



INTERNATIONAL STANDARDS FOR PROFESSIONALS

IMPLEMENTATION NOTE ON FACTI PANEL ON RECOMMENDATION 6A BY BENEDICTE SHILBRED FASMER & IRENE OVONJI-ODIDA

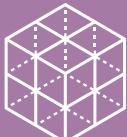
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Members of the FACTI Panel are producing implementation notes on how they see the FACTI Panel Recommendations being implemented in practice. The notes are meant as supplementary to the FACTI Panel report and recommendations, and seek to provide more detail on how all actors can take actions on the FACTI Panel blueprint for financial integrity for sustainable development. The notes, however, represent the views of their authors, and not of the whole FACTI Panel.

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FINANCIAL ACCOUNTABILITY TRANSPARENCY & INTEGRITY

RECOMMENDATION 6A: GOVERNMENTS SHOULD DEVELOP AND AGREE GLOBAL STANDARDS/GUIDELINES FOR FINANCIAL, LEGAL, ACCOUNTING AND OTHER RELEVANT PROFESSIONALS, WITH INPUT OF THE INTERNATIONAL COMMUNITY.

INTRODUCTION

Professionals such as bankers, lawyers and accountants are important players in international business dealings. As advisors, facilitators, negotiators and mediators, they have a duty to look after the interests of their clients. However, this does not excuse them from acting anything less than ethically and in line with global values, norms and standards. Those professionals that choose to enable illicit financial flows are responsible, alongside their clients, for the resulting harms, such as insufficient resources for investing in public health and education services, worsening inequalities, fueling instability, undermining governance and damaging public trust in both the financial system and governments.

Creating financial integrity for sustainable development will require professionals across the world to enable sustainable investment, rather than facilitate illicit financial flows. Changing social norms and unwritten conventions and practices within these professions will be essential, as the FACTI report highlights in multiple places. But there is also an important role for hard regulation and enforcement, the subject of this implementation note.

While there is a widespread practice of criminal prosecution of those complicit in aiding or abetting violent criminal offences, there is no corresponding practice for those enabling financial crimes. This is puzzling because many exposés such as Panama Papers and Cum-Ex spotlight how some intermediaries and enablers of illicit financial flows make the planning and execution of financial abuses and crimes their unique selling proposition to their clients.

Self-regulation has proved to be insufficient and unreliable. Over the centuries, and through many financial crises, this is a lesson that Governments have learned and re-learned about banks and financial institutions. Know your customer (KYC) requirements are widely adopted for banks, but Governments have been less consistent at mandating them at other types of financial institutions or for other advisors and professions. While many professions have codes of conduct and other standards for membership in professional bodies, notably national bar associations, these codes were by and large not written to be aligned with the demands of sustainable finance. Some voluntary international guidelines have been promoted, but none in inclusive settings such as the United Nations. Meanwhile, many governments, particularly in haven countries, refrain from setting mandatory standards for appropriate conduct of professionals, despite the social costs.

PROPOSED SOLUTION

Currently, many countries lack mandated regulatory standards for some professionals, often relying instead on voluntary codes of conduct. This creates gaps, both in unregulated spaces, and between different standards in different countries, that will be exploited. By having global agreement, we can start to close those gaps.

The FACTI Panel has recommended strengthening global standards, building on existing voluntary standards. At a minimum these should require all relevant professionals to ask their clients to furnish proof of their funds' legitimacy and/or the legitimacy of the business concept and structures (Know Your Customers' Business – KYCB). This means verifying a trail tracing funds back to a legitimate source and gaining an understanding of the entire value chain of a client's

business. The purpose and structure of transactions should be traceable and documented. Handling any funds should make professionals liable for their provenance. Advising a client on structuring transactions should make professionals liable for their legality. With appropriate enforcement and sanction, professionals will be incentivised towards financial integrity.

The greatest responsibility for implementing such standards lies with traditional financial centres in developed countries, where the biggest markets and professional services firms are to be found. However, all jurisdictions, including those operating niche offshore financial centres or trying to build up new financial centres, must be held accountable for what transpires in their territory. To develop agreed global standards, countries, businesses, professionals and other stakeholders should work together in the following ways.

