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MONEY LAUNDERING

Two Proskauer Rose LLP attorneys explain France’s implementation of the EU’s Fourth Money Laundering Directive and its new disclosure requirement for ultimate beneficial owners.

New Ultimate Beneficial Owner Disclosure Requirement for Companies Registered in France



BY STEPHANIE MARTINIER AND DELIA SPITZER

Since Aug. 1, 2017, registration of a French entity (whether a corporation or other various forms of legal entities) triggers the requirement of providing information regarding the beneficial owners (*bénéficiaires effectifs*) of such entity to the French Trade and Companies Register (*Registre du Commerce et des Sociétés*). Entities registered prior to that date must provide information regarding their beneficial owners by April 1, 2018. (Further references in this article to “beneficial owner(s)” is a reference to such term as defined under French law. See the subheading “The notion of beneficial owner” for an explanation of this definition.)

Stephanie Martinier is an associate at Proskauer Rose LLP in Paris in the firm’s corporate practice.

Delia Spitzer is a partner at Proskauer in Paris and practice head of the firm’s Private Equity and Corporate Mergers & Acquisitions department.

This new disclosure requirement results from France’s implementation of the European Union’s Directive 2015/849/EU, referred to as the Fourth Money Laundering Directive (the “Fourth Directive”). The disclosure requirement is in line with the current trend to impose more transparency in the business world in order to effectively fight money laundering and the financing of terrorism. The EU deadline for the implementation of the Fourth Directive was June 26, 2017, but the beneficial ownership disclosure and the creation of a beneficial ownership register still required more detailed implementation in some of the European Union member States, including France. Each member State had some leeway in how to implement the Fourth Directive, which created differences among the member States regarding, in particular, the deadline to file the information on beneficial ownership (for example, in Germany the deadline for existing entities was Oct. 1, 2017, while in Finland it is July 1, 2020), the sanctions in the event of non-compliance, and access rights to the register of beneficial ownership (see the discussion on this register below).

In France, the Fourth Directive was implemented through an order (*Ordonnance*) dated Dec. 1, 2016, and through a decree (*Decret d’Application*) dated June 12, 2017. A separate decree providing additional implementation details is expected to be issued by the end of the first quarter of 2018.

Entities Subject To the New Disclosure Obligation

All French entities that are created by their registration with the French Trade and Companies Register are subject to the obligation to disclose their beneficial owners. (See Article L. 561-46 of the French Monetary

and Financial Code.) This encompasses *sociétés anonymes*, *sociétés par actions simplifiées*, *sociétés en nom collectif*, *sociétés en commandite*, and *sociétés à responsabilité limitée*, and includes also branches of foreign entities registered in France.

Companies that are listed on a stock exchange in France or in another State member of the European Economic Area (the 28 EU members and Iceland, Liechtenstein, and Norway), or even in another State outside that area, if the relevant stock exchange on which a company is listed imposes equivalent obligations regarding disclosure of stock ownership, are exempt from the obligation to disclose their beneficial owners. However, paradoxically, French subsidiaries of such listed companies must comply with the obligation. The requirement may not be satisfied merely by declaring the listed company as the beneficial owner since, as explained in more detail below, the declared beneficial owner must be the ultimate individual owner or owners. The National Council of Commerce Tribunal Clerks (*Conseil National des Greffiers des Tribunaux de Commerce*) considers that in such a case, the legal representative of the subsidiary is deemed to be the beneficial owner and that there is therefore no need to identify the beneficial owner of the listed company. (See Case Study no. 15 in the Practical Guide published by the *Conseil National des Greffiers des Tribunaux de Commerce* on Nov. 17, 2017.)

The Notion of Beneficial Owner

The beneficial owners of an entity are the individuals who either:

- (i) Hold directly or indirectly more than 25 percent of the share capital or voting rights of a company; or
- (ii) Exercise by any other means the power to control the management, administration or supervisory bodies of the company or the shareholders at the shareholders' meetings. (See Article R. 561-1 of the French Monetary and Financial Code.)

The Fourth Directive provides that the obligation to disclose information about the beneficial owner(s) is deemed to have been properly satisfied by identifying the person who is the entity's top officer in the event that after serious efforts, the beneficial owner(s) cannot be identified (x) because no individual meets the criteria or (y) because it is not certain that the person identified is a beneficial owner.

The provision of the Fourth Directive mentioned in the preceding paragraph was not adopted either in the French implementing order or in the decree. In spite of this, in the form that the Trade and Company Register has made available online for companies to use in order to satisfy their disclosure obligation, it is stated that when no individual who meets the criteria of the definition has been identified, the name of the legal representative of the declaring entity may be provided instead, which is consistent with this provision of the Fourth Directive. In such instance, the legal representative of the declaring company should make sure to document the steps taken to try to find the required information.

The current definition of beneficial owner is expected to be modified by the further decree referred to above. (The new decree was initially expected to be issued by the end of Nov., 2017. No new time frame for publication has been officially set. It is clear, though, that it will modify the current provisions of the French Monetary

and Financial Code defining a beneficial owner, to clarify how to satisfy the disclosure obligation when no beneficial owner can be identified. It will also address some instances where it may be particularly complicated to identify a beneficial owner (cases of usufruct, indivision, etc.).)

