The Case for Beneficial Ownership

A Discussion Paper on the policy frameworks promoting Beneficial Ownership in Africa.

This report has been produced with support from FTC, a global civil society network working to curtail illicit financial flows through the promotion of a transparent, accountable and sustainable financial system that works for everyone.
This report reflects the views of Tax Justice Network Africa and is not intended to represent the views of other FTC members.

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EXECUTIVE **SUMMARY**

Beneficial Ownership (BO) disclosure has been demanded by Civil Society Organizations (CSOs) in Africa. The tax justice movement has reiterated the need for an enhancement of transparency, and the UN has also recognised the impact of BO on the achievement of the Sustainable Development Goals (SDGs).

This discussion paper aims to provide an overview of the policy frameworks promoting BO disclosure. It maintains a focus on the impact that a lack of transparency generates on the African continent. Finding an efficient way to render beneficial owners accountable is a necessary step to curb Illicit Financial Flows (IFFs), which have a massive effect on the ability of Africa to finance its development and to gain independence from external aid.

BO provisions are still at a nascent stage in African countries. The objective of this paper, therefore, was to examine the policy frameworks promoting BO in the continent in a bid to enable stakeholders to understand the policy context for them to engage in advocacy for BO. This paper underscores several impetuses for BO, including initiatives around anti-money laundering and counter-terrorism financing, for transparency within the extractives sector, for BO as an anti-abuse provision within Double Taxation Agreements (DTAs) and the phenomenon of derisking. It documents the progress made in these efforts to support BO in Africa as a means of promoting an understanding of how African countries can pursue various policy frameworks to implement it.

It follows from a previous paper produced by the Tax Justice Network (TJN) and the Tax Justice Network Africa (TJNA) on the State of Play of BO in Africa, which assessed the BO status of legal vehicles in 17 countries in Africa and reiterates the recommendations made then to promote BO.

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LIST OF **ACRONYMS**

AEOI – Automatic Exchange of Financial Account Information Standard
AML – Anti Money Laundering
BEPS – Base Erosion and Profit Shifting
BO – Beneficial Ownership
CBCR – Country-by-Country Reporting
CBRs – Correspondent Bank Relationships
CDD – Customer Due Diligence
CRS – Common Reporting Standards
CSOs – Civil Society Organizations
DNFBPs – designated non-financial businesses and professions
DRM – Domestic Resource Mobilization
EIA – Existing Information Approach
EITI – Extractive Industry Transparency Initiative
EOI – Exchange of Information
EOIR – Exchange of Information on Request Standard
FATF – Financial Action Task Force
FinCEN – Financial Crimes Enforcement Network
FIs - Financial Institutions
FIUs – Financial Intelligence Units
FSAP – Financial Sector Assessment Program of the IMF
GRC – Governance, Risk and Compliance
GTO – Geographic Targeting Orders
IFFs – Illicit Financial Flows
IFIs – International Financial Institutions
IMF – International Monetary Fund
ISM – Information Security Management
IO – Immediate Outcome of the FATF
KYC – Know Your Customer
KYCC – Know Your Customer's Customer doctrine
MAC – Convention on Mutual Administrative Assistance in Tax Matters
MNEs – Multinational Enterprises
MTOs – Money Transfer Organizations
ODA - Official Development Aid
OECD – Organization for Economic Co-Operation and Development
RBA – Risk-based Approach
SAR – Suspicious Activity Report
SDGs – Sustainable Development Goals
TJN – Tax Justice Network
TJNA – Tax Justice Network Africa
UNODC – United Nations Office on Drugs and Crime
WB – World Bank

1.

BACKGROUND

Why the topic is important

A state's ability to improve its governance relies on its ability to pool resources. In order to comply with its duties, a state must mobilise domestic resources through the imposition of taxes on natural and legal persons.

Illicit Financial Flows (IFFs) constitute a significant obstacle for Domestic Resource Mobilization (DRM). Every year more than $50 billion is lost annually from Africa and ends up hidden in tax havens, paving the way to crime, corruption, and massive tax evasion.

IFFs are a considerable challenge to political and economic security around the world, particularly to developing countries. They have devastating consequences for growth and development and are considered as having a significant impact on the achievement of the Sustainable Development Goals (SDGs). IFFs subtract resources that could be critical if employed to achieve development, had those revenues not been lost to capital flight.

In the long term, developing countries will gain their political and economic independence when they will be able to finance their development. The tax justice movement asserts that tax is at the heart of issues and critical for poverty eradication, equality promotion, and all other matters connected to the broad concept of economic development. In fact, the current situation, in which Multinational Enterprises (MNEs) and High-net-worth individuals (HNWIs) are exploiting loopholes in legislation and a lack of transparency to hide and pile up enormous wealth, is increasingly unsustainable.

The Organisation for Economic Cooperation and Development (OECD) Global Forum on Taxation, the Financial Action Task Force (FATF), the UN Convention against Drugs, Transnational Organized Crime, and Corruption (UNODC) and other actors have led international initiatives to limit tax evasion and address the risks of IFFs. However, these efforts have not been sufficient to stem IFFs, which are substantial and growing.

International efforts to curb IFFs are calling attention to the role played by financial intermediaries and BO as stumbling blocks.

Defining BO

The beneficial owner is the natural person who effectively owns, controls, or benefits from a legal vehicle. The importance of individuating beneficial owners is evident for reasons of transparency, not only for tax purposes but connects to all kinds of IFFs, from money laundering to financing of terrorism.

The difficulty in determining the identity of beneficial owners is because a natural person can enjoy ownership or control through an array of techniques. The graph below (Fig.1) shows some ways in which a natural person can exercise his control over an entity, through the employment of legal vehicles.

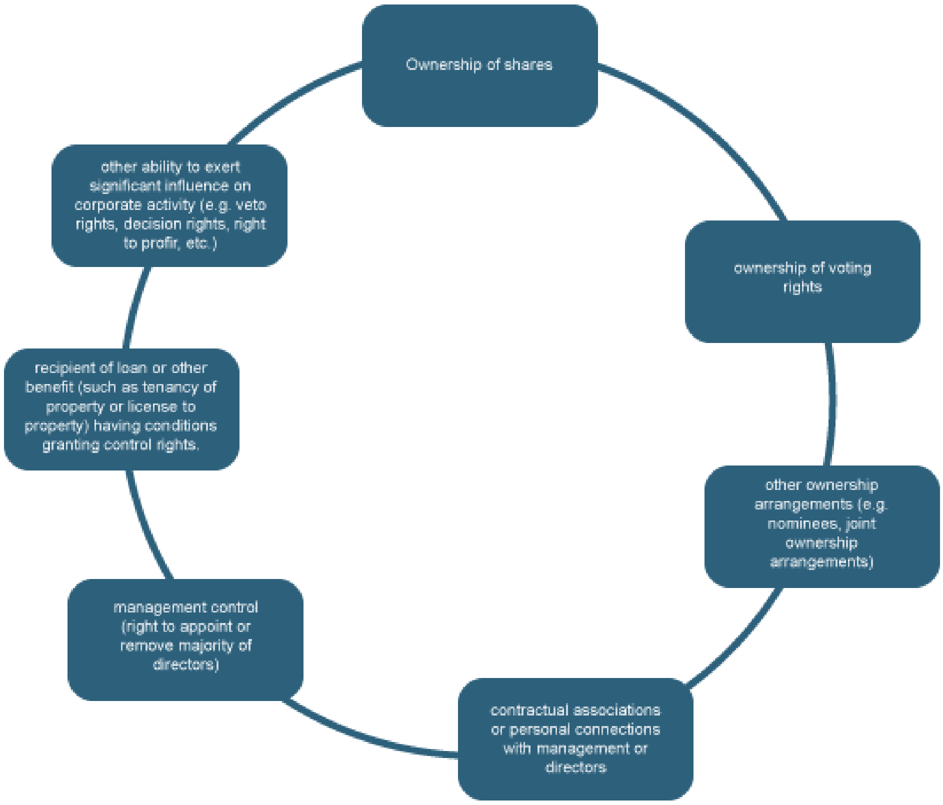


Figure 1:[2] Different ways of controlling a legal vehicle

Many criminals deliberately use the opacity of corporate vehicles to hide their identity, the real purpose of the account, and the source or use of funds or property associated with the entity. They do this for different purposes: it may be for tax avoidance purposes or to prevent authorities tracking the proceeds of individual or corporate crime, such as money-laundering or bribery and corruption, and worse still, it can be used to conceal the sponsoring of terrorism activities.

The International Consortium of Investigative Journalists (ICIJ) leaked millions of papers in 2016 from Panamanian law firm Mossack Fonseca. The documents contain financial and attorney-client information about wealthy individuals and public officers and the shell companies they used for illegal purposes, including fraud, tax evasion and avoidance, and evading international sanctions.[3]

2 Global Forum on Transparency and Exchange of Information for Tax Purposes (OECD) and Inter-American Development Bank, 'A Beneficial Ownership Implementation Toolkit' (2019).

3 ICIJ, 'Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption' (2016).

These war crimes (in Syria) have been well documented, not so, the part played by the shadowy world of offshore finance. Behind the scenes, companies using offshore tax havens were accused of supplying fuel to the Syrian airforce. In 2014, multiple governments including the UK and US issued bans on doing business with these companies but now a new global investigation has revealed a Panamanian firm helped these companies operate as attacks in Syria continued. That firm, Mossack Fonseca, is a key player in a sprawling secretive industry for the world's rich and powerful use to hide assets and skirt rules by setting up front companies in far-flung jurisdictions… clients involved in bribery, arms deals, financial fraud and drug trafficking.

Behind the invoices, emails and paper trails are real victims One of the alleged ring leaders (of child trafficking and prostitution) was a client of Mossack Fonseca's, when the firm discovered their client was a paedophile, they decided they were not legally obliged to report his offshore business activities to authorities. The offshore industry has recently come under fire for enabling dubious activities like these but firms like Mossack Fonseca have helped clients continue to operate behind a veil of secrecy. Until the shadowy world is held accountable, international criminals will keep doing business, tax dollars will be dodged and bombs will continue to fall.

– ICIJ, The Panama Papers: Victims of Offshore (animation), 2016

To combat this kind of activity, it is therefore critical to determine the policy framework of BO. Some considerations must be made. First, the longer the chain of entities of a legal vehicle, and more jurisdictions the entities span, the harder it is to identify the real owner, given the need to determine who controls each of the layers.[4] Second, there can be added difficulties to individuate beneficial owners, such as the use of Nominees – persons who act as representatives of the actual owners who can remain unnamed, or of Bearer Shares (and Bearer Shares Warrants) which are shares in paper form so that whoever possesses or bears them, owns them. These figures can occasionally also be combined, representing further obstacles to individuate the final individual.

At the international level, standards on transparency concerning BO are anchored on several key initiatives; The Financial Action Tax Force (FATF), which is an intergovernmental body whose mandate is to promote regulation and international standards to combat IFFs; the Extractive Industry Transparency Initiative (EITI), a global standard for the good governance of oil, gas and mineral resources, the Global Forum on Transparency and Exchange of Information for Tax Purposes, whose mandate is to ensure implementation of international standards on transparency[5] and in the form of anti-treaty abuse measures within double taxation agreements (DTAs).

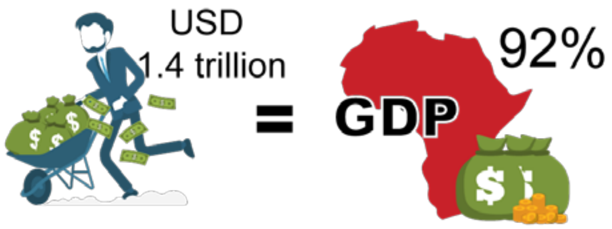
This paper aims to present and explain these initiatives and policy frameworks to stakeholders interested in advocating for BO to better do so.

4 Global Forum on Transparency and Exchange of Information for Tax Purposes (OECD) and Inter-American Development Bank (n 2).

5 ibid.

The significance of IFFs – How much money is flowing out?

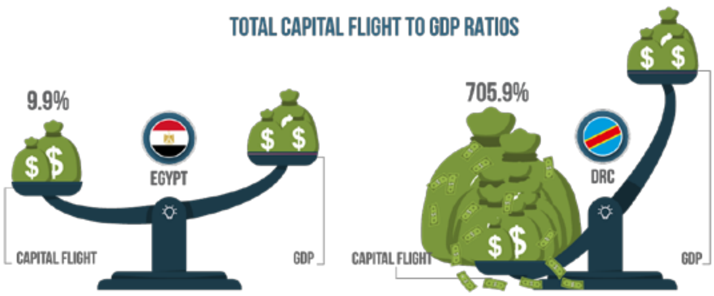
Capital flight is a considerable concern in Africa, as it is a significant obstacle in the path toward growth and prosperity. African countries are continually struggling with a lack of adequate financial resources, which impede the financing of their development and prevent them from forming their independence from external aid.



Capital flight from 30 African countries

Ndikumana and Boyce evaluated the loss due to capital flight from 30 African countries between 1970 to 2015 to amount to about USD 1.4 trillion. This combined amount accounts for 92 percent of the continent’s GDP and outstrips the debt accumulated and qualifies Africa as a net creditor to the world.[6] The volume of money illegally piped out from the continent is enormous. Following high levels in the 1970s and 1980s, it declined in the 1990s and later exploded since 2000. The rise that has been happening in the last two decades has been prompted by the resource boom and has lasted up to the global financial crisis.[7]

> According to the report, in most cases, capital flight is driven by evasion on taxes on private wealth or avoidance of possible prosecution from the illicit acquisition of wealth. In the case of illicitly acquired wealth, the owners may willingly accept a low or even negative return on assets in exchange for the protection that offshore financial centres provide. Oil-rich countries feature prominently on the top of the list in terms of volume of losses.



