

## AGREEMENT ON SALE OF CLOSE COMPANY SHARES: REQUIREMENTS OF FORM AND SIGNIFICANCE OF REGISTRATION

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**Abstract.** *The form and registration requirements applicable for transfer of close company shares differ in various countries. Discussions on separate related aspects take place in the international business transfer theory and practice. The Lithuanian legal regulation of the said requirements is continually improved, taking into account the experience of other countries and business practice needs. Based on the analysis of the European Union, the Lithuanian and foreign legislation, case law and doctrine, this article is designed for the examination of effectiveness and adequacy of current requirements for the form of share sales transactions as well as expedience of fixing the model of public registration of data about shareholders of a close company.*

**Keywords:** *transfer of shares, sale of shares, form requirements for share sale, registration of share sale, registration of shareholders, close company.*

## Introduction

The objects of this research are the form and registration requirements for close company's<sup>1</sup> share sales agreement. The relevance of the chosen subject is determined by the fact that recently (in December 2009) the amendments of the Law on Companies of the Republic of Lithuania<sup>2</sup> (hereinafter – the Law on Companies) were adopted, which had fixed fairly significant changes in the matters of registration of shareholders of private limited companies. Also, the form and registration requirements applicable for transfer of close company shares differ in various countries.

The Lithuanian legal basis lacks deep traditions on matters of form and registration of transfer of company shares. The court practice is not numerous too. In addition, this topic was not properly examined in the Lithuanian jurisprudence. Only a few works of the Lithuanian authors discussing separate issues related to the form and other procedural requirements of company share transfer can be found. The following authors can be mentioned: dr. J. Kiršienė and K. Kerutis, who carried out the comparative examination of legal regulation and practice of business transfer by selling shares or enterprise<sup>3</sup>, prof. V. Mikelėnas, who analysed (on the basis of a comparative aspect) the criteria and significance of requiring the notarial form for transactions in the Lithuanian civil law<sup>4</sup>, T. Rymeikis, who discussed the Lithuanian legislation developments and trends in the field of ownership and transfer of ownership title to shares<sup>5</sup>.

The purpose of this research is to examine the effectiveness and adequacy of the current requirements for the form of share sales transactions, as well as the expedience of fixing the model of public registration of data about shareholders of close company. Various scientific methods have been applied during the research, such as *linguistic, documental (content of source), logical, systematic, comparative, critical analyses*, etc.

### 1. General Overview of the Procedures of Close Company Share Sale

In various countries the requirements for share transfer transactions are different. It should be noted that formal requirements are related to the actual transfer of shares.

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- 1 Because of different names for legal forms of company in various countries and for all jurisdictions typical separation of companies to public and closed, the generalising concept of close company is used in this article. In Lithuania a private limited company (UAB) corresponds to the said form of close company.
  - 2 Law on Companies of the Republic of Lithuania. *Official Gazette*. 2000, No. 64-1914 (edit of 01/03/2012).
  - 3 Kiršienė, J.; Kerutis, K. Verslo perleidimas akcijų ar įmonės pardavimo būdu: teisinio reglamentavimo ir praktikos lyginamoji analizė [Business Transfer by Selling Shares or Enterprise]. *Jurisprudencija*. 2006, 3(81): 24–31.
  - 4 Mikelėnas, V. Sandorių notarinės formos nustatymo Lietuvos civilinėje teisėje kriterijai ir reikšmė: lyginamasis aspektas [Criteria and Significance of Fixing Notarial Form for Transactions in the Lithuanian Civil Law: comparative aspect]. *Notariatas*. 2007, 2: 25–29.
  - 5 Rymeikis, T. Nuosavybės teisė į akcijas ir jos perleidimas: Lietuvos įstatymų leidybos vystimasis ir tendencijos [Ownership and Transfer of Ownership Title to Shares: Developments and Trends in the Lithuanian Legislation]. *Jurisprudencija*. 2004, 57(49): 71–81.

Therefore, even in the countries where the notarial form is required for share transfer, a written comprehensive agreement on purchase-sale of close company shares, including the provisions for the determination of purchase price, representations and warranties, etc., and the transfer of shares is formalised on the basis of a separate short form notarial act. Formal requirements for the transfer of shares in close company are closely related with the availability of documentation: in the countries where companies may issue share certificates (e.g., Lithuania, Finland, Sweden),<sup>6</sup> material shares are typically transferred by means of endorsement, and where no such documents have been issued (e.g., Denmark, Estonia, Spain, Latvia, Portugal, Slovakia),<sup>7</sup> the transfer method is different.

Approximately in half of the European countries, the transfer of close company shares requires the involvement of a notary public<sup>8</sup>. In some countries, such transfer is possible only by a notarial act<sup>9</sup> (e.g., Austria, Estonia (except where the shares are registered in the Estonian Central Securities Register (*Väärtpaberite Keskregister* in Estonian)), Greece, Spain, Luxembourg, the Netherlands, Portugal, Slovenia, Germany)<sup>10</sup>, in other countries shares are transferred under a written contract, but the notary public verifies the authenticity of the signatures of the parties (e.g., Czech Republic, Poland, Italy (however, it should be noted that in Italy a notarial contract is only required to implement it against third parties and the company, while the transfer between parties requires only a simple contract), Slovakia)<sup>11</sup>. Meanwhile, the rest of the countries do not usually require this level of formalities and allow the transfer of shares under a written contract (e.g., Lithuania, Luxembourg, France (transfer of SARL shares), Russia, Sweden, Switzerland<sup>12</sup>, Hungary)<sup>13</sup> or a written declaration – special forms for share transfer to be completed and signed by the seller and submitted to the buyer

6 *International Business Acquisitions: Major Legal Issues and Due Diligence*. 3rd ed. Whalley, M.; Semler, F.-J. The Hague, London: Kluwer Law International, 2007, p. 145; *European Corporate Law*. Van Hulle, K.; Gesell, H. (eds.). Baden-Baden: Nomos, 2006, p. 350.