Information to Be Provided

The form that the Trade and Companies Register has made available online lists the information that the declaring entity must provide regarding its beneficial owners, as follows: name; date of birth; country of citizenship; home address; type of control exercised over the concerned entity (via share ownership, voting rights, other); and date when the individual became a beneficial owner.

The clerk of the Trade and Companies Register where the entity is registered checks that the form has been properly completed, with all of the information required by law, but obviously is not in a position to verify the accuracy of the information provided. For now, the Trade and Companies Register does not systematically request back-up for the contents of the form, which clearly limits the reliability of the information towards the stated goal of contributing to the fight against money laundering and financing for terrorism. In the Netherlands, Portugal and Sweden, certain of the institutions that have access to the beneficial ownership register, such as credit institutions, must report information identified by them as incorrect, which goes at least some way towards improving the accuracy of the information.

Deadlines to Provide Information And Updating Obligation

For any entity created on or after Aug. 1, 2017, the information regarding the beneficial owners must be provided either at the time of the initial registration with the Trade and Companies Register, or within 15 days following such registration. In principle, the lack of beneficial ownership information at the time of the initial filing with the Register should not delay the registration of the entity, but no assurances can be given that some specific Trade and Companies Register offices will not insist on the information being provided before registration is actually granted.

As noted earlier, entities registered prior to Aug. 1, 2017 have until April 1, 2018 to file the required information.

The information regarding beneficial owners on file with the Trade and Companies Register must be updated within 30 days following the date on which any change occurs. As a practical matter, we recommend that the legal representative of a declaring entity put in place a system aimed at receiving promptly information about any relevant change, in order to allow the entity to comply with this updating obligation. The representative could, for instance, notify each shareholder of the nature of the obligation and request to be informed in writing within five business days in case of any change concerning such shareholder that would warrant doing an updating filing. We also would recommend that the representative request that each shareholder respond to a form sent by the company on an annual basis, con-

firming the information provided in the past regarding beneficial ownership, or updating it as needed, as is done by way of Officers' and Directors' questionnaires in the context of public companies.

The Register Of Beneficial Ownership

The information regarding the beneficial owners is compiled in a register to be kept by the Commercial Court (the "RBE" (*Registre de bénéficiaires effectifs*)).

The French RBE is not accessible to the public. Access to it is limited to those listed in the implementing decree, which include, among others, the judicial authorities, the French national financial intelligence unit, tax and customs officers, the French financial markets authority, the French bar councils, and credit institutions. (Article R. 561-57 of the French Monetary and Financial Code.) This is in contrast, for example, to what the implementing law provides in the United Kingdom. Going beyond what is required by the Fourth Directive, the U.K. law provides that the U.K. equivalent of the RBE is accessible to the public.

The ownership of a company and, more generally, the elements constituting a person's wealth tend to be considered a private matter in France. By a decision of Oct. 21, 2016, the Constitutional Council (*Conseil Constitutionnel*) ruled that public access to the register compiling information regarding trusts the existence of which has a tax impact in France breached privacy rights, due notably to its disclosing to the public of the details related to individuals who are part of the trust arrangements, as well as information about their respective wealth management decisions. As a result, access to the trusts register has been limited to certain persons. (Article 1649 AB of the French General Tax Code.) By way of exception, French law allows all of the shareholders of a *société anonyme* to request, prior to a shareholders' meeting, the list of the shareholders and the attendance sheet, which also includes the number of shares held, and therefore provides information that goes beyond what is in the RBE. (Articles R. 225-90 et R. 225-92 of the French Commercial Code.) One could say that access to this information is limited to share-

holders of the *société anonyme* in question, but it is generally easy in the case of a public company, to buy a share with a view to finding out who are its shareholders.

The law implementing the Fourth Directive in France allows any person to petition the courts to be given access to the French RBE, if such person is able to prove that the person has a "legitimate interest" to review the register. The proceeding to make this petition to a court is a unilateral, rather than an adversarial, proceeding, and the beneficial owners and the company are not informed of the request until after (and if) it is granted. (Article R. 561-59 of the French Monetary and Financial Code.)

Sanctions for Non-Compliance

If the required information related to the beneficial owners is not provided, or if the information provided is incorrect or incomplete, a judge may order the company to file the required information, subject to a daily fine in the event of delay in the execution of the order.

The law also provides for criminal penalties, consisting in imprisonment for up to six months, and a €7,500 fine (€37,500 if the person sanctioned is a legal entity). Both the company and its officer(s) individually may be subject to these financial penalties.

Given that fighting money laundering and the financing of terrorism is often a stated priority of politicians, including of French President Emmanuel Macron, it is likely that the disclosure requirements regarding beneficial ownership will become more stringent in the coming years, since they are deemed essential to prevent certain behaviors recently highlighted by the Panama Papers and the Paradise Papers scandals. The European Commission and the European Parliament are both in favor of additional measures to enhance transparency, and discussions are currently ongoing between the European Parliament and the Council of the European Union regarding a fifth money laundering directive which would contain tightened requirements, such as a lower threshold for a person to be considered a beneficial owner for purposes of disclosure, and broader public access to the beneficial ownership information.