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REGISTER OF BENEFICIAL OWNERS: HOW TO IDENTIFY SUCH OWNERS?

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Since August 1, 2017, unlisted companies and legal entities required to be incorporated with the Register of Trade and Companies and based in France (in particular foreign corporations with an establishment in France) have the obligation to file with the clerk of the Commercial Court a document that sets forth identification data on their beneficial owner(s), his/her/their personal place of residence as well as the way in which he/she/they exercise(s) control over the relevant company or entity. This document must be produced in support of the registration application.

Companies that meet these criteria and that were already incorporated as of August 1, 2017 must comply with this obligation by April 1, 2018 at the latest.

Ordinance n°2016-1635 of December 1, 2016 strengthening the French system for the prevention of money laundering and terrorist financing transposed Article 30 of Directive 2015/849/EU (the "Directive") that provides for the creation of a register of the beneficial owners of legal entities. Specifically, unlisted companies and legal entities based in France and incorporated with the Registre du Commerce et des Sociétés (Register of Trade and Companies or "RCS") have now the obligation to file with the clerk of the Commercial Court a document that sets forth identification data on their beneficial owner(s), his/her/their personal place of residence as well as the way in which he/she/they exercise(s) control over the relevant company or entity^[1].

The words "beneficial owner" mean:

- Pursuant to the Directive^[2]:

" a) in the case of corporate entities:

- i) the natural person(s) who *ultimately own(s) or control(s) a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity*[...].

A shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a natural person shall be an indication of direct ownership. A shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a corporate entity, which is under the control of a natural person(s), or by multiple corporate entities, which are under the control of the same natural person(s), shall be an indication of

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indirect ownership [...];

ii) if, after having exhausted all possible means and provided there are no grounds for suspicion, no person under point (i) is identified, or if there is any doubt that the person(s) identified are the beneficial owner(s), the natural person(s) who **hold(s) the position of senior managing official(s)**, [...]."

- Pursuant to the French Monetary and Financial Code[3]:

"Natural person(s) who either **hold, directly or indirectly, more than 25 percent of the share capital or voting rights of the company**, or **who exercise, by any other means, a power of control** over the management, administrative, or executive bodies of the corporation or the general meeting of its shareholders." [4]

It should be noted that an implementing decree, to be issued shortly, should amend this definition and clarify the notion of "power of control" by inserting a reference to Article L. 233-3 I §3 and §4 of the Commercial Code[5] and by adding that "Wherever it is impossible to identify a natural person as per these criteria, [...] **the beneficial owner shall be the legal representative** [...]. Wherever this legal representative is a legal entity, the beneficial owner is the legal representative of that legal entity (and so on until a natural person can be identified)" [6], as permitted under the Directive.

In the meantime, the Association Nationale des Sociétés par Actions (French association of joint stock companies, referred to as "ANSA") recommends that companies which are unable to identify their beneficial owners should mention the name of their legal representative wherever such representative is a natural person or, if such representative is a legal entity, the legal representative-natural person of such entity[7]. The model forms made available online by the clerk of commercial courts already provide for this possibility.

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Notes

[1] For more information on (i) the scope of application of this new obligation, (ii) the content of the document on the beneficial owner(s) and the applicable filing requirements, (iii) the terms and conditions governing the disclosure of the filed information to third parties, and (iv) the applicable penalties for non-compliance, please refer to the article entitled "Effective as of August 1, 2017, companies and other entities incorporated with the Register of Trade and Companies will have the obligation to disclose their beneficial owner(s)" published in our June 2017 e-newsletter.

[2] Article 3, §6.

[3] Article L. 561-2-2.

[4] Article R. 561-1.

[5] "Any natural person or legal entity is deemed [...] to control another company: [...] §3 When it effectively determines the decisions made at that company's general meetings through the voting rights it holds; §4 When it is a partner in, or shareholder of, that company and has the power to appoint or dismiss the majority of the members of that company's administrative, management or supervisory bodies."

[6] ANSA communication n° 17-020, June 2017. (ANSA means Association Nationale des Sociétés par Actions, i.e. French association of joint stock companies)

[7] Communication ANSA n° 17-043, October 2017.

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