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WHITE PAPER

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France Establishes Register of Beneficial Owners of Corporations and Other Entities

In an effort to prevent money laundering and fight the financing of terrorist activities, France has adopted requirements for the identification and registration of beneficial owners of corporations and other entities registered in France. The requirements were incorporated into French law as required of EU Member States by Directive (EU) 2015/849, approved in May of 2015. Those falling under the new requirements include all unlisted companies (civil and commercial) and economic interest groupings that have their registered office in France, foreign commercial companies having a French branch, and other legal persons required to register under French law.

This Jones Day *White Paper* explains the definitions, obligations, procedures, and potential penalties associated with the beneficial owner registration requirements.

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As part of the fight against money laundering and the financing of terrorism, Directive (EU) 2015/849 of May 20, 2015, required EU Member States to set up national registers of beneficial owners of companies by June 26, 2017, at the latest. This requirement was incorporated into French law through the adoption of Ordinance N° 2016-1635 of December 1, 2016, reinforcing France's arsenal of measures to combat money laundering and the financing of terrorism ("Ordinance"), as well as through Implementing Decree No. 2017-1094 of June 12, 2017, amending the French Monetary and Financial Code ("MFC").¹

Under these provisions, beneficial owners of corporations and other entities registered in France must now be identified and declared to the Registry of the Commercial Court.

BENEFICIAL OWNER IDENTIFICATION AND DECLARATION OBLIGATIONS

Persons concerned by the new obligations include (L. 561-46 of the MFC):

- All unlisted² companies (civil and commercial) and economic interest groupings (EIG, EEIG) that have their registered office in France and have "legal personality";
- Foreign commercial companies if they have one (or several) branch(es) located in France; and
- All other legal persons required to be registered under French law (i.e., certain associations).

Given the exclusion of listed companies from this requirement, it is possible that an unlisted company may be required to search and declare the identity of its ultimate beneficial owner(s), even though its listed parent company would not be required to do so. The provisions applicable to date do not provide for any exceptions for companies controlled by a listed company, neither with respect to the principle of the declaration obligation of their beneficial owner(s), nor with respect to the definition, in such case, of the beneficial owner(s). An alternative approach could have been to provide that in such cases the beneficial owner is deemed to be the listed company controlling the reporting person, and the various disclosure requirements applicable to listed companies

(major holding notifications, disclosure of shareholders' agreements, disclosure requirements of the reference document, etc.) would have taken over from there.

SCOPE OF THE REQUIREMENTS CONCERNING BENEFICIAL OWNERS

Persons concerned by these requirements must (L. 561-46 of the MFC):

- Obtain and maintain accurate and up-to-date information on their beneficial owners; and
- File a document with the Registry of the Commercial Court relating to the beneficial owner containing the identification elements and the personal domicile of the latter and the modalities of the control he/she exercises, to be annexed to the Commercial and Companies Registrar.

WHAT IS A BENEFICIAL OWNER?

The definition and methods for determining the beneficial owner remain unclear. Indeed, the new provisions on the identification and declaration requirements use, by reference, the concept of "beneficial owner" as used in the provisions of the MFC concerning the diligence requirements for certain economic actors with regards to their clients. The use of these provisions for the determination of entities' own beneficial owners, and not those of their clients, is unclear.

A beneficial owner is therefore defined as being the natural person(s) (L. 561-2-2 of the MFC):

- Who ultimately controls, directly or indirectly, [the reporting entity], it being specified in particular with regards to the modalities of control that:
 - When the relevant person is a corporation (R. 561-1 of the MFC), the following are deemed to exercise control, and, therefore, deemed the beneficial owner(s) of the corporation: 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;

- When the relevant person is a collective investment undertaking (i.e., a fund) (R. 561-2 of the MFC), the following are deemed to exercise control, and, therefore, deemed the beneficial owner(s) of the undertaking: natural person(s) who either hold, directly or indirectly, more than 25 percent of the units or shares of the undertaking, or who exercise a power of control over the management or administrative bodies of the undertaking or, where appropriate, the management company or portfolio management company representing it; or
- For whom “a transaction is carried out” or for whom “an activity is carried out.”

This second category (i.e., individuals for whom transactions or activities are carried out) seems inappropriate for the objective of the regulation on the beneficial owner register. Moreover, the Decree of June 12, 2017, which specifies the information that must be included on the filing with the Registry, provides for information to be included for the first category (way of control) but does not specify any information to be included for the second category (transactions and activities) (L. 561-2-2 of the MFC, paragraph 2). In this light, it would therefore appear that this second category may potentially be excluded from the definition of a beneficial owner.