7 *European Corporate Law, ibid.*, p. 104, 116, 222, 300, 312, 337.

8 In addition, for example, in Austria and Germany the notarial form is also required for indicative agreements on share transfer. In fact, the lack of proper form can be rectified by the transfer agreement concluded in the required notarial form (*International Business Acquisitions, op. cit.*, p. 44; Baumbach, A.; Hueck, A. *GmbH-Gesetz: Gesetz betreffend die Gesellschaften mit beschränkter Haftung*. 18., erw. und völlig überarb. Aufl. München: C.H. Beck, 2006, p. 280).

9 The notary must not only verify the authenticity of the signatures, but also identify the intentions of the acting parties, and in Austria and Germany – also to inform about the consequences of its signing (Kalss, S. The Transfer of Shares of Private Companies. *European Company & Financial Law Review*. 2004, 1(3): 340–367, p. 354).

10 *European Corporate Law, supra note 6*, p. 32, 324; *International Business Acquisitions, supra note 6*, p. 44, 397, 447; Maitland-Walker, J. *Guide to European Company Laws*. 3rd ed. London: Sweet & Maxwell, 2008, p. 275, 378, 395, 668.

11 *European Corporate Law, supra note 6*, p. 32, 284, 312; Maitland-Walker, J., *op. cit.*, p. 217, 504.

12 It should be noted that previously the notarial form was mandatory for the transfer of shares of the Swiss limited liability company, but from 1 July 2007 this requirement has been abolished and now a written agreement is sufficient.

13 *International Business Acquisitions, supra note 6*, p. 166; *European Corporate Law, supra note 6*, p. 182–183, 246; Maitland-Walker, J., *op. cit.*, p. 786, 792.

together with a share certificate (e.g., Ireland, UK, France (transfer of SAS shares))<sup>14</sup>, or no formal requirements are defined (e.g., Belgium, Denmark, Latvia, Malta, Finland)<sup>15</sup>.

Furthermore, almost in every country the transfer of shares must be notified to the company in order to update the register of shares (or shareholders) and the share transfer contract should come into force with regard to the company (in Ireland, Belgium, Czech Republic, Denmark, Estonia, Greece, Spain, Italy, UK, Latvia, Poland, Lithuania, Luxembourg, Malta, Norway, the Netherlands, France, Russia, Slovakia, Slovenia, Hungary, Germany and others)<sup>16</sup>. In a significant number of countries the share transfer must be notified to (or registered in) the public register (in Austria, Czech Republic, Estonia, Greece, Italy, Latvia, Luxembourg, Malta, Portugal, France, Romania, Switzerland, Hungary, Germany (after the reform in Autumn 2008))<sup>17</sup> or even additionally published in the Official Journal (in Greece, Luxembourg)<sup>18</sup>. Many jurisdictions allow the articles of association determine the precise mechanism of transfer and, in some cases, accept either more liberal (e.g., Czech Republic) or more restrictive (e.g., Austria, Belgium, Greece, Hungary, Italy) approach than the law<sup>19</sup>.

The draft Council Regulation on the Statute for a European private company<sup>20</sup> (hereinafter – the SPE Regulation) requires a written form for all agreements on the transfer of shares of the European private company (*Societas Privata Europaea*) (Article 16(3)). The SPE Regulation also states that the transfer must be notified to the company and it shall become effective in relation to the company on the day of the notification, and in relation to third parties - on the day of its entry in the shareholders' list (Article 16(4)). Written form for the transfer of shares of a limited liability company is also required in the Model Company Law for Transition Economies<sup>21</sup> (241(2)), prepared by a group of scientists.

In Lithuania, the transfer of private limited company shares requires no notarial form. The material shares and share certificates of a company are transferred by endorsement and the dematerialised shares – under a written contract and records in

14 *European Corporate Law*, supra note 6, p. 32; Maitland-Walker, J., supra note 6, p. 469, 961; *International Business Acquisitions*, supra note 6, p. 166.

15 *European Corporate Law*, supra note 6, p. 32, 104, 222, 258; Maitland-Walker, J., supra note 10, p. 257.

16 *European Corporate Law*, supra note 6, p. 32, 68, 104, 170, 183, 222, 258, 284; Maitland-Walker, J., supra note 10, p. 217, 469, 669, 695, 792; *Corporate Business Forms in Europe: a Compendium of Public and Private Limited Companies in Europe* / ed. F. Dornseifer. Munchen: Sellier. European Law Publishers GmbH, 2005, p. 151; *International Business Acquisitions*, supra note 6, p. 166, 266, 447.

17 Maitland-Walker, J., supra note 10, p. 52, 504, 548, 768, 915; *Company Formation: a Practical Global Guide* / gen. ed. A. Jausas. London: Globe Business Publishing Ltd., 2006, p. 152, 204, 369; *International Business Acquisitions*, supra note 6, p. 397; *European Corporate Law*, supra note 6, p. 157, 183, 246, 258, 285.

18 *European Corporate Law*, supra note 6, p. 170, 246.

19 *Ibid.*, p. 32.

20 Proposal for a Council Regulation on the Statute for a European private company ((COM/2008) 396/3) [interactive]. [accessed on 14-04-2012]. <[http://ec.europa.eu/internal\\_market/company/docs/epc/proposal\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/epc/proposal_en.pdf)>.

21 Dine, J.; Koutsias, M.; Blecher, M. *Company Law in the New Europe: the EU Acquis, Comparative Methodology, and Model Law*. Cheltenham Northampton (Mass.): Edward Elgar, 2007, p. 289.

the personal securities accounts of the transferor and the transferee (Articles 46(1) to 46(3) of the Law on Companies). Such regulation of form of share transfer is applied in practice from the moment of adoption of the Law on Companies 1994<sup>22</sup>. On the other hand, the Law on Companies 1990<sup>23</sup> did not refer to the dematerialised shares.

