money laundering in this area.

2. Draft Interpretive Note

According to paragraph 14 of the draft interpretive note, *“countries should take measures to prevent and mitigate the risk of the misuse of bearer shares and bearer share warrants, by prohibiting the issuance of new bearer shares and bearer share warrants; and, for any existing bearer shares and bearer share warrants, by applying one or more of the following mechanisms within a reasonable timeframe:*

- (a) converting them into a registered form; or*
- (b) immobilising them by requiring them to be held with a regulated financial institution or professional intermediary, with timely access to the information by the competent authorities; and*
- (c) During the period before (a) or (b) is completed, requiring holders of bearer instruments to notify the company, and the company to record their identity before any rights associated therewith can be exercised.”*

a) Bearer shares of listed companies:

In our opinion, bearer shares of companies listed on a regulated market should clearly be exempted from the suggested restrictions.

Bearer shares of listed companies do not pose any specific elevated risk for money laundering activities. Those companies are submitted to rigid capital markets transparency/disclosure requirements that ensure adequate ownership information. For instance, in the realm of the European Union, the Markets in Financial Instruments Directive (MiFID II), the Markets in Financial Instruments Regulation (MiFIR) and the Transparency Directive ensure that transparent information on the ownership structure is being provided on a constant basis. This most importantly via setting shareholding/voting rights thresholds that trigger notification obligations.

We thus support the exemption mentioned in the footnote of paragraph 14 of the draft interpretive note, which states:

« This requirement does not apply to bearer shares or bearer share warrants of a company listed on a stock exchange and subject to disclosure requirements (either by stock exchange rules or through law or enforceable means) which impose requirements to ensure adequate transparency of beneficial ownership. »

However, being such an important exemption, we would appreciate if the exemption was clearly stated in the main body of paragraph 14, instead of being a footnote. Also, the scope of the exemption is unclear. Does the exemption only include existing bearer shares or also the issuance of new bearer shares ? We ask to clarify that the exemption for companies listed on a regulated market includes

the issuance of new bearer shares against the background of the above mentioned arguments regarding transparency.

Against this background, we suggest the following wording to be added to paragraph 14 as sentence 3 and 4 :

The restrictions in s.1 and 2 do neither apply to existing nor the issuance of new bearer shares or bearer share warrants of a company listed on a stock exchange and subject to disclosure requirements (either by stock exchange rules or through law or enforceable means) which impose requirements to ensure adequate transparency of beneficial ownership. Bearer shares of non-listed companies

Even for bearer shares of non-listed companies, we do not see the need of a prohibition for new bearer shares nor the application of the proposed mechanisms for existing bearer shares.

This applies especially to bearer shares, which are maintained in a collective securities account that is being held by a depository bank. Those bearer shares and its beneficial owner can certainly be traced.

In particular Regulation (EU) No 909/2014¹ includes extensive requirements on so called central securities depositories (CSDs) that ensure traceability. As an example, Germany² allows the issuance of bearer shares specifically with reference to this European Regulation under the condition that those bearer shares are being deposited at a CSD fulfilling the requirements of said regulation .

Last, but not least we ask again to re-consider if said measures need to be imposed on companies, whose bearer shares are not held in a collective account. Even those bearer shares can be traced, for instance at times when the owner claims its dividends or exerts rights stemming from the bearer share ownership. With reference to bullet point 1 we also fail to understand, why such bearer shares pose such an elevated risk to money laundering and if so, whether this elevated risk is present accross industries. A more differentiated approach would be desirable instead of a plain prohibition.

3. Draft glossary note

The draft glossary note defines bearer shares as *negotiable instruments that accord ownership in a legal person to the person who possesses the physical bearer share certificate,*

¹ Regulation (EU) No 909/2014 of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0909>

² See Art. 10 para. 1 Nr. 2 Aktieninggesetz (German stock corporation act).

and any other similar instruments without traceability. It does not refer to dematerialised and/or registered forms of share certificate whose owner can be identified.

Bearer share warrants refers to negotiable instruments that accord entitlement to ownership in a legal person who possesses the physical bearer share warrant certificate, and any other similar warrants or instruments without traceability. It does not refer to dematerialised and/or registered form of warrants or other instruments whose owner can be identified. It also does not refer any other instruments that only confers a right to subscribe for ownership in a legal person at specified conditions, but not ownership or entitlement to ownership, unless and until the instruments are exercised.

With regard to bearer shares of non-listed companies, it is not clear to us whether a collective securities account that is being held by a depository bank satisfies the requirements of shares being „dematerialised and/or registered forms of share certificate whose owner can be identified“ according to the draft glossary note. We hence ask the FATF to amend the draft glossary note with examples to remove any form of uncertainty.

An amendment could be:

It does not refer to dematerialised and/or registered forms of share certificate whose owner can be identified. This is for instance the case with bearer shares of listed companies or bearer shares of companies, which are maintained in a collective securities account of a custodian bank.

Last, we suggest to move the definition of bearer shares of the glossary note to the main body of the text amending paragraph 14. Paragraph 14 covers restrictions on bearer shares which is why the definition of bearer shares should also be located there for the purpose of better legal clarity and readability.

4. Ramifications on capital markets

The FATF should also consider cross-sectoral ramifications of the suggested measures. They would make the issuance of bearer shares less attractive for listed companies. Bearer shares are however classes of shares that are commonly used across various jurisdictions as they offer features that can benefit both issuers and shareholders. Before taking any steps, the impact of the suggested measures on the capital markets ecosystem should be assessed and more proportionate measures be envisaged.

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