IMPLEMENTATION

BUILDING ON EXISTING WORK, CONSULTING ALL STAKEHOLDERS

The FACTI Panel is not proposing to throw away the excellent work done by professional organisations, such as the International Bar Association, or their national chapters. On the contrary, the FACTI Panel has been clear throughout its report that the international community needs to build on the work done to date. This existing work, such as guidelines and standards, can be the basis on which further progress is made.

Work to improve on existing guidelines should be done hand-in-hand with the private sector including investors and the professional associations. There is a need for a stronger partnership between the public and private sector. The voices of the private sector are critical, but they cannot be the only ones that have a say because they are not the only ones with a stake in the results. The public at large also has a stake because of the potential catastrophic drainage of resources that can be the result of financial abuses. Interested civic actors, including media and NGOs, can play an important role due to their expertise investigating and studying these issues.

An inclusive process for elaborating such standards would ensure a fair and balanced approach. Ultimately, governments, as the legitimate representatives of citizens, should take the final decision about the content of standards. The most inclusive international forum for governments to coordinate global decisions on these topics is at the United Nations.

CONTENT OF STANDARDS

Due diligence requirements: anti-money laundering standards already require customer due diligence for financial institutions and designated non-financial businesses and professions (DNFBPs). This should include due diligence on the beneficial owners of any legal vehicles, as well as requirements to check if customers are politically exposed persons (PEPs). Agreement on the standards for professionals will also give an opportunity for countries to agree on the formal definition of a PEP. For corporate clients, professionals should do due diligence to Know Your Customers' Business (KYCB). This would help prevent

legitimate funds being used in an unethical or illegal way, for example paying bribes to win business. Due diligence must also apply to transactions, for example real estate purchases, that may be used to park or conceal illegitimate funds, not just to those transactions that may generate such funds.

Suspicious activity reporting requirements: financial institutions and DNFBPs already usually have obligations to report suspicious activity, however in some countries, there are exemptions or a lack of inclusion of some professions in regulatory frameworks. The global standards should be clear that all relevant professions have these obligations, and that they are not exempt because of professional privileges. Beyond specific financial transactions, professionals need to also be able to securely and efficiently report on suspicious business activities beyond the source of funds, for example to report suspected bribery. Secure reporting systems are essential and anonymous hotlines should be considered, especially for whistle-blowers within professional service firms.

Applicability of standards: the international community does not have a common definition of relevant professions that may enable crime. However fixed international definitions may be too rigid to address constantly evolving risks, for example virtual asset service providers were unheard of a decade ago. They also may not be specific enough to national contexts, for example in some countries notaries play a very important role in asset purchases, but they be unimportant in others. This argues for a combination of using definitions that are principle based and providing illustrative lists of professions that countries can decide how to apply in their national contexts.

Criminal liability standards: countries should universally agree that enablers of financial crime should face equivalent criminal penalties to the perpetrators of the financial crime. Professionals already have an ethical obligation not to assist a client to commit crimes. The global standards can clarify that all national legal regimes should enable and encourage prosecution regardless of claimed professional privileges. Additionally, liability should include personal sanction of individuals involved in enabling illicit financial flows, not only institutional liability such as a bank. Institutional liability has proven to not provide sufficient deterrence. The criminal liability is important for setting clear incentives

especially in view of potentially large financial gains for enabling illicit financial flows. However, non-trial resolutions, subject to safeguards, may be appropriate for professionals that voluntary report to relevant enforcement authorities.

Sanctions: lack of enforcement is one of the biggest challenges to successfully fighting illicit financial flows. Enforcement cannot be left in the hands of professional bodies alone, as governments need to take a role in protecting the public interest. Sanctions should include effective, proportionate and dissuasive (administrative/criminal) sanctions, with particular attention given to banks and other financial institutions. Thus, while professional associations may receive and act on misconduct reports, the judicial system should also have sanctions beyond penal and pecuniary punishments, such as derecognition or removal of business/professional licenses. This should be made clear in the global standards.

