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[FACTI Inbox] Input into the Panel's debate on IFF

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Thu, May 7, 2020 at 9:02 AM

Dear Colleagues,

Vienna has been working with the WB and UNODC on how to counter IFFs in Africa.

Attached is the summary of outcomes of the 1st stage of the project and some papers prepared for the 2nd stage of the project.

These papers should not be quoted as they are drafts.

Vienna is happy to contribute to a future cooperation covering those topics.

Best,

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5 attachments

 **1_Note on Inter-Agency Cooperation.pdf**
335K

 **1_Note on Creating Mechanism to Obtain Beneficial Ownership Information.pdf**
1548K

 **1_Note on Client Attorney Privilege.pdf**
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 **Report2015-2018_FINAL.pdf**
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tax transparency & corruption



In association with

World Bank Group

United Nations Office on Drugs and Crime (UNODC)

And

African Tax Institute

Inaugural Conference on Tax Transparency and Corruption

**Title: Understanding the Practical Operation and Impact of Client Attorney
Privilege on Tax and Financial Transparency**

By WU Team

Session VI: The misuse of Client/Attorney Privilege

Date: Thursday, 24 September 2020

Introduction:

The role of Client-Attorney Privilege (C-AP) in the context of money laundering, tax evasion and aggressive tax planning is nuanced, if misused, it has the potential to hinder investigation and prosecution. A lawyer who prevents any cooperation with authorities by invoking C-AP has, arguably, the ultimate tool to ensure that a client remains above scrutiny or the rule of law.¹ The use and misuse of C-AP should be evaluated in the national and cross-border contexts in order to determine whether it may have the potential to delay or limit due process and the ability of law enforcement agencies to carry out investigations.

Based on the experiences of investigators utilizing information obtained through the Panama Papers and the Paradise Papers, the potential for misuse has become more apparent as a threat to the ability of revenue authorities, financial intelligence units (FIUs) and other law enforcement agencies to recover tax revenues and prosecute financial crimes. For instance, the Australian Tax Office (ATO) have identified that one in five major audits conducted in 2019 were being complicated by blanket claims of privilege which often meant that key documents were being withheld from authorities.² African tax authorities and FIUs can expect that this challenge will require some action in their own jurisdictions, particularly where the need to effectively investigate and prosecute Illicit Financial Flows (IFFs) is more pressing.

More needs to be done to identify the potential obstacles and provide detailed guidance on the acceptable and unacceptable uses of C-AP, particularly as the last barriers to overall financial and tax secrecy are being confronted by a number of organizations.

An overview of the concept:

Although seldom codified, Client-Attorney Privilege (C-AP) is a unique legal doctrine.³ It is the oldest Privilege for confidential communication, dating back to the monarchy of the Queen of sixteenth-century England.⁴ Initially, the Privilege was to support the Attorney's honour and his oath to guard the secrets of his clients if called to be a witness against them.⁵ The seventeenth-century however, brought a new utilitarian justification that continues to exist⁶, today it seeks to encourage "*full and frank communication*" between the client and the Attorney.⁷ C-AP is a legal principle of the law of evidence that protects from admissibility of confidential communications between the client and the Attorney as evidence. Noted American jurist John Henry Wigmore defines C-AP in his famous treatise on evidence as:

*"Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived."*⁸

¹Andres Knobel (2019), Protecting enablers: attorney-client privilege is just the tip of the iceberg in facilitating illicit financial flows, Tax Justice Network [online]. Available at: <https://www.taxjustice.net/2019/07/24/protecting-enablers-attorney-client-privilege-is-just-the-tip-of-the-iceberg-in-facilitating-illicit-financial-flows/>

²Ugur Nedim & Sonia Hickey (2019), The Tax Office's Attack on Client Legal Privilege, Lexology [online]. Available at: <https://www.lexology.com/library/detail.aspx?g=7d5c4edd-24f2-4ded-a317-52b36df7d98a>

³McCormick On Evidence § 87, at page 386 (Kenneth S. Broun Ed., 6Th Ed. 2006); ⁸John Henry Wigmore, Evidence In Trials At Common Law § 2290, at page 542 (John T. McNaughton Ed., Rev. Ed. 1961)

⁴John William Gergacz, Attorney-Corporate Client Privilege § 1.04, At page 1-4(3D Ed. 2000); Wigmore, supra note 1, at page 542

⁵McCormick, supra note 1, at page 387

⁶Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, page 160-61 (1993).

⁷McCormick, supra note 1, at page 388

⁸Wigmore, supra note 1, at page 554

The general contours of the attorney-client Privilege, as stated by Wigmore, are⁹:

1. Legal advice of any type sought from a professional legal adviser acting in that capacity;
2. The communication relates to that purpose;
3. The communications are made in confidence by the client who claims permanent protection of the communication; and
4. The client does not waive the Privilege. The client is the holder of the Privilege, and the Attorney has an ethical obligation to maintain the secrecy of the communication.

However, it is increasingly recognized that those claiming C-AP do not always deserve blanket application; not every communication between a client and Attorney should be accorded protection. In legal systems of various states there exist both institutionalized exceptions to this privilege as well as situations, in which the privilege is waived by the client. In addition, there exists also a number of situations which constitute exceptions to the exceptions. Some of these include the following:

- Crime-fraud exception: communications are not covered by the privilege in a situation where the client (taxpayer) is trying to obtain advice to cover the commission of a crime or fraud or prevent the negative decision in the proceeding. What is important to note is that the party opposing the assertion of privilege will have the burden of proving that the exception should apply. This means that the opposing party has to submit evidence proving that the intention of the other party (the client) or its lawyer was to commit a crime or that a crime has been actually committed and that the results of attorney's work served covering or further developing the crime or fraud at stake in the proceeding.¹⁰
- Disclosure to a third party: There exists, however, an exception to this waiver, known as common interest doctrine.¹¹ It permits parties to share information with a third party without waiving the privilege, this enables attorneys to work on a joint defense and coordinate legal strategy with other members of a team. Furthermore, it is also a tool for lawyers handling similar cases of various clients to consult between each other the without disclosing it to other parties without the same interest and thus not risking waiving of the privilege.¹²
- Client waiver of privilege - where the client voluntarily waives their privilege or their attorney (acting on their behalf) produces a document covered under C-AP to the other party, or to the court. Importantly, waiving the privilege in this way might oblige the party to produce further documents which were formerly covered by the privilege.

The exceptions and waiving of the C-AP is a topic which does not go unnoticed by the courts and thus there exists a significant body of case law on this specific issue. Notably, the issue is of considerable significance both in common law as well as in civil law countries. This wide

⁹ McCormick on Evidence § 92 (John W. Strong ed., West 5th ed. 1999);

¹⁰ Saunders Gregor, K., Smith, E., Tolon, E., *A Brief Exploration of Privilege Nuances in the Tax Context*, Law360, 13 February 2019.

¹¹ Saunders Gregor, K., Smith, E., Tolon, E., *A Brief Exploration of Privilege Nuances in the Tax Context*, <https://www.lexisnexis.com/LegalNewsRoom/tax-law/b/newsheadlines/posts/a-brief-exploration-of-privilege-nuances-in-the-tax-context>, accessed 10.12.2019.

¹² Rowlett, G.A., *The Common Interest Doctrine: Key Practices for Maintaining Confidentiality*, in: Subrogator, Spring/Summer 2011, NASP, p. 72.

variety of case law available in developed jurisdictions provides for a very interesting overview of approaches towards C-AP. An in-depth analysis of the solutions accepted by numerous courts can translate into meaningful policy considerations and recommendations, taking into account the specificity of the involved legal systems.

Understanding and identifying the boundaries of the application of C-AP

As mentioned above, C-AP is not provided without limits. For instance, an attorney's conduct in claiming privilege can be considered ethically impermissible in situations where:

- (i) They are not motivated by the defence of legal rights but by other interests;
- (ii) They are based on weak research or factual findings;
- (iii) They do not adhere to procedural requirements; and
- (iv) They are inconsistent with existing laws and are conducted in bad faith.

Abuse of attorney client privilege occurs where:

- (i) General advice is covered up as legal advice;
- (ii) Communication to a person who is clearly not an attorney, or an agent of an attorney is cloaked as such;
- (iii) No communication is made or no communication is made for the purpose of giving legal advice;
- (iv) Communications are not made in confidence;
- (v) No client-attorney relationship is formed;
- (vi) No protection is afforded to the communications; and
- (vii) The privilege is waived.

In applying the eight-prong test, courts have further delineated the requirements of several of the elements. For example, purely investigative work done by attorneys does not constitute legal advice and frivolous claims and attempts to cloak non-legal advice as legal communications, attracts sanctions.¹³ For instance where the predominant purpose of the communication is not to provide legal advice, but business or investment advice.

Generally, when deciding whether legal advice is being sought, an evaluation of the facts of the case is required. As evidenced in various cases, the factual settings may lead to courts having different interpretations of whether the nature of the service is legal or predominantly legal. More importantly, in the context of tax and financial transparency, it has become increasingly evident that privilege can be used as a tool to prevent tax, financial intelligence units and other authorities from accessing information.

Treatment of C-AP in Tax and Financial Transparency initiatives

The overall importance of C-AP has been recognized in both tax and financial transparency initiatives. However, both the Global Forum on Transparency and Exchange of Information (Global Forum) and the Financial Action Task Force (FATF) have generally called for the

¹³ Cobell v Norten; FDIC v Hurwitz.

narrowing of the scope across jurisdictions to ensure that it does not act as a major constraint on legitimate investigation of financial and tax crimes.

For instance, Article 7 of the 2002 EOI Model Agreement sets out the situations under which a Contracting Party may decline a request for EOI, in particular:

The provisions of this Agreement shall not impose on a Contracting Party the obligation to obtain or provide information, which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:

- a) Produced for the purposes of seeking or providing legal advice; or*
- b) Produced for the purposes of use in existing or contemplated legal proceedings.*

The communications must be between a client and an attorney or other admitted legal representative acting in that capacity and must be produced for purposes of seeking or providing legal advice.

The 2006 Manual on Information Exchange recommends that whilst a contracting party can decline to provide information on the basis that it is privileged information, what constitutes privileged information should not be interpreted or applied in such a broad way that it hampers effective EOI.

Commentary to Article 26, paragraph 3 of the OECD MTC provides:

A requested State may decline to disclose information relating to confidential communications between attorneys, solicitors or other admitted legal representatives in their role as such and their clients to the extent that the communications are protected from disclosure under domestic law. However, the scope of protection afforded to such confidential communications should be narrowly defined. Such protection does not attach to documents or records delivered to an attorney, solicitor or other admitted legal representative in an attempt to protect such documents or records from disclosure required by law. Information about the identity of a person like a director or beneficial owner is not protected as a confidential communication. Whilst the scope of protection afforded to confidential communications might differ among states, it should not be overly broad so as to hamper effective exchange of information. Communications between attorneys, solicitors or other admitted legal representatives and their clients are only confidential if, and to the extent that, such representatives act in their capacity as attorneys, solicitors or other admitted legal representatives and not in a different capacity such as nominee shareholders, trustees, settlors, company directors or under a power of attorney to represent a company in its business affairs.

A requested party should verify and challenge, if necessary, the validity of a claim of C-AP. In addition, the introduction of mandatory disclosure requirements which are increasingly being used by tax administrations and require that parties that provide advice and assistance on tax, legal and banking matters, amongst others, report cross-border structures or transactions of a tax aggressive nature. Whilst the primary reporting requirement is with the intermediary including lawyers, accountants or tax advisors, the reporting obligation may shift to the taxpayer if the intermediary opts not to report. This requirement, in many ways, overrides the protections provided by C-AP and may even completely diminish the concept in the context of tax matters.

FATF have also recognized the vulnerabilities of legal professionals and the potential for increased complexity in carrying out investigations as a result of C-AP.¹⁴ In particular, FATF have sought to address, the perception sometimes held by criminals and at times supported by claims from legal professionals that C-AP can prevent law enforcement agencies from accessing information to enable prosecution.¹⁵ Since the scope of C-AP remains diverse across countries, differing interpretation amongst legal professionals has dis-incentivized law enforcement taking action against complicit or willfully blind legal professionals.¹⁶ FATF acknowledge that C-AP is complex due to the diversity in treatment and interpretation of the concept.¹⁷ For instance, the extent of information needed to invoke the crime/fraud exception and the consequences of a breach of C-AP varies from country to country, whilst the practical basis on which C-AP can be overridden is still unclear.¹⁸

Overall, FATF review of the operation of C-AP across a number of countries established that, both law enforcement agencies and the private sector found the lack of clarity on the extent of the reporting duty under Anti Money Laundering and Combatting the Financing of Terrorism (AML/CFT) legislation challenging.¹⁹ Since law enforcement must remain careful to respect C-AP, investigations often become lengthy and the resources required to build evidence increase in cases concerning legal professionals; this is similarly the case where privilege is claimed and needs to be resolved.²⁰ FATF has found evidence of “extremely wide claims of privilege...being occasionally made which exceed the generally understood provisions of the protections within the relevant country”²¹. As mentioned, these difficulties associated with the scope of privilege act as a disincentive for law enforcement to investigate legal professionals or seek alternative sources of evidence especially where time is an essential factor.²²

Mechanisms to address the misuse of privilege

There are several mechanisms available to government to address abusive tax practices. These can be broadly categorized as legislative, judicial and administrative. Legislative measures include general and specific anti-avoidance rules as well as reportable arrangement provisions²³ to counter tax evasion and a penalty regime that addresses failures to disclose in a meaningful way.²⁴ Judicial measures include doctrines such substance over form and *fraudum legis* (sham transactions). Administrative measures can include awareness campaigns; monitoring tools (maintaining lists of buyers of schemes); registration of promoters of schemes and penalties for

¹⁴ FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals*, FATF 2013 available online at: <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf>

¹⁵ *Ibid*, pg. 6

¹⁶ FATF, *note 12*, pg. 6

¹⁷ FATF *note 12*, pg.

¹⁸ FATF, *note 12*, pg. 20 - 31

¹⁹ *Ibid*

²⁰ FATF, *note 11*, pg. 31-32

²¹ *Ibid*

²² *Ibid*

²³ Provides for timeframes for reporting and disclosure obligations.

²⁴ E.g., Regulations 6011; 6111; 6112 that require reporting of “transactions of interest” (TOI) that are transactions that the IRS believes has a potential for tax avoidance, but for which it lacks enough information to determine whether the transaction should be identified specifically as a tax avoidance transaction.

failure to register (disallowing claimed benefits); exchange of information, as well as voluntary disclosure programmes.²⁵

The upholding of the principle of privilege is under-scored in various jurisdictions. As stated by the honorable Sutherland, R.²⁶

“The rationale for the idea of privilege has evolved over time in response to judicial perceptions and evolving social mores about how court proceedings might appropriately be conducted. In our era, it is incontrovertible that the ‘right’ vests in the client...” and:

“... in divining the exact nature of the right, its rationale must dictate the nature of the right. The rationale for the concept of legal advice privilege has been distilled from what has been understood to be the essence of the adversarial legal system. The right of a person to a guarantee of confidentiality over communications with that person’s legal advisor is an indispensable attribute of the right to counsel and the adversary litigation system.”