Capital flight represents a heavy burden compared to the size of the economy for

6 Léonce Ndikumana and James K. Boyce, ‘CAPITAL FLIGHT FROM AFRICA: Updated Methodology and New Estimates’ (2018).

7 ibid.

> while the assets accumulated abroad are private, debts are public and, as such, constitute a collective liability.

most countries. For the 30 states as a group, it represents 65.5% of their combined 2015 GDP. The ratios of total capital flight to 2015 GDP range from 9.9% for Egypt to 705.9% for the Democratic Republic of Congo (DRC). In general, it vastly exceeds the stock of external debts owed by these countries (USD 496.9 billion) as of 2015. However, while the assets accumulated abroad are private, debts are public and, as such, constitute a collective liability.

The report disavows the widely spread idea of Africa as aid and debt-dependent as if the continent does not have adequate resources. Resources flowing out of the country exceed inflowing ones under the form of development aid or private investment. In general, African countries would not need to rely on Official Development Aid (ODA) if they could retain their resources onshore.

Sustainable Development Goals (SDGs)

The 2030 Agenda for Sustainable Development, adopted by the UN in 2015, recognizes the importance of BO. According to the UN, 'there is no reason for hiding the true ownership of companies, trusts and other legal arrangements from a country's tax authorities,' as 'anonymous shell companies in offshore locations open the door to corruption and defrauding the public purse.'[8] The UN, therefore, acknowledges that transparency on BO is critical in curbing IFFs that undermine sustainable development. Therefore, BO should be transparent and publicly available.

BO relates to SDG Goals 16 and 17 in several ways. In particular, it refers to target 16.4, which states the need to reduce IFFs, 'to strengthen recovery and return of stolen assets, and combat all forms of organized crime'; and target 17.1, which states the importance of mobilizing domestic resources in developing countries to improve internal capacity for tax and other revenue collection.

The UN also identifies some actors that could potentially lead the actions to be undertaken on BO, such as the OECD's Global Forum and the Financial Action Task Force (FATF), and other transparency initiatives. It also mentions the Financial Secrecy Index of TJN, as well as the Open Company Data Index, which could play a role in BO action.

BO is also included in the mandate of the FACTI panel, which is assigned to research upon current mechanisms and good practices related to BO transparency.

The Addis Ababa Action Agenda on Financing for Development

The Monterrey Conference in 2002 represented the first quadripartite exchange of views between governments, civil society, business representatives, and institutional stakeholders, acknowledging the multi-dimensional nature of the global development challenge, culminating in the adoption of the Monterrey Consensus. During this time, the UN General Assembly elevated its existing expert tax group to committee status within the framework of the Monterrey Consensus on Financing for Development, which identified the need to tackle capital flight and tax evasion. The UN Committee of experts on international Cooperation in Tax Matters

8 SDSN, 'Indicators and a Monitoring Framework, Launching a Data Revolution for the Sustainable Development Goals' 3 <https://www.unsdsn.org/> accessed 18 August 2020.

meets annually in Geneva. It comprises 25 expert members appointed from UN member states. At its November 2009 meeting, Sub-Saharan African states with a membership of the UN Tax Committee were Ghana, Nigeria, Senegal, and South Africa (SA). Kenya was also represented with observer status. North African states were represented by Morocco and Egypt.

The Addis Ababa Conference in 2015 was a follow up to the Monterrey Consensus in which representatives of 174 UN member states, including 28 Heads of State and Governments, and Heads of the UN, IMF, WB, WTO and prominent business and civil society leaders gathered and expressed their commitment to creating an enabling environment at all levels for Sustainable Development in the spirit of global partnership and solidarity. This was followed up by the Doha Declaration on Financing for Development of 2008. The Addis Ababa Action Agenda (AAAA) asserts the need to support inclusive economic growth, protection of the environment, and promotion of social inclusion. The Conference focused on the situation of developing countries, particularly in Africa. They also reaffirmed the need to achieve a positive socio-economic transformation in Africa. This is also in line with the African Union's Agenda 2063, which states the intention to make a prosperous Africa based on inclusive growth and Sustainable Development.

With regards to the topic, the AAAA committed to scaling up international tax cooperation, following each nation's capacities and circumstances. They agreed on the need to work together to increase transparency and implement adequate policies, including Country by Country Reporting (CBCR) of multinational enterprises (MNEs) to tax authorities, and access to BO information for competent authorities. Also progressively advancing towards Automatic Exchange of Information (AEOI) among tax authorities. Furthermore, they stated the need to promote discussion on tax incentives in regional and international forums to end harmful tax practices. The very nature of tax issues in today's world must be global. There is the need to play efforts in international tax cooperation that should be universal in approach and scope and should fully consider the different needs and capacities of all countries.[9]

9 United Nations, Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) 2015.

2.

CONTEXTUAL FRAMEWORKS

FATF and Best Practices on BO for Legal Persons

A critical player in financial transparency is the FATF. This intergovernmental body develops and promotes measures to prevent money laundering, terrorism financing, and the proliferation of weapons of mass destruction.[10] It was founded in 1989 during the G-7 Summit held in Paris, which acknowledged the need to undertake policies on a global level to counter Money Laundering practices that represented at the time a growing peril to the banking system and financial institutions.

In 2012 the FATF adopted a list of Recommendations, setting the international standards on anti-money laundering (AML) and counter-terrorist financing (CFT). The Recommendations were updated in June 2019. Recommendations provided are not supported by mandatory measures to implement them, which leaves countries free to choose which approach to adopt. The 2012 text distinguishes between basic ownership information and BO information. BO is considered a central concept in the pursuit of the objectives of FATF, which recognises the importance of having accurate and updated information on legal persons and arrangements and establishing efficient procedures.

BO is a topic that repeatedly appears throughout the Recommendations. R. 24 and R.25 urge countries to adopt measures to prevent the misuse of legal persons and legal arrangements (such as trusts) and to grant relevant authorities adequate and accurate information on BO and control promptly.

In July 2018, the FATF, in conjunction with the Egmont Group of Financial Intelligence Units, an organisation which promotes cooperation and intelligence sharing among national Financial Intelligence Units (FIUs), published a Report on the Concealment of BO.[11] The report's core finding is that inefficiencies in individuating BO lie in the faulty implementation of the existing standards rather than in the gaps of the standards themselves. Most deficiencies detected relate to risk assessment, adequacy and accuracy and timeliness of information; access by competent authorities; bearer shares and nominee shareholders and arrangements; fines and sanctions; and international cooperation.[12]

In 2019 the FATF published a paper on Best Practices of BO for Legal Persons, which is restricted to consideration on legal persons, leaving out the scope of legal arrangements such as Trusts, which is problematic. It only considers issues related to R.24 and measures on preventing misuse of legal persons by criminals under Immediate Outcome 5 (IO.5)

R.24 provides that countries should take action to prevent the misuse of legal persons for money laundering and terrorism financing. Hence, they should ensure there is 'adequate, accurate and timely information' on BO and control of legal persons. This information must be available promptly by competent authorities. Also, countries should favour measures through which they can provide access to BO and control information by financial institutions (FIs) and designated non-financial businesses and professions (DNFBPs), as set out in R.10 and 22.

10 FATF, 'The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation' (2018).

11 FATF and Egmont Group, 'Concealment of Beneficial Ownership' (2018).

12 FATF, 'Best Practices on Beneficial Ownership for Legal Persons' (2019) <www.fatf-gafi.org>.

To meet such requirements, the FATF provides three methods:

The Registry Approach: requires companies to keep registries that must contain up-to-date information on the companies' BO.

The Company Approach: requires companies to obtain or take reasonable measures to secure and hold up-to-date information on the companies' BO.

The Existing Information Approach: entails the use of existing information, such as a) the information obtained by FIs and DNFBPs, under R.10 and 22. b) Information held by other competent authorities on the Legal and Beneficial Ownership of companies; c) information held by the company as required; d) available information on companies listed on a stock exchange, where disclosure requirements ensure adequate transparency of BO.

FATF does not express preferences on which approach countries should adopt, as they are left free to choose their path toward enhanced transparency, acknowledging that each state has a separate legal, regulatory, economic, and cultural character and, as such must retain the freedom to choose which option works better for it.[13] Countries can decide the modalities on how to pursue the fight against the misuse of legal persons for money laundering and terrorism financing based on their circumstances following risk assessments. Regardless of the mechanism used, R.24 also requires countries to create procedures to ensure that companies co-operate with authorities in the determination of the beneficial owner. They have three options to co-operate:

a. Require companies to authorise at least one natural person resident in the country of incorporation to be accountable to the competent authorities for providing all essential information and available BO information, and giving further assistance to the authorities as needed.
b. Require companies to authorize a DNFBP in the country to be accountable to the competent authorities for providing such information and assistance.
c. Take other comparable measures which can effectively ensure a company's cooperation.

In 2013, FATF agreed to a methodology to allow an assessment of a country's technical compliance with the recommendations. Such methodology is based on 11 Immediate Outcomes (IO). In particular, R.24 is linked with IO.5, to prevent the misuse of legal persons for money laundering and terrorism financing. IO.5 states that an effective system should put in place measures to a) prevent legal persons and legal arrangements from being used for criminal purposes, b) make legal persons and legal arrangements sufficiently transparent, and c) ensure that accurate and up-to-date basic and BO information is available on a timely basis.

Although it does not favour any of the methods proposed, the FATF endorsed the multi-pronged approach, which consists of identifying the beneficial owner(s) behind a legal person, through a combination of different approaches, which supplement each other.

According to the Report, jurisdictions using a single approach are less effective in complying with the recommendations than those jurisdictions using a multi-pronged one using several sources of information. In the latter case, countries are more effective in preventing the misuse of legal persons for criminal purposes. In particular, the opportunity to use diversified sources to enhance transparency and access to information and address accuracy problems, as competent authorities

13 ibid.

can gain access to BO data through different sources and cross-check this information.[14]

Global Forum on Transparency and Exchange of Information for Tax Purposes (OECD) and Exchange of Information

In March 2019, the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes, in partnership with the Inter-American Development Bank, published a BO Toolkit, meant to support Global Forum Members and especially developing countries. The current BO standards do not provide practical guidance on how to implement them. The Global Forum seeks, therefore, to assist policymakers in assessing different implementation options by giving considerations on how-to evaluate efficacy from an array of measures.[15]

The Global Forum is the principal international body working on the implementation of the international standards on tax transparency, to which at the time of writing, 161 countries participate on an equal footing. The group aims to ensure compliance with high standards on transparency and EOI for tax purposes (both on request and automatic).

Intergovernmental cooperation meant to curb cross-border tax evasion is built on two pillars: tax transparency and EOI. The action that the Global Forum has undertaken to support this cooperation is rooted in the implementation of two complementary international standards: the Exchange of Information on Request Standard (EOIR) and the AEOI. The two are complementary.

EOIR requires tax authorities to provide on request, information to another tax authority. The information for EOIR relates to a) ownership information of all relevant legal entities and arrangements (legal and BO), b) Accounting Records, c) Bank Information. All members of the Global Forum have committed to EOIR, and its peer-review process monitors its implementation.

On the other hand, AEOI compels FIs to provide financial account information of non-residents to the tax authorities of the account holders' country of residence under the globally agreed Common Reporting Standards (CRS), which substantially improves the ability of tax authorities to detect tax evasion, including in cases where there was no initial indication of non-compliance.[16]

	EOIR (Exchange of Information on Request Standard)	AEOI (Automatic Exchange of Information)
Who is exchanging information?	Tax authorities provide information to other tax authorities on request	Financial institutions to tax authorities of the account holders' country of residence

14 ibid.

15 Global Forum on Transparency and Exchange of Information for Tax Purposes (OECD) and Inter-American Development Bank (n 2).

16 Global Forum on Transparency and Exchange of Information for Tax Purposes (OECD), 'Tax Transparency In Africa: Africa Initiative Progress Report 2018' (2019).

What kind of information is being exchanged?	Ownership information of all relevant legal entities and arrangements Accounting records Bank information	Financial account information of non-residents under the common reporting standards
Who monitors this? Or what does this mean?	All members of the Global Forum peer review process	Tax authorities are better able to detect tax evasion particularly where there non-compliance

The Africa Initiative is a project centred on the importance of tax transparency and EOI in Africa. The project was launched in 2014, during a plenary meeting of the Global Forum held in Berlin. The project aims to support domestic resource mobilisation (DRM) and to strengthen the fight against tax evasion while addressing the problem of IFFs flowing out from Africa through enhanced transparency and EOI.

The Initiative has seen the support of many African Finance ministers and, in 2017, was extended for an additional three years. The Initiative is guided by a task force that includes several African countries together with regional and international bodies. It also has the support, among others, of the African Development Bank, the West African Tax Administration Forum (ATAF), and the World Bank group. On the 25th June 2020, the Africa Initiative released its last report 'Tax Transparency in Africa 2020', which is a joint publication of the Global Forum and Exchange of Information for Tax Purposes, The African Union, and the ATAF.