The Ordinance provided that an implementing decree would be issued to clarify the definition of beneficial owner as set out in Article L. 561-2-2 of the MFC and the methods for its determination currently included in Articles R. 561-1 to R. 561-3 of the MFC. This implementing decree has not yet been adopted. According to National Association of Joint Stock Companies (“ANSA”, communication n° 17-020), the draft decree currently being prepared could in particular specify that, with respect to corporations, the “power to control” mentioned above (other than the holding of more than 25 percent of the share capital or voting rights) may refer to the provisions of paragraphs 3 and 4 of Article L. 233-3 of the French Commercial Code that target the determination in fact of decisions taken in general meetings, and the power of a shareholder to appoint and dismiss the majority of the members of the management or executive bodies of the company.

Also, the model forms relating to beneficial owners provided by Infogreffe and the Registry of the Paris Commercial Court:

- Only refer to reporting persons that are corporations, collective investment undertakings, EIGs, or associations;
- Do not provide for the case of a beneficial owner for whom a transaction or an activity is carried out (and thus are in line with the Decree of June 12, 2017, see above);
- Provide only for the following three options of control: (i) direct or indirect holdings of more than 25 percent of the share capital, (ii) direct or indirect holdings of more than 25 percent of the voting rights (or more than 25 percent of “rights” in EIGs and associations), or (iii) the exercise, through any other means, of a power of control over the management, administrative, or executive bodies of the corporation/undertaking/EIG/association or the general meeting of partners or shareholders/members of the undertaking/members of the EIG or association, therefore reflecting the current provisions of article R. 561-1 of the MFC relative to corporations and not those of articles R. 561-2 concerning collective investment undertakings and R. 561-3 concerning other legal persons.

In order to avoid difficulties when proceeding with this formality, reporting persons should probably use the model forms made available by Infogreffe and the Registry of the Tribunal at this stage. However, once the abovementioned decree is published, it will be necessary to ensure that the identification of the beneficial owners indicated in the documents already filed with the Registry remains compliant with the revised provisions and, if not, to amend them.

PROCEDURE AND DEADLINES FOR MAKING THE DECLARATION

Persons subject to these new requirements must file with the Registry of the Commercial Court a document relating to the beneficial owner containing the identification elements and the personal domicile of the latter and the means of control it exercises (L. 561-46 and R. 561-55 and R. 561-56 of the MFC). This document will be attached as an annex to the Commercial and Companies Registrar. Infogreffe and the Registry of the

Paris Commercial Court have made available model forms for this purpose, which are appended.

This document is dated and signed by the legal representative of the reporting corporation or entity.

Concerning corporations incorporated since August 1, 2017: this document must be filed with the Registry at the time of deposit of the registration file with the Registry or within 15 days there from.

Concerning corporations or entities registered before August 1, 2017: they must file this document with the Registry by April 1, 2018.

A revised version of the document must be filed within 30 days following any event pursuant to which the beneficial owner(s) has(ve) changed (i.e., a sale of securities, an asset contribution, a capital increase, the reporting entity, or an entity that controls it directly or indirectly).

CONTENT OF THE DECLARATION OF BENEFICIAL OWNERS

This document must contain, with regard to the beneficial owner:

- Surname, common name, pseudonym, first names, date and place of birth, nationality, personal address of the natural person(s);
- The means of control exercised in the reporting corporation or legal entity, determined in accordance with Articles R. 561-1, R. 561-2, or R. 561-3 of the MFC (Note: as previously mentioned, the model forms made available by Infogreffe and the Registry of the Paris Commercial Court only partially reflect the current provisions of these articles); and
- The date on which the natural person(s) became the beneficial owner of the reporting corporation or legal entity.

Pursuant to the Ordinance, the clerk (*greffier*) of the Registrar of the Commercial Court must verify that the information communicated concerning the beneficial owner is complete and compliant with applicable legal and regulatory provisions, is

consistent with the other elements and documents delivered to the annex of the commercial registry by the reporting company or entity, and, in the case of an amendment to a pre-existing declaration of beneficial ownership, is consistent with the other documents in the file.

If it is impossible to identify the beneficial owner according to the prescribed criteria, the forms made available by Infogreffe and the Registry of the Paris Commercial Court provide that, by default, the legal representative of the reporting company or entity must be designated as the beneficial owner. This default designation is not provided for in the Ordinance, nor by the aforementioned Decree of June 12, 2017; it however complies with the provisions of Directive (EU) 2015/849 of May 20, 2015, referred to above, and the draft decree mentioned by ANSA in its above-mentioned communication. It therefore seems that the Registry has anticipated the forthcoming adoption of this new decree.

