TETRALERT – CORPORATE

PREVENTIVE APPARATUS AGAINST MONEY LAUNDERING AND FINANCING TERRORISM: ADMINISTRATORS MUST IDENTIFY THE ACTUAL BENEFICIARIES AND COMMUNICATE THEIR INFORMATION TO THE UBO REGISTER

Article 14/1 has been inserted in the Companies Code by the law of 18 September 2017 transposing the fourth AML directive (hereinafter, the "BC/FT Directive"). Article 58/11 was inserted in the law of 27 June 1921 on non-profit associations, foundations, European political parties and European political foundations.

I. OBLIGATIONS OF THE ADMINISTRATORS

Thus, non-profits, foundations and companies must collect and save appropriate, exact and up-to-date information regarding identification of their actual beneficiaries. What does this cover? At a minimum, the name, date of birth, nationality and address of the actual beneficiary(ies).

The administrators of non-profits, foundations and companies must communicate in the same month as information relating to the actual beneficiaries becomes known or modified, and they must do this by electronic means, sending the data collected to the register of actual beneficiaries, most commonly known as the "Ultimate Beneficial Owner or UBO register".

Failure to comply exposes the administrators to a fine of from 50 to 5000 euros.

Furthermore, the administrators of the legal entities mentioned above must of course communicate to the regulated entities – when they comply with their obligations of identification of the actual beneficiary – the information so collected apart from the information on the legal owner.

Let us recall that by failure to comply the regulated entity cannot conclude business relations (so long as it does not honour its obligation to identify the actual beneficiary) and that the issue of a possible declaration in case of suspicions in this matter will be analysed.

II. ACTUAL BENEFICIARIES

The notion of the "actual beneficiary", already introduced by the law of 18 January 2010 in the preventive apparatus, has been amended and more precisely set out.

Today, the notion of "actual beneficiary" covers three scenarios:

(i) a private individual or individuals who, in the final analysis, own or control the client, the client's representative;
(ii) the beneficiary of life-insurance contracts;
(iii) a private individual or individuals for whom a transaction is carried out or a business relationship is concluded

Companies, non-profits and foundations must gather the information on the first category.

The following are considered as owning or controlling in the final analysis:

(i) In the case of companies:
   a. The private individual or individuals who own, whether directly or indirectly, a sufficient percentage of voting rights or a sufficient participation in this company's capital, including via bearer shares.

      The Law stipulates that a direct participation will be considered as sufficient if a private individual owns more than 25% of the voting rights or more than 25% of the shares or capital of the company. Holding more than 25% is an indication of sufficient percentage for voting rights or for direct participation.

      The Law stipulates in addition that a participation held by a company controlled by one or several private individuals or by several companies controlled by the same private individual(s) at a level of more than 25% for shares or more than 25% of the capital of the company, is a sufficient indication of indirect participation.

   b. The private individual or individuals who exercise control over the company by other means.
      The exercise of control by other means can be established in particular, the law tells us, according to the criteria mentioned in article 22, §§1 to 5 of Directive 2013/34 EU of the European Parliament and the Council dated 26 June 2013 relating to annual financial reports, to consolidated financial reports and to the reports relating to them by certain forms of companies.

   c. If, after exhausting all means possible, and if there is no motive for suspicion, none of the persons mentioned in points (i) and (ii) is identified, or if it is not certain that the person(s) identified is/are the actual beneficiaries, the private individual or individuals who occupy the position of principal director.

(ii) In the case of non-profit associations and foundations:
   a. The administrators and members of the board of directors;
   b. Persons authorised to represent them;
   c. The founders of foundations;
   d. The persons responsible for daily management;

e. Private individuals or, if these persons have not yet been appointed, the category of private individuals in the principal interest of whom the non-profit association or the foundation was constituted or operates;
f. Any other private individual exercising by other means the control and final say over the non-profit association or the foundation.

III. UBO REGISTER

Within the general administration of the Treasury of the Federal Public Service of Finance, a department is created responsible for keeping a centralised register of the actual beneficiaries and called the "UBO Register".

We have seen that the administrators of non-profits, foundations and companies send it information. But who has access to it? The answer is in a Royal Decree still to be enacted….

In reality, the question of access to the UBO Register is controversial.

According to the parliamentary work, access is granted solely for the purposes of allowing the regulated entities to honour their obligations in a preventive way. Nevertheless, in the draft bill of the framework legislation, provision was made to amend articles 322 and 338 of the CIR 92 to permit the tax administration (i) to have access to the register and (ii) to exchange information with foreign tax authorities.

IV. WHAT ARE THE OBLIGATIONS OF THE SHAREHOLDER?

Article 515a of the Companies Code has been inserted by the law of 18 January 2010 implementing the third directive. This provision removes the obligation for any private individual or legal entity which has acquired securities, whether representing capital or not, conferring voting rights in public limited companies (other than those subject to the obligation of transparency) and which have issued bearer shares or dematerialised shares, to declare to the company no later than on the fifth working day following the date of acquisition, the number of securities that it owns when voting rights relate to these securities reach a level of 25% or more of the total voting rights existing at the time of implementation of the transaction leading to the declaration.

This provision is amended and now stipulates that this obligation weighs on every private individual who directly or indirectly acquires the given securities.

V. CONCLUSION

The preventive apparatus has been greatly reworked with the transposition of the fourth directive. Preparation of the fifth directive is now underway.

One may confirm as regards identification of the actual beneficiary that the debate has come round full circle:

(i) the shareholder must declare to the company his or her participations greater than 25%;

(ii) Non-profits, foundations and companies must gather exact, appropriate and useful information concerning their actual beneficiaries and must communicate this (i) to the UBO register and (ii) to the regulated entities if they fulfil their identification obligations in the preventive arrangements;

(iii) the regulated entities cannot enter into business relations or embark on operations if identification has not been made.

Thus, the preventive apparatus against money laundering leads to transparency.

This is still not sufficient in the view of certain States which would like the UBO register to be accessible to every tax authority, and not only to them. France supports accessibility of the given register to all third parties, in particular to investigative journalists.

This is a matter to be monitored….

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