This narrowing of the concept is becoming more acceptable. For instance, the European Parliament’s inquiry into money laundering, tax avoidance and tax evasion noted:

“The scope of the statutory provisions on the client-attorney privilege of certain designated professional practitioners such as lawyers and notaries to refuse to testify or give evidence in tax matters is not clear and consistent in all Member States, let alone across Member States.”²⁷

The role of C-AP in the context of money laundering, tax evasion and aggressive tax planning should be evaluated in the jurisdictional and cross-border context in order to determine whether it may have the potential to delay or limit due process. Based on past events such as the Panama Papers and the Paradise Papers leaks, the potential for misuse has become more apparent as a threat to the ability of revenue authorities to recover tax revenues and FIUs to investigate money laundering and terrorism financing cases. But this threat and the complications that mismatches in jurisdictional treatment of C-AP may impact the effectiveness of exchange of information efforts, frameworks and efforts to tackle money laundering, corruption and bribery. Little has been done to identify the potential obstacles, particularly as the last barriers to overall financial and tax secrecy are confronted by a number of organizations.

These developments denote a move toward the narrowing of C-AP. To prevent excessive narrowing of the concept, there is a need for clarity as to the acceptable and unacceptable uses of C-AP that may guide authorities, courts and clients. The current uncertain status is detrimental to authorities, legal professionals and their clients and requires more in depth analysis.

The objective of this note is to provide a brief background to a more extensive paper being prepared by the WU team and develop an understanding of participants’ experiences with and concerns about C-AP in the context of tax investigations and litigation.

²⁵ Rostain (2006) 95; Steenkamp (2012) 228.

²⁶ South African Airways Soc. V BDFM Publishers (Pty) Ltd and Others 2016 (2) SA 561(GJ) 2016 1All SA 860 [par 45; 47].

²⁷ European Parliament, *Report on the Inquiry into Money Laundering, Tax Avoidance and Tax Evasion*, A8-0357/2017, 16 November 2017, pg. 32, available online: http://www.europarl.europa.eu/cmsdata/134368/A8-0357_2017_EN.pdf

Issues for consideration:

- Client/Attorney privilege has a long tradition in the legal systems around the world, what are the country experiences so far?
- Are there increasing cases of misuse of Client/Attorney privilege? What are the implications for your ability to successfully prosecute cases of tax and other crimes?
- How should the tax authorities and FIUs respond?
- How do we identify acceptable and unacceptable uses of the privilege?
- Should there be any carve outs in C-AP for Accountants, Tax advisors, and other service providers?

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In association with

World Bank Group
United Nations Office on Drugs and Crime (UNODC)
And
African Tax Institute

Inaugural Conference on Tax Transparency and Corruption

**Title: Creating Better Mechanisms To Obtain Beneficial Ownership
Information: International Context**

By WU Team

Session III: Access to Information on Beneficial Ownership

Date: Wednesday, 23 September 2020

Executive Summary¹

International initiatives to enhance tax compliance and to reduce the extent and impact of illicit financial flows have now been ongoing for over two decades, led primarily by the Organisation for Economic Co-operation and Development (OECD), the Financial Action Task Force (FATF), the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum), the European Union (EU), the United Nations Office of Drugs and Crime (UNODC), and the World Bank.

Increasingly, the various forums, bodies, panels and countries involved in developing policy responses to the issue of illicit financial flows (IFFs) are recognising that there are potential synergies between these regimes and initiatives that, if harnessed properly, can multiply the effectiveness of current individual approaches. For instance, while the stated purposes of the FATF Standards on transparency and beneficial ownership is to prevent the misuse of corporate vehicles for money laundering or terrorist financing, the implementation of these Standards supports efforts to prevent and detect other predicate offences such as tax crimes and corruption, while reinforcing jurisdictions' capacity to meet their legal obligations arising from related international standards such as the UNCAC, the *Criminal Law Convention on Corruption*, the *OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions*, and the Standard for Automatic Exchange of Financial Account Information.

Common to many of these initiatives is the shared recognition that the identification of the ultimate beneficial owners of accounts and of corporations is crucial to detecting, tracking, and preventing illicit financial flows, by enabling authorities to more effectively and efficiently “follow the money”. The availability of beneficial ownership information is a key requirement of international tax transparency and features in both the exchange of information on request (EOIR) and automatic exchange of information (AEOI) standards.

Despite the wealth of international standards providing guidance on the implementation of beneficial ownership frameworks, pressure continues to increase for all countries to demonstrate that they can obtain beneficial ownership information and share it with other jurisdictions.² Early results from the Global Forum's second round of EOIR reviews under the 2016 TOR revealed that most jurisdictions continued to face challenges in implementing a compliant legal framework and practical implementation. This was particularly the case where only one source for beneficial ownership information existed in the legal framework, whereas jurisdictions using multiple sources often received better ratings.

Moreover, results of FATF Mutual Evaluations indicated, in 2019, that jurisdictions found it challenging to achieve a satisfactory level of transparency for the beneficial ownership of legal persons. A 2016-2017 review of enforcement and supervision of beneficial

¹ This is an abridged version of the discussion paper “*Transparency and Beneficial Ownership in the African Context: Ghana, Nigeria and South Africa*” first presented by the Global Tax Policy Center at the high level conference on “*Tax and Good Governance in Africa*” which took place in Abuja on 26-28 April 2017 and of the discussion paper “*Review of current practices on beneficial ownership*” first presented by the Global Tax Policy Center at researchers' meeting on “*Creating Mechanisms to Get Good Access to Beneficial Ownership Information*”, which took place in Vienna on 2 October 2017. The Authors would like to thank Mr. Rick McDonell for his contribution to this paper and support throughout the project.

² OECD, “Beneficial ownership toolkit”, 2019, OECD, pg. 30, <https://www.oecd.org/tax/transparency/beneficial-ownership-toolkit.pdf>

ownership obligations further revealed that major challenges arose because of weak implementation of existing standards and not gaps in the standards.

Countries must take note that it is not enough to just have a compliant legal framework; effective implementation and enforcement of laws in practice should be prioritized since, according to the OECD, if the likelihood of offenders being caught is low, the incentive to comply disappears. Appropriate compliance, monitoring and enforcement processes are critical measures that can be undertaken to ensure that laws and regulations on beneficial ownership are observed. The lacking enforcement of beneficial ownership standards at domestic level has an impact on the ability to effectively exchange information, therefore aggravating secrecy regimes. Unless some of these challenges are addressed, the misuse of corporate vehicles to facilitate corruption, tax evasion and other financial crimes will continue.

There are various definitions of IFFs, but essentially they are generated by methods, practices and crimes aiming to transfer financial capital out of a country in contravention of national or international laws.³ IFF have bled resources from developing countries for decades and, whilst the size of IIFF and their impact on revenues is contested, few would deny that IFF are large and increasing and that annual revenue loses for developing countries can ran range from USD 50-100 billion : money that could transform the health systems in these countries and help to them to more effectively counter COVID 19.⁴

The use of opaque corporate vehicles to conceal the true beneficial owners of assets is very much at the center of this debate. Whilst most developing countries do have a range of company ownership registries, they are often hosted by different agencies which fail to cooperate and are under resourced which prevents in depth verification and regular updating. Inter-agency cooperation also tends to be weak. Penalties for non-compliance are puny and enforcement weak. In addition, many developing countries do not have the technical platforms that would allow them to use the data to track and identify sectors, groups of individuals and offshore locations which are most prone to IFFs.

This lack of a robust approach to identify the ultimate physical owners of companies is not just a problem for government, especially tax and custom authorities and FIU, but also for MNE 's that operate in developing and emerging countries. They also need to know who owns and controls their sub-contractors in the country. This shared interest should make it easier to move forward, especially at a time when governments are putting in place massive procurement projects in the health sector and billion-dollar stimulus packages to counter the effects of COVID 19.

As stated by FATF, 'the misuse of corporate vehicles could be significantly reduced if information regarding both the legal owner and the beneficial owner were readily available to authorities.' Achieving this outcome cannot be done through one-off approaches, it requires an ongoing and long-term political commitment from leaders and decision-makers to prioritize the development of legislative and operational responses and

³ OECD (2014) 16. Schlenther (2019) points out that international organisations such as the IMF and OECD have taken a pragmatic approach in addressing IFFs by focusing on the "how to" aspects rather than getting stuck on the definition.

⁴ Global Financial Integrity (GFI) 2020 data estimates IFFs due to trade misinvoicing between and among 135 developing countries and 36 advanced economies, at USD 7.3 trillion.

the provision of sufficient resources to ensure their effective implementation.

In this regard, the Tax Transparency and Corruption project proposes to address the next steps toward enhancing the practical implementation of the beneficial ownership information requirements, particularly through centralized registries.

Issues for Discussion:

- Is the current FATF standard satisfactory?
- Why are countries under-performing in the Global Forum peer reviews?
- What are the implementation issues that countries have encountered?
- Are national registries the answer and under what conditions?
- Can new technologies help resolve some of the outstanding issues?
- What is the status of inter-agency cooperation on collection, verification and maintenance of beneficial ownership information?
- Is there a role in Africa for unexplained wealth orders?
- Are African countries prepared to use the information for investigations, tracing and recovery of assets?
- Does the COVID-19 crisis present an opportunity to pursue an African initiative for better access to beneficial ownership information?

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1. INTRODUCTION

This paper examines the progress made over the last two decades in counteracting money laundering and tax evasion. Particular emphasis is placed on the need for law enforcement and tax administrations to get good access to the identity of the natural person that ultimately owns such opaque vehicles such as trusts, foundations and holding companies. It then assesses how effective the current measures introduced at the international level are in counteracting financial and tax crimes and identifies some of the barriers that these agencies encounter in the fight against these activities. This is followed by an examination of how the Financial Action Task Force (FATF), the OECD and the EU, as well as national governments have, so far, implemented measures to gain access to the ultimate beneficial owners of the opaque mechanisms typically used by money launderers and tax evaders. The final section sets out some recommendations on how to improve the current structure.

1.1 DEVELOPMENT OF THE CURRENT FINANCIAL TRANSPARENCY AGENDA

The period from the 1980s to the mid-1990s was marked by the progressive liberalisation and deregulation of international trade, investment, and capital flows. Increasingly dense networks of cross-border economic relationships resulted, as financial centres were forced to compete with each other to attract international financial business. In this same period, the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 introduced provisions that first sought to overcome banking and financial secrecy laws in recognition of the role that financial secrecy played in blocking criminal investigations.⁵ In 1989 the Paris G7 Summit resolved to convene a financial action task force (FATF) to assess the results of cooperation already undertaken in order to prevent the utilization of the banking system and financial institutions for the purposes of money laundering.⁶ Less than a year later FATF published a report containing forty recommendations to fight against money laundering.⁷ The recommendations highlighted the need for financial institutions to obtain information about the true identity of the persons on whose behalf accounts are opened or transactions carried out.⁸ Political efforts to address the impact of the global financial system had begun to acknowledge the role of secrecy in facilitating corruption, money laundering and tax avoidance.

In 1996, the Heads of the G7 Countries sought to bring these developments to a head. In their final Communiqué issued following the Lyon Summit, they acknowledged:

Globalisation is creating new challenges in the field of tax policy. Tax schemes aimed at attracting financial and other geographically mobile activities can create harmful tax competition between States, carrying the risk of distorting trade and investment [and] leading to the erosion of national tax bases. We strongly urge

⁵ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, *hereafter the 1988 Convention*, available online at:

https://www.incb.org/documents/PRECURSORS/1988_CONVENTION/1988Convention_E.pdf

⁶ G7, 1989 Paris Summit, *Economic Declaration*, 16 July 1989 at para 53, available online at:

<http://www.g8.utoronto.ca/summit/1989paris/communiquel/index.html>

⁷ FATF, *The Forty Recommendations of the Financial Action Task Force on Money Laundering*, FATF 1990, available online at: <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf>

⁸ *Ibid* at pg. 2

the [Organisation for Economic Cooperation and Development (OECD)] to vigorously pursue its work in this field, aimed at establishing a multilateral approach under which countries could operate individually and collectively to limit the extent of these practices.⁹

The OECD Committee on Fiscal Affairs, in response to the G7 Heads of State, embarked upon the preparation of a report on the role of tax havens and harmful preferential tax regimes in the global financial system. Two years later, the UN once again recognized the role of modern technology, like the internet, in raising barriers to criminal investigations of money laundering and facilitating increased use of offshore banks and bank secrecy.¹⁰ In particular, the UN identified that, “*jurisdictions which offer high levels of secrecy, and a variety of financial mechanisms and institutions providing anonymity for the beneficial owners are highly attractive...*”¹¹ The 1998 report raised concerns about the need for requirements to maintain information about beneficial owners and improve mutual legal assistance in obtaining such information.¹²

1.2 FALLOUT FROM THE PANAMA PAPERS DISCLOSURES

On 3 April 2016, journalists from 107 media organisations in more than 80 countries released the first wave of stories reporting on 2.6 terabytes of confidential information leaked to the German newspaper *Süddeutsche Zeitung* from the database of Mossack Fonseca, the world’s fourth biggest offshore law firm. The ‘Panama Papers’ leak contained 11.5 million documents, representing more data than the US diplomatic cables released by WikiLeaks in 2010, the Offshore Leaks in 2013, the Luxembourg tax files in 2014, and the HSBC files in 2015 combined. The files contained the confidential records of over 214,000 companies, trusts, and foundations set up across the 21 secrecy jurisdictions where Mossack Fonseca operates, and detailed the involvement of over 14,000 intermediaries (such as lawyers and tax advisors) who directed their clients to use the firm’s services. These records revealed details of the previously hidden financial dealings of 12 current and former heads of state, 61 associates of current or former heads of state, and 128 current and former political and public officials.

1.2.1 Beneficial ownership pilot initiative

The response from the international community was swift. Less than two weeks after the first stories were published, the UK, Germany, France, Italy and Spain had announced the launch of a pilot initiative for the automatic exchange information on beneficial ownership of companies and of “trusts with tax consequences,” mirroring arrangements already in place under the CRS. Noting that, as with the CRS, the effectiveness of the initiative would ultimately be contingent on full global implementation, the five European countries wrote to their G-20 counterparts to encourage the adoption of a new single global standard governing such exchange, as

⁹ G7, 1996 Lyon Summit, *Economic Communiqué: Making a Success of Globalization for the Benefit of All*, 21 June 1996 at para 16, available online at: <http://www.g8.utoronto.ca/summit/1996lyon/communique.html>

¹⁰ J.A. Blum, Prof. M. Levi, Prof. R.T. Naylor & Prof. P. Williams, *Financial Havens, Banking Secrecy and Money Laundering*, United Nations Office for Drug Control and Crime Prevention, Global Programme Against Money Laundering, 1998, at pg. 6, available online at: <https://www.amnet.co.il/joomla/attachments/UN-FINANCIAL%20HAVENS%20laundering.pdf>

¹¹ *Ibid.*, at pg. 7

¹² See J.A. Blum et al. at note 3, pg. 90 - 95

well as the development of a system of interlinked registries of beneficial ownership information.¹³ By the end of 2016, 54 jurisdictions had made a political commitment to support the development of the new global system for the systematic exchange of beneficial ownership information on a reciprocal basis.¹⁴

Guidance on beneficial ownership information availability already existed in the form of international standards including the FATF Recommendations (most widely adopted), the EoIR and AEOI standards in line with the CRS. The challenge has continued to be a lack of effective implementation of standards and limitations on the ability to exchange, cross-reference, trace and analyse beneficial owner data.¹⁵ Most recently, the OECD published a beneficial ownership toolkit¹⁶ which provides an overview of international tax transparency standards, provides examples of various approaches taken by several countries to ensure effective availability of beneficial ownership information and provide practical suggestions when considering various policy options.