The Africa Initiative Progress Report for 2018 analysed the impact of the advocacy guided by the Global Forum since the launch of the Africa Initiative in 2014. The Progress Report for 2018 is the first of its kind, and its release represented a key milestone on the Africa Initiative Agenda. The Forum measures progress based on some key indicators. In general, the report suggests there was a generalized improvement following 2015, under the profile of tax transparency and EOI in the continent. In particular, 12 new African countries had become members of the Global Forum since 2015, bringing the number to 29. This number has increased to 32, according to the recently published Africa Initiative Progress Report for 2019, that has followed. This improvement means that Africa has ceased to be the unrepresented continent at the Forum.

Besides quantity, African participation has also increased qualitatively, as African members have actively contributed to the work of the Global Forum, providing assessors for the EOIR peer-review process and actively participated in its working groups.

The African Initiative has contributed to change the perception tax authorities have on transparency, which has become a priority in their agenda. In 2018, 24 of 29 countries considered tax transparency as a priority, of which five have assessed the issue as a high priority. According to the Report for the following year, the level of priority accorded to tax transparency has remained stable.

Apart from an increase in the number of the members taking part in the Global Forum, the quality of their participation and the level of their engagement must also be considered. According to the 2018 Report, the quality of EOI infrastructure improved in between 2015 and 2018. Not only a larger number of officials are exclusively assigned to EOI matters, but more than half of the Global Forum members adopted suitable EOI infrastructures by adopting measures such as the creation of an EOI unit and the approval of an EOI manual. This data is significant as, before the Initiative, only Mauritius and South Africa had suitable infrastructures to deal with EOI. The Report for 2019 has highlighted that four African countries have come forward to nominate 16 assessors for the EOIR peer review from 2020 onwards. This is meaningful because the extent to which a jurisdiction provides expert assessors to the review of other jurisdictions, the more its officials build their skills in tax transparency.[17]

In general, evidence shows that members of the Global Forum are developing an EOI culture based on EOI infrastructure, by promoting the value of including an EOI unit within the tax authority, adhering to an EOI manual, and training staff.

Technical assistance

the Global Forum, besides providing technical assistance to the countries, has also focused on building an engagement with governments to prompt or maintain the political will to undertake such reforms.

The Global Forum has sought to assist developing countries in growing capacities that can help them implement international standards and mobilize domestic resources. The assistance provided seeks to:

- strengthen their legal framework and ensure availability and access to information relevant for tax purposes.
- Improve their organization of the tax administrations and set up EOI units with appropriate tools.
- Train officials and tax auditors to ensure effective use of the EOI instruments to tackle IFFs and increase domestic resource mobilization.

The idea is that through an enhancement of the technical capacities of tax administrations and tax officials, this will, in turn, help overcome the hurdles in the political sphere. The assistance provided concerns both the legal framework and the practical arrangements needed to use and implement EOI. The support provided is of two kinds: Induction Programs and A' la Carte.

New members since 2015 are eligible for Induction programs. The programs can last three to four years and seek to increase awareness and build capacity. Assistance provided concerns about tax transparency, EOI standards, peer review process, and helps countries put in place the infrastructure they need. Twelve African countries so far have benefited from Induction programs.[18]

The Global Forum has structured Induction programs in three phases. The first phase consists of a Gap Analysis that focuses on the specific needs of the assisted country. The second phase consists of the adoption of an Action Plan. The third phase relates to Implementation and envisages an active engagement with stakeholders.

Structure of the Induction programs of the Global Forum

17 Global Forum on Transparency and Exchange of Information for Tax Purposes (OECD), 'Tax Transparency in Africa: Africa Initiative Progress Report: 2019' (2020).

18 ibid.

Other African members receive assistance on an as-request basis,which focuses on transparency requirements such as BO and AEOI. The support provided is tailored to each jurisdiction's need and consists of assistance to prepare for peer reviews, legislative advice, or support for AEOI implementation. The program offers different pieces of training and assistance on BO, Information Security Management (ISM), effective use of information, extend EOI networks, and AEOI.

Although the Africa Initiative has highlighted the importance of moving from short-medium term support to a more forward-looking approach, that also involves Finance Ministers to obtain political buy-in, and that builds sustainable capacity, training seminars are nevertheless considered essential tools. Since 2015, over 23 in-country and regional training seminars have been held in Africa and have seen the participation of more than 1,000 tax officials.[19]

EOI Networks

A significant improvement prompted by the Africa Initiative has been a rapid increase in the number of agreements for EOI. In fact, for its very nature, EOI infrastructure is useless if not inserted into a well working and sound network of international agreements. Before the launch of the Africa initiative, the number of EOI agreements was very low. In 2013 all African countries together had a total amount of 685 EOI relationships. The Africa Initiative has been instrumental from this point of view as it has helped African countries to broaden their EOI networks by adhering to the Convention on Mutual Administrative Assistance in Tax Matters (MAC). Currently, the MAC covers 137 jurisdictions, here included 18 African countries. The increase in the number of agreements in place has allowed MAC parties to send and receive information for tax purposes. The chart below shows the involvement of African countries in the MAC.

FIGURE 2.7: **Number of EOI Relationships created by African countries since 2014**

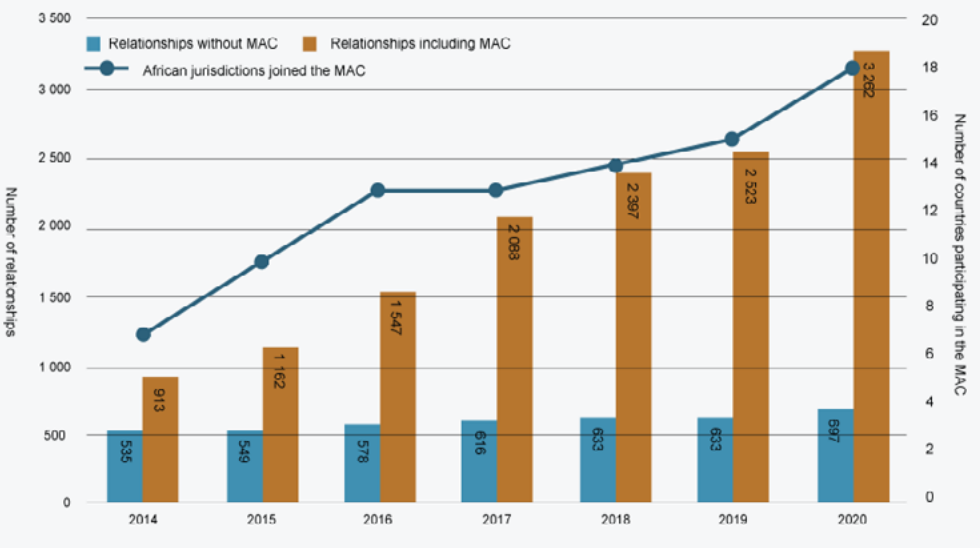


Figure 2[20] Number of EOI relationship created by African countries since 2014

19 Global Forum on Transparency and Exchange of Information for Tax Purposes (OECD) (n 16).

20 Global Forum on Transparency and Exchange of Information for Tax Purposes (OECD) (n 17).

	Multilateral Convention	
	Number	**Countries**
Convention signed	**18**	Benin; Burkina Faso; Cabo Verde; Cameroon; Gabon; Ghana; Liberia; Kenya; Mauritius; Mauritania; Morocco; Senegal; Seychelles; South Africa; Togo; Tunisia; Uganda
Convention ratified	**10**	Cameroon; Ghana; Mauritius; Nigeria; Senegal; Seychelles; South Africa; Tunisia; Uganda; Morocco
Process of signing	**7**	Angola; Chad; Eswatini; Madagascar; Lesotho; Namibia; Rwanda

Figure 321 Signatories to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters

The Agreement sets up all forms of tax cooperation, including the exchange of Country by Country reports and the mandatory spontaneous exchange of tax rulings, which are critical elements of the Base Erosion and Profit Shifting (BEPS) agenda.[22]

Challenges for Africa

Achieving actual results from EOI relationships

The mere existence of EOI relationships does not automatically lead to the detection of fiscal crime. The real potential of international tax cooperation relies on the ability to use increased transparency to identify income and assets on which tax has been evaded. This can be done by sending requests and by receiving information from treaty partners. This ability depends on the capacities of local tax authorities and the existence of an EOI infrastructure in the country.

The whole sense of increased transparency lies in the development of capacities that eventually allows countries to convert information into revenues through the recovery of money evaded. In these regards, a growing number of African members now register tangible first results. For example, Uganda declared it has recovered over USD 14 million as a result of EOI in the period 2015 – 2018, having made its first request in 2014.[23]

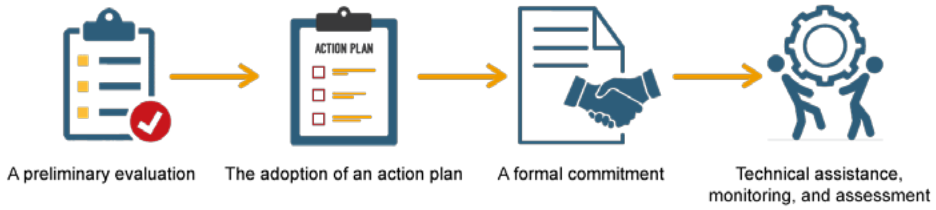
AEOI

African countries are now starting to implement AEOI. To help developing countries coping with its complexity, the Global Forum has developed a step-by-step approach to implement it. The Forum has built its approach on four steps:

21 ibid.

22 The BEPS Agenda has been developed to address the Domestic tax base erosion and profit shifting (BEPS) due to multinational enterprises exploiting gaps and mismatches between different countries' tax systems.

23 Global Forum on Transparency and Exchange of Information for Tax Purposes (OECD) (n 16).



Global Forum four steps approach to the implementation of AEOI

So far, three African countries, namely South Africa, Ghana and Nigeria, have implemented the plan, while Tanzania, Uganda and Kenya are part of a group of developing countries, having not yet set the date for the first automatic exchange.[24]

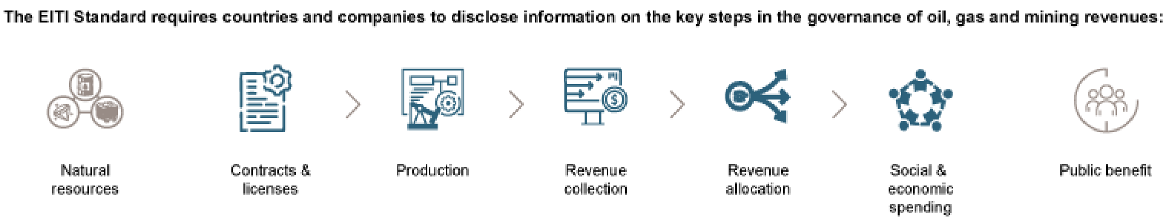
Problems

> Despite the improvements in tax cooperation, the progress made by African countries remains uneven. Also, the low number of EOI requests sent by African partners demonstrates that African countries are not using their EOI network intensively enough. On the one hand, countries with a broad network of partners do not exploit it sufficiently, on the other hand, many countries cannot count on a robust EOI network as they need to enhance it.

Besides, new challenges are arising, as international tax cooperation is continuously moving forward. In particular, African countries must be able to furnish foreign counterparts with increasing kinds of information (including BO) and must develop the capacity to obtain this information. However, to reap the full benefits of the increased tax cooperation, African tax authorities must be able to adopt AEOI, which is more challenging than EOIR.

Extractives Industry Transparency Initiative (EITI) and the Open Government Partnership (OGP)

The EITI is the global standard to promote the open and accountable management of oil, gas, and mineral resources. Countries apply to become implementing countries by committing to meet specific requirements on transparency and accountability, which progress is monitored annually by way of EITI reports. Half of the implementing countries on the EITI are from Africa (26 out of 52), which is significant and important for Africa being a resource-rich continent and failing to benefit from its resources as much as it could.



24 Global Forum on Transparency and Exchange of Information for Tax Purposes, 'Automatic Exchange of Information (AEOI): Status of Commitments as at May 2020' (2020).

Figure 4:[25] EITI Standard

The Open Government Partnership (OGP) is a multilateral initiative that aims to secure concrete commitments from national and subnational governments to promote open government, empower citizens, fight corruption, and harness new technologies to strengthen governance. Seventy-eight countries, local governments—representing more than two billion people—along with thousands of civil society organisations are members of the OGP), a multilateral initiative that works to promote open governments and fight corruption. All OGP governments sign on to the Open Government Declaration committing to increase the availability of information about governmental activities, among other commitments.[26]Thereafter, OGP participants produce two year action plans and periodic self-assessment reports which are evaluated by local Independent Reporting Mechanism (IRM) researchers who publish their findings for each member as part of each action plan cycle.[27]

The extractive sector is a key sector for BO disclosure, particularly in Africa, which depends on oil, gas and minerals as their most important sources of government and export revenues and is deemed to play a role in the break of the 'resource curse', a scourge for resource-rich countries. Noticeably, those countries have an average lower performance on human development indicators, if compared to countries that are less endowed with natural resources. This is due to the additional difficulties in terms of governance that the presence of natural resources generates, and the corresponding inability of domestic governments to respond to them.[28]

The extractive industry is a sector that is particularly susceptible to tax abuse and IFFs. An analysis of the OGP has evidenced that promoting policy reform in the extractives sector also presents increased opportunities. In particular, enhancing transparency in this field can help to detect corruption, recognise community interests, boost investments, and encourage sustainable management of natural resources. A study published by the OGP has evaluated that the impact of policies related to the extractives results in, on average, double the impact of commitments made in other sectors.[29]

In 2018, OGP and the EITI launched a partnership that focuses on the extractives, and that provides, among others, enhanced transparency around BO.[30] Evidence shows that the continent's extractive industry is particularly vulnerable to IFFs, and this is due to a multiplicity of reasons. At the same time, this industry has registered since 2013 remarkable progress in the field of transparency, thanks to the implementation of the EITI. With regards to BO, since 2016, the EITI adopted a gradual approach that aims at assessing the implementation of the BO requirement

25 EITI, 'The Global Standard for the Good Governance of Oil , Gas and Mineral Resources . Webinar : Sustainable Debt or Pending Threat ? Why Transparency Matters for Resource-Backed Loans News and Blog Posts' <https://www.eiti.org/> accessed 1 September 2020.