NATIONAL IMPLEMENTATION

Regulation and supervision: the standards themselves can specify the need for national implementation. Regulatory regimes should be mandatory and inclusive with coverage across financial crimes including money-laundering, tax evasion, and handling the proceeds of corruption and bribery. There must be sufficient resources dedicated to supervision. Supervision should be risk-based, so that institutions with higher risk factors (e.g. larger volumes of cross border flows, large number of legal vehicle incorporation, large high-end real estate transactions) face more frequent supervision.

National coordination: in line with FACTI Panel Recommendation 13, global standards should encourage coordination and information sharing amongst law enforcement, financial intelligence units, tax administrations, financial regulators, and any new regulatory bodies.

LOOKING FORWARD FOR THE PRIVATE SECTOR

Ultimately all countries and most citizens lose from a lack of financial integrity, while financial institutions, lawyers, accountants and other professions face large declines in public trust because of the role of some members of these professions in enabling financial crimes. By strengthening regulation and cleaning up the activities of their members, professions can regain public trust, while removing the competitive edge unethical practitioners may have. This regulatory agenda reduces harm to wider society and promotes fair professional competition.

Meanwhile, businesses themselves need to establish effective compliance programs. These should be empowered to investigate suspicious incidents and transactions, ethical breaches and alleged misconduct. Corporate compliance programs should also integrate lessons learned from any misconduct into the company's policies, training, and controls. To do so, a company will need to analyse the root causes of misconduct to timely and appropriately remediate those causes to prevent future compliance breaches. Investors have a role to play as shareholders of businesses providing professional services. Investors should actively exercise their ownership rights by setting expectations of good governance to their investments.

Expanded public-private cooperation: while maintaining functional independence for regulators and supervisors is essential, increased cooperation between the public and private sector can improve results. National cooperation, of an interdisciplinary nature, can improve information sharing, risk analysis, share best practices among different actors, help regulators identify malicious actors, and jumpstart investigations.

Education: to ensure effective compliance, countries can improve professional educational systems, so that, for example, curriculums at business schools or law schools, better include financial integrity issues.

Whistleblower policies: an important complementary policy for professional standards is whistleblower protections and serious investigation of tips from whistleblowers. These are essential so that individuals working in professionals can report wrongdoing by their employers or senior partners without fear of retribution or retaliation.

Safeguards: national rulemaking should include appropriate safeguards for preventing these standards from being used to target political opposition. That can include independent and impartial appeals mechanisms.

Peer review: it is essential international financial integrity peer reviews should check the actual implementation of these provisions, not just their presence in law. This includes UNCAC implementation reviews and FATF/FSRB mutual evaluations. Their terms of reference should require a review data on the volume and circumstances of relevant prosecutions or administrative sanctions. Their reports should appropriately interpret the data, being informed by engagement with stakeholders, and publicly highlight any non-cooperative professional bodies.

FOR UNITED NATIONS MEMBER STATES

Given the suggested undertaking, the best course of action is for the General Assembly of the United Nations to mandate the creation of global standards for professions, and the call for associated national regulation, delegating the review of the standards and their adoption to the Economic and Social Council. This mandate can be created through either the Second Committee (on economic and financial matters) or the Third Committee (on social, humanitarian & cultural matters).

Given the wide-ranging nature of the standards, and their importance to legal and business communities, support to this effort would need to be provided across the UN System and also involve non-UN entities. Building on the experience of the Inter-agency Task Force on Financing for Development; and inter-agency working group to support this effort should include at a minimum the UN Office on Drugs and Crime, UN Conference on Trade and Development, the UN Department of Economic and Social Affairs.

The Annex to this note provides some specific language that could be adapted by Member States for incorporation into a resolution.

ANNEX: POSSIBLE RESOLUTION LANGUAGE

Below is possible language for use in a United Nations General Assembly resolution:

We call on UNDESA, UNODC and UNCTAD to jointly prepare draft global standards/guidelines for financial, legal, accounting and other relevant professionals, building on existing standards and in consultation with all relevant international institutions and stakeholders, and to bring these to ECOSOC for intergovernmental discussion and agreement.

ANNEX: FURTHER READING

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