1.2.2G-20 call for action on tax and beneficial ownership transparency

At their meeting on 13 April 2016 in Washington D.C., the G-20 Finance Ministers and Central Bank Governors called on the FATF and the Global Forum to consider ways to improve implementation of the international standards on transparency, including on the availability of beneficial ownership information and its international exchange. In September/October 2016, the FATF and the Global Forum outlined their initial proposals:

- a) Greater emphasis to be placed on beneficial ownership in follow-up processes to both the FATF mutual evaluations and the peer reviews conducted by the OECD Global Forum.
 - i. The Global Forum agreed upon new Terms of Reference (ToR) for the 2nd round of peer reviews of the EoIR Standard requiring all jurisdictions have access to information regarding the beneficial ownership of entities and legal arrangements operating in their jurisdictions (as defined by the FATF) and allow for its international exchange for tax compliance purposes.
 - ii. The assessment of the effectiveness of the implementation of the beneficial ownership standard to drive forward improvements in implementation.
- b) Enhanced cooperation between the FATF and the Global Forum to further ensure coherence and mutual reinforcement to ensure work was mutually supportive and promoted clear and consistent recommendations to improve

¹³ Letter from UK Chancellor to G-20 Counterparts, available online at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/516868/G5_letter_DOC140416-14042016124229.pdf

¹⁴ France, Germany, Italy, Spain, United Kingdom, Afghanistan, Anguilla, Argentina, Austria, Belgium, Bermuda, Brazil, British Virgin Islands, Bulgaria, Cayman Islands, Chile, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Gibraltar, Greece, Guernsey, Hungary, Iceland, India, Ireland, Isle of Man, Jersey, Latvia, Liberia, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Moldova, Montserrat, Netherlands, Nigeria, Norway, Poland, Portugal, Romania, Saudi Arabia, Seychelles, Slovakia, Slovenia, Sweden, Turks and Caicos Islands, United Arab Emirates. See, *HM Treasury, Statement on the initiative for the systematic sharing of beneficial ownership information*, 14 December 2016.

¹⁵ K. N. Vaidyanathan, Akshay Mathur & Purvaja Modak, *A global framework for tracing Beneficial Ownership*, G20 Insights, 24 July 2018, available online at: https://www.g20-insights.org/policy_briefs/a-global-framework-for-tracing-beneficial-ownership/

¹⁶ IDB & OECD, *A Beneficial Ownership Implementation Toolkit*, OECD & IDB, March 2019.

implementation.

- i. Although the scope of FATF and Global Forum assessments differed, some practical challenges recurred in the context of different legal and administrative systems, e.g. how to ensure the accuracy of ownership information held in a company registry, or how to enable ownership information to be exchanged between fiscal and law enforcement authorities, in both directions. For this reason, it was important to ensure that countries received clear and consistent guidance on how to improve their implementation of the international standards on beneficial ownership for AML/CFT and tax purposes. This would minimise confusion on the part of assessed countries about what steps they needed to take to improve implementation. The FATF Secretariat and Global Forum Secretariat mapped where the respective standards and assessment processes coincided, and considered ways to promote clear and consistent recommendations to countries.
- c) Engagement with relevant bodies to compile and disseminate examples of effective implementation for ensuring the availability, timely access to and exchange of accurate and reliable legal and beneficial ownership information for tax purposes.

At the 2018 G20 meetings, the OECD indicated its willingness to the G-20 Finance Ministers and Central Bank Governors to undertake further work in the tax area relating to beneficial ownership information for legal entities and arrangements. Specifically, the OECD's contribution, which is designed to complement the FATF and Global Forum's proposals, focused on the following components¹⁷:

- a) Gap analysis: conduct an analysis to determine whether there are gaps between tax compliance needs (both civil and criminal) for beneficial ownership information, and the relevant FATF standards for AML, and, suggest possible solutions taking into account cost benefit considerations.
- b) Designing structured and electronically searchable data sets of ownership information: review the existing data structures and formats used for FATCA/CRS, and explore the benefits, costs and issues involved in the wider adoption of the existing FATCA/CRS common structure and related formats for possible use by other repositories of ownership information such as registries, designated non-financial businesses and professions.
- c) Mapping domestic access to beneficial ownership information with respect to the legal ability of jurisdictions to share or access beneficial ownership information amongst different agencies domestically, including information received from a treaty party and explore the possibility of improving the sharing of beneficial ownership information between Competent Authorities as well as other authorities including tax authorities in their "civil" tax capacity.
- d) Improving international access to beneficial ownership information by mapping the ability to obtain beneficial ownership information both in the FATF and tax domains, and evaluating the practical issues associated with the existing framework with the goal of improving international access.

¹⁷ OECD Secretary-General's tax report to G20 Finance Ministers, October 2016.

The OECD Secretary General's Tax Report to G20 leaders¹⁸, delivered in June 2019, indicated that the review of implementation of new beneficial ownership requirement raised concerns with most jurisdictions receiving recommendations to improve their overall legal framework to align with international standards.¹⁹ The beneficial ownership toolkit, mentioned above, sought to assist policymakers in effectively implementing the legal and supervisory frameworks necessary to identify, collect and maintain beneficial ownership information.²⁰ The G20 Osaka Leader's Declaration welcomed the progress on automatic exchange of information for tax purposes as part of the tax transparency agenda and the updated list of jurisdictions that had not satisfactorily implemented international tax transparency standards.

1.2. AFRICAN NATIONS COMMIT TO IMPROVING BENEFICIAL OWNERSHIP TRANSPARENCY

The 2015 High Level Panel Report on Illicit Financial Flows recognized that masking the identity of owners and laws that ensured secrecy were enabling money laundering and the hiding of illicit wealth.²¹ In order to combat this, the panel recommended the use of public registries of beneficial ownership.²² In particular, they called on African countries to require that beneficial ownership information is collected during the incorporation or registration of legal persons and arrangements and kept up to date. Further requirements to reveal beneficial owners should extend to parties entering into government contracts with significant penalties for those who failed to do so.²³

In May 2016, following the London Anti-Corruption Summit, 36 countries including Tanzania, Kenya, Uganda, Ghana and Nigeria made commitments to realizing beneficial ownership transparency.²⁴ Ghana, Kenya and Nigeria committed to establishing public central registers.²⁵ Alongside these commitments, initiatives to enhance the regulation and enforcement of ownership transparency including the Extractives Industry Transparency Initiative (EITI) and the Open Governance Partnership involve 25 African countries who have made various commitments to collecting beneficial ownership information in centralized registers.

In 2018, during the 5th meeting of the African Initiative, 21 African countries, the AU, UNECA, Global Forum and other stakeholders recognized the importance of beneficial ownership, AEOI and abolishing bank secrecy.²⁶ As part of this effort the Global Forum has been providing technical assistance in various areas including beneficial ownership to several African countries including Kenya, Ghana, Nigeria, and Tanzania. The Africa

¹⁸ OECD, *OECD Secretary-General Tax Report to G20 Finance ministers and Central Bank Governors*,

¹⁹ *Ibid*, pg. 23

²⁰ OECD, *note 63*, pg. 25

²¹ High Level Panel Report on Illicit Financial Flows, UNECA, 2015, pg.46. Available online at: https://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf

²² *Ibid*

²³ *Ibid*

²⁴ Transparency International, *2016 London Anti-Corruption Summit Assessment, TI, 2016, pg, 7*

²⁵ *Ibid*

²⁶ Global Forum, *Tax Transparency in Africa: Africa Initiative Progress Report 2018*, OECD, February 2018, pg.21 – 22. Available online at: <http://www.oecd.org/tax/transparency/africa-initiative-report-2018.pdf>

Initiative recognizes that receiving beneficial ownership information has the potential to strengthen the capacity of tax authorities to fight tax evasion, but this would require cross sharing between African countries.²⁷

1.3 CONCLUSION ON TRENDS

In summary, over the last decade there has been significant progress in counteracting all forms of IFFs, partially reflecting a new political focus on the ways these flows undermine the revenue base and risk, undermining democracies. The emphasis has now shifted away from developing new standards to implementing the existing standards more effectively. Most notably, the institutions involved in the development of international standards to guide the collection and availability of beneficial ownership information began to recognize the gaps in implementation. Whilst countries had readily endorsed the FATF, EoIR and AEOI standards, effective implementation was lacking and this limited the ability of international organisations to evaluate the weaknesses or strengths of the standards.

2. OVERVIEW AND ASSESSMENT OF CURRENT REGULATORY FRAMEWORKS AND THEIR LINKAGES

There is an increasing recognition by the various forums, bodies, panels, and countries involved in developing policy responses to deal with illicit financial flows that there are common synergies between them which, if harnessed properly, can amplify the effectiveness of individual approaches. For instance, while the stated purpose of the FATF Standards on transparency and beneficial ownership is to prevent the misuse of corporate vehicles for money laundering or terrorist financing, the implementation of these Standards supports efforts to prevent and detect other predicate offences such as tax crimes and corruption. They also reinforce the capacity of jurisdictions to meet their legal obligations arising from related international standards such as the UN Convention against Corruption (UNCAC), the Council of Europe Criminal Law Convention on Corruption, the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions, and the Standard for Automatic Exchange of Financial Account Information. Common to many of these regimes and standards is the shared recognition that the identification of the ultimate beneficial owners of accounts and of corporations is crucial to detecting, tracking, and preventing illicit financial flows, by enabling authorities to more effectively and efficiently “follow the money”.

2.1 ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING FRAMEWORKS

Binding legal obligations relating to the prevention and detection of money laundering and terrorism financing are directly or indirectly incorporated in a broad range of international instruments, including the UN Convention Against Illicit Traffic in

²⁷ Ibid

Narcotic Drugs and Psychotropic Substances (the Vienna Convention), UN Convention against Transnational Organized Crime and the Protocols Thereto (UNTOC), the UNCAC, and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism. However, the obligations as set out in these instruments are highly generalised and lack the specificity of the FATF Standards, which constitute the universally accepted standard in AML/CFT. Accordingly, the analysis in the following sections concentrates mostly on the FATF Standards and, where relevant, on the EU 4AMLD and 5AMLD, which spell out in greater detail what jurisdictions should require of financial and non-financial institutions in applying their AML/CFT regimes.

2.1.1 IDENTIFICATION AND VERIFICATION OF THE ‘BENEFICIAL OWNER’ – REQUIREMENTS AND PROCEDURES UNDER THE FATF STANDARDS

2.1.1.1 *Definitional issues*

While various legal, academic, and industry definitions of ‘beneficial owner’ exist, the broadly worded FATF definition is generally accepted as the benchmark. It refers to:

The natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.

There are two key elements to this definition:

- 1) A beneficial owner must always be a real, living, ‘natural’ person—a legal person (e.g. a corporation) cannot, by definition, be a beneficial owner, as a legal person is itself always controlled by a natural person.
- 2) It is important to make a distinction between concepts of ultimate “legal” ownership and control and “effective” control, which can also include those situations where a transaction is being conducted on behalf of someone else.
 - a. Ultimate legal ownership refers to the natural person(s) who have direct title, under the respective jurisdiction’s legal provisions, to the legal person through a chain of ownership. Ultimate legal control refers to the ability to take decisions and impose resolutions within a legal person, e.g. through legal ownership of a controlling block of shares. For instance, listed companies often employ complex control and ownership arrangements designed to give investors voting/control rights in excess of their cash-flow rights. These arrangements are commonly employed by inside block holders who usually have voting control, even if they ostensibly have no majority stake in the company.²⁸
 - b. Ultimate “effective” control refers to means of control other than direct control. This requires the identification of the natural person(s) who are in a position to take advantage of the capital or assets of the legal person,

²⁸ J.A. McCahery & E.P.M. Vermeulen, *Disclosure of Ownership and Public Companies*, in Caprio, G. (ed.), *The Evidence and Impact of Financial Globalisation* (Academic Press: San Diego, 2012) at 187.

even where they have no actual or legal ownership or control.²⁹

This could include situations where an individual with no equity interest in a company receives a significant part of the company's economic benefit (e.g. excess cash flow) by virtue of indirect relationships or other lines of influence, or where an individual with no equity interest has a significant say in company decision-making (i.e. 'control', through powers of attorney or contractual arrangements).³⁰

Identification of the beneficial owners of accounts and of corporations is crucial to detecting, tracking, and preventing illicit financial flows, by enabling authorities to more effectively and efficiently "follow the money".³¹ Therefore, the issue of defining beneficial ownership remains controversial. Even though the FATF is the most commonly accepted definition, it is not the only one used. Currently, the government of United States is considering the introduction of beneficial ownership definition by setting up the threshold, which would be equal to 10%. This lack of coherency among the states and organizations may influence difficulties with establishing transparency. Introduction and enforcement of implementation of unilateral definition could resolve this issue. Common understanding of the notion would thus constitute a valuable input in the discussion.

2.1.1.2 Initial customer due diligence requirements

Customer due diligence (CDD), often referred to as 'Know Your Customer' (KYC) requirements, is the basic building block of the entire AML/CFT regulatory framework. The main requirements are outlined in Recommendations 10 and 22 of the FATF Standards, namely:

"Financial institutions should be required to undertake CDD measures when:

- a) Establishing business relations;
- b) Carrying out occasional transactions: (i) above the applicable designated threshold (US\$/EUR 15,000); or (ii) that are wire transfers in the circumstances covered by the Interpretive Note to Recommendation 16;
- c) There is a suspicion of money laundering or terrorist financing; or
- d) The financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.

The CDD measures to be taken are as follows:

- a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information.

²⁹ See FATF, *Transparency and Beneficial Ownership*, Guidance Paper, October 2014; E. van der Does de Willebois et al., *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It*, Stolen Asset Recovery Initiative, World Bank, UNODC, 2011, available online at: <https://star.worldbank.org/star/sites/star/files/puppetmastersv1.pdf>.

³⁰ A. Sayne et al., *Owning Up: Options for Disclosing the Identities of Beneficial Owners of Extractive Companies*, Natural Resource Governance Institute (NRGI), Briefing, August 2015, available online at: http://www.resourcegovernance.org/sites/default/files/nrgi_Beneficial%20Owners20150820.pdf.

³¹ See: A. Meyer, *Transparency and Beneficial Ownership in the African Context: Ghana, Nigeria and South Africa*. *Provisional discussion paper*, Conference on Tax and Good Governance in Africa 26-28 April 2017 Abuja, Nigeria.

- b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows whom the beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership and control structure of the customer.
- c) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship.
- d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.”

FATF Recommendation 22 sets out the requirements on customer due diligence (designated non-financial business and professions, namely: The CDD requirements set out in Recommendation 10 apply to designated non-financial businesses and professions (DNFBPs) in the following situations.

- a) Lawyers, notaries, other independent legal professionals and accountants – when they prepare for or carry out transactions for their client concerning the following activities:
 - i. Buying and selling of real estate.
 - ii. Management of client money, securities or other assets.
 - iii. Management of bank, savings or securities accounts.
 - iv. Organisation of contributions for the creation, operation or management of companies.
 - v. Creation, operation or management of legal persons or arrangements, and buying and selling of business entities.
- b) Trust and company service providers – when they prepare for or carry out transactions for a client concerning the following activities:
 - i. Acting as a formation agent of legal persons.
 - ii. Acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons.
 - iii. Providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement.
 - iv. Acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement.
 - v. Acting as (or arranging for another person to act as) a nominee shareholder for another person

³² The requirements of FATF Recommendation 22 extend to other DNFBPs including casinos, real estate agents, and dealers in precious metals and stones. However, for the purposes of this paper the focus is limited to those professional intermediaries known to service secrecy jurisdictions and assist in the obfuscation of beneficial ownership.

Effective application of CDD/KYC measures ensures that financial institutions and DNFBPs have sufficient information to accurately identify the legal and/or beneficial owner of their customer, the true nature and purpose of the account or property held by that customer, and the source of that customer's funds or property. In turn, this information allows law enforcement and other competent authorities to more readily "follow the money" and identify those person(s) who are either suspected of involvement in an activity of concern, or who may have relevant information to further an investigation.