26 Open Government Partnership;, 'Open Government Declaration' <https://www.opengovpartnership.org/process/joining-ogp/open-government-declaration/> accessed 18 August 2020.

27 Open Government Partnership, 'Accountability' <https://www.opengovpartnership.org/process/accountability/> accessed 18 August 2020.

28 Open Government Partnership, 'Extractive Industries' <https://www.opengovpartnership.org/policy-area/extractive-industries/> accessed 6 August 2020.

29 ibid.

30 ibid.

(2.5) and its success. The requirement on BO disclosure has become effective as of 1 January 2020.

Among the parameters for an effective BO disclosure, there is the adoption of a publicly available register, that must contain the identity of ultimate individuals benefiting from corporate entities 'that apply for, or hold a participating interest in an exploration or production oil, gas or mining license or contract, including the identity of their beneficial owners, the level of ownership and details about how ownership and control are exerted.[31] The following map shows what the EITI considers meaningful progress (countries in light green) in terms of implementing the EITI standard.

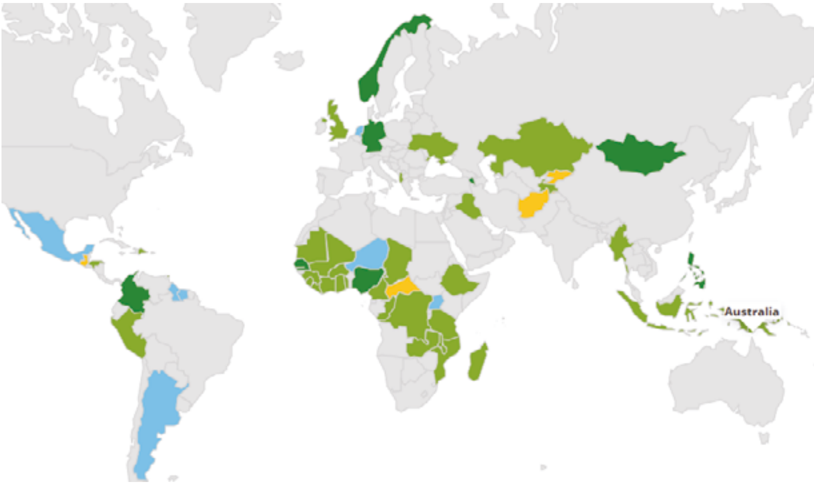


Figure 5:[32] EITI countries

The EITI process has promoted innovative approaches to BO, such as in DRC, which has expanded its EITI reporting to the artisanal and small-scale mining sector and IS automating online reporting by companies and government entities.

In Ghana, EITI reporting has highlighted gaps in the way the extractive sector is managed, leading to changes to the fiscal regimes governing the sector, such as the introduction of capital gains tax, higher ground rent, and fixed royalty rates. The Ghana Extractive Industries Transparency Initiative (GHEITI) is also working to improve the accountability of subnational transfers, as 10% of mining royalties are transferred to local governments. Ghana's latest EITI Reports provide contextual information on the oil and gas and mining sectors, including the overview of the sector, licensing regime, contracts, state participation, BO, exploration production and exports, revenues collection and allocation, quasi-fiscal expenditures, transactions by state-owned enterprises(SOE'S), outcomes and impacts and revenue management.

In Senegal, in addition to the national EITI multi-stakeholder group, Parliamentarians established a Parliamentary Network on Transparency in 2014 to use EITI to improve transparency and public understanding of the management of natural resources. This is apt given the social tensions around community relations, sub-national revenue transfers, and environmental protection.

31 EITI, 'Assessing Implementation of EITI ' s Beneficial Ownership Requirement' (2019).

32 EITI, 'Countries - Implementation Status'.

Sierra Leone's latest EITI report covers the mining and the oil and gas sectors in Sierra Leone as well as registers of licenses; exploration, production and exports; BO; contract transparency; state participation in the extractive sector; revenue collection and allocation; and social and economic spending.

Double Taxation Agreements

Double Taxation Agreements (DTAs) are international agreements concluded between two jurisdictions to allocate taxing rights between them to prevent double taxation on the same income of a resident. Within these DTAs, BO provisions may be included as anti-abuse or anti-avoidance measures to prevent treaty shopping or treaty abuse by ensuring that it is the beneficial or real owner who benefits from the relief instead of someone merely passing the income on to another entity and for another entity. As the principle of BO existed in DTAs before it did in many domestic laws in African countries, DTAs are significant frameworks for promoting BO, albeit the contention as to how BO should be interpreted outside of DTAs. The OECD Commentary gives direction on this, stating that the right to benefit from a treaty may be denied from the alleged beneficial owner if; 1) there is a legal obligation to transfer the proceeds or if 2) there is a relation of interdependence between the recipient and the transferor.

African countries generally follow the OECD Model Tax Convention on Income and on Capital (OECD Model) or the UN Model Double Taxation Convention between Developed and Developing Countries (UN Model).[33] The main difference between the models being that the UN Model preserves a greater share of taxing rights for the source country (or the country where investment takes place).

DTAs have often been promoted to attract foreign direct investment (FDI), despite the scant evidence of them generating FDI. On the contrary, there is evidence of them causing significant revenue losses. In a study attempting to correlate DTAs with FDI in Uganda, for example, Hearson makes the conclusion, that the only treaty for which there is evidence of a significant impact on investment into Uganda is the Dutch treaty, which actually has had the converse effect of encouraging treaty shopping rather than promoting FDI.[34] This brings to bear the importance of strong BO provisions in DTAs.

Policy Advocacy

Over the years, several CSOs have been on the frontline insisting on the need for enhanced transparency, as a means to reduce corruption, tax evasion and money laundering, among others. CSOs such as the Tax Justice Network (TJN), Global Financial Integrity (GFI), Transparency International (TI), Open Ownership (OO), the OGP, as well as groups focusing on the extractive sector have called on the importance of ensuring BO information is publicly available. For example, Open Ownership, a CSO exclusively focused on BO, has developed principles for an effective BO disclosure. These include, among others, consideration on the definition of BO, the quality of the data collected, the way in which they are collected and schematized, data verification and updating, enforcement, and sanctions. TJN has been publishing the Financial Secrecy Index (FSI), a ranking for countries based on their secrecy and the scale of their offshore financial

33 AW Oguttu, 'Tax Base Erosion and Profit Shifting in Africa Part 2: A Critique of Some Priority OECD Actions from an African Perspective' (2017).

34 A Review of Uganda's Tax Treaties and Recommendations for Action, Martin Hearson and JaliaKangave ICTD Working Paper 50, March 2016, © Institute of Development Studies 2016

activities.[35] Open Corporates publishes the Open Company Data Index, a ranking of the availability of company registration information globally.[36] BO is also included in the mandate of the UN Financial Accountability, Transparency and Integrity (FACTI) panel, to research about the current mechanism and good practices related to BO transparency.[37]

TJN has been advocating that for public registries, even if exchanged automatically, the information should be publicly available; that central registries are made to ensure access by authorities that need the data, but also by regulated entities (e.g., banks) and the society at large. In particular, the FATF approach is criticized as it misses the point on the need for public registries. As illustrated above, the FATF and the OECD's Global Forum demand to implement countries to choose at least one of the three approaches to grant timely access to accurate BO information.[38]

Knobel et al, insist the core problem the FATF misses is that the three approaches were never on an equal footing, as the company approach is a pre-requisite for the other two. The FATF should indicate the regime to be adopted by implementing countries. However, this regime should conceive the three approaches as successive building blocks. If the company approach is a pre-requisite for other procedures it is because the company is in the best position to identify its beneficial owners.

TJN advances that the FATF should not leave to the discretion of the various countries the approach to use, nor is the Multi-pronged approach considered as the most effective option. Instead, it is vital to require the Registry approach as the central part of the plan, and as the primary source of BO data for authorities. Nevertheless, the company approach, which is a pre-requisite, should be incorporated in the Registry approach. Also, the Existing Information Approach (EIA) would improve the system. The EIA is of great value as it comprehends and covers a vast array of actors (e.g., banks, lawyers, tax authorities, real estate registries). The problem in relying exclusively on this kind of approach is that it counts only on information already existing.

Putting the Registry Approach at the centre, means assuming that authorities will have information on all companies. If, on the one hand, the mere existence of a registry does not provide for the verification of the information, it is possible to require the registry to adopt given verification procedures, and the EIA can be used to cross-check any existing discrepancy among data.[39] The EIA should be used to complement and verify already available data, and involved parties should be obliged to report any difference they may find with the Registries.

In short, upgrading the existing Registries that countries have (which contains necessary information such as Company name and address) could be a very efficient way to ensure access to BO.[40] The graph below illustrates the ideal

35 OpenCorporates, 'Open Company Data Index' <http://registries.opencorporates.com/>.

36 ibid.

37 FACTI, 'FACTI PANEL INTERIM REPORT' <https://www.factipanel.org/>

38 Andres Knobel, Markus Meinzer and Moran Harari, 'FATF Beneficial Ownership Report Reveals Cutting-Edge Verification Processes, Hesitates to Endorse Public Registries' <https://www.taxjustice.net/2019/11/27/fatf-beneficial-ownership-report-reveals-cutting-edge-verification-processes-hesitates-to-endorse-public-registries/> accessed 29 April 2020.

39 ibid.

40 ibid.

approach.

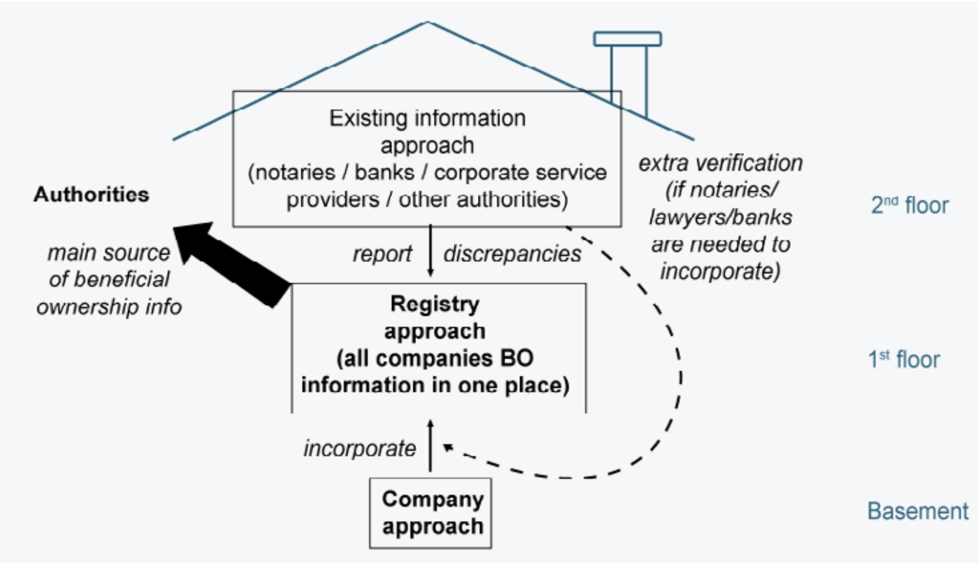


Figure 6:[41] Suggested approach to collect BO Information

The role of financial intermediaries

Scandals such as the Panama Papers have made evident to the world that financial intermediaries such as lawyers and banks use their influence and expertise to exploit loopholes to conceal illegal activities.[42] Shell companies, although not illegal by definition, are often used are legal vehicles to commit a vast array of crimes.

Lawyers

Panamanian law firm Mossack Fonseca was revealed by the Panama Papers to have been acting as a gatekeeper and hiding ethical and legal wrongdoing carried out by their clients, among whom happened to be 'crooks, members of the Mafia, drug dealers, corrupt politicians, and tax evaders.'[43] After the scandal exploded, and the subsequent investigation started, Mossack and Fonseca denied any wrongdoing, as they claimed their activity was proving legal service, as they could not be aware of the purpose to which legal vehicles they created were used for. During an interview, they claimed 'the company is no more culpable than an automobile factory that built a car later used in a robbery.'[44]

The legal profession has a duty to both uphold and safeguard the spirit and the letter of the law. As a result of being legally knowledgeable or learned, the profession is held to higher standards and is called to act in the public service.

41 ibid.

42 Bruce Zagaris, 'The International Financial Regulation and Enforcement Regime : Implications for Financial Intermediaries' (2017).

43 M Hamilton, 'Panamanian Law Firm Is Gatekeeper To Vast Flow of Murky Offshore Secrets.' (OCCRP, 2016) 1 <https://www.occrp.org/en/panamapapers/mossack-fonseca/> accessed 7 August 2020.

44 ibid.