Formally, failure to comply with the written form requirement for the transfer of close company shares makes the transfer of shares invalid. Such a conclusion can be drawn, having regard to the provisions of Articles 46(3) and 46(4) of the Law on Companies, which contains mandatory requirements for the content of a written contract and which determines that the contract, if lacking at least one of the data required, shall be invalid from the moment of conclusion and account keepers are not entitled to make records on the basis of such contract. However, it can be noted that in specific circumstances, the case law recognises the lack of some data stated in Article 46(3) of the Law on Companies (e.g., company code<sup>24</sup> or share emission code<sup>25</sup>) as a formal defect, which does not lead to the invalidity of a share transfer contract, if there is enough other evidence to identify the company or shares being transferred.

As in many other countries, every transfer of shares must be registered in the company's internal share (shareholders) register. Registration of owners of shares of private limited companies is governed by the Rules on management of personal securities accounts of shareholders of private limited companies – owners of dematerialised shares and on registration of owners of material shares in private limited companies<sup>26</sup> (hereinafter in this subsection – the Rules). In case of transfer of material shares of a company, the share account keeper (the company) is informed about the change in ownership of company's shares by the acquirer of the shares, who provides the material share(s) (share certificate) with appropriate record (endorsement) and their copies, and in case of transfer of company's dematerialised shares – by the persons who have transferred and acquired the shares, providing the appropriate share purchase-sale contract and its copy, and the shares account keeper must immediately make the appropriate entries in the share accounting documents, as well as within 2 working days after making the entries issue (deliver under signature or send by registered mail) to the acquirer a certified extract from the shareholder's account (in case of dematerialised shares) or an extract from the shareholders registration journal (in case of material shares) (Points 17, 14.10-14.11 of the Rules). It should be noted that the legislation

22 Law on Companies of the Republic of Lithuania. *Official Gazette*. 1994, No. 55-1046 (no longer in force; version applicable from 21/12/1994 to 30/06/2001).

23 Law on Companies of the Republic of Lithuania. *Official Gazette*. 1990, No. 24-596 (no longer in force; version applicable from 30/07/1990 to 20/07/1994).

24 Judgment of the Civil Division of the Supreme Court of Lithuania of 15/02/2006 in case 3K-3-139/2006, *S. Č. v. UAB „Srega“*.

25 Judgment of the Civil Division of the Court of Appeal of Lithuania of 06/06/2006 in case 2A-136/2006, *BKB „Saulės karys“ v. UAB „Bufina“ ir Labdaros ir paramos fondas „Tautvila“*.

26 Resolution No 1041 of the Government of the Republic of Lithuania of 23 August 2004 'Regarding the approval of the rules on management of personal securities accounts of shareholders of private limited companies – owners of dematerialised shares and on registration of owners of material shares in private limited companies'. *Official Gazette*. 2004, No. 132-4761.

does not provide for any time limit within which an acquirer of the shares must apply to the company's manager regarding the registration of the acquired shares in the shares accounting register. However, according to our opinion, this should be done within a reasonably short period of time, the duration of which should be determined having regard to the particular circumstances of the case (for example, in one of the cases, a 2 months period has not been declared unreasonable<sup>27</sup>).

## 2. Form of a Share Transfer Agreement: Written or Notarial?

In Lithuania, a simple written form suffices for the transfer of close company shares. Despite that, as referred above, more than half of the European countries require a notarial form. Historical reasons, namely, the influence of the Roman law, determined that the notarial form of a transaction became known only in the countries that were largely influenced by the Roman law. Meanwhile, in England, in the other common law countries and in the Scandinavian countries the Latin notary did not strike root and accordingly the notarial form of a transaction is not known to the contract law of those countries<sup>28</sup>. Maybe the Lithuanian legislator should also strengthen the requirements for the form of share transfer? To answer this question, we should analyse the pros and cons of requiring the notarial form.

The aims of requiring a notarial form for share transfer are slightly different in various countries. For example, in Germany and Austria the prevention of exchange-based trading in close company shares historically has been the primary purpose of such restrictions, while transparency and legal certainty are the main thrust in the Dutch and Spanish provisions<sup>29</sup>. However, foreign legal literature usually refers to the following aims: the prevention of trade exchange, legal certainty, transparency of shareholders' structure and 'protection of urgency'.

First of all, it is stated that in 1892 the German legislator, being the first to require a notarial form, sought to impede the sale of shares and 'to prevent doubt as to the fact of transfer of shares'<sup>30</sup>. It is also meant to prevent a 'great market' for close company shares that would compete with public companies traded on stock exchanges<sup>31</sup>. It is true that some German authors stress that the German jurisprudence and the doctrine have presented a restrictive interpretation of that aggravation, by saying that speculative trade was a subject of prohibition. In their view, the legislator sought to minimise changes of shareholders<sup>32</sup>.

27 Judgment of the Civil Division of the Supreme Court of Lithuania of 05/10/2005 in case 3K-3-456/2005, *N. B. v. UAB (sensitive data)*.

28 Mikelėnas, V., *supra* note 4, p. 25.

29 For more information see Kalss, S., *supra* note 9, p. 354–355.

30 *Kommentar zum GmbH-Gesetz: mit Anhang Konzernrecht*. I. Band / Scholz; bearb. von G. Crezelius, *et al.* 10. neubearb. und erw. Aufl. Köln: O. Schmidt, 2006, p. 992.

31 Noack, U.; Beurskens, M. Modernising the German GmbH – Mere Window Dressing or Fundamental Redesign? *European Business Organization Law Review*. 2008, 9(01): 97–124, p. 115.

32 *Kommentar zum GmbH-Gesetz: mit Anhang Konzernrecht*, *supra* note 30, p. 992.