2.1.1.3 Procedures for obtaining basic and beneficial ownership information for legal persons and arrangements

Recommendation 24 of the FATF Standards set out the requirements and procedures for obtaining basic and beneficial ownership information for legal persons, though the bulk of the guidance is contained in the Interpretive Note.

The FATF Recommendation 24 on transparency and beneficial ownership of legal persons notes that:

"Countries should take measures to prevent the misuse of legal persons for money laundering or terrorist financing. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries that have legal persons that are able to issue bearer shares or bearer share warrants, or which allow nominee shareholders or nominee directors, should take effective measures to ensure that they are not misused for money laundering or terrorist financing. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22."

The interpretive note to Recommendation 24 recommends the following mechanisms to ensure that beneficial ownership is made available to competent authorities in a timely manner:

- a) Registry approach – requiring companies of company registries to obtain and hold up-to-date information on the companies' beneficial ownership.
- b) Company approach – requiring companies to take reasonable measures to obtain and hold up-to-date information on the companies' beneficial ownership.
- c) Existing information approach – using existing information obtained by financial institutions or DNFBPs, information held by other competent authorities, information held by the company and available information on companies listed on the stock exchange on beneficial ownership information.

The FATF Recommendation 25 on transparency and beneficial ownership of legal arrangements notes that:

"Countries should take measures to prevent the misuse of legal arrangements for money laundering or terrorist financing. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries, which can be obtained or accessed in a timely fashion by competent authorities. Countries should consider measures to

facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22.”

The Interpretive Note to Recommendation 24 requires that ‘basic’ information on legal persons be obtained and recorded in a company registry, as a necessary prerequisite to determining the identity of the beneficial owner(s). This information should, at a minimum, include the following:

- a. The company name, proof of incorporation, legal form and status, the address of the registered office (or, if different, the principal place of business), basic regulating powers (for example, memorandum of incorporation and/or articles of association, by-laws)³³, as well as the names of relevant senior management; and
- b. The register of shareholders or members, containing the names of the shareholders and members and number of shares held by each shareholder, and the categories of shares (including the nature of the associated voting rights).

This information can then be used as an initial basis for obtaining and verifying the identity of the natural person(s) (if any, as ownership interests can be so diversified that there are no natural persons, whether acting alone or together, who exercise control of the legal person through ownership—this will nearly always involve a widely held publicly traded company) who have an ultimate beneficial interest in the legal person.³⁴

In practice, this involves a three-step ‘test’:

Step 1 Is there a natural person(s) who directly or indirectly holds a minimum percentage of ownership interest in the legal person (often referred to as the ‘threshold’ approach), or who exercises control together with other shareholders, including through any contract, understanding, relationship, intermediary or tiered entity (the ‘majority interest’³⁵ approach)?

Step 2 To the extent that there is doubt as to whether any of the persons identified in Step 1 above are the beneficial owners, or where no natural person exerts control through ownership interests, is there a natural person(s) exercising control through other means?³⁶

Step 3 Where no natural person is identified under Steps 1 or 2 above, the relevant natural person who holds the position of senior managing official (i.e. the person responsible for taking strategic decisions or for exercising general executive control) may be deemed to have an ultimate controlling interest.

³³ “Note that these types of document are intended to be indicative, not definitive. Documentation is not standard: supporting documentation to validate ownership may vary from jurisdiction to jurisdiction and is also subject to the type of entity. Terminology can also be problematic, e.g. “articles of incorporation” is a term often used in reference to the document that list rules for conduct of a corporation, association, partnership or any organisation, whereas the correct term in this case should be “by-laws.” Further detailed information and guidance on this point is provided in J.C. Ariza, Challenges of Finding the Ultimate Beneficial Owners in AML and ATF, ACAMS, July 2014, available online at: <http://www.acams.org/wp-content/uploads/2015/08/Challenges-of-Finding-the-Ultimate-Beneficial-Owners-in-AML-and-ATF-JC-Ariza.pdf>.

³⁴ See FATF, *Transparency and Beneficial Ownership*, at para. 32.

³⁵ The ‘majority interest’ approach would also extend to consideration of, e.g., partnership or shareholders’ agreements, power to appoint senior management, holding of convertible stock, or any outstanding debt that is convertible into voting rights.

³⁶ For example, those who exert control through personal connections, by participating in financing, because of close and intimate family relationships, historical or contractual associations or as a result of default on certain payments.

There are two important points to note here:

- 1) These steps are not alternative options, but are cascading measures, i.e. ‘Step 2’ is only to be used where ‘Step 1’ has been applied and has failed to identify the beneficial owner(s).³⁷
- 2) There is a widespread misconception that under the ‘threshold’ approach outlined at ‘Step 1’ above, the FATF Standards expressly specify a minimum threshold of 25% or more in order to determine a direct or indirect ownership interest. In fact, the FATF does not specify what threshold may be appropriate. In determining an appropriate minimum threshold, each country must consider the level of money laundering and/or terrorism financing risk identified for the various types of legal persons or minimum ownership thresholds established for particular legal persons pursuant to commercial or administrative law.³⁸

The requirements and procedures for beneficial ownership information for legal arrangements differ substantively from those applicable to legal persons. Recommendation 25 of the FATF Standards calls on countries to ensure that trustees of any express trust governed under their law obtain and hold adequate, accurate, and current beneficial ownership information regarding the trust. However, the specific characteristics of these types of arrangements make it more complicated to identify the beneficial owner(s) in practice. This is because in a trust, the legal title and control of an asset are separated from the equitable interests in the asset. This can mean that different persons might own, benefit from, and control the trust, depending on the applicable trust law and the provisions of the document establishing the trust (e.g. the trust deed). Accordingly, Recommendation 25 requires trustees to record and verify information on a broader grouping, including:

- a) The identity of the settlor, the trustee(s), the protector (if any), and the beneficiaries or class of beneficiaries,³⁹ and any other natural person exercising ultimate effective control over the trust (including through a chain of control/ownership); and
- b) Any regulated agents of, and service providers to, the trust, including investment advisors or managers, accountants, and tax advisors.⁴⁰

³⁷ See FATF Interpretative Note to Recommendation 10, at para. 5(b)(i). This is of particular importance for those seeking to apply the EU 4AMLD, where it has been suggested that the current drafting may lead to an interpretation that a person with a senior managing position is a valid “alternative” substitute for the beneficial owner who controls the company through ownership or other means – see A. Knobel & M. Meinzer, *Drilling down to the real owners – Part 1*, Tax Justice Network, 18 May 2016, available online at: http://www.taxjustice.net/wp-content/uploads/2013/04/TJN2016_BO-EUAMLD-FATF-Part1.pdf.

³⁸ See FATF, *Transparency and Beneficial Ownership*, at para. 33. For further discussion of the application of the risk-based approach in setting thresholds, see A. Sayne et al. note 52 above at 12, and Global Witness, *Assessment of EITI Beneficial Ownership pilots*, March 2015. The NRGi report notes that it is critical that countries pick thresholds with care. In some oil-producing sub-Saharan African nations, for example, it is not uncommon for a beneficial owner to hold only a small interest, sometimes less than 1% of the total. For large extractives projects, however, even a 1% or 5% interest can be quite lucrative, generating millions of dollars in rents.

³⁹ For beneficiaries of trusts that are designated by characteristics or by class, sufficient information should be obtained to ensure that the identity of the beneficiary or beneficiaries can be established at the time of the payout or when the beneficiary intends to exercise vested rights. See FATF Interpretative Note to Recommendation 10, at para. 5(b)(ii).

⁴⁰ FATF *Interpretative Note to Recommendation 25*, at para. 1.

Note that, unlike the three-step process applicable to legal persons, legal arrangements do not require any type of cascading test to be applied, as all the related parties must be identified from the beginning. Also note that for other types of legal arrangement that have similar structures or functions to express trusts (e.g. fiducie, treuhand, and fideicomiso), the FATF Standards require countries to take similar measures to those outlined for express trusts, with a view to achieving similar levels of transparency.

2.1.2 PRACTICAL CONSIDERATIONS – MECHANISMS AND SOURCES FOR OBTAINING BENEFICIAL OWNERSHIP INFORMATION

In practice, most jurisdictions employ a variety of complementary mechanisms to obtain information on beneficial ownership and control, though they can broadly be grouped into four categories: reliance on up-front disclosure; imposing an obligation on corporate service providers or ‘gatekeepers’; investigative processes (compulsory powers, court-issued subpoenas, etc.); and central registries. Choosing which of these mechanisms is appropriate will depend on a number of factors, including the nature of business activity in a jurisdiction, extent and character of non-resident ownership, corporate regulatory regime, existing AML/CFT laws, powers and capacity of supervisors and law enforcement authorities to obtain beneficial ownership and control information, functioning of the judicial system, and availability of anonymity instruments.⁴¹ Their usage is not intended to be mutually exclusive, and an effective system is likely to utilise a number of mechanisms in combination.

2.1.2.1 *Up-front disclosure system*

An up-front disclosure system requires the disclosure of beneficial ownership and control information to the relevant authorities at the establishment or incorporation stage, and generally imposes an obligation to update such information on a timely basis when changes occur. The reporting obligation may be placed on the corporate entity, the beneficial owner, or the corporate service provider involved in the establishment or management of the corporate entity. The OECD has identified a range of documents that an effective up-front disclosure system should seek to obtain in order to enable authorities to determine beneficial ownership, including (but not limited to):⁴²

- a) Copies of share registries.
- b) Periodic reports such as tax filings and annual reports.
- c) Certificate of incorporation and other corporate formation documents.
- d) Any document that provides persons with authority to act on behalf of the corporation.
- e) A copy of the trust deed.
- f) A copy of the letter of wishes, if any.
- g) The availability of any documents granting other persons authority to act on behalf

⁴¹ OECD, *Behind the Corporate Veil* note 13 above, at 41-42.

⁴² OECD Steering Group on Corporate Governance, *Options for Obtaining Beneficial Ownership and Control Information*, 1 September 2002, available online at: <https://www.oecd.org/daf/ca/1961539.pdf>.

of the trust.

- h) A copy of the partnership agreement.
- i) A copy of any arrangements that permit limited partners to influence management. For example, arrangements permitting a limited partner to serve as an officer or director of a corporate general partner or to otherwise provide advice to the general partner.
- j) The basic document that sets forth the structure, power and details of the foundation.
- k) The availability of any documents that provide other persons with authority to act on behalf of the foundation.

The effectiveness of up-front disclosure is largely dependent on the ability of the relevant supervisory authorities to ensure entities' compliance with the requirements, and to impose proportionate sanctions in cases of non-compliance. Such sanctions must be vigorously enforced if they are to be dissuasive.

2.1.2.2 Imposing reporting obligations on service providers and professional intermediaries

This option places reporting obligations on corporate service providers and professional intermediaries involved in the establishment and management of legal persons and arrangements, including company formation agents, registered agents, lawyers, notaries, accountants, tax advisors, professional trustees, and companies supplying nominee shareholders, directors, and officers. These so-called 'gatekeeper' professions would be required to obtain, verify, and retain records on the beneficial ownership and control of the corporate entities that they establish, administer, or for which they provide fiduciary services. Authorities should seek to obtain information and documents similar to those specified above in respect of an up-front disclosure system. As with up-front disclosure, the effectiveness of this mechanism will be determined by authorities' ability to enforce reporting obligations and punish non-compliance.

2.1.2.3 Reliance on investigative mechanisms

Investigative mechanisms rely on the use of compulsory powers (e.g. court-issued subpoenas) by law enforcement and competent authorities to obtain beneficial ownership and control information. This type of mechanism can generally only be utilised in specific situations, e.g. when illicit activity is suspected; where such information is required by authorities to fulfil their regulatory/supervisory functions; or such information is requested by other authorities domestically and internationally for regulatory/supervisory or law enforcement purposes. For investigative-type mechanisms to work requires a well-functioning judicial system, of high competence and integrity, which is capable of processing applications and responding to requests for information in a timely manner. The overall effectiveness of such a system will also be dependent on the availability of information within the relevant jurisdiction.⁴³

2.1.2.4 Centralised (publicly accessible) registries

⁴³ Ibid.

Systems utilising central registries place the burden on legal persons and arrangements to obtain and record (and potentially disclose) accurate and current information on their beneficial ownership. A well-resourced and proactive company registry holding beneficial ownership information can significantly reduce the compliance burden for financial institutions and DNFBPs undertaking CDD/KYC checks, as well as enhancing efficiencies in investigations by law enforcement and other competent authorities and assist companies in knowing who they are dealing with. However, there are a number of legitimate criticisms regarding their utility in practice. Of particular concern is the accuracy and verification of information—it is something of a truism that a registry is only as good as the information it records. Previous iterations of companies’ registries have been criticised for acting in passive and archival roles, rarely verifying the information received, and failing to ensure its currency.⁴⁴ Generally with these mechanisms, responsibility for verifying information and notifying changes in particulars of ownership rests with the legal entity. Central registries take information on good faith, with most documents and filings being accepted at face value unless an omission of information is blatant or the information supplied is plainly false. Supporters of central registries generally point to the sanctions that are usually put in place for providing misleading or incorrect information or falsely attesting to its accuracy. However, as studies undertaken by the StAR initiative have shown, many registries report that companies often still failed to comply, claiming that they had not understood their requirements and responsibilities.⁴⁵ It can be difficult for authorities to differentiate between legitimate cases of innocent mistake, and deliberate concealment by criminal entities with a vested interest in supplying misleading or incomplete information. Some most registries exclude trusts and other opaque structures. Also, at present no attempt has been made to connect national registries

2.1.3 INCONSISTENT GLOBAL IMPLEMENTATION AND THE RISK OF REGULATORY ARBITRAGE

Although the FATF Standards are non-binding, so-called ‘soft’ law, instruments; in other words, they provide only that jurisdictions “should” rather than “shall” implement them, the threat of targeted financial sanctions by countries the threat of sanctions has been effective. This reflects the FATF’s position as an inter-governmental body governed by a relatively narrow, non-treaty-based mandate. Its member states have diverse legal frameworks and financial systems, and a framework of non-binding principles-based recommendations allows for domestic implementation by to be flexibly pursued by members in accordance with their own particular circumstances. In practice, this means that although there is often a significant degree of convergence, different jurisdictions have chosen to apply the FATF Standards regarding beneficial ownership (where they have done so at all) in different ways.

In most cases two types of differences can be distinguished: threshold differences (i.e. changes to the minimum thresholds for determining a direct or indirect ownership or control interest); and scoping differences (i.e. clarifications or specifications around captured and excluded persons and arrangements).⁴⁶ For instance, while the UK and the

⁴⁴ See E. van der Does de Willebois, et al., *The Puppet Masters*, note 51 above at 72-74.

⁴⁵ Ibid.

⁴⁶ See European Commission, *Final Study on the Application of the Anti-Money Laundering Directive*, January 2011, available online at: http://ec.europa.eu/internal_market/company/docs/financial-

US have both imposed the common 25% threshold, the recent EITI beneficial ownership pilot revealed thresholds within the African region ranging anywhere from zero to between 5–25%.⁴⁷ These differences exist not only between jurisdictional regimes, but also within apparently homogenous supra-national regimes as well.