They play a key role in developing, interpreting and protecting rules, and because of the complex nature of taxation and global finance, are called upon to provide their services, which they should provide with these attributes in mind. Several key UN conventions provide the mandate for lawyers to tackle IFFs;[45]

- the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substance (1998), requires states to criminalise money laundering, to investigate, arrest and prosecute offenders domestically;
- the Convention against Transnational Organised Crime (2000), calls on states to criminalise all acts incidental to IFFs and 'other bodies susceptible to money laundering' including legal professionals to highlight their role as enablers of IFFs;
- the Convention against Corruption (2003), requires party states to cooperate in criminal matters, including IFFs and asset recovery, and to investigate issues pertaining to corruption; and
- the Convention for the Suppression of Financing of Terrorism (1999), requires states to criminalise financing terrorism and freeze and seize money intended to finance terrorist activities.

> Lawyers, therefore, should advise against and not take part in the creation of secretive trusts and shell companies and the development of contracts that provide for the use of secrecy jurisdictions and tax havens. The state and the professional associations regulating the legal profession should condemn the use of secrecy jurisdictions, aggressive tax planning, and non-compliant taxation behaviour by its members.[46]

Accountants

Accounting firms and in particular the global ones can be said to enable IFFs by claiming to have a duty to minimise tax liabilities of their clients, which is in conflict with their duty to the public and by having registered subsidiaries themselves in secrecy jurisdictions. To prevent their facilitating of IFFs, Accountants should not mix auditing with the provision of other services like corporate consulting or tax advice; they should respect their duty to the shareholder and other users of accounts by ensuring companies report their finances truthfully; and they should create ethical codes of conduct to prevent company directors from requiring unethical practice from them.[47]

Banks and Bankers

Cross-border money transfers happen, if not in cash, through accounting movements which are documented through the SWIFT messaging system. IFFs, therefore, must go through the international banking system and the patterns of SWIFT movements substantiate the story of capital flight. Megabanks or globally systemically important banks systemically facilitate IFFs. The Wolfsberg Group, for example, is comprised of the largest Western megabanks (including Japan) and are developing frameworks and guidance for financial crime risk management, from a banking perspective. Among the group's priorities for 2019 are 'reducing friction for the customer' and 'ensuring data privacy guarantees' from which we can

45 Francois J Godbout, Grace Mbogo and Dr Paradzai Garufu, 'Advocacy Manual for Lawyers ' Associations in the Global South'.

46 Richard Murphy and John Christensen, 'Tax Us If You Can' (2013).

47 ibid.

deduce that they intend to promote IFFs and bank secrecy.[48]

For banks to play their role in curbing IFFs, they should refrain from offering secrecy services; they should keep records of the company's beneficial owners; they should improve financial transparency and not influence governments to try to establish new secrecy jurisdictions; they should co-operate with regulators and judicial inquiries concerning their clients, placing the public rather than the client interest first as all banks operate with banking licences granted by the public.[49]

These concerns with financial intermediaries have prompted action and have contributed to the general concern for the need to regulate the activity of financial intermediaries on the international agenda. As a result, lawyers need to comply with international standards of AML and CFT enforcement, and gatekeepers and other wealth management professionals are now confronted with enhanced duties to monitor their client's activities. It follows that professionals who do not comply, or who fail to timely adjust to this dynamic area of practice, risk finding themselves in a position in which they have enforcement and criminal problems,[50] their increased duties to comply with international AML/CFT standards, do not exclude their obligations under their national ethical codes. In these regards, as each country has different rules, this can result in an asymmetry of standards between national and international AML and CFT laws.[51]

The Revenue Authorities

According to the OECD framework, a possible means of collecting and maintaining BO information is to establish a comprehensive requirement that all relevant legal persons and arrangements have an annual tax reporting obligation and provide timely updates of information. The benefits of creating a tax reporting requirement to capture BO are not only to ensure direct access to information, but it also enables the supervision of obliged entities and arrangements.[52] Also, using the FATF standard, a tax agency may also already collect some ownership information from the taxpayer during the registration process, the filing of a tax or information return, or some other procedure. Thus, tax reporting can be a useful process for acquiring BO information in the jurisdiction's framework, but it should be recognised that using tax reporting may not ensure that other competent authorities can access the information in a manner consistent with the FATF Standards.[53] An appropriate sanction is often present in the tax code or tax regulations for failure to provide information in timely fashion, or for providing misleading or false information are obliged to update National Legal Entity Registry to reflect any change regarding its registration data before the last working day of the month subsequent to occurrence.

48 Andres Arauz, 'Technical Module : The Role of Banking in Latin America as a Facilitator of Illicit Financial Flows'.

49 Murphy and Christensen (n 43)

50 Zagaris (n 39).

51 ibid.

52 Global Forum on Transparency and Exchange of Information for Tax Purposes (OECD) and Inter-American Development Bank (n 2).

53 FATF, 'International Standards on Combating Money Laundering and The Financing of Terrorism and Proliferation: The FATF Recommendations' <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF Recommendations 2012.pdf>.

Fifth Anti-Money Laundering (AML) Directive and Customer Due Diligence Rule (CDD)

In April 2018, the European Parliament adopted the Fifth Anti-Money Laundering (AML) Directive, which requires EU member states to keep and publish national registers containing BO information for certain kinds of legal entities. The European Commission has also sought to identify jurisdictions non-compliant with international AML/CFT standards. The assessment followed eight criteria (or building blocks). The last assessment was published on 18 February 2020.

In the US legal framework, the centrepiece of the US Financial Crimes Enforcement Network (FinCEN) response to concerns on BO transparency is its Customer Due Diligence Rule (CDD Rule), effective from May 2018. The law requires individual financial institutions (FIs) to establish procedures to identify and verify the beneficial owners of legal entities when opening new accounts. The rule covers individuals owning 25% of the entity (threshold). Moreover, the FinCEN has the power to issue Geographic Targeting Orders (GTOs) to demand additional requirements on domestic FIs and nonfinancial businesses in a particular geographic area.

De-risking

More elevated expectations in terms of risk management have entailed banks and financial institutions (FIs) undertaking de-risking - which is terminating or restricting of business relationships with clients or categories of clients to avoid rather than to manage risk. De-risking can take three forms: the termination of bank accounts for various individuals and firms or any other kind of restrictions on access to financial services; the limitation or withdrawal of banking services from Money Transfer Organizations (MTOs) and other remittances facilities; and the termination of Correspondent Banking Relationships (CBRs) which can entail the loss of access to the international payments system.[54]

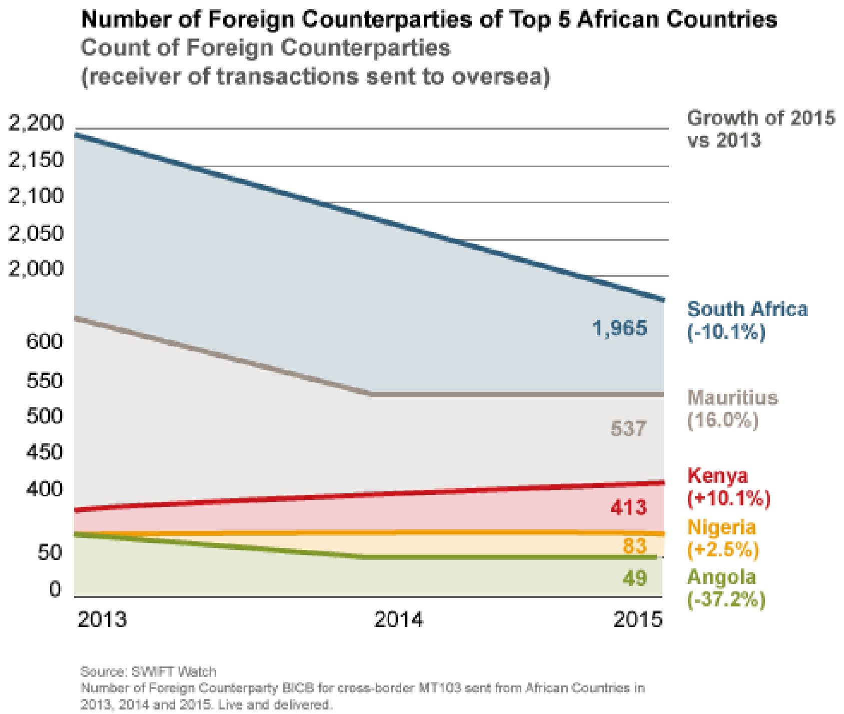
Regulation on anti-money laundering and counter-terrorist financing (AML/CFT) provides for severe sanctions in case of failure to comply with set standards. Penalties provided are severe and include criminal prosecutions and administrative penal sanctions attract harsh fines, loss of reputation, and independent monitors inspecting operations for one to three years. High standards for AML/CFT and efforts to enhance tax transparency have led European and US FIs to terminate CBRs with Indigenous banks worldwide, negatively affecting the Caribbean, Central America, and Africa.[55]

SWIFT data shows that in 2015, 75% of the large international banks surveyed had reported a decline in their CBRs. In Africa, there are significant though uneven levels of de-risking. The graph below shows Angola, South Africa and Mauritius experienced falls in the number of counterparties by about 37%, 10% and 16% respectively between 2013 and 2015 though Nigeria and Kenya have experienced increases.[56]

54 James A Haley, ‘De-Risking of Correspondent Banking Relationships: Threats, Challenges, and Opportunities’ [2018] Wilson Centre 1.

55 ibid.

56 SWIFT, ‘Addressing the Unintended Consequences of De-Risking - Focus on Africa’ (2016).



While derisking can be driven by legitimate objectives including those pursued by BO such as anti-money laundering, counter-terrorist financing and other regulatory measures, derisking may also be brought about by the cost of maintaining manifold CBRs. The cost of complying with AML/CFT standards has grown significantly over the past decade. Governance, risks, and compliance (GRC) costs are estimated to account for 15-20% of the operating expenses. Particularly onerous is the Suspicious Activity Report (SAR).

Strategies to manage risk involve calculating a transaction's size with relatively small yields and low margins but with high transaction volume, which then requires a more meticulous analysis of each transaction in applying the Know Your Customer's Customer (KYCC) doctrine, established by FATF. Any breach can, in fact, entail fines of a considerable amount.

There is a lack of uniformity in the sanctions regimes across countries. It follows that correspondent banks confront a great deal of uncertainty that contributes to the shift of banks toward businesses associated with lower risks as high risks businesses could, in fact, outweigh the possible rewards. To reduce de-risking, the cost of compliance must be worth the benefits.[57]

Customer Due Diligence (CDD) requirements are also perceived as highly burdensome because banks are required to verify BO information of legal entity's customers. Confronted with the risk of incurring fines, international banks providing Correspondent Banking Relationships (CBRs) tend to categorise respondent banks in a jurisdiction as a potential source of risk. In these regards, a further relevant aspect is the existence of bank secrecy laws, impeding international banks from complying with due diligence regulations, as their foreign respondent banks are prohibited by local laws to share information.

57 Zagaris (n 39).

Taking account of all these aspects, banks will make capital allocation decisions. From a business perspective, they will confront expected returns with potential costs (here included the risk of incurring into fines). This assessment put into severe disadvantage smaller jurisdictions and smaller markets.[58] For example, countries heavily reliant on trade can suffer from a drastic reduction in imports or exports due to the inability of bank customers to keep business relationships with foreign customers and suppliers. In general, a less efficient banking system indeed can be an obstacle to growth in various ways, for example, by deterring FDI from taking place. Also, the loss of MTOs produces a rise in costs for transferring money and adversely impacts poorer households.[59]

Developing countries at the periphery of the global economy suffer the loss of access to international banking operations. To them, de-risking represents a threat to growth and development. Although these jurisdictions with smaller markets bear the financial cost, de-risking also poses a danger to those economies at the core of the global financial system, given the peril that it represents in terms of development and security objectives.

International implications of de-risking and mitigation

Mitigating de-risking is in the interest of both affected jurisdictions and the international community and needs a shared response. Affected jurisdictions have the most to lose, and therefore should implement policy-making arrangements tailored to the need to address the issue of de-risking. In this regard, the importance of collaboration and coordinating policy responses among each other is essential. Jurisdictions suffering the consequences of de-risking should align to AML/CFT, also through the employment of state of the art data utilities as tools to determine BO and information-sharing practices.[60] Key challenges under this profile are that the small size and fragmented nature of these banking markets may pose a barrier to the investments in information processing technology that are needed for a reason cited above. At the same time, a profusion of different national regulations increases the costs of compliance.

As mentioned above, a generalized uncertainty surrounding AML/CFT regulations represents a problem for FIs that have to comply with them. In these regards, the FATF has provided guidance to clarify its code in 2016[61] and 2017.[62] The Reports calls FIs to manage rather than avoid the risk associated with these business relationships, by providing greater certainty on the FATF Recommendations and on the legal framework in which FIs are operating so that they can perform an efficient spending in terms of compliance, avoiding to waste resources unnecessarily, as this will, in turn, help to cut costs of compliance.[63]

In general, the challenge the international community confronts is threefold: it must reduce cost compliance while maintaining the objectives contained in the AML/CFT regulations and should lessen to the maximum extent possible the consequences

58 Haley (n 51).

59 ibid.

60 James A Haley, 'De-Risking Effects, Drivers and Mitigation' [2017] CIGI Papers <https://www.cigionline.org/sites/default/files/documents/Paper no.137web.pdf>.

61 FATF, 'Correspondent Banking Services' (2016) <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-Correspondent-Banking-Services.pdf>.

62 FATF, 'Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion. With a Supplement on Customer Due Diligence' (2017).

63 FATF, 'Correspondent Banking Services' (n 57).

of de-risking.

