

TAX ALERT - Mach 2023
News on the "beneficial owner"

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Compliance & public availability of beneficial owners register

Unlisted companies must declare to the Trade and Companies Registry/RCS their beneficial owners, being the individuals who ultimately own or control them (or for whom an operation/activity is carried out)¹. Some of the information listed in the National Business Register/RNE is accessible to the public without restriction.

Public access to data relating to beneficial owners **was suspended**, following a decision by the Court of Justice of the European Union², **then restored** on January 19, 2023, subject to new access conditions to be defined.

Importance of the determination of the beneficial owner for the application of a tax treaty

The French administrative supreme Court (*Conseil d'Etat*) has an established case law on questioning the advantage granted by the tax treaty binding France and the State of residence of the **apparent** beneficiary³.

This case law was recently illustrated in a real estate investment scheme in France via a double Luxembourg holding, where one of the Luxembourg companies was considered as the apparent beneficiary of the dividends received from its French subsidiary redistributed the next day to its Luxembourg holding company, leading to the refusal of the benefit of the tax treaty and of the parent-subsidary regime.

The French administrative supreme Court also ruled favorably last summer on the application of the tax treaty binding France and the State of residence of the **beneficial** owner⁴.

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The recent decisions on beneficial owner of passive income refer to an objective definition of the beneficial⁵/apparent owner, according to an economic and realistic approach (by reference to a body of evidence, for example the immediate redistribution of the income), thus going beyond a formal and legal approach. In this context, using the information stated on the beneficial owners registry could provide an element of the body of evidence.

¹ Articles L 561-2-2, L 561-45-1 et L 561-46 Code monétaire et financier

² CJUE gde ch. 22-11-2022 aff. 601/20, invalidating the provision of the 5th directive Dir. UE/2018/843 du 30-5-2018 said "anti-money laundering"

³ In cases of passive incomes deriving from France.

⁴ CE 5-2-2021 nos 430594 & 432845, Sté Performing Rights Society Ltd ; CE 9e-10e ch. 20-5-2022 no 444451, Sté Planet

⁵ The one who «has actually the right to use (the income) and benefit from it without being forced by a contractual or legal obligation to transfer/redistribute the payment to another person. »