In 2014, FATF recognized⁴⁸ that the implementation of the FATF Recommendations was proving challenging and identified the following issues:

- The misuse of legal persons and arrangements – the lack of adequate, accurate and timely beneficial ownership facilitates ML/TF by disguising the identify of known or suspected criminals; the true purpose of an account or property held; or the source or use of funds or property associate with a corporate vehicle. Multiple methods could be adopted including shell companies, complex ownership and control structures, and bearer shares, amongst others.
- Access to information by competent authorities – adequate powers, mechanisms and expertise to access, in a timely manner, beneficial ownership information on legal persons held by relevant parties and other information held by trustees, financial institutions and DNFBPs on beneficial owners of the trust, assets held and the residence of the trustee. Cooperation between government entities holding such information is essential and communication mechanisms must be established in legislation or regulation to ensure timely access. To facilitate this, it is useful for competent authorities to know what basic and beneficial ownership information is available in the country, and which relevant parties are holding it.
- International cooperation on beneficial ownership – due to the difficulty to obtain information on the ownership of foreign companies and trusts and little, if at all, cooperation on identifying beneficial owners in some countries, criminals are able to conceal their identities behind a chain of different companies incorporate in different jurisdictions.

In a report to the G20 on beneficial ownership, FATF identified the following challenges based on peer reviews:

- Insufficient accuracy and accessibility of basic information relating to company registration.
- Less rigorous implementation of customer due diligence measures by key gatekeepers.
- Lack of sanction on companies that fail to update information held by national registries or maintain information about their shareholders or members.
- Obstacles to information sharing such as data protection and privacy laws which impeded competent authorities from timely access.

Although countries have since agreed and committed to cooperate on the collection and accessibility of beneficial ownership information, challenges remained and FATF has since prepared additional guidance to enhance compliance across jurisdictions. Results

crime/20110124_study_aamd_en.pdf.

⁴⁷ Burkina Faso, Niger, Nigeria, Togo, Tanzania – no threshold; DRC - 25%; Honduras – 5%; Kyrgyz Republic – 5%; Liberia – 5/10%; Tajikistan – 5%; Zambia – 20%. See EITI, ‘Beneficial Ownership Pilot Evaluation Report,’ October 2015, available online at: https://eiti.org/sites/default/files/documents/bo_pilot_evaluation_report-full.pdf.

⁴⁸ See FATF, *Guidance on Transparency and Beneficial Ownership*, FATF, October 2014, available online at: <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf>

from FATF Mutual Evaluations identified that jurisdictions found it difficult to ‘achieve a satisfactory level of transparency regarding the beneficial ownership of legal persons’.⁴⁹ The root of the problem was found to be the weak implementation of existing standards rather than gaps in the standards.⁵⁰ In particular, FATF identified the following areas that raised obstacles to effective implementation⁵¹:

- a) Risk assessment;
- b) Adequacy, accuracy and timeliness of information on beneficial ownership;
- c) Access by competent authorities;
- d) Bearer shares and nominee shareholder agreements;
- e) Fines and sanctions; and
- f) International co-operation

There is no single solution to tackling these obstacles that are closely linked, FATF recommend a combination of approaches and concerted efforts from different stakeholders.⁵²

2.1.3.1 European Union Anti-Money Laundering Directive

In 2012, the European Commission conducted a review of Member States’ implementation of the 3rd AMLD.⁵³ One of the main concerns highlighted by the review was inconsistent implementation of AML/CFT obligations. Specifically, the review found that the definition of beneficial ownership had been interpreted and legislated differently across Member States, leading to legal and business uncertainty and negatively impacting the overall effectiveness of the system.⁵⁴

According to a report issued by the European Supervisory Authorities:

- a. 13 EU Member States followed a ‘top down’ approach with respect to the calculation of the beneficial ownership threshold, which means that in cases of indirect ownership, the percentage/share was determined by reference to the customer only.⁵⁵
- b. Some Member States required institutions to determine whether a natural person at grandparent level (or beyond) holds 25% plus one share of the customer or more, e.g. a 30% share (grandparent level) of a 60% share (parent level) in the customer is considered an indirect 18% share in the customer and is not normally considered an ultimate beneficial owner.

⁴⁹ FATF, *Best Practices on Beneficial Ownership for Legal Persons* (2019) FATF, pg.5. Available online at: <https://www.fatf-gafi.org/media/fatf/documents/Best-Practices-Beneficial-Ownership-Legal-Persons.pdf>

⁵⁰ *Ibid*, pg.8

⁵¹ *Ibid*, pg.8

⁵² FATF (2019), n.107, pg.8

⁵³ See COM, *Report on the application of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing*, (2012) 168 final

⁵⁴ The main difficulties identified were the determination of the minimum threshold for a direct/indirect ownership interest, and uncertainty over the meaning of “otherwise exercising control” or “control by other means”.

⁵⁵ EBA, ESMA and EIOPA, *Report on the legal, regulatory and supervisory implementation across EU Member States in relation to the Beneficial Owners Customer Due Diligence requirements under the Third Money Laundering Directive*, AMLTF/2011/05, April 2012.

- c. Other Member States, also following the ‘top-down’ approach, required institutions to determine whether a natural person at grandparent level (or beyond) exercises control or owns at least 25% plus one share of the customer (de jure or de facto).
- d. 11 Member States took the ‘bottom-up’ approach that ownership at any layer has to be counted in full, e.g. a 30% share (grandparent level) of a 60% share (parent level) in the customer is considered an indirect 30% share in the customer, and thus a person who owns more than 25% of such entity is considered the ultimate beneficial owner.

Following the first supranational risk assessment, as required by 4AMLD, the European Commission found that a majority of recommendations had been implemented by various actors, however, vulnerabilities remained on identification of beneficial owners.⁵⁶ In particular, it was found that failure to identify DNFBP client’s beneficial owner was a main weakness in the sector.⁵⁷ Some parties did not understand the concept or failed to check the identity. Other vulnerabilities included⁵⁸:

- Criminals using complex corporate structures registered in third countries given that the real registers foreseen in 4AMLD only covered legal entities and arrangements in MS.
- Criminals might wilfully use false information or documentation in order to hide their identity.
- The national registers on beneficial ownership might have weak spots with regard to their technical implementation or management. Criminals might shift their business to MS with a less effective framework.

5AMLD tried to address these vulnerabilities by introducing wider accessibility of beneficial ownership registers.

While the above inconsistencies may seem insignificant, they greatly increase the likelihood of financial institutions and DNFBPs reaching different conclusions regarding the beneficial owner of the same customer. This increases both regulatory risk and compliance costs for cross-border entities at a group-level, and negatively affects the level playing field for these entities.⁵⁹ Inconsistencies such as these also create systemic loopholes, which open the global financial system up to greater risk of abuse from persons and entities looking to take advantage of regulatory arbitrage opportunities (e.g. by setting up accounts or sending money through jurisdictions with less stringent interpretations of the Directive’s requirements). Similar arbitrage risks continue to be posed within the EU by exemptions and carve-outs from due diligence obligations/beneficial ownership identification requirements that apply to both offshore trusts and companies listed on

⁵⁶ European Commission, *Communication from the Commission to the European Parliament and The Council: Towards better implementation of the EU’s anti-money laundering and countering the financing of terrorism framework*, European Commission, COM (2019) 360, available online at:

https://ec.europa.eu/info/sites/info/files/communication_from_the_commission_to_the_european_parliament_towards_better_implementation_of_the_eus_anti-money_laundering_and_countering_the_financing_of_terrorism_framework.pdf

⁵⁷ European Commission

⁵⁸ Ibid

⁵⁹ See European Commission, *Impact Assessment*, SWD(2013) 21, available online at: http://ec.europa.eu/internal_market/company/docs/financial-crime/130205_impact-assessment_en.pdf.

regulated public stock exchanges. Recommendations regarding the need for beneficial ownership information of legal entities and arrangements to be adequate, accurate and up to date made in 2017 by the European Commission were restated in 2019, encouraging MS to implement the provisions of 5AMLD related to beneficial ownership registers.

2.2 INTERNATIONAL TAX TRANSPARENCY FRAMEWORKS

Although an agreement between the States seeking to exchange information is a necessary prerequisite for the exchange of information, there are several different legal mechanisms available. These can be broadly categorised into two internationally agreed standards on transparency and exchange of information for tax purposes: exchange of information on request (EoIR) and automatic exchange of information (AEOI).

2.2.1 GLOBAL FORUM PEER REVIEWS

Effective implementation of either, or both, of the EoIR or AEOI standards requires three basic components: (i) availability of ownership information; (ii) appropriate access to that information by tax and other competent authorities; and (iii) the existence of information exchange mechanisms.

In 2010, the Global Forum for Tax Transparency and Exchange of Information for Tax Purposes (the Global Forum) instituted a peer review process to assess and ensure the availability of relevant information. The mandate of the Global Forum has developed from the strict focus on the policing tax havens and harmful preferential tax regimes to spreading the culture of jurisdictional transparency through voluntary compliance with a global standard of tax transparency and exchange of information. The peer review process applies to those jurisdictions that are members of the Global Forum, and those deemed to be systemically important to the tax transparency agenda.⁶⁰ There are currently over 160 members of the Global Forum, of which 20% are from Africa, including Benin, Botswana, Burkina Faso, Cabo Verde, Cameroon, Chad, Ivory Coast, Djibouti, Egypt, Eswatini, Gabon, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Mali, Mauritania, Mauritius, Morocco, Namibia, Niger, Nigeria, Rwanda, Senegal, Seychelles, South Africa, Tanzania, Tunisia, and Uganda.

Peer reviews are conducted in accordance with Terms of Reference (ToR) and a Methodology. Separate review mechanisms are in place for both AEOI and EoIR. The ToR for EoIR breaks the standard down into 10 'Essential Elements'.

Essential Element A.1 sets out what a jurisdiction must do to satisfy requirements for availability of ownership information under EoIR:

- A.1. Jurisdictions should ensure that ownership and identity information, including information on legal and beneficial owners, for all relevant entities and arrangements is available to their competent authorities.

⁶⁰ For the methodology of peer reviews see: *Global Forum, Revisited Methodology for Peer-Reviews and Non-Member Reviews* (2013) available online at: <http://www.eoitax.org/keydocs/3a4dca676433deb37b910032fa0848ba#default>.

- A.1.1. Jurisdictions should ensure that information is available to their competent authorities that identifies the owners of companies and any bodies corporate. Owners include legal owners and beneficial owners (including, in any case where a legal owner acts on behalf of any other person as a nominee or under a similar arrangement, that other person), as well as persons in an ownership chain.
- A.1.2. Where jurisdictions permit the issuance of bearer shares they should have appropriate mechanisms in place that allow the owners of such shares to be identified. One possibility among others is a custodial arrangement with a recognized custodian or other similar arrangement to immobilize such shares.
- A.1.3. Jurisdictions should ensure that information is available to their competent authorities that identifies the partners in, and the beneficial owners of, any partnership that (i) has income, deductions or credits for tax purposes in the jurisdiction, (ii) carries on business in the jurisdiction or (iii) is a limited partnership formed under the laws of that jurisdiction.
- A.1.4. Jurisdictions should take all reasonable measures to ensure that beneficial ownership information is available to their competent authorities in respect of express trusts (i) governed by the laws of that jurisdiction, (ii) administered in that jurisdiction, or (iii) in respect of which a trustee is resident in that jurisdiction.
- A.1.5. Jurisdictions that allow for the establishment of foundations should ensure that information is available to their competent authorities for foundations formed under those laws to identify the founders, members of the foundation council, and beneficiaries (where applicable), as well any beneficial owners of the foundation or persons with the authority to represent the foundation.

The first round of peer reviews were conducted in two phases: Phase 1 sought to determine whether institutional and legal frameworks in the reviewed jurisdictions were sufficient to satisfy potential requests for tax relevant information; Phase 2 sought to determine whether exchange of information was functioning efficiently and effectively. Following the two phases of the peer review process, jurisdictions were rated as either ‘Compliant’, ‘Largely Compliant’, ‘Partially Compliant’, or ‘Non-Compliant’.⁶¹

Given the scope of this paper, it is important to note that while the first round of peer reviews touched on some issues concerning beneficial ownership (e.g. in relation to the use of nominees, trusts and bearer shares),⁶² the main focus was on the availability of information on the legal ownership of entities and legal arrangements, and the ability to exchange such information in a cross-border context.⁶³ The requirements under the EoIR

⁶¹ Ratings of the jurisdictions reviewed by Global Forum are available online at: <http://www.oecd.org/tax/transparency/exchange-of-information-on-request/ratings/#d.en.342263>.

⁶² OECD, *Implementing the Tax Transparency Standards: A Handbook for Assessors and Jurisdictions*, (Second Edition, OECD Publishing, 2011) at 24.

⁶³ The Peer Review Methodology provides that: “Effective exchange of information requires the availability of reliable information. In particular, it requires information on the identity of owners and other stakeholders as well as information on the transactions carried out by entities and other organisational structures. Such information may be

ToR are not limited to companies, but include: foundations, trusts and any similar structures; partnerships or other bodies of persons; trusts or similar arrangements; collective investment funds or schemes; any persons holding assets in a fiduciary capacity; and any other entities or arrangements deemed relevant in the case of the specific jurisdiction.⁶⁴

While jurisdictions are not required to implement any specific institutional framework to ensure the availability of ownership information, such information must at least be held at the level of financial institutions or other intermediaries and be made available to the competent authorities when a request for information, conformant with the requirements of administrative cooperation agreements, is received from other jurisdictions.⁶⁵ The peer review Methodology also requires that national legal secrecy provisions are relinquished, when ownership information is requested in the cross-border context.⁶⁶ It is important to note that jurisdictions would also be expected to exchange information on any entities in the ownership chain, provided that information on such entities is within the possession or control of persons within jurisdiction.⁶⁷

2.2.1.1 First round peer reviews

Of the 113 jurisdictions that have undergone both Phase 1 and Phase 2 peer reviews, over 27% were found to be either Partially or Non-Compliant with Element A.1 on availability of ownership information; only 30% were rated as fully Compliant.⁶⁸

2.2.1.2 Second round peer reviews

Under the second round of peer reviews, scheduled to take place from 2016–2020, all jurisdictions will be assessed as to the progress they have made in implementing the EoIR standard. Assessments will take place under revised ToR and Methodology, which now include an explicit requirement that beneficial ownership information (as defined under the FATF Standards) be available for EoIR purposes in respect of both legal persons and legal arrangements.⁶⁹

The revised ToR makes it clear that it is the responsibility of the jurisdiction under whose laws legal persons are formed to ensure that beneficial ownership information in relation to those entities is available. In addition, where a company or body corporate has a sufficient nexus to another jurisdiction, including being resident there for tax purposes (e.g. by reason of having its company HQ there), that other jurisdiction will also have the responsibility of ensuring that ownership information is available. Also, where a foreign company has a sufficient nexus, then the availability of beneficial ownership information is also required to the extent the company has a relationship with an AML-

kept for tax, regulatory, commercial or other reasons. If such information is not kept or the information is not maintained for a reasonable period of time, a jurisdiction's competent authority may not be able to obtain and provide it when requested." See note 91 above, at 23–26.

⁶⁴ See note 92 above, at 24.

⁶⁵ *Ibid.*, at 27.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ See OECD Global Forum, *Phase 1 and Phase 2 Reviews*, November 2016, available online at: <http://www.oecd.org/tax/transparency/GFratings.pdf>.

⁶⁹ OECD Global Forum, *Exchange of Information on Request: Handbook for Peer Reviews 2016-2020*, (3rd edition, 2016), at 19.

obligated service provider that is relevant for the purposes of EoIR.⁷⁰

Notably, the Global Forum has acknowledged that as its “standard-setting and evaluation closely relates to areas covered by other international bodies, and in particular the FATF, the principles developed by the FATF may be taken into consideration to interpret and apply the standard where appropriate.”⁷¹

The Global Forum is now intensifying its reviews under the broader ToR Standards and putting more emphasis on how far jurisdictions meet the FATF standard on access to beneficial ownership information.