Apart from clarifying regulation requirements, efforts should be directed toward reducing the obstacles to the sharing of information between FIs and promoting the use of Know Your Customers (KYC) utilities. Haley suggests the need to employ a more efficient way of collecting and monitoring data on BO, and the use of the 'legal entity identifier,' through a utility that would support the sharing and analysis of bulk data. This kind of action must, of course, respect all due privacy concerns.[64] In this regard, 'multilateral response to the challenges of facilitating the sharing and analysis of information through new utilities,' should be elaborated jointly by IFIs (such as the WB and regional development banks) and actors operating at the national level (such as governments and banks.')[65]

De-risking is a shared concern, as it promotes illicit transfer by forcing genuine transactions into informal avenues. From the above conversation, it emerges that there is a wide range of stakeholders in charge of responding to de-risking both at the domestic and international levels. On the one hand, relevant authorities in the affected jurisdiction must build the technical capacity to comply with AML/CFT standards. On the other hand, the international community can play a role in promoting the knowledge transfer needed to create the conditions for this to happen, such as providing regional technical assistance programs.

The IMF has recognised its role in the promotion of financial inclusion and in ensuring financial stability. It had been monitoring the impact of the withdrawal of CBRs, fostering a shared understanding of the complexity of this phenomenon, and helping develop possible policy responses. The IMF has called for the need to inform an international debate that acknowledges and better understands the entanglement of the issues related to the withdrawal of CBRs and to evolve new policy responses.[66] The paper expresses the IMF's commitment to continuing to gather data to analyse this issue further. In the case of Africa (MENA Region and Sub-Saharian Africa), studies on drivers and impact of de-risking have been carried out by the IMF in collaboration, respectively, with the Arab Monetary Fund and the Association of African Central Banks. National authorities are supported to progress their data collection, as a robust database is considered to be necessary to understand this issue better.[67]

The IMF has discussed the withdrawal of CBRs in the context of the Financial Sector Assessment (FSAP) Program on financial stability. In the framework of the FSAP, the IMF Technical Assistance program helps countries strengthen regulatory and supervisory frameworks, including AML/CFT related. The IMF is committed to continuing to collect evidence on instances of CBRs withdrawal, as a way to progress its investigation onto the causes and impact of CBRs.

While operating under the FSAP in 1999, the IMF, in the case of developing countries, cooperates with the WB, assists domestic governments in determining vulnerabilities in their financial systems and the causes of systemic risk. The collaboration of the IMF and WB aims to support developing economies to

64 Haley (n 56).

65 ibid.

66 Michaela Erbenová and others, 'The Withdrawal of Correspondent Banking Relationships: A Case for Policy Action The Withdrawal of Correspondent Banking Relationships: A Case for Policy Action' <http://www.imf.org/external/pubs/ft/sdn/2016/sdn1606.pdf>.

67 ibid.

establish a regulatory and supervisory framework that also covers AML/CFT.[68]

In general, to stem de-risking an active cooperation at the international level, and efficient co-ordination of the authorities of affected jurisdictions seem an essential point of departure for any action. The wholesale cutting loss of entire classes of customers that do not take into adequate account the consequences that risk mitigation measures have for individual customers within a particular sector is, in fact, not in line with the international standards. Measures should be commensurate to mitigate the negative consequences.

The FATF holds that a risk-based approach (RBA) should be the cornerstone of an effective AML/CFT system and is essential to properly managing risks. The RBA does not translate into a 'zero failure' policy and leaves a great deal of discretion to FIs. It follows that not all FIs must adopt the same measure, which opens the possibility of isolated incidents, and this does not invalidate the integrity of the FI in question.

In general, the collection of further evidence and a more in-depth analysis of the drivers and scale of de-risking is needed to provide support for the implementation of a case-by-case approach. This is important because, if on the one hand a wholesale approach risks to push legitimate transactions into informal channels, on the other hand, the FATF, in line with its mandate, must ensure that the global AML/CFT standard is well understood and implemented in a financially inclusive manner.

In 2014 the FATF published a report to provide guidance to the banking sector to promote the adoption of a RBA. Adopting a RBA means assessing and understanding the ML/TF risks and adopting commensurate measures in order to mitigate them effectively. Competent authorities are expected to identify, assess, and understand the ML/TF risks to which they are exposed and prevent them by taking correspondent AML/CFT measures tailored to the client. Adopting RBA does not exclude the possibility of failure, and it can be the case that a FI takes all reasonable measures to identify and mitigate AML/CFT risks, but is still used as a vehicle for ML or TF activities.

Access to accurate and timely information is a prerequisite for the implementation of an effective RBA. Competent authorities or banks should assess ML/TF risks and threats and analyze how these would impact them. Through a thorough analysis of the information obtained, these FIs can assess the likelihood of these risks occurring and the impact that these would have.

68 ibid.

Conclusions and Recommendations

This study has considered several policy frameworks and initiatives influencing BO and its objectives in Africa, outlining the various thrusts, progresses, limitations and opportunities for the development of BO in Africa and examining the work and role of FATF and the Global Forum, Exchange of Information, the Open Government Partnership, the Extractives Industry Transparency Initiative, BO as anti-abuse measures in DTAs and the threat of derisking. Its objectives were to understand and present the existing policy space for BO in Africa to enable stakeholders advocating for BO to better do so. .

This study recommends the following to African governments:

1. To implement all three FATF approaches for BO beginning with the Company Approach (requiring companies to obtain or take reasonable measures to secure and hold up-to-date information on the companies' BO) as a prerequisite for the second third approaches; the Registry Approach (requiring companies to keep registries that must contain up-to-date information on the companies' BO) and finally the Existing Information Approach (involving the use of existing information, such as a) the information obtained by FIs and DNFBPs, under R.10 and 22. b) Information held by other competent authorities on the Legal and Beneficial Ownership of companies; c) information held by the company as required; d) available information on companies listed on a stock exchange, where disclosure requirements ensure adequate transparency of BO).
2. Support AML/CFT efforts including addressing deficiencies related to risk assessment and creating procedures to ensure that companies cooperate with authorities in the determination of the beneficial owner (R. 24).
3. To go beyond the FATF recommendations on BO, including requiring BO from all legal arrangements, including trusts and private foundations, not just legal vehicles such as companies and to make BO information up-to-date, verified and verifiable by making it publicly available, accessible and adequate for BO's purposes (including disallowing bearer shares and nominees), enforced through sanctions.
4. To take advantage of EOI by engaging with the Global Forum on Transparency and Exchange of Information for Tax Purposes by becoming members and contributing to its working groups and making EOI requests and through the Africa Initiative to benefit from technical assistance in order to be able to use increased transparency to identify income and assets on which tax is evaded.
5. To join the OGP and/or the EITI as relevant to take full advantage of Africa's resources for its own development and to abide by these commitments to realise meaningful progress in implementing these transparency standards.
6. To ensure the inclusion and use of anti-abuse provisions in DTAs, including BO provisions to prevent capital flight through treaty shopping.
7. To support financial intermediaries in their roles to promote BO including providing more direction to professional bodies such as lawyers, bankers and accounting associations on their duties to the public.
8. To participate in the regulation of derisking by disabling local bank secrecy laws, investing in data monitoring including through BO registers, promoting the sharing of information between FIs and enforcing the implementation of KYC rules.

This study concludes that these initiatives have in various degrees, with the support of different actors, contributed to curbing capital flight and IFFs over the past two decades. It recommends further research into the causes of IFFs, the push and pull factors, the actors driving illicit flows at the national and global level, and how BO can be used to prevent it.[69] In these regards, the role of the tax justice movement and its researchers is critical, as it calls for influencing partners internationally and regionally. Therefore, a reflection on partnership strategies is also important.

69 Léonce Ndikumana and James K. Boyce (n 6).

The State of BO in Select Countries in Africa

The following provides a focus on the state of play of BO legislation at the domestic level by considering a series of parameters relevant for BO disclosure. The aim is to track the progress made in each of the seven countries scrutinised and to individuate strengths and challenges.

In Ghana, Nigeria , Kenya, and Egypt BO is provided for in their respective acts related to companies regulation. In Uganda, it is proposed within their Income Tax (Amendment) Bill 2019, in South Africa, it is within their Financial Intelligence Centre (Amendment) Bill and in Tanzania it is in some way captured as a result of their membership to EITI. Nigeria has a register that captures BO in the extractives sector as a member of EITI, and Uganda has also recently joined EITI. Tunisia, Botswana, Seychelles and Mauritius have recently enacted companies regulations providing for BO, but little is known about these provisions as yet.

Annex I
Country specific information

1. GHANA
2. KENYA
3. NIGERIA
4. SOUTH AFRICA
5. TANZANIA
6. UGANDA
7. EGYPT

1. GHANA

Which forms of company registration are available?

a. Companies Limited by shares.

b. Companies Limited by guarantee.

c. Companies with unlimited liability.

d. External Company.

e. Sole Proprietorship

What are the laws that govern these companies in terms of BO?

The Companies Act, 2019, (Act 992) amended the Companies Act of 1963, paving the way for the implementation of a BO disclosure regime in Ghana.

in addition to the amended Companies law that outlined BO registration, the L.I 2359 (Exploration and Production. Oil and Gas), made specific provision for BO registration as part of a broader Contracts Register.

Definition

The Companies Act, 2019, (Act 992) introduced the definition of BO. Ghana's definition of beneficial owners is considered highly satisfactory and in line with the standards recognized by Transparency International.

The Companies Act of Ghana defines a beneficial owner an individual (natural person)

a) who directly or indirectly ultimately owns or exercises substantial control over a person or company.

b) who has a substantial economic interest in or receives substantial economic benefits from a company whether acting alone or together with other persons.

c) on whose behalf a transaction is conducted.) Who exercises significant control or influence over a legal person or legal arrangement through a formal or informal agreement.[70]

Registers/

Requirement to provide BO and threshold

The Companies (Amendment) Act 2016 introduced the definition of BO, a requirement for companies to keep a registry of beneficial owners, and the duty to lodge a copy of it with the Registrar of Companies. The Central Registry will include the current company registry complemented with BO information.

According to Transparency International, collection, recording, and maintaining of BO information regulation in Ghana is satisfactory. Ghana's law requires legal persons to keep BO information onshore. The information provided must be adequate, accurate, and current. Also, legal entities must maintain a registry of

70 Laws of Ghana, Companies Act 2019 (Act 992) 2019.

their members, containing information on their owners and beneficial owners.

Which BO information is required?

Information relates to the member's name, address, the number of shares held, consideration for the shares, date at which a person ceased to be a member, date on which the person entered in the registry as a member. Meanwhile, legal entities are obliged to request information from shareholders, and such shareholders are required to provide information on the personal details of BO of the shares they hold where they are not the beneficial owners of such shares.[71]

In respect of each beneficial owner of a company, the following particulars are required:[72]

(i) the full name and any former or other name of the beneficial owner; (ii) the date and place of birth; (iii) the telephone number; (iv) the nationality, national identity number, passport number or other appropriate identification, and proof of identity; (v) residential, postal and email address, if any; (vi) place of work and position held; (vii) the nature of the interest including the details of the legal, financial, security, debenture or informal arrangement giving rise to the beneficial ownership; and (viii) a confirmation as to whether the beneficial owner is a politically exposed person.

Access

In the area of access and verification of BO information, there are few shortcomings. The Registrar is not required by law to verify BO information or other relevant information against independent and reliable sources.An important issue concerns how the Central Registry will be regulated; it is not clear if it will be published online and made accessible to anyone. Whereas the government commitment is promising, these have not been translated into legislation yet.[73]

The contract Register regulated under the L.I 2359 (Exploration and Production. Oil and Gas), should be published on the website and be made available to the public. They are published on the Petroleum Commission's website as well as by the African Centre for Energy Policy and the Public Interest Accountability Committee.

How often are the registers updated?

Companies have to update BO information within 28 days after they are informed about any change (or anytime one does his company filings), which period is considered too long for the Transparency Information standards.[74] According to Act 992 Section 35 (6), 'A company shall, within 28 days of making entry required under paragraph (b) of subsection (1) and subsection (5) submit particulars of the entry to the Registry for registration and indicate the member or beneficial owners who are politically exposed person'. 35(9)' An existing company shall, within 28 days of a change in the place at which the register of members is kept, send notice of the change to the Registrar'. Section 126(1), 'A company shall, at least once in every year, deliver to the Registrar for registration an annual return including particulars of every member of the company, and every beneficial owner

71 Ghana Integrity Initiative - Local Chapter of Transparency International, 'Beneficial Owner Disclosure, Assessment of Ghana's Legal Framework' (2017).

72 Laws of Ghana Companies Act 2019 (Act 992) (n 69).

73 Ghana Integrity Initiative - Local Chapter of Transparency International (n 70).

74 ibid.

of that company and in the form and relating to the matters prescribed in the Fifth Schedule.'

Sanctions and exceptions

In case a legal entity fails to give correct information on BO, the Companies Act provides sanctions. These are sanction of a fine of not less than 150 penalty units (approximately USD 420) (each penalty unit is about USD 3) or a term of imprisonment of not less than a year and not more than two years or both.

Sanctions are provided in case a company does not comply with the requirements. The company, and every officer who is in default, is liable to pay a fine to the Registrar. The administrative penalty is of 25 penalty units (about $ 75) for each day during which the default continues.[75]

Also, according to Section 17 (1) of the Companies Act 2019, 'where there is an error or omission in a document containing particulars delivered to the Registrar under section 13, the company and every signatory of the document is without limiting section 346, liable to pay to the Registrar an administrative penalty of one hundred and fifty penalty units."