The second goal expresses the desire to ensure legal certainty (to avoid doubt as to the fact of share transfer). In the past, and now in practice, there are often different manipulations of the facts, when in order to avoid responsibility, act illegally (e.g., to conceal taxes) or for other reasons the fictitious share transfer contracts are drawn or the contracts are drawn retroactively. Risk of falsification, simulated transactions, etc., is particularly relevant in close companies, when a particular shareholder is *ipso facto* the company's manager, who manages share accounting because he is free, in the absence of a public registration of share transactions, to manipulate the entries in share accounting registers. The notary public, in the exercise of a statutory duty to ensure the legality of transactions, verifies personal documents, analyses whether the parties are truly free to express their will, whether the counterparty is not recognised as legally incapable. In addition, the notary public keeps the original documents and this helps to identify the fact of forgery or alteration of the documents. At the same time, the notarial form has important procedural implications, because the notarised documents are recognised as authentic documents (*acte authentique*) and are therefore of a greater probative value, i.e. having *prima facie* power<sup>33</sup>. As a result, it becomes easier to prove the fact of transaction.

The notarial form of a contract, especially when a contract is recorded in public registers, protects the interests of third parties and ensures transparency in civil turnover, because it allows identifying the owner of the property, the fact of property transfer, etc.<sup>34</sup> Transparency of the composition of a shareholder is particularly important to others and to creditors, as the business partners of the company can easily identify its shareholders, it will help to avoid abuses like money laundering and such increase of confidence in the company may have a positive effect on the business prospects of the company<sup>35</sup>.

Finally, it is considered that the notarial form of a transaction encourages caution, attention, care and reduces the number of impulsive, reckless deals, as a notary public shall inform both parties of the essence of a contract, its conditions and explain the potential negative effects<sup>36</sup>. I.e. the notarial form performs a certain preventive function, while protecting individuals against ill-considered decisions<sup>37</sup>. The idea is to ensure that a purchaser is warned by a neutral person (i.e., the notary public) before entering into an unknown business. On the other hand, it is noted that the aim of formal requirements is the protection not only of the purchaser, but also of the seller from ill-considered share sales<sup>38</sup>.

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33 Mikelėnas, V., *supra* note 4, p. 26.

34 *Ibid.*

35 Seibert, U. Close Corporations – Reforming Private Company Law: European and International Perspectives. *European Business Organization Law Review (EBOR)*. 2007, 8(01): 83–92, p. 90.

36 Mikelėnas, V., *supra* note 4, p. 26.

37 It is true that some German authors do not distinguish this goal as an independent goal while raising doubts as to why the participants of a close company should have more protection in trading than traders in public company shares and so on (see *Kommentar zum GmbH-Gesetz: mit Anhang Konzernrecht, supra* note 30, p. 993).

38 Kalss, S., *supra* note 9, p. 356.

In literature we can find other arguments to satisfy the requirement of the notarial form, for example: it allows ensuring greater clarity of the relationship between the parties (clearly set out the terms of the contract), it allows effective protection of the weaker party, because the notary public controls the legality of a transaction; it allows ensuring the proper execution of the mandatory norms establishing certain restrictions<sup>39</sup>.

On the other hand, even in countries where a share transfer requires notarial form (e.g., Austria, Germany)<sup>40</sup>, the scholars discuss that this strict requirement should be removed<sup>41</sup>. In particular, it is argued that the notarial form did not achieve the goals referred above. It is stated that the fantasy that the formal requirements will retain stability of shareholders does not correspond to reality, and the goal of legal certainty was only partially achieved, as the expression of the will can be also argued in the court<sup>42</sup>. It is noted that a requirement of notarial certification can not ensure effective protection of the participants from common risks of share owner, since there is the institute of representation and the notary public can not influence anything, i.e. notary public can not fully explain all effects of the transfer directly to the transferor, also he is not required to verify the appropriateness of the transaction content, price or commitments, as well as the notary public often does not know whether the transferred share exists, whether the transferor is actually still the owner, whether the contribution is paid and is not returned, as well as whether there is no undeclared capital contribution<sup>43</sup>. Often the notary public, because he is not an expert, is unable to determine the facts of falsification of documents. In addition, according to V. Mikelenas, knowing our case law, even a notarised contract may be invalidated by reason of an error, conflict with imperative legal norms or on the basis of Article 1.89 of the Civil Code of the Republic of Lithuania<sup>44</sup> (hereinafter – the Civil Code). V. Mikelenas states that such case law generally denies the sense of the notarial form<sup>45</sup>. Finally, the notarial form of a transaction is always connected both with extra cash expenditure and additional time cost, and this may result in slowdown of civil circulation, as well increase the transaction value<sup>46</sup>. All of these arguments suggest the questionable expedience of application of the notarial form<sup>47</sup>.

Article 1.74 of the Civil Code provides for a relatively short list of transactions requiring notarial form. According to V. Mikelenas, after conducting a thorough analysis, the working group on the preparation of the Civil Code has concluded that the setting of mandatory notarial form for transactions can be justified by two arguments: (1) the

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39 Mikelėnas, V., *supra* note 4, p. 26.

40 *GmbH Gesetz Kommentar*. 3. aktualisierte und erweiterte Auflage. von. em. O. Univ.-Prof. Dr. Hans-Georg Koppensteiner, Univ.-Prof. Dr. Friedrich Ruffler. Wien: LexisNexis, 2007, p. 994.

41 As mentioned above, in Switzerland, which previously had held by the model proposed by Germany, a notarial form for transfer of close company shares has been abolished since 1 July 2007.

42 *Kommentar zum GmbH-Gesetz: mit Anhang Konzernrecht*, *supra* note 30, p. 993.

43 *Ibid.*, p. 994.

44 Civil Code of the Republic of Lithuania. *Official Gazette*. 2000, No. 74-2262 (edit of 10/01/2012).

45 Mikelėnas, V., *supra* note 4, p. 29.

46 *Ibid.*, p. 25.