3. BENEFITS AND BARRIERS TO THE COLLECTION, VERIFICATION, DISCLOSURE AND EXCHANGE OF BENEFICIAL OWNERSHIP INFORMATION

3.1 SHARED INTERESTS IN ACCESS TO INFORMATION

The identification of adequate, accurate, current, and reliable information on beneficial ownership is the golden thread that runs through every initiative and regulatory regime seeking to enhance transparency, reduce illicit financial flows, reverse harmful capital flight, and prevent criminals from laundering and utilising the proceeds of their crimes. This is evident in the work being done by international organisations including the FATF, the OECD, the World Bank, and the UNODC, and in the regional efforts being spearheaded by organisations such as the ATAF, ADFB, ECA, and the EITI.

For those in the private sector, this information provides greater clarity about the people with whom they are doing business. It enables them to make informed decisions about potential deals or transactions, and makes it much easier to manage legal, reputational, political, operational, and regulatory risks. In regions such as Africa, particularly those in countries where the extractive industries play a critical role in turning natural resources into the revenue streams that underwrite national development, the importance of transparency in company ownership structures is paramount, because complexity masks transparency. Dense, opaque ownership structures can provide a veneer of respectability, hiding potentially problematic interests and influence behind the seemingly reputable corporate history of a shelf company.⁷² This is a particular concern when PEPs hold hidden stakes in a company, as ownership and control of extractives companies by PEPs has frequently been shown to be the result of corrupt self-dealing and conflicts of interest during government contracting and licensing.

Though the definitions of PEPs varies by jurisdiction, most follow the FATF, which refers to: individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials (‘Foreign PEPs’); and individuals who

⁷⁰ Ibid.

⁷¹ Ibid., at 29.

⁷² See, generally, A. Sayne et al., *Owning Up*, note 52 above

are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials ('Domestic PEPs').

Disclosure of the beneficial ownership information can guard against these types of practices by revealing, e.g., the use of shell companies located in secrecy jurisdictions, or showing when an oil company owned by a politician receives a valuable license. This in turn protects the public interest by helping to deter corruption and improving the investment climate.⁷³

From a public-sector perspective, access to information on beneficial ownership is essential in order to remove the veil of secrecy and prevent bad actors from maintaining plausible deniability and continuing to operate with impunity. By identifying the natural person(s) responsible for the underlying activity of concern, this information can assist law enforcement and other competent authorities to "follow the money" in financial investigations involving suspect accounts/assets held by corporate vehicles, and assist in locating a given person's assets within a jurisdiction.⁷⁴ Beneficial ownership information can also assist tax authorities to verify compliance with tax laws, securities regulators to investigate market manipulation, unlawful insider trading, and fraud, and assist the Courts in the context of corporate self-dealing and other litigation cases.⁷⁵

3.2 THE NECESSITY FOR EXCHANGE OF INFORMATION

When the Heads of the G-7 States spoke of the challenges of globalisation and the progressive liberalisation of international capital flows in 1996, it is doubtful that they envisaged the sheer scale and complexities of our contemporary global financial economy. Consider, for a moment, the example of Goldman Sachs, a global behemoth at the vanguard of financial sector innovation. Taking one of their subsidiaries more or less at random, we see that Goldman Sachs Structured Products (Asia) Limited is a company registered in Hong Kong. This company is controlled by Goldman Sachs (Asia) Finance, a company registered in Mauritius. That company is controlled by a company back in Hong Kong, which in turn is controlled by a company in New York, which is controlled by a company in Delaware. Now, that company is controlled by another company in Delaware called GS Holdings (Delaware) LLC II, which itself is a subsidiary of The Goldman Sachs Group in New York, the global corporate HQ. Astoundingly, that is only one of hundreds of such chains, and by no means the most complex. All told, Goldman Sachs consists of more than 4000 separate corporate entities all over the world, some of which are around ten layers of control below the New York HQ. Interestingly, of those 4000 companies, approximately one third are registered in secrecy jurisdictions.

The unavoidable reality is that criminal activities are taking place in an increasingly

⁷³ EITI, *Guidance on beneficial ownership*, Guidance Note 22, available online at: <https://eiti.org/document/guidance-on-beneficial-ownership>. Further 'business use' cases have been identified by the B20 Anti-Corruption Task Force Ultimate Beneficial Ownership Workstream, see: <http://bteam.org/wp-content/uploads/2015/11/B20-Beneficial-Ownership-in-Practice.pdf>.

⁷⁴ See FATF, *Transparency and Beneficial Ownership*, at 3.

⁷⁵ OECD, *Behind the Corporate Veil*, note 13 above, at 42.

complex and globalised financial environment, one that is indifferent to the origins of illicit funds, whether accumulated through drug trafficking, investment fraud, extortion, corruption, embezzlement, tax fraud, or terrorism financing. The nature of modern financial crime means that the same activity may violate a number of different laws, and numerous authorities may have a recognisable legal interest in receiving information on beneficial ownership and control in order to investigate suspected illicit activities. Tax offences, for instance, are often intrinsically linked to other financial crimes as criminals fail to report their income from illicit activities for tax purposes. Conversely, criminals may over-report income in an attempt to launder the proceeds of crime. In 2012, the FATF expressly recognised the linkages between tax crimes and money laundering by adding tax crimes to the list of designated predicate offences for money laundering purposes. The EU recently followed suit, passing amendments to the 4AMLD that require Member States to provide access to information on the beneficial ownership of companies to tax authorities when monitoring the proper application of rules on the automatic exchange of tax information, thereby helping prevent tax evasion and tax fraud. Nevertheless there is still no international agreement on what constitutes a “tax crime”.

3.3 LEGAL MECHANISMS ENABLING THE SHARING OF INFORMATION BENEFICIAL

The capacity for authorities to exchange information, both domestically and internationally, will often be determined by whether the information sought falls into a restricted category, whether such information is confidential or non-confidential, whether such information is to be used for law enforcement or civil/regulatory purposes, and whether information is to be shared between authorities performing similar or non-similar functions.⁷⁶ Broadly speaking, there are currently four mechanisms that enable competent authorities to share information on beneficial ownership and control with their domestic and international counterparts.

3.3.1 MUTUAL LEGAL ASSISTANCE TREATIES

Mutual Legal Assistance Treaties (MLATs) are agreements between two or more countries to provide ‘the widest possible measure of mutual assistance’ in criminal investigations and prosecutions. Requests must take place through a designated ‘Central Authority’ in each State. MLATs can be bilateral or multilateral; there are regional MLA schemes within Europe, the Americas, Commonwealth countries, and South-east Asia.⁷⁷ Where there is no MLAT in place, jurisdictions can also seek to rely on subject-specific conventions that include MLA provisions, such as the UN Convention against Corruption; the UN Convention on Transnational Organized Crime; the OECD Convention on the Bribery of Foreign Public Officials; and the UN Convention on Psychotropic Substances. A wide range of assistance may be provided under the MLA mechanism, including interviewing witnesses, evidence gathering,

⁷⁶ *Ibid.*, at 68-72.

⁷⁷ Key regional MLATs include: the Inter-American Convention on Mutual Legal Assistance in Criminal Matters; Agreement on Mutual Legal Assistance between the European Union and the United States of America; European Convention on Mutual Assistance in Criminal Matters; and the Treaty on Mutual Legal Assistance in Criminal Matters.

obtaining testimony under oath, and execution of searches and seizures,⁷⁸ though these remedies are generally available only to criminal law enforcement authorities and not to regulatory/supervisory authorities.⁷⁹

3.3.2 LETTERS ROGATORY

Also known as a letter of request, letters rogatory are used to request information from foreign jurisdictions in matters outside the scope of an MLAT. The request is issued from a court in one jurisdiction to their counterpart in another, seeking assistance in obtaining records or in compelling testimony. A letter rogatory can be issued on behalf of law enforcement or prosecutorial authorities. Their validity is recognised in almost all jurisdictions, though some countries place limits on their use (e.g. cannot be executed before formal criminal charges have been filed).⁸⁰

3.3.3 A MEMORANDUM OF UNDERSTANDING

An MOU is an arrangement entered into between government agencies and/or authorities, and can form the legal basis for both domestic and international co-operation. An MOU expresses the intent of the parties to use their best efforts to provide assistance on specified matters, and regulates how information will be exchanged. MOUs generally contain safeguards protecting confidential information from being disclosed to third parties, and limiting the use of information shared to designated purposes.⁸¹

3.3.4 INFORMAL ARRANGEMENTS

The term ‘informal arrangements’ broadly encompasses the exchange of non-evidentiary information between foreign counterparts. The range of assistance varies among jurisdictions, but can include assistance in public document and source searches, interviews with witnesses, and information in government databases.⁸²

Informal arrangements are an effective and efficient way to share information. However, they are subject to a number of limitations; they usually preclude the sending of confidential or sensitive information, and information shared on an informal basis may not be admissible as evidence in legal proceedings. Given these limitations, informal arrangements are often used as a precursor for more formal requests through official channels.

3.4 BARRIERS TO ACCESS AND DISCLOSURE OF INFORMATION

3.4.1 CORPORATE AND BANKING SECRECY LAWS

There are a number of issues that impact the ability of government authorities and

⁷⁸ See StAR, *Access to Beneficial Ownership Information Of Legal Entities and Arrangements*, available online at: https://star.worldbank.org/star/sites/star/files/afar_bo_intro_final.pdf.

⁷⁹ OECD, *Behind the Corporate Veil*, note 13 above, at 65.

⁸⁰ *Ibid.*, at 66.

⁸¹ *Ibid.*

⁸² StAR, note 111 above.

agencies to obtain and share information on beneficial ownership and control. Some of these issues, outlined in greater detail below, are the result of complex chains of entities and permissive company or trust laws that allow the use of, *inter alia*, bearer shares, nominee directors and shareholders, and non-charitable purpose trust structures. Others arise from the fact that sovereign states retain the right to determine what can be shared, when, by and with whom, and how. In some jurisdictions, such as the Cook Islands, access to information requires consent, and corporate records can only be examined in the Companies Office Registry if the relevant company under investigation allows it. In others, such as Nauru, secrecy laws prohibit the inspection of corporation records for regulatory and enforcement purposes, even where illicit activity is suspected. The Cayman Islands, meanwhile, imposes prison terms not only for handing over information to unauthorised parties, but also for merely *asking* for such information.⁸³

3.4.2 PRIVACY LAWS AND DATA PROTECTION

Current moves towards implementation of central (public) registries also raises issues regarding potential violations of individual privacy, as well as the potential for misuse or abuse of personal information by governments lacking sufficient data protection mechanisms.⁸⁴ Legitimate concerns have also been raised regarding increased risks of individual reprisal arising from the public exposure of beneficial ownership information. This would expose certain classes of individuals (namely those with significant net worth or who occupy high profile positions) to higher risks of identity theft, cyber-crime, extortion, and kidnapping and ransom.

The privacy risks of disclosure of personal ownership information were the subject of a recent ruling by France's *Conseil Constitutionnel*.⁸⁵ On 5 July 2016, the French government launched a publicly accessible central register of trusts. This led to a legal challenge from an 89-year-old American woman, resident in France, who was a beneficiary of one of the trusts thus made public. The Court ruled that the register was unconstitutional, noting that "a reference in a publicly accessible register of the names of the settlor, beneficiary and administrator of a trust provides information on how a person intends to dispose of his or her estate," and that "this results in a breach of the right to respect for private life" guaranteed by Article 2 of the *Déclaration des droits de l'homme et du citoyen de 1789*. While the decision was contentious, with some arguing that only the 'public' aspect of the trusts register is unconstitutional and others arguing that the register itself was invalid,⁸⁶ it provides potential precedent for similar judicial determinations to be made elsewhere.

3.4.3 PRACTICAL IMPEDIMENTS ARISING FROM COMPANY AND TRUST RULES AND STRUCTURES

3.4.3.1 Inserting additional layers or 'chains' of ownership across multiple jurisdictions

⁸³ Tax Justice Network, *Financial Secrecy Index – Narrative Report on Cayman Islands*, September 2015, available online at: <http://www.financialsecrecyindex.com/PDF/CaymanIslands.pdf>.

⁸⁴ As shown in the EITI Beneficial Ownership Pilot Report of Nigeria, there is also the perception that disclosure of beneficial ownership information can be used for 'witch-hunting' of political opponents.

⁸⁵ *Conseil Constitutionnel Décision* no.2016-591 QPC du 21 octobre 2016 3/3.

⁸⁶ STEP, *French Constitutional Court rules on public register of trusts*, 24 October 2016, available online at: <http://www.step.org/news/french-constitutional-court-rules-public-register-trusts>.

In a tiered corporate vehicle structure, layers or chains of legal entities and/or arrangements, generally spread across multiple jurisdictional boundaries, are inserted between the beneficial owner(s) and the assets of the primary corporate vehicle. These chains can be lengthy, with a dozen or more tiers of parent, child and sister companies, holding companies, special purpose vehicles (SPVs) and other entity types separating the subsidiary from its ultimate parent.⁸⁷

While there is nothing ostensibly illegal about this practice, and indeed there are many legitimate reasons for legal entities to utilise such structures, by increasing the opacity of corporate frameworks this kind of ‘layering’ represents a significant problem for law enforcement and other competent authorities seeking to investigate transactions, determine ownership, or trace assets. It is quite common to encounter a situation where, as part of an investigation the authorities in Country A have successfully cooperated with the authorities of Country B to discover the shareholders of a corporation registered in that jurisdiction, only to find that the listed shareholders of that corporation are in fact corporations registered in Countries C and D.⁸⁸ The problem is obviously greatly exacerbated if Countries C and/or D are secrecy jurisdictions with some form of banking or corporate secrecy laws in place.

3.4.3.2 *Hiding behind nominee shareholders and directors*

The use of some form of ‘surrogate’, such as nominee shareholders or directors⁸⁹ is a very effective and common method of increasing the opacity of a corporate structure and concealing the identity of the beneficial owner. A nominee shareholder is a company or person who appears as the registered shareholder in a company, but who holds the shares on behalf of another person (normally undisclosed)—the beneficial owner. Sometimes, in a nominee shareholder arrangement, a confidential legal document (such as a declaration of trust, a deed of transfer, a nominee services agreement, or something similar) is issued by the nominee and held by the beneficial owner. Nominee shareholders are utilised in most jurisdictions. With respect to publicly traded shares, nominees (e.g., registering shares in the names of stockbrokers) are commonly, and legitimately, used to facilitate the clearance and settlement of trades. The rationale for using nominee shareholders in other contexts, however, is less persuasive and may lead to abuse. For example, many jurisdictions require corporations to maintain shareholder registers and file annual returns containing information on shareholders and directors. The use of nominees, however, reduces the usefulness of the shareholder register or the shareholder list because the shareholder of record may not be the ultimate beneficial owner. See OECD, *Behind the Corporate Veil*, note 13 above, at 31. Indeed, out of the 150 grand corruption cases studied by the Stolen Asset Recovery (StAR) Initiative in its *The Puppet Masters* report, more than two-thirds involved some form of surrogate.⁹⁰

While these arrangements have a variety of legitimate uses, revelations from the April 2016 ‘Panama Papers’ leak offer insight into ease with which they can be subverted and misused.

⁸⁷ A. Sayne et al., *Owning Up*, note 52 above, at 6

⁸⁸ See E. van der Does de Willebois, et al., *The Puppet Masters*, note 51 above, at 52.