Loopholes

According to Transparency International, there is 'room for improvement in the area of BO information of trusts. Accountable institutions are not required to hold information on all parties to the trust. The country also lacks a registry that would collect information, including BO information on trusts.

Transparency International also recommends adopting legislation on access to BO information. In particular, Ghana's government shall clarify the meaning of 'timely manner' for the Companies Act, and to mandate the Registrar to verify the BO information or other relevant information and to define rules for such verification.[76]

75 ibid.

76 ibid.

2. KENYA

Which forms of company registration are available?

a. Registered Companies (private and public);

b. Branch office of a foreign-registered company;

c. Partnership;

d. Limited Liability Partnership;

e. Sole proprietorships;

f. Societies.

What are the laws that govern these companies in terms of BO?

Kenyan Companies Act of 2015. Later amended (2017). When the Companies Act No. 17 of 2015 (Companies Act) came into force in 2015, none of the provisions in the original text provided for disclosure of beneficial owners in Kenyan companies. In an attempt to promote transparency in ownership of companies and to comply with international standards on transparency, Section 93 of the Companies Act was amended in 2017 to require a company to disclose information relating to beneficial owners of shares recorded in its registry of members. The latest development in terms of BO legislation has been the introduction of the Companies Act (BO information) Regulations, 2020, published in February 2020.[77]

Definition

Transparency International assessed the Kenyan definition of beneficial owners with a top score (100%). The Companies (Amendment) Act of 2017 defines a beneficial owner 'a natural person who ultimately owns or controls a legal person or arrangements, or the natural person on whose behalf a transaction is conducted, and includes those persons who exercise ultimate effective control over a legal person or arrangement.' The Companies (BO information) Regulations Act, 2020 defines the term 'arrangement' as 'an artificial entity, without legal personality, associating one or more natural or legal persons together in an ownership or control relationship, but without implying that the parties to this arrangement have any other form of collective legal identity'.[78] The Regulations, therefore, extend to direct and indirect ownership.

Transparency International considers high scoring jurisdiction, these jurisdictions that include in the definition of BO the natural persons who control a legal entity or arrangement through other means in addition to legal ownership.[79]

77 Laws of Kenya, Companies Act (Beneficial Ownership Information) Regulations 2020.

78 ibid.

79 Transparency International Kenya, 'Towards Beneficial Ownership Transparency in Kenya: An Assessment of the Legal Framework' (2017).

Registrers/

Requirement to provide BO and threshold

The Companies Act (BO Information) Regulations 2020 provide a threshold for disclosure. Namely, individuals 'who directly or indirectly hold at least 10 percent' of shares issued by a company or 10 percent of its voting rights, as well as those individuals who have the power to appoint or remove a director, or who exercise significant influence or control over a company' are required to notify their particulars. This latter threshold has a discretional nature and needs to be considered on a case by case basis.

Which BO information is required?

It is mandatory for all Kenyan Companies, both public and private, to keep a Registry of their members, which shall include information relating to beneficial owners of the company. The entry must consist of the name and address of the beneficial owners. Also, shareholders are required to declare any information on BO they have. However, Section 104 of the Companies Act states that 'a company shall not accept, and shall not enter in its registry of members, a notice of any trust, expressed, implied or constructive.' This, has been addressed by the new legislation on Companies Act (BO information) Regulations 2020, which addresses trusts and other legal arrangements. This is explained under the voice ' definition' of this chapter.

Access

There are three sources where BO information is available. A) the Registry of members held by the companies, B) the Registry of companies, and C) customer and transaction information kept by FIs and DFNBPs.

The former (A), in the case, is a public company, the registry is open for any person on payment of a fee. The company may require the person seeking access to the information to declare his/her name, the purpose for which information is needed, and if the person is going to share accessed data with third parties. The company can accept or deny the request within the next five working days. Register of members of private companies is not open for inspection.

As a rule, Registries of Companies (B) are accessible to the public. However, the law provides some exceptions; these are listed in Sections 852 to 855 of the Companies Act. Information on companies incorporated in Kenya is available online through the e-citizens portal.

(C) under Kenyan Law (See POCAMLA Act), FIs and DFNBPs must keep 'customer records' referring to transactions. These records must include, name, physical, and postal address of the persons conducting the operations or on whose behalf the transaction is done. These registries must be available for the competent authorities.[80]

How often are the registers updated?

The company must communicate any amendment concerning its registry of members within 14 days from when it occurs. Therefore, shareholders are required

80 ibid.

to inform the company of any change in BO.[81]

Sanctions and exemptions

Failure to update the registry of members of the company is an offense and attracts a fine of up to Ksh 500,000. Also, failure to provide an update on the change of directors is an offence and attracts a penalty of maximum Ksh 200,000 for the company.[82] According to the Companies Act (BO information) Regulation 2020, the company must identify its beneficial owners by sending a notice to a person whom it believes is the beneficial owner, requiring him to provide his particulars. The person is allowed 21 days to provide it. In case there is no reply within this timeframe, the company will proceed to issue a 'warning notice.' If the person does not respond to the warning notice in 24 days, the company will restrict his shares, voting rights, or the right to appoint or remove a board member of the person.[83]

Loopholes

Section 104 of the Companies Act states that 'a company shall not accept, and shall not enter in its registry of members, a notice of any trust, expressed, implied or constructive.' This contradicts the requirements of disclosure on BO in the registries. The office of the Companies Registrar has communicated to Transparency International Kenya that the failure to repeal Section 104 has been neglected and is going to be addressed in due course.[84] The issue of Trust has been addressed by the new Companies Act (BO Information) Regulations 2020. It is, to date, to soon to evaluate the impact of legislation introduced and individuate possible loopholes. Besides, a problem is constituted by the fact that Kenya allows Bearer Shares.

81 Laws of Kenya Companies Act (Beneficial Ownership Information) Regulations (n 76).

82 Transparency International Kenya (n 78).

83 Laws of Kenya Companies Act (Beneficial Ownership Information) Regulations (n 76).

84 Transparency International Kenya (n 78).

3. NIGERIA

Which forms of company registration are available?

a. Limited Liability Companies,

b. Incorporated Trustees,

c. Company Limited by Guarantee,

d. Registered Business Names.

e. Limited Partnerships

f. Limited Liability Partnerships.[85]

What are the laws that govern these companies in terms of BO?

The law that regulates company formation in Nigeria Is the Companies and Allied Matters Act (CAMA) of 2004, subsequently amended in 2018 when the Nigerian Senate passed the Companies and Allied Matters Act Repeal and Re-enactment Bill. On 7th, President Buhari signed the Amended Companies and Allied Matters Bill, 2020

The amendment made provisions for the implementation of Nigeria's BO commitments, and it takes into consideration the remarks made by the FATF, Transparency International, and other advocates. As a result, the introduction of the BO in Nigeria is hinged on the amendments of the CAMA. The new version of the CAMA represents a very welcome and successful attempt to address the issue of transparency on BO and brings Nigeria at the forefront of African countries setting high transparency standards, and among others, also prohibits bearer shares.

Definition

The National Stakeholders Working Group (NSWG) of the Nigeria Extractive Industries Transparency Initiative (NEITI) adopted the Extractive Industries Transparency Initiative (EITI) definition of BO, which gives the following definition of BO:

i. A beneficial owner in respect of a company means the natural person(s) who directly or indirectly ultimately owns or controls the corporate entity.

ii. The multi-stakeholder group should agree on an appropriate definition of the term beneficial owner. The definition should be aligned withinternational norms and relevant national laws and should include an ownership threshold(s). The definition should also specify reporting obligations for politically exposed persons.

iii. Publicly listed companies, including wholly-owned subsidiaries, are required to disclose the name of the stock exchange and include a link to the stock exchange filings where they are listed.

iv. In the case of joint ventures, each entity within the venture should disclose its beneficial owner(s), unless it is publicly listed or is a wholly-owned subsidiary

85 Limited Partnerships and Limited Liability Partnerships, are forms of entity recently introduced in Nigeria's Company Law through the Companies and Allied Matters Bill, 2020.

of a publicly listed company. Each entity is responsible for the accuracy of the information provided

Registers /

Requirement to provide BO and threshold

At the Anti-Corruption Summit hosted by the UK in 2016, the Nigerian government expressed its commitment to join OGP. As a consequence, it sets up a national public registry of BO. The government has communicated that the body appointed to keep the registry is the Corporate Affairs Commission (CAC), which is pursuing efforts for a sectoral action plan on BO through the EITI process by December 2019. According to the EITI, Nigeria has made satisfactory progress in implementing the 2016 standards. (https://eiti.org/countries).

On the 7th August, with the signature of the CAMA, 2020 Nigeria has introduced registries of beneficial owners and has established that the commission shall maintain a register of persons with significant control. The threshold for disclosure is set at 5%.

Which BO information is required?

The new law requires the disclosure of the particulars of every person with significant control of companies. Noticeably, also trusts are adequately addressed.

Access

The Company Registry is available online at www.cac.gov.ng

In general, the following information is publicly available online (free or for a nominal fee, with no log-in requirements): Name of Legal Entity, Entity Number (If any), Type of Legal Entity, Date of Incorporation, Principal Address of Business.

The following information is not publicly available online, but is available upon specific request and payment of the necessary fees: Current Status (e.g., active), Principal Purpose of Business, Registered Capital, Registered Agent Information, Officer/Director Information (incl. power of representation), Shareholder/ Member Information, Memorandum, Articles of Incorporation, Application/Certificate of Formation, Annual/Biennial Reports, Shareholder Register, Register of Charges, Historical Documents (example: past annual filings).

The following information is not available online or through another form of public access, but access can be possible to law enforcement, through specific procedures.[86] To date there is no possibility to access BO information, let alone using an online platform.[87]

How often are the registers updated?

The CAMA 2020 provides that every person with significant control shall, within seven days of becoming such a person indicate to the company in writing the particulars of such control. After receiving this information, the company can take

86 Global Forum on Asset Recovery (GFAR), 'Guide to Beneficial Ownership Information: Legal Entities and Legal Arrangements - Nigeria'.

87 Rachel Etter-Phoya, Eva Danzi and Riva Jalipa, 'Beneficial Ownership Transparency in Africa: The State of Play in 2020' [2020] SSRN Electronic Journal.

up to one month to notify it to the Commission.

Sanctions and exceptions

The penalties provided in case of failure to comply depends on the kind of information and are mostly fines. Section 119 (5) of the CAMA, 2020 provides that if the default is made by any person or company in complying with the law, the person or company is liable to such fines as the commission may prescribe by regulation for every day the default continues.

Loopholes

According to the OGP, In Nigeria, often names cited as beneficial owners are not the real owners, and Nigerian legislation lacks a mechanism to verify the accuracy of the information provided, nor are there sanctions for falsifying information.[88] However, the introduction of the new CAMA 2020 has introduced measures on BO that, if adequately implemented, will address this problem. Once implemented, we will be able to identify any possible loopholes.

88 Open Government Partnership, ‘Global Report’ (2019).

4. SOUTH AFRICA

Which forms of company are available?

The Companies Act 71 of 2008, as amended by Act 3 of 2011, governs the formation of companies in SA.

Type of legal entities:

a. Private Company (Pty) Ltd

b. Public Company Ltd

c. State-owned Companies (SOC)

d. Personal Liability Companies (INC)

e. Non-Profit Companies (NPC)

What are the laws that govern these companies in terms of BO?

In SA, the Financial Intelligence Centre Amendment Bill B33D - 2015[89] amended the previous Financial Intelligence Centre Act, 2001. On 26 April 2017, the President of SA signed the Bill into Law, which became effective on the 2 October 2017. The amendment intended to 'define or further define certain expressions (…) to provide for the strengthening of CDD measures including with respect to BO and persons in prominent positions.'[90] The amendments aimed to align South African Law with international best practices and standards. The Bill draws from the FATF Recommendation. In general, however, South African law does not require the recording on BO information.[91]

Definition

The FIC (Act) of 2017 introduces a definition of 'beneficial owner' in South African Law. According to the Bill, the term 'beneficial owner' refers to any 'natural person who, independently or together with another person, directly or indirectly owns the legal person, or exercises effective control of the authorized person.'[92] This definition, does not provide for a threshold. Ideally the law should not include a minimum threshold and require that all owners or parties to a trust or foundation (whether domestic or foreign) to register.[93]

Registers/

Requirement to provide BO and threshold

SA legislation does not require BO registration. SA has not established a public BO registry so far.

89 Laws of South Africa, Financial Intelligence Centre Amendment Bill B33D 2015.

90 ibid.

91 Etter-Phoya, Danzi and Jalipa (n 96).

92 Laws of South Africa, Financial Intelligence Centre Amendment Act (Act No.1 of 2017) 2017.

93 Etter-Phoya, Danzi and Jalipa (n 96).

Which BO information is required?

The law does not require BO information to be collected for any legal entity.

Access

The Registry in SA Is the Companies and Intellectual Property Commission, and it is available online at www.cipc.co.za

In general, the following information is not available online. Still, it may be available through another form of public access (i.e., in-person only or via a pre-registration requirement) or to law enforcement, through specific procedures listed in further detail below: Name of Legal Entity, Entity Number (if any), Type of Legal Entity, Date of Incorporation, Current Status (active, etc.), Principal Address of Business, Principal Purpose of Business, Registered Capital, Registered Agent Information, Memorandum, Articles of Incorporation, Application/Certification of Formation, Historical Document.[94]

How often are the registers updated?