ACCESS TO THE DECLARATION FILED WITH THE REGISTRY

This document is accessible, without restriction, to a number of public administrations and authorities within the framework of their mission (L. 561-46, R. 561-57 of the MFC):

- Judicial authorities;
- National financial intelligence unit;
- Agents of the customs administration;
- Authorized agents of the public finance administration responsible for tax collection and control; and
- Certain supervisory authorities, in particular the French *Autorité de contrôle prudentiel et de résolution* (ACPR, responsible for supervising the banking and insurance sectors) and the French *Autorité des marchés financiers* (AMF, the financial markets' regulator).

The persons in charge of the fight against money laundering and the financing of terrorism can, within the implementation of certain prevention measures provided for by the MFC, also request to be provided with this document.

Finally, it is also accessible by any other person with a legitimate interest and authorization to do so by a court decision no longer subject to an ordinary appeal.

The reporting company or entity shall also have access to the declaration.

SANCTIONS—INJUNCTIONS

Failure to file the document relating to the beneficial owner to the Registry of the Commercial Court or the filing of a document containing inaccurate or incomplete information is punished as follows (L. 561-48 and L. 561-49, R. 561-62 *et seq.* of the MFC):

- Natural persons (i.e., the legal representative who is required to complete the filing and sign the declaration) face six months of imprisonment and a fine of 7,500 euros; and
- Legal persons (i.e., the corporation or entity concerned by this reporting requirement) face a fine of 37,500 euros.

Natural persons are also subject to the prohibitions on managing a company provided for by Article 131-27 of the French Criminal Code and to a partial deprivation of civil and civic rights provided for in paragraph 2 of Article 131-26 of the French Criminal Code.

Legal persons are also liable to additional penalties, as set forth in paragraphs 1, 3, 4, 5, 6, 7, and 9 of Article 131-39 of the French Criminal Code, which provide, for example, for the temporary or definitive exclusion from public procurement procedures.

In light of these sanctions, it is in the interest of the reporting companies or entities to set up internal procedures for the identification of their beneficial owners and to keep track of the measures taken to identify them. Thus, should its controlling shareholders, or entities controlling them directly or indirectly, refuse to cooperate, the person required to complete

the filing with the registry will be in position to prove that, in spite of its/his/her actions, it was impossible for it/him/her to identify the beneficial owner.

Although this situation is not expressly covered by applicable French law, it appears to be nonetheless anticipated by the Paris Registrar, which provides for the designation of a beneficial owner by default in such cases (see above), and the draft decree mentioned by ANSA in its communication n° 17-020 also refers to it. The Anti-Money Laundering Directive of May 20, 2015, which any citizen of a Member State may rely on, also provides for this designation by default, “if, after having exhausted all possible means and provided there are no grounds for suspicion, no person satisfying the definition of beneficial owner is identified, or if there is any doubt that the person(s) identified are the beneficial owner(s), the natural person(s) who hold the position of senior managing official(s).”

INJUNCTION UNDER PENALTY PAYMENT

The President of the Commercial Court, acting *ex officio* or at the request of the public prosecutor or any person having an interest therein, may order the reporting corporation or entity to file such a declaration, subject to a penalty payment.

Under the same conditions, the President of the Tribunal may appoint an agent to carry out these formalities. If the reporting company or legal entity has appointed an auditor, the agent may obtain from the latter all necessary information.

BENEFICIAL OWNER DECLARATION FORMS

- [Document Relating to the Beneficial Owner of a Corporation](#)
- [Document Relating to the Beneficial Owner of an EIG or an Association Registered with the RCS](#)
- [Document Relating to the Beneficial Owner of a Collective Investment Undertaking](#)

LAWYER CONTACTS

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ENDNOTES

- 1 As a result of a legislative imbroglio, the provisions of the directive of May 20, 2015, relating to the register of beneficial owners have been transposed twice into French law: once by the Ordinance on December 1, 2016, which entered into force on August 1, 2017, and a second time by the Sapin II Act adopted on December 9, 2016, (Article 139), which entered into force on April 1, 2017. These two texts each created new articles L. 561-46 and L. 561-47 of the MFC, both providing for this register but in different terms. Although Article 139 of the Sapin II Act has not been formally repealed, the general view seems to be, particularly in view of the chronology of the dates of entry into force of these texts (the Ordinance being more recent than the Sapin II Act), that the provisions resulting from the Ordinance have replaced those of the Sapin II Act and are therefore solely in force.
- 2 The provision does not apply to “companies whose securities are admitted to trading on a regulated market in France or in another State party to the agreement on the European Economic Area or in a country imposing requirements that are recognized as equivalent by the European Commission within the meaning of Directive 2013/50/EU of the European Parliament and of the Council of October 22, 2013.”

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