⁸⁹ A nominee director appears as the registered director in a company on behalf of the (normally undisclosed) beneficial owner. When the nominee director is a corporate entity, the nominee is referred to as a corporate director.

⁹⁰ See E. van der Does de Willebois, et al., *The Puppet Masters*, note 51 above, at 58

Investigations undertaken by the German newspaper *Süddeutsche Zeitung* demonstrate that the nominee system in Panama essentially requires only three documents in order to function.

1. First, the nominee director provides a written declaration assuring the true beneficial owner that they will follow their instructions, and that they do not have any claims against them or the company.
2. Then, they give the beneficial owner a power of attorney, which makes them the *de facto* director.
3. In the third and final document, the nominee director drafts a signed but undated resignation letter, which is then passed on to the beneficial owner, who can then remove them at any time with retrospective effect.⁹¹

More troubling than the ease with which nominee directors can be controlled, is the sheer scale of potential abuse enabled by the system. One of the nominee directors employed by Mossack Fonseca⁹² is Leticia Montoya, a 63-year-old Panamanian citizen living in a poverty-stricken area outside Panama City. She reportedly speaks very little English, and has no secondary education. Despite this, Ms Montoya is listed as a director of more than 25,000 entities in the Panamanian company register alone.

3.4.3.3 Using bearer shares

Though now being phased out in most jurisdictions,⁹³ bearer shares continue to provide a simple means to ensure anonymity of beneficial ownership. Bearer shares are company shares that exist in certificate form, with ownership determined by whomever is in physical possession. Transfer requires only the delivery of the instrument from person to person.⁹⁴ Unlike ‘registered’ shares (for which ownership is determined by entry in a register), bearer shares typically give the person in possession of the certificate (the bearer) voting rights or rights to dividend. The company that issues the certificate typically does not report the owner’s name to any regulator, nor does it disclose when the shares change hands. Some companies do not even keep internal records of who owns their bearer shares.⁹⁵

3.4.3.4 Utilising complex trust structures

A simple, or express, trust involves a legal relationship whereby one party—usually referred to as the trustee—holds property for the benefit of another—commonly called the beneficiary. The trustee has legal title to the trust property, but must act for the good of the beneficiary. However, a number of more complex trust structures have been developed to assist settlors in obscuring beneficial ownership and control. For example, in order to prevent the identification of trust beneficiaries, discretionary trusts have been created. In these, the settlor appoints potential beneficiaries, but it is the trustee who has the discretion to choose, for instance, who will end up being a beneficiary. In order to

⁹¹ B. Obermayer & F. Obermaier, *The Panama Papers: Breaking the Story of How the Rich & Powerful Hide Their Money*, Oneworld Publications Ltd; London (2016)

⁹² Mossack Fonseca & Co. is a Panamanian law firm and corporate service provider.

⁹³ See E. van der Does de Willebois, et al., *The Puppet Masters*, note 51 above, at 41.

⁹⁴ *Ibid.*

⁹⁵ A. Sayne et al., *Owning Up*, note 52 above, at 6

reduce the risks of giving discretion to a complete stranger over their assets, the settlor may: write a ‘letter of wishes’ telling the trustee how they should distribute assets; appoint a ‘protector’ or ‘enforcer’ to tell the trustee what to do; or give power of attorney to another to either veto or remove the trustee, to ensure that the settlor will retain control. Non-charitable ‘purpose trusts’⁹⁶ on the other hand, are not trusts in a classical sense, but are generally artificial constructs⁹⁷ used predominantly in secrecy jurisdictions, and which are designed to be used as adjuncts to taxation planning structures and risk avoidance.⁹⁸ As these structures have no ascertainable beneficiaries, but exist only to advance some kind of non-charitable purpose, they can potentially be used to undermine and avoid the concept of beneficial ownership altogether.

3.4.4 LACK OF CAPACITY AND NEED FOR POLITICAL SUPPORT

Even in the absence of impediments arising from corporate structures or privacy laws, the ability to obtain and disclose beneficial ownership information can be severely limited by simple capacity constraints, which are widespread in many African countries. Many authorities and agencies, in both developed and developing countries, are faced with inadequate financial and/or human resources, out-dated IT systems, and a lack of institutional infrastructure. In some part, this necessarily reflects a failure of political will; and yet, though frequently cited as a culprit for unsatisfactory reform outcomes, the concept of ‘political will’ is complex and poorly defined. The issue, in part, is that political will consists of two interrelated challenges: the first is making a commitment to undertake actions to achieve a set of objectives; the second is a willingness to sustain the costs (both political and financial) of those actions over time.⁹⁹

Jurisdictions make a political commitment when they agree to implement the Standards imposed by, e.g., the FATF and the Global Forum. When it comes to actual implementation, the crux of the matter, more often than not, comes down to a cost/benefit analysis. Yet, as the High-Level Panel on Illicit Financial Flows noted, even where independent studies show that the additional cost of building capacity, particularly for revenue authorities, pays off through increased tax collection, the key thing is that the resources have to be found in a context of competing priorities, while the results will almost certainly take a long time in coming.¹⁰⁰

3.5 VERIFICATION OF BENEFICIAL OWNERSHIP INFORMATION

Even where practical impediments to the collection of ownership information have been overcome, information must be both accurate and reliable if it is to be of any practical

⁹⁶ Trusts for charitable purposes are also technically purpose trusts, but they are usually referred to simply as charitable trusts. Reference to purpose trusts is usually taken to refer to non-charitable purpose trusts.

⁹⁷ Generally, the law does not permit non-charitable purpose trusts (outside of certain anomalous exceptions which arose under the eighteenth century common law), as they are unenforceable due to lack of certainty (no identifiable beneficiaries), and usually fall foul of the rule against perpetuities. A number of tax havens and OFCs have enacted legislation overriding the common law prohibition, including the Bahamas, Bermuda, the British Virgin Islands, the Cayman Islands, and the Isle of Man.

⁹⁸ See case example using the Isle of Man Purpose Trusts Act 1996 in P. Beckett, P., *Beneficial Ownership of Companies – G20 High Level Principles – A Paper Tiger?*, Paper delivered at the 107th Annual Conference of the Society of Legal Scholars, held at St Catherine’s College, Oxford on 7 September 2016.

⁹⁹ U4, Anti-Corruption Resource Centre, *Unpacking the concept of political will to confront corruption*, May 2010, available online at: <http://www.u4.no/publications/unpacking-the-concept-of-political-will-to-confront-corruption/>.

¹⁰⁰ *High-level Panel on Illicit Financial Flows*, note above, at 59.

value. For this reason, the international AML/CFT standards call on financial institutions and other regulated entities to take reasonable measures to verify the accuracy of all information collected about beneficial ownership, including information collected about an entity's ownership, control and structure.

Verification of identity refers to the requirements for regulated institutions to verify the information obtained from customers by confirming it against documents, data or information obtained from a reliable and independent source. The obligation to take "reasonable measures", as it is applied under the FATF Standards, is to be done using a risk-based approach. There is no specific requirement to have regard to particular types of evidence; it is up to each regulated entity whether it makes use of records of beneficial owners in the public domain, if any exist (e.g. central registers), asks its customers for relevant data, or obtains the information otherwise through external third parties. In situations identified as being low-risk for money laundering or terrorism financing, regulated entities may choose to rely solely upon information supplied by the customer (though some form of independent confirmation should, where possible, be obtained). In higher-risk situations entities may choose to apply enhanced due diligence measures, which would require additional identification documentation to be supplied for verification and confirmation of identity.

3.5.1 DOCUMENTARY VERIFICATION OF IDENTITY INFORMATION

Documentation purporting to offer evidence of identity may emanate from a number of sources, with differing levels of reliability and integrity. The broad hierarchy of documents includes:

- a) Documents issued by government departments and agencies or by a court.
 - a. These documents usually incorporate a full name, address, date of birth, and photograph, and may include the following: valid (or only recently expired) passport; valid driving licence including a photograph of the customer; proof of age card; or a national identity card, ideally also including a photograph of the customer.
 - b. Government-issued documents without a photograph may also be used for customer identification, as long as they incorporate the customer's full name (e.g. birth certificate, citizenship certificate, pension card) and are supported by a second document which is government-issued, or issued by judicial or public sector authority or a regulated firm which incorporates full name, address and date of birth (e.g. assessment notice issued by a taxation authority, marriage certificate).
- b) Documents issued by other public bodies or local authorities.
- c) These documents may include, e.g., some form of public utility or other type of bill, statement, or invoice.
- d) Documents issued by regulated firms in the financial services sector.
- e) Documents issued by those subject to AML/CFT regulations or equivalent legislation.
- f) Documents issued by other organisations.¹⁰¹

¹⁰¹ See D. Cox, *Handbook of Anti-Money Laundering* (John Wiley & Sons: Cornwall, 2014), at 178.

The highest quality documentation which firms can place reliance on will be documentary evidence issued by a government department or agency, as they can usually be relied upon to have undertaken their own verification procedures on the identity of the person concerned. However, as a general rule, the key element is having at least one piece of documentary identification evidence that includes a recent photograph of the customer's face.

3.5.1.1 Risks of fraudulent information

Government authorities and regulated entities need to be aware of the risks associated with physical identification documents, and take these into account in determining their risk-based approaches to verification. For instance, while passports are usually regarded as the “gold standard” of identification documentation, they are easily and commonly forged. One common method is known as a “camouflage” passport, which is a passport issued in the name of countries that no longer exist or have changed their name—e.g. Burma, or Ceylon—or in the name of a non-existent country, and that is intended to look like a real country's passport. Such passports are also often sold with several matching documents, including an international driving licence and similar supporting identity papers.¹⁰² Of course, any other documents providing supporting evidence, for example utility or phone bills, can easily be forged as well. For this reason it is important for original document to be seen, as a photocopy is generally not sufficient (unless they have clearly been authorised as accurate reproductions by an appropriate legal source such as a notary or justice of the peace).

3.5.2 ELECTRONIC VERIFICATION OF IDENTITY INFORMATION

Electronic verification of identity can also be carried out either directly or through a third-party commercial supplier, by using a customer's name, address, and date of birth as identity attributes to be verified. A range of sources of information could potentially be used for electronic identity verification, including: electoral rolls; corporate registers maintained by central authorities; credit reporting information; registries of births, death and marriages.

The ability to use several data sources electronically to confirm an identity match is particularly useful for those entities where face-to-face interaction with customers is minimal or non-existent (e.g. when setting up online bank accounts). Electronic verification also benefits remote customers who are unable to physically access a physical location such as a bank branch, and must use alternative and more onerous methods of providing their identification.

Although electronic verification provides additional independent assurance that the customer is who they say they are, entities should be aware that although the use of third-party service providers is permitted, the ultimate responsibility for compliance with regulatory obligations rests with the regulated entities themselves. Accordingly, a measure of oversight should still be maintained.

¹⁰² Ibid., at 172.

4. REVIEW OF CURRENT PRACTICES ON BENEFICIAL OWNERSHIP

Although the need for improved collection and availability of beneficial ownership information had been previously emphasised by a number of organisations including the Tax Justice Network¹⁰³, the Panama Papers re-emphasized the vulnerabilities of the current system and the need for a stricter approach towards transparency. Several countries, international organizations and NGOs committed to enhance the availability and exchange of beneficial ownership information between domestic authorities and jurisdictions.

4.1 DEVELOPMENTS BY THE MAIN STAKEHOLDERS

4.1.1. The OECD and the Global Forum on Transparency and Exchange of Information for Tax Purposes

4.1.1.1. Ongoing work on Beneficial Ownership

“Since the Secretary General’s report to the G20 Finance Ministers in March 2017, the OECD has furthered its work aimed at improving the effectiveness of beneficial ownership information in the tax area, based on the FATF standard. This complements the work of the Financial Action Task Force (FATF) and the Global Forum on the issue of beneficial ownership information. The primary focus of the OECD’s work is an analysis of the potential costs and benefits of the design of a common format for electronically searchable data sets of ownership information.”¹⁰⁴

This work is continued into the second half of 2017, and a report was issued in 2018.

“The Global Forum on Transparency and Exchange of Information for Tax Purposes has been working to enhance global tax transparency, end banking secrecy and protect public finances by curtailing tax evasion since 2008. It has developed a series of international tax transparency standards and constantly monitors and reviews implementation and adherence by its 142 members. It is part of the international efforts on tax transparency that also include the OECD/G20 BEPS Initiative.”¹⁰⁵

“At their meeting in April 2016, the G20 Finance Ministers and Central Bank Governors called on the Financial Action Task Force (FATF) and the Global Forum to make initial proposals by their October 2016 meeting on ways to improve the implementation of the internationally agreed standards on transparency, including on the availability of beneficial ownership information of legal persons and legal arrangements, and its international exchange. This call was subsequently endorsed by the G20 Leaders. The

¹⁰³ For more see: Tax Justice Network, *True beneficial ownership*, TJN available online at: <https://www.taxjustice.net/true-beneficial-ownership/> & Tax Justice Network, *The mechanics of secrecy*, TJN, available online at: <https://www.taxjustice.net/topics/secrecy/the-mechanics-of-secrecy/>

¹⁰⁴ OECD, *Secretary General Report to G20 leaders*, Hamburg, July 2017, p. 12

¹⁰⁵ OECD, *Strong progress seen on international tax transparency*, available online: <http://www.oecd.org/tax/transparency/strong-progress-seen-on-international-tax-transparency.htm>

initial proposals of the Global Forum were developed through consultation with the Global Forum membership and the FATF and then were delivered to the G20 Finance Ministers and Central Bank Governors for their October 2016 meeting. Since then the Global Forum has been working on their implementation.

The proposals made by the Global Forum are based upon three pillars.

a) Improving effective implementation of beneficial ownership through peer reviews

Under the first pillar, the Global Forum integrated the effective implementation of the legal and beneficial ownership requirements into the new reviews against both the EOIR and AEOI standards. The implementation of this first pillar incorporates four specific actions, namely: i) ensuring particular importance is being placed on the beneficial ownership requirements during the second round of EOIR reviews (Action 1); ii) providing training and support, notably on the assessment of beneficial ownership requirements (Action 2); iii) assessing the legal framework implementing AEOI (Action 3); and iv) developing the AEOI Methodology and Terms of Reference (Action 4).

b) Ensuring closer institutional cooperation between the FATF and the Global Forum

Under the second pillar, cooperation between the FATF and the Global Forum is being enhanced and will lead to a greater synergy of work in relation to beneficial ownership. This enhanced collaboration is implemented through two actions, namely: i) setting up a framework for closer cooperation at the institutional level by inviting the FATF to be an observer to the Global Forum (Action 5), and ii) carrying out a mapping exercise which analyses where the Global Forum and the FATF standards coincide (Action 6).

c) Facilitating effective implementation through examples of effective implementation and technical assistance

Under the third pillar, the Global Forum, the FATF and the OECD will work together to compile and widely disseminate examples of effective implementation for tax purposes, and will provide technical assistance as necessary. Two concrete actions are envisaged under the third pillar, namely: i) compiling examples of effective implementation in relation to the beneficial ownership requirements (Action 7), and ii) providing technical assistance (Action 8)¹⁰⁶.

4.1.1.2 Strong progress seen on international tax transparency – second round of peer reviews

These actions are already well underway. Both FATF and the Global Forum have invested in enhanced cooperation to ensure coherence and mutual reinforcement of work to improve transparency. Most notably, the beneficial ownership requirement has been incorporated in the EOIR review process with the first tranche of reviews currently taking place, the FATF has been invited to be an observer to the Global Forum, the mapping exercise is underway and regional training events have taken place to assist members. The

¹⁰⁶ OECD, *Secretary General Report to G20 leaders*, Hamburg, July 2017, pp. 29-30

Global Forum will continue to take these actions forward.