Legal persons must notify any change in the information provided at the time of registration within 14 days.

Sanctions and exceptions

There are no sanctions provided for failure to comply with registry requirements for companies and trusts nor enforcement powers to guarantee that the data recorded in the registers incorrect.[95]

Loopholes

The SA law does not require the registration of BO information. SA also allows for Bearer Shares.

94 G-20 Anti-Corruption Working Group, 'Guide to Beneficial Ownership Information: Legal Entities and Legal Arrangements' (2018).

95 ibid.

5. TANZANIA

Which forms of company registration are available?

a. Private Companies.

b. Public Companies.

c. Foreign Branch.

d. Parastatal or State-Owned Companies.

What are the laws that govern these companies in terms of BO?

In Tanzania, the Companies Act is the legal and authoritative source of information on companies' ownership. BO Initiatives in the country are related to the extractive industry. As an Extractive Industries Transparency Initiative (EITI) implementing country, Tanzania joined other states in establishing the BO of companies operating in the extractive industry in its jurisdiction. The EITI is a global standard for the good governance of oil, gas, and mineral resources. The EITI Standard requires disclosure of information and enhances the overall transparency of the processes throughout the whole value chain. It also requires information on how the sector contributes to the national economy.

EITI Standard requires information along the extractive industry value chain from the point of extraction, to how the revenue makes its way through the government and its contribution to the economy. The EITI requires disclosure of information on beneficial owners of operations related to the extractive industry.

The Companies Act Chapter 212 sets out the registration process as a precondition for operating in Tanzania. The Act requires disclosure of information related to shareholders (that can be individuals or corporate entities) and directors.

The Companies Act provides for the formation and regulation of the corporate bodies in Tanzania. However, it does not provide for the requirement necessary for the disclosure of BO. In fact, the formation requirement under this statute can easily enable the concealment of the actual beneficial owner of any company. Under this statute, a company can be formed by shareholders who are also companies. In that case, therefore, the ownership of the company becomes layered, which makes it impossible to establish with certainty as to who is the actual individual owner of the company, or who has what interests in the company.[96]

Definition

There is no specific legislation that defines BO in a broad and all-encompassing manner in Tanzania.

In 2017 the Tanzania Extractive Industries Transparency Initiative (TEITI) has suggested a definition of the beneficial owner, as 'a natural person who has title to the property, or influences transaction(s) in the company notwithstanding whether he has title to a property, or obtains any benefit from the transaction of

96 United Republic of Tanzania - Ministry of Energy and Minerals and TEITI, 'Inception Report: Collecting & Disclosing Company BO in Extractive Industries through the Tanzania EITI' (2016).

the company, without regard to the value of the shares or interest(s) he has in the company."[97]

Registers/

Requirement to provide BO and threshold

The TEITI Multi-Stakeholder Group (MSG) met on 17 June 2015 and deliberated on the materiality threshold of BO in Tanzania. Generally, the materiality of 5% was considered to be adequate. However, there was a concern that the materiality level should reflect the authorised capital of the company. This is due to the fact that authorised capital varies between companies. It was resolved that a final decision on materiality will be made after receiving recommendations from the BO study.[98] The pilot program conducted by the EITI suggested that thresholds should be established taking into consideration the corporate structure of the companies operating in the country, an individual's full aggregated interest as well as different means of exercising ownership and control. Shareholder equity is, in fact, not the only system for exercising control over a company, and thresholds should apply regardless of how ownership or control is exercised.[99]

Which BO information is required?

Tanzanian law does require the company to keep registries. However, the kind of entries required do not provide enough information to individuate beneficial owners of companies.[100]

Access

Chap 212 of Companies Act. The Act allows inspection of company records kept by the Registrar. Information kept in the registries of companies is inadequate to determine the ultimate owners of a company.

Chap 212, of the Companies Act, requires that any company not being a joint-stock company must deliver the following information to the Registrar:

A) a list of the names, addresses, and occupation of the directors or other managers (if any) of the company,

B) A copy of an act of Parliament, letters patent, deed of settlement, contract of co-partnerty, cost book regulations, or other instrument constituting or regulating the company,

C) And in case the company is intended to be registered as a company limited, the amount of the guarantee.

Chapter 212 provides that 'every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from directors and officers of the company such information and

97 TEITI, 'Unveiling the Mask: Disclosure of Beneficial Ownership of the Oil, Gas & Mining Companies in Tanzania.' (2017).

98 TEITI, 'Beneficial Ownership Implementation Status' (2015) <https://eiti.org/files/tanzania_bo_evaluation_report_0.pdf>.

99 EITI, 'Guidance Note 22 - Developing a Roadmap for Beneficial Ownership Disclosure' (2016) 1.
TEITI (n 94).

100 TEITI (n 94).

explanation as may be necessary for the performance of the duties of the auditors.' Recently the Business Registration and Licensing Agency (BRELA) launched an online registration system (ORS). BRELA now requires all filings and activities to be conducted through the ORS. Companies that were incorporated or registered before 1 February 2018 must ensure that their records are reconciled, updated, and then uploaded into the ORS, in order to access the ORS services.

The ORS was introduced to replace the paper-based registry to simplify the registration of companies and businesses in Tanzania. The ORS comprises registration of companies, business names, trade and service marks, and their respective post registrations, issuance of patents, and industrial licenses. The system enables customers to access all BRELA services without physically visiting BRELA offices.[101]

How often are the registries updated?

On 24 September 2019, BRELA issued a public notice requiring all companies to register in the ORS within 90 days from the date of publication of the notice. The information uploaded on the ORS must be accurate and complete, and relevant documents relating to changes in the company must be submitted.

The notice does not indicate any penalty for failure to comply within the set deadline. However, companies that are not registered with the ORS will not be able to comply with various legal obligations (e.g., making annual filings with BRELA such as annual returns and financial statements; notifying BRELA about changes occurring in the company such as change of directors, change of secretaries, change of authorized share capital, and change of shareholders).

Sanctions and exceptions

On 24 September 2019, BRELA issued a public notice requiring all companies to register in the ORS within 90 days from the date of publication of the notice. The information uploaded on the ORS must be accurate and complete, and relevant documents relating to changes in the company must be submitted. The notice does not indicate any penalty for failure to comply within the set deadline. However, the ORS is not accessible if the company's records at BRELA have not been updated. As such, the company will not be able to comply with various legal obligations.(i.e., not registered)

Failure to update the company's records at BRELA will mean that the company will be in breach of the Companies Act, Act No.12 of 2002. Accordingly, the company will incur some late filing penalties, which could range from USD 1 to USD 25 depending on whether it is a subsidiary or a branch office. Additionally, this would mean that the company's records at BRELA will not be up to date, and as a result, the company cannot obtain a clean search report. This could potentially create difficulties for a company trying to do business with both domestic and foreign investors and financial institutions.[102] (i.e., not updated).

Loopholes

Tanzania lacks regulation concerning BO, and the only initiatives concerning BO

101 EY Global, 'Tanzania Companies Registry Sets Deadline for Online Registration of All Companies in Tanzania' (2019) <https://www.ey.com/en_gl/tax-alerts/ey-tanzania-companies-registry-sets-deadline-for-online-registration-of-all-companies-in-tanzania>.

102 ibid.

are related to the EITI sector. Also, in this sector, however, the country lacks a clear legal framework on BO. In these regards, the TEITI recommends amendment of both the Tanzania Extractive Industries (Transparency and Accountability) Act, 2015 and the Mining Act, Cap 123, to introduce a full and accurate disclosure of BO mandatory and to stipulate that a company cannot secure a license or a government tender without making such disclosure. Although the introduction of a central registry by the BRELA has been a remarkable development, Tanzania should introduce mandatory disclosure requirements to identify beneficial owners of companies. Also, Tanzania allows for Bearer Shares.

6. UGANDA

Which forms of company registration are available?

Sole Proprietorship

Partnership

Private Company

Public Company

What are the laws that govern these companies in terms of BO?

Following the publication of the OECD BO Toolkit in March 2019, the Ugandan government took action, proposing a definition, in line with the recommendations made by the OECD, of 'beneficial owner' in the Income Tax (Amendment) Bill, 2019. In the framework of the EITI, Uganda provides BO Regulation in the Petroleum (Exploration, Development and Production) Act 2013, also referred to as the Upstream Law.

Also, the Anti-Money Laundering Act (AMLA) of 2013, part III on Money Laundering preventing measures, contains provisions related to BO. In 2017, the Ugandan government promulgated the Anti-Money Laundering (Amendment) Act.

On 12th August 2020 Uganda officially became the 26th African country that joined the EITI. The fulfillment of the commitments made within the EITI requires the public disclosure of information on beneficial owners of companies operating in the extractive industry.

How is BO defined in these countries?

The Income Tax (Amendment) Act 2019 identifies the beneficial owner as the 'natural person who owns or has a controlling interest over a legal person other than an individual, and who exercises control over the management and policies of a legal person or legal arrangement directly or indirectly whether through ownership or voting securities, by contract or otherwise.'

Before introducing the mentioned Act, Uganda had to rely on the very broad and confused definition provided by the AMLA of 2013, which stated that "beneficial owner" means any natural or legal person or any other entity including any charitable organisation, natural or juridical, including but not limited to a corporation, partnership, trust or estate, joint-stock company, association, syndicate, joint venture or any other unincorporated organization or group, capable of acquiring rights or entering into obligations.

Registers/

The requirement to provide BO (when and by whom) and the threshold for providing BO?

The Upstream Law requires that applicants file BO information as part of their application during the bidding process. The Law, however, does not provide a guarantee of access to this information by the public. The Law set 5% of ownership as the threshold above which applications for licenses should disclose the identity of owners.

The legal framework currently existing in Uganda does not provide for information on BO to be obtained and retained by the competent authorities for purposes of ML.

Also, in 2016, the FATF published a Mutual Evaluation Report (MER), in which it remarked that the Ugandan legal framework was not consistent with the FATF Recommendations and that, in particular, it presented major weaknesses in relation to the transparency of BO of legal persons and arrangements requirements. A key problem identified has been a lack of clarity of the AMLA on the supervision processes of all reporting entities'.

According to the Global Anti-Money Laundering Research Tool published by Know Your Country limited, available at https://www.knowyourcountry.com/, Uganda made a commitment to work with the FATF and ESAAMLG to strengthen the effectiveness of its AML/CFT regime. The pledges made, among others, also related to the importance of ensuring that competent authorities have timely access to accurate basic and BO information for legal entities.

On 12th August 2020, Uganda became the 26th African Nation to be admitted to the EITI. The fulfillment of the EITI requirements requires the disclosure of information related to the business on the extractives, here included disclosure of beneficial owners of companies operating in the sector.

Which BO Information is required?

As part of the commitment made in the EITI, Uganda will collect and make publicly available BO information.

Apart from the EITI, Uganda does not provide a BO register. The register on local and foreign companies operating in the country is held by the Uganda Registration Services Bureau (URSB). The URSB maintains data and records on registrations affected by the bureau.

Access

URSB has recently uploaded its database online. It is now possible to search for a registered or non-registered name online.

How often are the registries updated?

N/A

Sanctions and excemptions

No BO information is required. To date, Uganda does not have a register containing particulars of beneficial owners of companies and other legal arrangments.

Loopholes

N/A

7. Egypt

Which forms of company are available?

- Limited Liability Company (LLC)
- Joint Stock Company (JSC)
- One Person Company
- Representative Office
- Branch of Foreign Company

What are the laws that govern these companies in terms of BO?

The different kinds of companies are created in accordance with Law No. 159 of 1981. In terms of BO, it is relevant to mention the Ministerial Decree No. 41 of 2020, which has amended the Executive Regulation of the Commercial Registry Law No. 234 of 1976. The Decree adds three new articles to the law that it amends. It entered into force on the 9th of March 2020, and it was issued in light of the Anti-Money Laundering Law No.80 of 2002.[103]

Definition

The Ministerial Decree No.41 of 2020 does not provide any definition to determine the legal terms of ownership and control.

Registers/

Requirement to provide BO and threshold?

Any natural or legal person that is registered in the Commercial Registry in Egypt shall create an additional Register on BO. The law does not provide any threshold for registration.

Which BO information is required?

The Register must include the particulars of the beneficial owners of the legal arrangements in question, whereas it is a legal or a natural person. However, there is an evident lack of clarity in these regards, and it is not clear how Egyptian authority will implement the register.

Access

The Decree holds that information contained in the Registers will be publicly available. However, the act does not specify how the register will be made easily accessible online.

103 Mohamed Hashish, 'New Legal Requirement for Maintaining a Beneficial Owners Register in Egypt' (Lexology, 2020) 8.

How often are the registers updated?

According to the Ministerial Decree, every change must be updated when the change takes place and must be notified 'immediately' to the Commercial Registry. The Register must be held in place during the life of the entity in question, and five years thereafter.

Sanctions and exceptions

No specific penalty is provided for failure to comply with the mentioned amendments. It follows that the penalty to be applied for non-compliance is the general penalty stated in the Commercial Registry Law No. 234 of 1976.

Loopholes

It is now soon to draw a thorough evaluation of the effects of the Ministerial Decree recently adopted. However, at first glance, the lack of a clear definition of BO could pose problems in the future implementation of the Decree. Also, although the decree does provide that registers should be a matter of public record, it seems unlikely that its implementation will lead to make these records easily accessible online.

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