



ARTICLE

IDENTIFICATION OF BENEFICIAL OWNERS IN GROUPS: MODIFICATION OF NEW REGIME BY DECREE NO. 2018-284 OF APRIL 18, 2018

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Order no. 2016-1635 of December 1, 2016^[1] requires unlisted legal entities registered with the Registry of Trade and Companies (RCS) in France to file a declaration on their beneficial owners^[2] with the clerk's office. Since April 1, 2018, all affected entities (registered before or after August 1, 2017) are supposed to have filed their declaration. Nevertheless, the filing of this declaration does not mean they have fully satisfied the new legislation. Indeed, subsequently, all changes (direct or indirect) in the declaring entity's shareholding or control will require the filing of an amending declaration in case there is a modification in its beneficial owners^[3].

This reform, which directly involves the carrying out of mergers and acquisitions, merits attention due to the violation (partial) of the confidentiality of an unlisted company's ultimate shareholding^[4], the penalties related to a lack of compliance^[5] and the complexity of complying, because the beneficial owners are not easy to identify.

Indeed, the notion of a beneficial owner—meant as the natural persons ultimately controlling, directly or indirectly, the declaring entity and provided (depending on the type of structure) by Articles R. 561-1 to R. 561-3 of the French Monetary and Financial Code—and the implementation of this new legislation quickly raised a number of questions by lawyers^[6].

This is the context within which clarifications, in force since April 21, 2018, were made by Decree no. 2018-284 of April 18, 2018 (the "Decree")^[7], although certain questions still remain.

1 - Clarifications made to the second criterion related to exercising control

As regards a company, Article R. 561-1 of the French Monetary and Financial Code, modified by the Decree, defines a beneficial owner as, "*the natural person(s) who either holds, directly or indirectly, more than 25% of the capital or voting rights of the company, or exercises, by any other means, control over the company within the meaning of Article L. 233-3-1-3° and 4° of the French Commercial Code.*"

Although the criterion of holding (directly or indirectly) more than 25% is maintained^[8], the Decree modifies the alternative criterion for exercising control by any other means, with the prior wording referring to, "*control over the company's management, administration or governance bodies or over its shareholders' general meeting.*"

Henceforth, a natural person will be deemed to fulfill the control criterion, "*when he in fact determines, through the voting rights he owns, the decisions in this company's general meeting*" (Article L. 233-3-1-3°) or, "*when he is a member or shareholder of such company, and has the power to appoint or remove a majority of the members of such company's administration, governance or oversight bodies*" (Article L. 233-3-1-4°).

The new definition of control limits the search to (i) owners of voting rights (Article L. 233-3-1-3°) and (ii) members or shareholders (Article L. 233-3-1-4°), which meets the aforementioned conditions. Although, as regards this latter case, the text states that this involves the controlled company's (i.e., the declaring company's) members (or shareholders), on the other hand, in the first case it is not indicated whether this should be limited to the voting rights owners in only the declaring company. If such were the case (this analysis will have to be confirmed), the search would be limited to only the declaring company without searching for the existence of any indirect control through the exercise of rights in other companies of the chain of control.

Reading shareholders' agreements (e.g., a search for specific rights granted to natural persons not meeting the criterion of more than 25%) will, in any event, still be necessary for the purpose of identifying whether the control criterion (as modified) is met.

It is also of interest to point out that:

- the aforementioned modification also applies to beneficial owners of mutual funds, with control being assessed in relation to the management company when the mutual fund is not a company^[9];
- on the other hand, the Decree has not reduced in the same manner the notion of control as regards (i) a legal entity that is neither a company nor a mutual fund^[10], or (ii) a trust or a comparable scheme^[11]; and
- involving these two latter categories, the first criterion of more than 25% of the capital is broadened since it covers natural persons who may become owners of more than 25% (and not only current owners).



2 – Identification of the beneficial owner by default

The Decree confirms the practice established by the clerk's office (pursuant to European law) consisting of declaring the declaring entity's legal representative (or, if involving a legal entity, the natural persons legally representing it) in case it is impossible to determine the beneficial owner pursuant to the applicable criteria. The Decree provides several clarifications about the notion of a beneficial owner by default:

- as regards the declaration for a French company, this will involve (i) the manager(s) of general partnerships (SNCs), simple limited partnerships (SCSs), partnerships limited by shares (SCAs), limited-liability companies (SARLs) or partnerships (sociétés civiles), (ii) the managing director of the single-governance public limited company (société anonyme), (iii) the chairman of the board of directors (directoire) (or of the single managing director) of the dual-governance public limited company, or (iv) the chairman and possible managing director of the simplified joint-stock company (SAS);
- any other legal representatives of the single-governance public limited company (the deputy managing director[12]), the dual-governance public limited company (the managing director[13]) or the simplified joint-stock company (the deputy managing director[14]), on the other hand, are not covered;
- as regards the declaration relative to a mutual fund managed by a management company, this will involve the natural person(s) effectively managing this management company[15]; and
- no beneficial owner by default is provided as regards trusts (or comparable schemes).