47 For more information about the discussions on the abolition of compulsory notarial form and alternatives see Kalss, S., *supra* note 9, p. 359–360.



desire to protect public interest, i.e. to ensure that no illegal, immoral transactions or transactions contrary to public policy are in civil circulation – therefore, it is purposeful to set such form for those transactions the conclusion and implementation of which has major importance for the protection of public interest (e.g., marriage contracts, transactions on the transfer of rights *in rem* in immovable objects and so on); (2) the desire also to protect private interest, because the possibility of fraud, falsification, mistake is reduced – therefore, it is purposeful to set the mandatory notarial form for those transactions the conclusion of which entails higher risk, increased investment (e.g., under this approach, it is purposeful to set the mandatory notarial form for transactions on the transfer of rights *in rem* in immovable objects or for transactions on the restriction of such rights, because the price of such transactions is often very high and a person concludes only few such important transactions during his lifetime)<sup>48</sup>. It is unlikely that the disposal of a close company's shares is an area that would require strict regulation in order to protect public interest. According to the second of the arguments referred above, the notarial form may also be required for the sale of shares as a transfer of business, because this type of a transaction is often a 'transaction of life' for the parties, and its price is relatively high. However, on one hand, these days the parties have all the means to apply for qualified legal assistance. In addition, the parties are free to choose the notarial form, if they want safety. On the other hand, the statutory requirement of notarial form imposed on the transfer of shares (e.g., transfer of more than 50%) can be easily avoided by formally splitting the transaction into several transactions. Therefore, in the light of the foregoing consideration, we consider that it is inappropriate and ineffective to set mandatory notarial form for transactions of transfer of close company shares in Lithuania.

Perhaps the goals referred above, in particular that of ensuring legal clarity and transparency of shareholder structure<sup>49</sup>, could be achieved by other means? The Lithuanian legal doctrine refers to the requirement that a private limited company can only have material shares<sup>50</sup>, and the obligation of private limited companies to inform the Register of Legal Entities about the owners of shares and transfer of shares<sup>51</sup>. The first of those proposals is highly questionable, since 'returning'<sup>52</sup> to the prohibition for private limited companies to issue material shares would be inconsistent with global

48 Mikelėnas, V., *supra* note 4, p. 28.

49 According to our opinion, striving for the goals of prevention in trade exchange and 'protection from hurry' is not relevant at this time. The first goal is achieved efficiently enough by setting strict requirements for public trade in public company shares and by a mandatory statutory prohibition on public trading in shares of private limited company (Article 2(4) of the Law on Companies). The achievement of the second goal is not so important for public interest, in addition, it is practically achieved when parties apply for the support of qualified legal, financial and other advisers.

50 Rymeikis, T., *supra* note 5, p. 66. True, the author refers to the disadvantages of such proposal, i.e. that we should finally regulate the requirements for printing of such securities, and that the multifold share transfer would cause the problems of technical character regarding recording of records on ownership transfer (endorsements) in the share.

51 Kiršienė, J.; Kerutis, K., *supra* note 3, p. 27.

52 The Law on Companies 1990 did not indicate the dematerialized shares and such opportunity arose only after adoption of the Law on Companies 1994.

trends. We can observe the trend of dematerialisation of securities in the legislation of continental European countries, when the rights deriving from a document are no longer considered to form a single whole with the material bearer, and the bearer in the form of a document is now regarded as one of the possible methods to formalise rights<sup>53</sup>. Therefore, we will analyse the possibilities of the second proposal more thoroughly.

### 3. Legal Significance of Registration of Share Transfer

Legal doctrine and practice discusses the legal sense of registration of transfer of shares, especially dematerialised ones<sup>54</sup>, in the internal register of share (shareholders) accounting. I.e. it questions whether the recording as such leads to a change of the ownership, or this entry only formalises the ownership right that has already been changed.

In foreign countries, the separation between transfer of ownership among parties and transfer of ownership *vis-à-vis* the company and third parties dominates. In most countries (e.g., Estonia, Greece, Poland, Norway, France, Finland, Sweden, Hungary, etc.)<sup>55</sup> it is considered that entry in the share (shareholders) register kept by the company does not affect the moment of transfer of ownership between the parties (that moment is set by the parties under their agreement), but it is important for the transaction to come into force *vis-a-vis* the company. I.e. exactly from this recording (or from the moment of notification to the company about the transfer of shares) the acquirer of shares may exercise all the rights of the shareholder (i.e. to participate in the general meeting of shareholders, to receive dividends, etc.). It is based on the fact that the essence of the share register is that only the company is obligated to recognise the person recorded in the share registre as a shareholder<sup>56</sup>. In some countries (e.g., Belgium, Luxembourg)<sup>57</sup> this recording means that the transfer of ownership of shares comes into effect not only against the company, but also against third parties<sup>58</sup>. It seems that the latter position is shared by the drafters of the SPE Regulation (see Article 16(4)). Meanwhile, in the common law countries (Ireland, UK) it is essentially viewed that the ownership of shares is transferred only after the registration of a new owner in the register of members of

53 Lomakin, L. Doli uchastija v ustavnykh kapitalakh khozjajstvennykh obshhestv kak osobyje objekty grazhdanskogo oborota [Shares in the authorised capital of business entities as a special objects of civil circulation]. *Khozjajstvo i pravo* [Business and law]. 2008, 2: 44–57, p. 49–50.

54 According to T. Rymeikis, the provision of Part 10 of Article 40 of the Law on Companies links the rice of ownership right in the material shares to only one legal fact – an entry in share, and the registration in shareholders registration book become as an optional formal procedure (Rymeikis, T., *supra* note 5, p. 65).

55 *Corporate Business Forms in Europe*, *supra* note 16, p. 151, 204; *European Corporate Law*, *supra* note 6, p. 170, 284, 350; Maitland-Walker, J., *supra* note 10, p. 290, 437–438, 697.

56 Maitland-Walker, J., *supra* note 10, p. 437.

57 *European Corporate Law*, *supra* note 6, p. 68, 246.

58 It should be mentioned that, for example, in France the transfero f close company shares is effective against the company only after the company has been informed about the transfer, and upon third parties – only upon registration in the public register (see *Ibid.*, p. 204).

the company<sup>59</sup>. It is true that the legal doctrine states here that the beneficial interest, it seems, passes from the seller to the purchaser before the registration of the transaction<sup>60</sup>.

