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## REGISTER OF BENEFICIAL OWNERS: HOW TO IDENTIFY SUCH OWNERS?

Chems Idrissi  
November 29, 2017

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<sup>[1]</sup>.

The words "beneficial owner" mean:

- Pursuant to the Directive<sup>[2]</sup>:

" 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

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[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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## 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)

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Unlisted companies and legal entities required to be incorporated with the Register of Trade and Companies and headquartered in France (in particular branches of foreign corporations) will very soon 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.

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 that provides for the creation of a register of the beneficial owners of legal entities. Specifically, unlisted companies and legal entities headquartered in France and incorporated with the Registre du Commerce et des Sociétés (Register of Trade and Companies or "RCS") will very soon 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.

A recent Decree<sup>[1]</sup> has specified the applicable filing requirements and the content of the document on the beneficial owner(s), as well as the terms and conditions governing the disclosure of this document to third parties.

### 1. Scope of application

The new measures apply to companies and entities mentioned in Article L. 123-1 §2 §3 and §5 of the French Commercial Code, i.e.:

- Companies and economic interest groups with legal personality headquartered in a French département (local administrative and geographical sub-division);
- Commercial companies headquartered outside of a French département that have an establishment in such a département (i.e. in particular branches of foreign groups);
- Other legal entities required to be incorporated as per applicable legal or regulatory provisions.

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## 2. Content of the document on the beneficial owner(s)

The document on the beneficial owner(s) must include the following information:

- Regarding the company or legal entity: Its corporate name or trade name, its legal form, the address of its registered office and, as the case may be, its unique identification number followed by the mention "RCS" followed by the name of the city where is located the clerk of the Commercial Court where the company or legal entity is incorporated;
- Regarding the beneficial owner(s):
  - The name, name used, pseudonym, first names, date and place of birth, nationality, personal address of the natural person(s);
  - The way in which control is exercised over the relevant company or legal entity;
  - The date on which the natural person(s) became beneficial owner(s) of the relevant company or legal entity.

"Beneficial owner" means the natural person (i) who ultimately owns or controls, directly or indirectly, the relevant company or legal entity, or (ii) on whose behalf a transaction or a business activity is carried out.

## 3. Filing requirements

The document on the beneficial owner(s) must be filed with the clerk of the Commercial Court (in order to be annexed to the RCS) upon incorporation with the RCS or within a maximum of fifteen days from the issuance of the proof of filing of the company creation file.

A new document must be filed within thirty days following any fact or action that makes it necessary to rectify or add to existing information.

## 4. Terms and conditions governing the disclosure of the filed information

The document on the beneficial owner(s) can be disclosed to the following persons:

- Judicial magistrates, as may be needed for the proper performance of their duties;
- The officers of the department referred to in Article L. 561-23 of the French Monetary and Financial Code;
- Customs agents individually appointed and specially authorized by the regional

- director or, as appropriate, the director of the department with national authority or, as the case may be, the general director of Customs;
- Officers of the general directorate of public finance responsible for tax inspection and collection, individually appointed and specially authorized by the director of, as the case may be, a public finance regional or departmental office, a department with national authority, a general tax inspection directorate, a specialized tax inspection directorate or, as the case may be, the general director of public finance;
  - The members of the French Prudential Supervision and Resolution Authority who perform a desk audit or examine applications for authorization and approval, the members of the legal department and the secretary-general and the deputy secretaries-general of such Authority;
  - The investigators and auditors of the French Financial Markets Authority, as per Article L. 621-10 of the French Monetary and Financial Code;
  - The Chair of the Bar and, as the case may be, on his/her delegation, one or several members of the Bar Council individually appointed and specially authorized by said Chair, as well as the individuals individually appointed and specially authorized by the National Council of Bars as per Article 156 of Decree n°91-1197 of November 27, 1991 organizing the legal profession;
  - The so-called “investigator-notaries” appointed in the conditions set forth by Article 5 of Decree n°74-737 of August 12, 1974 on the inspection of notary offices and departmental and interdepartmental syndics (i.e. a notary designated by his/her peers and responsible inter alia for taking action against a notary for professional misconduct) appointed in the conditions set forth by Article 4 of Decree n°45-0117 of December 19, 1945 on the application of the status of the notarial profession;
  - The so-called “investigator-bailiffs” appointed in the conditions set forth by Article 94-4 of Decree n°56-222 of February 29, 1956 adopted in furtherance of Ordinance of November 2, 1945 relating to the status of court bailiffs, as well as departmental and interdepartmental syndics (i.e. a bailiff designated by his/her peers and responsible inter alia for taking action against a bailiff for professional misconduct) appointed in the conditions set forth by Article 96-1 of said Decree;
  - The delegated judicial auctioneers appointed in the conditions set forth by Article 19 §8 of Decree n°45-0120 of December 19, 1945 on the application of the status of judicial auctioneers, as well as the syndics (i.e. a judicial auctioneer designated by his/her peers and responsible inter alia for taking action against a judicial auctioneer for professional misconduct) appointed in the conditions set forth by Article 10 of this Decree;
  - The Chair of the council of lawyers authorized to appear before the Conseil d’état (French Administrative Supreme Court) and the Cour de cassation (French Supreme Court) and, as the case may be, on his/her delegation, one or several members of this council individually appointed and specially authorized,