3 – Lack of clarification on method for calculating percentage of indirect holding

Despite lawyers' wishes for a clarification on this subject, the Decree is silent as to the method for determining the percentage a natural person indirectly holds for the more than 25% criterion. Indeed, although some consider that one should use the method involving the proceeds from shareholding[16], others recommend the method of control within the meaning of Article L. 233-4 of the French Commercial Code[17]. However, these two methods lead to different results.

4 – Lack of exemption in the case of listed companies in chain of control

The legislation excludes from its scope "companies whose shares are admitted for trading in a regulated market in France or in another State that is party to the agreement on the European Economic Area or in another third country requiring obligations recognized as being equivalent by the European Commission within the meaning of Directive 2013/50/UE of the European Parliament and the Council of October 22, 2013".

On the other hand, subsidiaries of "listed" companies are not excluded. Although certain lawyers had expressed the desire for changes to this text so that subsidiaries do not have to identify the shareholding (direct or indirect) of their "listed" parent company (which is exempted), the Decree did not modify the legislation on this point.

In any event, we believe that the transparency obligations imposed on "listed" companies and on their shareholders (in particular, the legislation on crossing thresholds, direct and indirect) should, in the majority of cases, allow unlisted subsidiaries to obtain information necessary for making their declaration on beneficial owners.

5 – Presence of other types of structures in chain of control of declaring company

As indicated, the legislation provides criteria for identifying different beneficial owners for (i) companies (Article R. 561-1 of the French Monetary and Financial Code), (ii) mutual funds, whether having legal entity status (Article R. 561-2 of the same code), (iii) other legal entities (Article 561-3 of the same code), and (iv) trusts or comparable legal schemes (specific provision added by the Decree in Article R. 561-3-0 of the same code).

However, the declaration filed with the clerk's office about the beneficial owners is required only for entities that have legal entity status, which may include in their chain of control various types of structures. Consequently, if, in the chain of control of a declaring company there are other types of structures (for example, mutual funds or trusts), must the specific definitions be taken into account?

As regards a company's identification of its own beneficial owners, logic would lead one to assess this based only on the criteria of Article R. 561-1, without using the specific criteria applicable to other types of structures. This analysis, however, will have to be confirmed[18].



[1] Completed by Decree no. 2017-1094 of June 12, 2017.

[2] Article L. 561-46 et seq. of the French Monetary and Financial Code, Articles R. 561-1 to R. 561-3-0 of the same code, Articles R. 561-55 to R. 561-63 of the same code.

[3] An amending declaration must be filed within 30 days after any fact or document requiring a rectification or an addition to the information provided in the declaration.

[4] This document is effectively accessible to the entities of which an exhaustive list is provided by the legislation or to any person proving a legitimate interest authorized for this purpose by the judge supervising the registry of trade and companies.

[5] Not filing such declaration or filing a document with inaccurate or incomplete information is punishable by a 6-month prison sentence and a €7,500 fine or a €37,500 fine for legal entities (supplementary sentences are also applicable).

[6] Cf., for example, the ANSA's press release no. 17-043.

[7] The Decree contains modifications other than those described in this article specifically involving (i) filing of the declaration by electronic means, and (ii) the enactment of a period for registered mutual funds to make amending declarations: the obligation to make such an amending declaration applies only after a period of 180 business days after the registration date. This provision would allow one to take into account the launching phase during which large increases in shares are generally noted.

[8] The Decree harmonizes this criterion by referring to ownership of more than 25% for all declaring entities, including legal entities other than companies and mutual funds (the prior version effectively referred to ownership of at least 25% for these other entities).

[9] Article R. 561-2 of the French Monetary and Financial Code, amended by the Decree.

[10] For example: an association, foundation, endowment fund or economic interest group. Article R. 561-3, as amended, refers to, "the exercise by other means [of] control over the administration, governance, management or oversight bodies."

[11] Article R. 561-3-0, created by the Decree, provides a definition specific to trusts or comparable schemes and covers the exercise, "by other means [of] control over the property, rights or securities included in the trust property or in any other comparable legal scheme within the scope of foreign law." Also covered are the trustor, trustee, beneficiary, "third-party protector" or, "the category of persons in whose main interest the trust or other comparable legal scheme within the scope of foreign law has been created or is in force."

[12] Article L. 225-56-II of the French Commercial Code.

[13] Article L. 225-66, paragraph 2 of the French Commercial Code.

[14] Article L. 227-6, paragraph 3 of the French Commercial Code.

[15] Within the meaning of Article L. 532-9-II-4 of the French Monetary and Financial Code.

[16] The practical information sheets published on the Infogreffe website (on the date hereof not updated after the Decree's publication) and illustrating several cases for determining the beneficial owners use this method.

[17] The majority of the ANSA's legal committee. See press release no. 17-043.

[18] In any event, these definitions are used for the obligations to fight against money-laundering and the financing of terrorism and, therefore, they have a broader scope than the declaration on beneficial owners filed with the clerk's office.