Some sources in the Lithuanian legal doctrine state that from the moment of entry in the securities accounts the title to the dematerialised share appears<sup>61</sup>. The authors of the commentary of the Civil Code refer that this entry is the direct proof of ownership of the securities indicated in such entry<sup>62</sup>. T. Rymeikis states that a person acquires title to the dematerialised shares from the moment determined in the transaction, i.e. under the terms of the transaction, and the entry in the share account should allow the new owner of the shares use the title *vis-à-vis* third parties<sup>63</sup>.

The jurisprudence has expressed the view that failure to record the transaction on share transfer in the register of shareholders does not deprive the shareholders of the ability to implement the rights granted by the Law on Companies<sup>64</sup>. Finally, the entries in the securities accounts were compared to the registration of transactions defined in Article 1.75 of the Civil Code, i.e. without registering the transaction, the parties to it can not use this transaction and the acquired rights against third parties (Article 1.75(2) of the Civil Code)<sup>65</sup>. On the other hand, in one of its rulings the Court of Appeal of Lithuania stated that the two conditions are necessary for the ownership, as an absolute right *in rem*, to the dematerialised shares to appear: (1) conclusion in written form of the agreement, on the basis of which such shares are transferred to another person (or persons), and which contains all the details required by the law; and (2) recording (on the basis of this agreement) the fact of transfer of the dematerialised shares in the securities accounts of the transferor and acquirer of the shares<sup>66</sup>.

According to our opinion, the analysis of Articles 40(9), 46(2) and 46(3) of the Law on Companies suggests that the position providing for the recording in the share (shareholders) register of the legal sense of use against third parties is more preferable. Nevertheless, this question is still disputed.

59 Maitland-Walker, J., *supra* note 10, p. 469; Sealy, L.; Worthington, S. *Cases and Materials in Company Law*. 8th ed. Oxford, New York (N.Y.): Oxford University Press, 2008, p. 440.

60 Davies, P. L. *Gower and Davies' Principles of Modern Company Law*. 7th ed. London: Sweet & Maxwell, 2003, p. 692.

61 Baranauskas, E., *et al. Civilinė teisė. Bendroji dalis*. [Civil Law. General Part]. Vilnius: MRU Leidybos centras, 2007, p. 249.

62 *Lietuvos Respublikos civilinio kodekso komentaras. Pirmoji knyga. Bendrosios nuostatos* [Commentary of the Civil Code of the Republic of Lithuania. First Book. General Provisions. Moderator V. Mikelėnas]. Vilnius: Justitia, 2001, p. 222.

63 Rymeikis, T., *supra* note 5, p. 68.

64 E.c., Judgment of the Civil Division of the Supreme Court of Lithuania as of 01/05/2000 in case 3K-3-494/2000, *V. Adomavičius v. UAB „Skiedra“*.

65 E.c., Judgment of the Civil Division of the Supreme Court of Lithuania as of 23/06/2004 in case 3K-3-386/2004, *Č. Kinderevičius v. J. Aleksandravičius and AB „Žaibas“*.

66 Judgment of the Civil Division of the Court of Appeal of Lithuania as of 03/07/2008 in case 2A-460/2008, *O. L. v. UAB „Alkesta“*.

#### 4. Registration of Close Company Shareholders

In Lithuania (until 1 March 2010) the company, in principle, had no obligation to inform the Register of Legal Entities about changes of shareholders. True, it was required when one person had acquired all the shares of the company or when the owner of all shares of the company had transferred all or a part of the shares to other persons. I.e. the data about the shareholder of the company were processed only when a single person had been the shareholder of the company (Articles 14(4) and 37(14) of the Law on Companies, point 23.1.2. of the Regulations of the Register of Legal Entities<sup>67</sup>)<sup>68</sup>. As the accounting of shares is executed by the company, the Lithuanian authors stated that there was no mechanism that could ensure reliable direct<sup>69</sup> information about the owners of shares of a private limited company<sup>70</sup>.

As referred above, in significant number of countries (in Austria, Czech Republic, Estonia, Greece, Italy, Latvia, Luxembourg, Malta, Portugal, France, Romania, Switzerland, Hungary, Germany) the share transfer (change of shareholders) must be notified (registered) to the public register. In some countries, it is the responsibility of managing bodies of the company (managers of the company) (e.g., Austria, Greece, Italy, Latvia, Poland, Malta, Switzerland, Hungary)<sup>71</sup>, while in others (e.g., Estonia, Germany)<sup>72</sup> the copy of a notarial contract or appropriate notice to the register are sent by the notary public that certified the transaction. In addition, in some countries the documents of transfer must be submitted to the public register (e.g., Greece, Italy, Malta), while in others only the list of company's shareholders is to be submitted and updated (e.g., Latvia, Poland, Switzerland, Hungary, Germany).

In different countries the legal essence of registration in the public register is also different. In one group of countries (e.g., Czech Republic, France, Romania)<sup>73</sup> it is stated that such registration entails the entry into force of the transfer of shares *vis-à-vis* third parties. It is true that, for example, in Malta such registration is of an entirely declarative nature: failure to fulfil this requirement does not result in invalidity of the transfer, but

67 Resolution of the Government of the Republic of Lithuania No. 1407 of 12 November 2003 'on the establishment of the Register of Legal Entities and approval of Regulations of the Register of Legal Entities'. *Official Gazette*. 2003, No 107-4810 (edit of 30/10/2011).

68 Obviously, this requirement could be easily avoided if there were at least two shareholders in the company. Therefore, the nominal person was involved in the role of the second shareholder (e.c. the relative of the main shareholder, etc.).

69 The indirect way to identify the composition of the company shareholders was to receive the copies of decisions of the general meeting of that company, required to be submitted to the Register of Legal Entities (e.g. when changing the company's articles of association).