as well as the syndics appointed in the conditions set forth by Article 8 of Ordinance of September 10, 1817 related to lawyers authorized to appear before the Conseil d'état and the Cour de cassation;

- The Chair of the national council of judicial administrators and receivers and the auditors appointed in accordance with Articles R. 814-44 and R. 814-45 of the French Commercial Code;
- The Chair of the High Council of statutory auditors and its rapporteur-general, any person directly involved in the activities of the High Council specially appointed for this purpose, as well as the auditors appointed in accordance with Article R. 821-69 of the French Commercial Code, and the investigators authorized under Article R. 824-2 of the French Commercial Code;
- The members of the committee for the fight against money laundering of the national council of chartered accountants created by the internal rules and regulations of said council and provided for by Article 12 of Order n°45-2138 of September 19, 1945 on the creation of the council of chartered accountants and the regulation of the qualification and profession of chartered accountants;
- The Chair of the French estate auction regulation authority;
- The person with jurisdiction over sports agents, acting under the authority of the commission of sports agents of the delegating sport federation, appointed and duly empowered by the competent governing authority as per Article R. 222-1 of the French Sports Code;
- The officers appointed by the administrative authority responsible for competition and consumer matters, specially authorized by Decree of the Minister of Economy in the conditions provided for by Article R. 561-40 of the French Monetary and Financial Code;
- The national police officers of the police unit responsible for the enforcement of gambling laws and regulations, specially authorized by Decree of the Minister of Home Affairs in the conditions provided for by Article R. 561-39 of the French Monetary and Financial Code;
- Persons subject to obligations concerning the fight against money laundering and terrorism who:
  - Have drawn up a declaration, signed by the legal representative of the entity subject to such obligations or by a duly authorized person within said entity, that contains the designation of the entity subject to such obligations and, as the case may be, the designation of its legal representative, and that specifies that (i) the person subject to such obligations belongs to one of the categories of persons defined in Article L. 561-2 of the French Financial and Monetary Code, and (ii) the consultation of the document on the beneficial owner(s) is made in the framework of the implementation of at least one of the due diligence measures provided for under Articles L. 561-4-1 to L. 561-14-2 of the French Monetary and Financial Code;
  - File a disclosure request that includes (i) the designation of the relevant company(ies) or legal entity(ies), and (ii) the due diligence measure(s)

implemented with respect to the company(ies) or legal entity(ies) mentioned in that request;

- Any other person authorized by a court decision for which all ordinary avenues of appeal have been exhausted.

#### **5. Penalties**

The President of the Commercial Court, acting upon his/her own motion or at the request of the Public Prosecutor or any other person with an interest, may order any relevant company or entity to file the required exhibits and information on the beneficial owner(s), or to have such exhibits and information produced, and may impose a penalty payment for non-compliance.

In the same conditions, the President of the Commercial Court may appoint an agent for carrying out these formalities. If the relevant company or legal entity has a statutory auditor, the agent may request such auditor to disclose any necessary information.

In addition, failing to file with the RCS the document on the beneficial owner(s) or filing a document that contains inaccurate or incomplete information is punished by six months' imprisonment and a €7,500 fine (x5 for legal entities). Additional penalties may be imposed.

#### **6. Entry into force**

The Decree will enter into force on August 1, 2017. However, legal entities incorporated with the RCS before that date have until April 1, 2018 to comply with the new provisions.

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#### Notes

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[1] Decree n°2017-1094 of June 12, 2017 on the register of beneficial owners defined in Article L. 561-2-2 of the French and Monetary Financial Code.

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