

IDENTIFYING AND REGISTERING BENEFICIAL OWNERS, A NEW OBLIGATION FOR ALL COMPANIES

The so-called « Sapin II » law, dated 9, December 2016 set forth a new obligation for all companies and legal entities registered in France with the Commercial Registry to (i) obtain, (ii) keep a record of, and (iii) register with the Commercial Registry their “beneficial owners”.

This new law reflects an enhanced transparency requirement within the framework of implementing EU Directive 2015/849 of the European Parliament and the European Council dated 20 May 2015 pertaining to the fight against money laundering and terrorist financing. This transparency requirement, implemented in the French Monetary and Financial Code, gives rise to the creation of a register of beneficial owners and puts an end to the anonymity of French “sociétés par actions” (corporations) shareholding, being however specified that this register is not made public but limited to certain categories of persons.

Even though the term “beneficial owners” still needs to be clarified by an upcoming decree, legal entities are invited to conform with this duty to register without delay, and by all means before 1, April 2018 for companies already registered and upon incorporation for companies newly established. Failure to comply with this new law is severely punished, including criminally.

Besides, companies will need to conform with the law permanently as they will have to update their register of beneficial owners by registering any change affecting these beneficiaries.

1. WHICH COMPANIES ARE CONCERNED ?

This law concerns all companies (whether with a commercial or non-commercial purpose) and intercompany partnerships (“groupements d’intérêt économique”), which are established in France as legal entities, foreign commercial companies having an establishment in France and other legal entities whose registration is requested by legal or regulatory provisions (e.g. *associations* registered with the Commercial Registry).

Naturally, companies listed on a regulated market in France or in another country member of the European economic area or in another country imposing obligations recognized as similar by the EU Commission per EU Directive 2013/50/EU dated 22, October, 2013 do not have a duty to comply with this law. Unregistered partnerships (which do not amount to legal entities) and natural persons registered with the local Commercial Registry do not need to comply either.

2. WHO ARE THE BENEFICIAL OWNERS TARGETED?

The obligation concerns “*the natural person or persons (1) who either directly or indirectly ultimately control(s) the [company] or (2) on whose behalf a transaction or activity is being conducted*”.

In order to clarify this definition, and until the upcoming decree is published, the Commercial Registries refer to existing provisions of the French Monetary and Financial Code pertaining to the fight against money laundering and terrorist financing and, in particular, article R.561-1 (and not article 233-3 of the French Commercial Code) to qualify a beneficial owner. As such, a beneficial owner is the natural person(s) who:

- hold(s) directly or indirectly, **more than 25% of the capital and/or voting rights of the company**, or
- exercise(s), by any other means, **control** over the management, administrative and governing bodies of the company or over its shareholders’ general meeting.

The Commercial Registries also provide that, in the event none of the above mentioned criteria allows identification of a beneficial owner, and provided there are no grounds for suspicion, the beneficial owner identified shall be the company’s legal representative, this interpretation being in line with the EU Directive 2015/849 above mentioned.

This classification allows companies to identify a beneficial owner in any case scenario. Still, the decree could clarify the concept of control to which the law refers. Besides, it would be desirable to address the situation of subsidiaries of companies listed on a regulated market (in France or abroad). Today, subsidiaries are compelled to identify and register their beneficial owners while the parent company, which controls them, is not subject to the same duty.

3. WHICH LIABILITIES IN CASE OF FAILURE TO COMPLY?

Failure to register the beneficial owners or providing inaccurate or incomplete information to the relevant Commercial Registry is punishable by up to six months imprisonment and a 7,500€ fine. The natural person who committed the offense may also be prohibited from managing and partially deprived from his or her civil and civic rights.

In addition, in the event of incorporating a new company, the founders, as well as members of the management, administrative and governing bodies, are severally liable for any prejudice suffered from failure to comply with any incorporation formalities imposed by law in accordance with article L.210-8 of the French Commercial Code.

The criminal liability of the company itself may also be sought when failure to comply with the obligation is due to an omission or action of its legal representative acting on the company’s behalf. The following penalties could therefore be applied to the legal entity: fine of up to 37,500€, winding-up, judicial supervision, permanent closure of the company’s facilities, exclusion from public markets, ban from making a public offering, ban from writing out checks, display of the ruling (paragraphs 1°, 3°, 4°, 5°, 6°, 7° and 9° of article 131-39 of the French Criminal Code).

Pursuant to French criminal law, where a company is convicted of an offense, its legal representative may also be held liable with the company.

In addition to incurring the legal representative or the company's liability, the President of the relevant Commercial Court may order an injunction to register beneficial owners subject to, as the case may be, a penalty in the event of noncompliance. The President may act upon his own motion or following an ex-parte request filed by a prosecutor or any person who demonstrates an interest in the matter.

4. WHICH DELAYS AND HOW FREQUENTLY?

The information on the beneficial owners must be filed upon incorporation for any new company.

Legal entities already registered must file the document before 1, April 2018.

Beyond this initial obligation, companies must ensure that the necessary updates are filed each time any event makes it necessary to rectify or add information to the information previously registered on beneficial owners within thirty (30) days of said fact or action. Companies must therefore put in place the necessary measures allowing them to be immediately warned of any change in their beneficial owners.

5. WHO MAY HAVE ACCESS TO THE REGISTRY OF BENEFICIAL OWNERS?

Pursuant to EU Directive 2015/849, Members States are free to give public access, without any restriction, to their national registry of beneficial owners. France, along with the United Kingdom, Luxembourg and Belgium, has chosen to not give public access to the register of beneficial owners and limit its access to the following persons:

- without any restriction:
 - the company registering its beneficial owners;
 - as may be needed for the proper performance of their duties, the following authorities : judicial bodies, custom agents, officers of public finance responsible for tax inspection and collection, tax inspection authorities mentioned in article L.561-36 of the French Monetary and Financial Code (in particular the French financial markets regulator (AMF));
 - persons subject to the fight against money laundering and terrorist financing within the framework of monitoring measures of articles L.561-4-1 to L.561-14-2 of the French Monetary and Financial Code;
- via a judicial procedure: any other person who can demonstrate a legitimate interest and who has been authorized by an order of the judge in charge of monitoring the relevant Commercial Registry. Access to any person who can demonstrate a legitimate interest is subject to the procedure set forth by article R. 561-59 of the French Monetary and Financial Code. The request to access the information is submitted to the judge in charge of monitoring the relevant Commercial Registry, who renders an order, which, in turn, may be challenged in appeal by the beneficial owner.

6. PRACTICAL FACTS

➤ Required information

The document must disclose certain information on the company: the company name, its legal form, the address of the registered office and, as the case may be, its unique identification number and the city where the relevant Commercial Registry is located.

Besides, it must contain the following information pertaining to the beneficial owners: the identification (name, name used, pseudonym, first names, date and place of birth, nationality, personal address), the manner in which control is exercised over the company or the legal entity, the date on which the natural person became a beneficial owner (it being specified that, in the event the company is in the course of being incorporated, Paris Commercial Registry recommends filling in the date of the articles of association of the company).

Additional pages will need to be completed according to the number of additional beneficial owners of the company.

➤ Disclosure modalities

Filing of the document may be done in paper or electronically. The paper filing of the document dated and signed by the legal representative of the company is done with the Commercial Registry where the company is registered. Electronic filing is exempt from signature but must be accompanied by the certified copy of the legal representative's ID.

The cost of this filing is 24,71€ for all newly incorporated companies (cost that adds to the usual registration costs), 48.39€ for any filing of a complementary or modifying document and 54.32€ for companies already registered with the trade and companies' registry.

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