70 Kiršienė, J.; Kerutis, K., *supra* note 3, p. 27.

71 Maitland-Walker, J., *supra* note 10, p. 52, 548, 915; *Corporate Business Forms in Europe*, *supra* note 16, p. 369; *International Business Acquisitions*, *supra* note 6, p. 266; *European Corporate Law*, *supra* note 6, p. 183, 258, 285.

72 *Corporate Business Forms in Europe*, *supra* note 16, p. 152; Muller, K. J. *The GmbH: a Guide to the German Limited Liability Company*. 2nd ed. Munchen: Verlag C. H. Beck, 2009, p. 117, 123.

73 *European Corporate Law*, *supra* note 6, p. 90; *Corporate Business Forms in Europe*, *supra* note 16, p. 204; Maitland-Walker, J., *supra* note 10, p. 768.

each official of the company is fined<sup>74</sup>. Meanwhile, in other countries (e.g., Italy<sup>75</sup>) such registration is generally important for the transaction to enter into force. In Germany, after the implementation of limited liability company (GmbH) legal regulation reform in 2008, only the rights of the shareholders appearing on the official list will be recognised<sup>76</sup> (however, it is left to the shareholders to determine when the transfer is to become effective, which leads to increased flexibility for the parties<sup>77</sup>), as well as the protection of *bona fide* purchaser is emphasized – a purchaser can rely on the contents of the shareholders' list kept at the commercial register<sup>78</sup>. However, such reliance would only be considered reasonable, if the shareholder list was incorrect for at least three years before the transactions, or if the erroneous list would somehow be attributable to the true owner of the shares<sup>79</sup>. In addition, failure to comply with this duty may result in personal liability of the managing directors *vis-a-vis* both the shareholders affected and the creditors of the company<sup>80</sup>. Also it is stated that such registration shall prevent secret pledging of the shares<sup>81</sup>.

Finally, the matter of publicity (accessibility) of shareholders' structure (list) is also resolved differently. Usually, the internal registers of share (shareholders) accounting are not publicly available. On the other hand, in some countries (e.g., Ireland, UK, Norway, Finland, Sweden)<sup>82</sup> such publicity (accessibility) is required. It should be noted that the draft SPE Regulation (Article 15(3)) also states that the shareholders' list can be checked by the shareholders or third parties on their demand. In most countries requiring compulsory registration of the share transfer (change of shareholders) in the public register, the information submitted to the register is public, except for Latvia, requiring that only the shareholders, members of the board of directors and the council, and the auditor, as well as competent authorities can access the register of company's shareholders (Article 187(7) of the Latvian Commercial Law<sup>83</sup>).

Considering the experience of other countries, in Lithuania the special law<sup>84</sup> was adopted on 15 December 2009 and Article 41<sup>1</sup>, governing the formation of shareholders' list in private limited company, was inserted in the Law on Companies. The said article

74 *European Corporate Law*, *supra* note 6, p. 258.

75 *International Business Acquisitions*, *supra* note 6, p. 266.

76 Noack, U.; Beurskens, M., *supra* note 32, p. 115.

77 Altgen, Ch. The Acquisition of GmbH Shares in Good Faith. *German Law Journal*. 2008, 09(09): 1143.

78 Seibert, U., *supra* note 36, p. 90.

79 Beurskens, M.; Noack, U. The Reform of German Private Limited Company: Is the GmbH Ready for the 21st Century? *German Law Journal*. 2008, 09(09): 1077.

80 Muller, K. J., *supra* note 73, p. 123.

81 Altgen, Ch., *op. cit.*, p. 1146.

82 Maitland-Walker, J., *supra* note 10, p. 290, 474, 697, 964; *The Regulation of Companies: a Tribute to Paul Krüger Anderson*. Neville, M.; Sørensen, K. E. (eds.). Copenhagen: Thomson [London]: Sweet & Maxwell, 2003, p. 57.

83 Latvian Commercial Law (as last amended in 2010) [interactive]. [accessed on 14-04-2012]. <<http://www.wipo.int/wipolex/en/details.jsp?id=7862>>.

84 Law amending and supplementing Articles 2, 4, 7, 10, 11, 12, 14, 17, 18, 26, 26(1), 32, 34, 35, 37, 41, 45, 47, 48, 53, 57, 62, 63, 65, 72, 73, 74, 75, 77, 78 of the Law on Companies and inserting Article 41(1). *Official Gazette*. 2009, No. 154-6945.

came into force on 1 March 2010. From that date in each private limited company the list of its shareholders must be formatted and constantly updated. It is important to note that the shareholders' list must be submitted to the Register of Legal Entities (Paragraph 8 Article 41<sup>1</sup> of the Law on Companies).

Thus, the law provides that the Register of Legal Entities shall be notified of any changes in the composition of shareholders of a close company. Meanwhile, in case of public limited companies, taking their specific features into consideration (large number of shareholders and dynamic change of shareholders composition), the Register of Legal Entities shall be notified only when one person acquires all the shares of the company or when the owner of all shares of the company transfers all or a part of the shares to another persons (Article 14(4) and Article 37(14) of the Law on Companies).

Only the shareholders' list (not the documents of share transfer) shall be submitted and updated in the Register (thus maintaining the confidentiality of the conditions of the transaction). The manager of the company is responsible for making and submission of the list of shareholders of a private limited company (Article 37(12)(10) and Article 41<sup>1</sup>(9) of the Law on Companies). The change of shareholders of a close company shall be notified in the same manner as the data of the sole shareholder. I.e. after receiving an appropriate notice from the parties to a transaction, the company's manager shall immediately create a new list of shareholders and submit it to the Register of Legal Entities no later than within 5 days after the creation (Articles 41<sup>1</sup>(7) and 41(8) of the Law on Companies). According to our opinion, if the parties fail to register the fact of share transfer in the Register of Legal Entities, they will not be able to invoke this fact against third parties and argue their rights against third parties by relying on other means of proof (Article 1.75(2) of the Civil Code).

Therefore, the list (data) of shareholders of any close company, as well as any other information submitted to the Register of Legal Entities, are made public and everybody may receive a copy of this list from the Register of Legal Entities. It is true, some Lithuanian authors<sup>85</sup>, relying on the protection of personal data (privacy) of the owners of the shares, suggest that such information should be accessible only to the statutory range of persons (as referred above, this model is chosen, for example, in Latvia). Of course, arguments for protecting the privacy of shareholders and similar arguments are strong and they should not be ignored. However, in our opinion, ensuring legal certainty and transparency of composition of shareholders of a close company deserves priority. In addition, under the current Lithuanian legal regulation all data (information) registered in the Register of Legal Entities are public<sup>86</sup>, therefore, affording greater protection to the data of separate shareholders of a close company (e.g., even with a 99% share) than, for example, to the sole shareholder of the company, is unlikely to be reasonable.

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85 Kiršienė, J.; Kerutis, K., *supra* note 3, p. 27.

86 Order No IR-503 of the Minister of Justice of the Republic of Lithuania of 3 December 2007 'Regarding the approval of management rules of the Register of Legal Entities'. *Official Gazette*. 2007, No 128-5230. Points 78 and 94.

## Conclusions

1. The Lithuanian legislation allows the transfer of close company shares under written contract. The same form for share transfer is provided for in about half of the European countries, as well as in the the draft Council Regulation on the Statute for a European Private Company.

2. Formally, failure to comply with written form of transfer of close company shares makes the contract on the transfer of shares invalid (Articles 46(3) and 46(4) of the Law on Companies). However, in specific circumstances the Lithuanian jurisprudence recognises the lack of some data indicated in Article 46(3) of the Law on Company (e.g., company code or share emission code) as a formal defect, which does not lead to ineffectiveness of the share transfer contract.

3. According to our opinion, it would be inappropriate and ineffective to require mandatory notarial form for transactions of transfer of close company shares in Lithuania. The goals referred to in the doctrine, in particular ensuring legal clarity and transparency of shareholder structure, could be achieved by other means, for example, by an obligation of private limited companies to inform the Register of Legal Entities about the owners of shares and transfer of shares.

4. As in many other countries, every transfer of shares must be registered in the company's internal share (shareholders) register. According to our opinion, the position providing for recording in the share (shareholders) register of the legal sense of usage against third parties is more preferable.

5. Taking into consideration the experience of other countries and in order to warrant the legal clarity and transparency of the shareholders' composition, Lithuania has introduced the model of public registration of data of private limited company shareholders. According to us, if the parties did not register the fact of share transfer in the Register of Legal Entities, they would not be able to invoke this fact against third parties and argue their rights against third parties by relying on other means of proof (Article 1.75(2) of the Civil Code).

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## UŽDAROSIOS BENDROVĖS AKCIJŲ PARDAVIMO SUTARTIS: FORMOS REIKALAVIMAI IR REGISTRACIJOS REIKŠMĖ

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**Santrauka.** Šiame straipsnyje tiriama uždarnosios bendrovės akcijų pardavimo sutarties formos ir registracijos reikalavimai. Temos aktualumą lemia tai, kad visai neseniai buvo priimti Lietuvos Respublikos akcinių bendrovių įstatymo pakeitimai, įtvirtinę gana reikšmingus pakeitimus uždarnosios akcinės bendrovės akcininkų registracijos klausimais. Be to, įvairiose valstybėse uždarytųjų bendrovių akcijų perleidimui taikomi formos ir registracijos reikalavimai skiriasi.

Lietuvos teisinė bazė bendrovės akcijų perleidimo formos bei registracijos klausimais neturi gilių tradicijų. Negausi ir teismų praktika. Lietuvos teisės doktrinoje ši tema taip pat nebuvo išsamiai nagrinėta. Galima rasti tik keletą Lietuvos autorių (dr. J. Kiršienės ir K. Keručio, prof. V. Mikelėno, T. Rymeikio) darbų, kuriuose buvo aptariami atskiri klausimai, susiję su bendrovės akcijų perleidimo forma, ir kiti procedūriniai reikalavimai.

Šio tyrimo tikslas – ištirti dabar galiojančių uždarnosios bendrovės akcijų pardavimo sandorių formos reikalavimų efektyvumą ir pakankamumą, duomenų apie uždarnosios bendrovės akcininkus viešos registracijos įtvirtinimo tikslingumą. Atliekant šį tyrimą taikyti įvairūs moksliniai metodai, kurių pagrindiniai: lingvistinė, dokumentų (šaltinio turinio), loginė, sisteminė, lyginamoji, kritinė analizė.

Atlikto tyrimo pagrindu autorius padarė išvadą, kad Lietuvoje būtų netikslinga ir neefektyvu nustatyti privalomą notarinę formą uždarytųjų bendrovių akcijų perleidimo sandoriams. Doktrinoje minimus tikslus, ypač teisinio aiškumo ir akcininkų sudėties skaidrumo užtikrinimą, galima pasiekti kitais būdais, pavyzdžiui, įpareigojimu uždarytąsias akcines bendroves apie akcijų savininkus ir akcijų perleidimą informuoti Juridinių asmenų registrą. Manytina, kad įrašymui į akcijų (akcininkų) apskaitos registrą suteikiama panaudojimo prieš trečiuosius asmenis teisinė reikšmė. Lietuvoje buvo įdiegtas uždarnosios akcinės bendrovės akcininkų duomenų viešos registracijos modelis. Autoriaus manymu, neįregistravusios akcijų perleidimo fakto Juridinių asmenų registre šalis negalėtų panaudoti perleidimo fakto prieš trečiuosius asmenis ir įrodinėti savo teisių prieš trečiuosius asmenis remdamosi kitais įrodymais.

**Reikšminiai žodžiai:** akcijų perleidimas, akcijų pardavimas, akcijų pardavimo formos reikalavimai, akcijų pardavimo registracija, akcininkų registracija, uždaroji bendrovė.

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