“In August 2017, The Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum) published the first 10 outcomes of a new and enhanced peer review process aimed at assessing compliance with international standards for the exchange of information on request between tax authorities.

The new round of peer reviews – launched in mid-2016 – follows a six-year process during which the Global Forum assessed the legal and regulatory framework for information exchange (Phase 1) as well as the actual practices and procedures (Phase 2) in 119 jurisdictions worldwide”¹⁰⁷.

The Global Forum have since continued to closely examine jurisdictions’ legal framework and practices to ensure availability and accessibility of beneficial ownership information to tax authorities for purposes of information exchange.¹⁰⁸ Documentation of examples of effective implementation by members, particularly developing countries, is now available in the form of the Beneficial Ownership Toolkit.

4.1.1.3 Seminar on Beneficial Ownership in Mexico City

Moreover, the Global Forum on Transparency and Exchange of Information for Tax Purposes held its “third seminar on Beneficial Ownership in Mexico City on 11-13 September 2017. The seminar was hosted by OECD Multilateral Tax Centre in Mexico City with support from the Inter-American Center of Tax Administrations (CIAT), the Inter-American Development Bank (IADB) and the World Bank Group. More than 60 delegates from 20 countries and international organizations participated.

Ensuring the availability beneficial ownership information is at the forefront of the international agenda on tax transparency and is a vital part of the international standards of transparency and exchange of information for tax purposes (both automatic and on request). The absence of information about who ultimately owns and controls companies and other legal entities leads to tax evasion and money laundering, as well as enabling flows of illicit funds from developing countries. The seminar is part of a broader effort to ensure that jurisdictions of the Caribbean and Latin America have the tools needed to ensure that tax evaders in the region can no longer hide behind shell companies or layers of intermediaries.

With the help of experts from the Global Forum, the Inter-American Center of Tax Administrations (CIAT), the Inter-American Development Bank (IADB) and the World Bank Group, delegates discussed the policy, legal, regulatory and institutional requirements of ensuring the availability of beneficial ownership information in the Caribbean and Latin America. The Global Forum and other participating international organizations also affirmed their commitment to continued support for the Caribbean and

¹⁰⁷ Global Forum releases second round of compliance ratings on tax transparency for 10 jurisdictions, <http://www.oecd.org/tax/transparency/global-forum-releases-second-round-of-compliance-ratings-on-tax-transparency-for-10-jurisdictions.htm>

¹⁰⁸ *OECD Secretary-General’s Report to G20 Leaders*, December 2018, available online at: <http://www.oecd.org/tax/oecd-secretary-general-tax-report-g20-leaders-argentina-dec-2018.pdf>

Latin American countries' efforts to improve transparency and counter international tax evasion”¹⁰⁹.

4.1.2 Financial Action Task Force (FATF)

“While the stated purpose of the FATF Standards on transparency and beneficial ownership is to prevent the misuse of corporate vehicles for money laundering or terrorist financing, the implementation of these Standards supports efforts to prevent and detect other predicate offences such as tax crimes and corruption, while reinforcing jurisdictions’ capacity to meet their legal obligations arising from related international standards such as the UNCAC, the *Criminal Law Convention on Corruption*, the *OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions*, and the Standard for Automatic Exchange of Financial Account Information.

Improving transparency had been on the FATF agenda since 2003 when it first introduced international standards on beneficial ownership. Subsequent assessments of countries highlighted weaknesses in the way many countries had implemented these standards. In 2012, the FATF strengthened the standards and addressed vulnerabilities such as bearer shares. The FATF standards now set out comprehensive measures to ensure transparency to prevent the misuse of corporate vehicles, which are globally recognized and are also used in the peer review process of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum).

The current cycle of FATF mutual evaluations places a greater emphasis on determining whether a country’s measures are effective in practice. Recent revelations as well as a review of the country reports so far published by the FATF have highlighted that many countries still do not implement the beneficial ownership requirements effectively.

The challenge today is not the lack of international standards to improve transparency but the effective implementation of these measures, which is why the FATF intends to work on the following proposals to improve countries’ implementation:

More emphasis on beneficial ownership in the follow-up processes to FATF mutual evaluations. Clear and consistent recommendations to assessed countries on how to improve effective implementation of beneficial ownership requirements.

Enhanced cooperation between the FATF and the Global Forum to reinforce each other’s work to improve transparency in relation to beneficial ownership.

As reported to the G20 in July 2016, the FATF has identified some significant implementation challenges on beneficial ownership based on fourteen country evaluations completed at that time. Only two of those fourteen countries - Italy and Spain - were found to have a substantial level of effectiveness in preventing the misuse of legal persons and

¹⁰⁹ Global Forum delivers tools to Caribbean and Latin American countries to address the issue of beneficial ownership information, <http://www.oecd.org/tax/transparency/seminar-on-beneficial-ownership-mexico-11-13-september-2017.htm>

arrangements and two countries – Canada and United States revealed deficiencies in the AML/CFT obligations, as little is done by FIs to verify the accuracy of beneficial ownership information. Since that time almost seventy countries have been assessed and the general picture remains the same. Major improvements are still needed in order to achieve effective results concerning the availability of beneficial ownership information.

. Some specific problems identified, include:

- a. Insufficient accuracy and accessibility of basic information relating to company registration;
- b. Less rigorous implementation of customer due diligence (CDD) measures by key gatekeepers such as company formation agents, lawyers, and trust-and-company-service providers;
- c. Lack of sanction on companies which fail to update information held by national company registries, or to keep information about their shareholders or members up-to-date; and
- d. Obstacles to information sharing such as data protection and privacy laws which impede competent authorities from getting timely access to adequate, accurate and up-to-date basic and beneficial ownership information.

The large-scale misuse of legal persons and arrangements which was exposed in April 2016 focused attention on the need to strengthen controls against the misuse of corporate structures. The analysis to date does not point to specific gaps or inadequacies in the international standards. Rather, it is becoming clear that some countries (including G20 members) have not yet fully or effectively implemented the FATF Standards on preventing the misuse of legal persons and arrangements. It is therefore imperative for countries to fully and effectively implement the FATF Standards in order to close the gaps in their national systems with regard to legal persons and arrangements.

The FATF process for assessing country compliance has proven to be an effective driver for countries to improve their implementation of AML/CFT measures, including those related to beneficial ownership. The related follow-up processes are particularly rigorous and give the FATF a broad range of tools for applying pressure to countries to make the necessary changes to their systems. As a result since the last round of evaluations, many countries have put in place sound legal frameworks requiring financial institutions and other gatekeepers to collect beneficial ownership information on customers who are legal persons or legal arrangements. The FATF promises to ensure the emphasis on beneficial ownership in its follow-up processes is effective by applying peer pressure to countries to accelerate their implementation of the FATF Standards in this area.”¹¹⁰

4.1.2.1 FATF Concealment of Beneficial Ownership

FATF, recognizing the ability of criminals to employ a range of techniques and mechanisms to obscure ownership and control of illicitly obtained assets, developed the Concealment of Beneficial Ownership report to assess the role of legal persons, legal

¹¹⁰ FATF, *Report to the G20 on Beneficial Ownership*, September 2016, available online: <http://www.fatf-gafi.org/media/fatf/documents/reports/G20-Beneficial-Ownership-Sept-2016.pdf>

arrangements and professional intermediaries in supporting the concealment of the identity of criminals.¹¹¹ Some of the methods and techniques commonly used to conceal beneficial ownership include¹¹²:

- Generating complex ownership and control structures which may be established across multiple jurisdictions.
- Using individuals and financial instruments to obscure the relationship between the beneficial owner and the assets including bearer shares, nominees and professional intermediaries.
- Falsifying activities through the use of false loans, false invoices and misleading naming conventions.

FATF found some of the major vulnerabilities that enabled the concealment of beneficial ownership included¹¹³:

- Failure to impose any AML/CFT obligations or supervision on any DNFBPs despite the requirement to do so. In some cases this has been as a result of resistance to regulation from relevant professionals. This vulnerability represents an unregulated back-door into the global financial system.
- Reluctance by professional intermediaries to comply with their AML/CFT obligations due to perceived conflicts with their duty to their client, or their obligations to protect client confidentiality and legal professional privilege¹¹⁴.
- The fact that professional intermediaries are often not the primary targets of law enforcement investigations and details pertaining to their activities are not universally recorded on law enforcement indices.

The findings above led FATF to conclude that countries needed to take measures to prevent the misuse of legal arrangements for ML/FT. To ensure effective implementation of the FATF recommendations, competent authorities will need ongoing dialogue with DNFBPs to educate them on vulnerabilities and allow for the sharing of emerging risks.¹¹⁵

4.1.2.2 FATF Best Practices on Beneficial Ownership for Legal Persons

In October 2019, FATF published the Best Practices on Beneficial Ownership for Legal Persons paper¹¹⁶ in response to the FATF Mutual Evaluations which revealed that jurisdictions were finding it challenging to achieve a satisfactory level of transparency in relation to beneficial ownership of legal persons. The Mutual Evaluations revealed that

¹¹¹ FATF, *Concealment of Beneficial Ownership*, October 2018, available online at: <https://www.fatf-gafi.org/media/fatf/documents/reports/FATF-Egmont-Concealment-beneficial-ownership.pdf>

¹¹² Ibid, at para. 53

¹¹³ FATF, *Concealment of Beneficial Ownership*, note 167, at para. 110

¹¹⁴ WU GTPC team have identified this as a research area and are in the process of developing a paper addressing the role of legal professional privilege in limiting transparency.

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¹¹⁶ FATF, *Best Practices on Beneficial Ownership for Legal Persons*, October 2019, available online: <http://www.fatf-gafi.org/media/fatf/documents/Best-Practices-Beneficial-Ownership-Legal-Persons.pdf>

the use of a single approach was less effective than a multi-pronged approach since the variety and availability of sources would be more likely to increase transparency and access to information, whilst mitigating the accuracy challenges.¹¹⁷ At the time of publication of the paper, out of the 25 countries assessed on Recommendation 24, 11 were rated largely compliant, 12 were partially compliant and 2 were non-compliant.¹¹⁸ Based on the Mutual Evaluations, FATF identified a need for more practical advice and examples to address the following obstacles to effective implementation¹¹⁹:

- a) Inadequate risk assessment of possible misuse of legal persons for ML/FT;
- b) Adequacy, accuracy and timeliness of information on beneficial ownership;
- c) Inadequate mechanisms to ensure competent authorities have timely access to beneficial ownership information;
- d) Insufficient measures to address the ML/FT risks of bearer shares and nominee shareholder arrangements;
- e) Lack of effective, proportionate and dissuasive sanctions on companies which failed to provide accurate and up to date information on beneficial ownership; and
- f) Inadequate mechanisms for monitoring the quality of assistance received from other countries.

FATF recommended a multi-pronged approach to addressing the issues identified above. The multi-pronged approach involves the use of a combination of the registry approach, company approach and existing information approach. Since information on beneficial ownership of legal persons can be obtained from a number of sources including financial institutions, DNFBPs, companies and national authorities, implementing multiple approaches could assist in verifying and monitoring information and ensuring its accuracy. The issue of lack of verification and cross-checking processes has been raised as a potential challenge to the accuracy of beneficial ownership information and multi-pronged approach may prove effective in tackling this. However, the Tax Justice Network have commented that despite the overall strengthening potential of this approach, public beneficial ownership registries are a good starting point.¹²⁰

4.2 ACTIONS OF OTHER INTERNATIONAL ORGANIZATIONS

4.2.1 Extractive Industries Transparency Initiative

Ending company anonymity - the key to fighting corruption

The EITI had early last year agreed to adopt new rules on disclosing beneficial ownership for all extractive companies operating in its 51 member countries. By 2020, companies that bid for, invest in or operate extractive assets in an EITI country must report the name,

¹¹⁷ Ibid, at para. 3

¹¹⁸ FATF, *Best Practices on Beneficial Ownership for Legal Persons*, note 167, at para. 10

¹¹⁹ FATF, *Best Practices on Beneficial Ownership for Legal Persons*, note 167, at para 29 - 30

¹²⁰ See: Andres Knobel, *FATF beneficial ownership report reveals cutting edge verification processes, hesitates to endorse public registries*, TJN, 27 November 2019, available at:

<https://www.taxjustice.net/2019/11/27/fatf-beneficial-ownership-report-reveals-cutting-edge-verification-processes-hesitates-to-endorse-public-registries/>

nationality, and country of residence of the beneficial owner. Further, politically exposed persons in their extractive sector who own extractive assets will be identified and disclosed.

This means that countries that produce oil, gas and minerals will know who the owners of the companies that develop their natural resources are, regardless of where these companies are registered, and regardless of how many layers there are between these companies and their beneficial owners.

The 51 governments will need substantial advice and political support in turning these commitments into reality. As well as supporting these governments, it has to be presented how companies can easily disclose their owners and help civil society to use the ownership information.

This information will be publicly available and will be published in EITI Reports and/or public registries. EITI requirements have sparked reform in 20 countries now working on establishing public registers. Once published, law enforcers, civil society and others have a responsibility to scrutinize the information, and take action to hold to account those who misuse anonymous companies.

Hidden ownership also poses problems for honest companies because they don't know who they are doing business with. Publishing the real owners will help ensure that there is a level playing field for all companies and allow them to know who they are doing business with.

Requirement 2.5 of the EITI Standard (2016) specifies what countries will do to uncover beneficial owners:

- a) By 2020, all implementing countries have to ensure that all oil, gas and mining companies that apply for, or hold a participating interest in an exploration or production oil, gas or mining license or contract in their countries publish the names of their real owners.
- b) This should include the identity of the owner, i.e. the name, nationality and country of residence. Companies are also encouraged to publish further details such as the date of birth, national identity number, residential address etc.
- c) Any politically exposed persons holding ownership in oil, gas and mining projects must be publicly identified.
- d) The EITI recommends that beneficial ownership information is made available through public registers. At a minimum, the information must be published in the country's EITI Report.

4.2.2 World Bank

Confronting corruption as a core development issue

At the UK Anti-Corruption Summit in May 2016, the World Bank Group reaffirmed its commitment to confront corruption as a core development issue wherever it exists and to support integrity in public sector institutions. The Bank Group also agreed to following

commitments.

Below is an overview and status update of progress so far.

Progress:

In the context of the Bank Group's operational engagements on tax administration and transfer pricing, the Global Tax Team is assisting tax authorities in gathering and sharing beneficial ownership information as part of the requirements under the OECD's Base Erosion and Profit-Shifting (BEPS) initiative (specifically BEPS action 6). The Global Tax Team has partnered with the Global Forum on Tax Transparency and Exchange of Information on training officials in over 20 Sub-Saharan African countries on the standards related to beneficial ownership.

Starting in FY18, the Bank Group will begin to require beneficial ownership information for winning bidders in procurement above a specified threshold. The template for submitting such information is under development, and will be designed to meet FATF standards.

Commitment:

- a) Provide capacity building to law enforcement and regulators to support: implementation of Global Forum and Financial Action Task Force (FATF) standards; assessment and strengthening of systems for collecting and accessing information on beneficial ownership; strengthening of financial disclosure systems; and assessment of Anti-Money Laundering (AML) or Combat the Financing of Terrorism (CFT) risks and the design of action plans to address identified risks.
- b) Assist countries in reducing tax evasion in high-risk sectors and provide technical support for efforts within the context of EITI to identify and make use of information on beneficial ownership of companies.
- c) Build on reforms and enhance transparency in Bank-financed procurement, including a new requirement to disclose beneficial ownership when bidding on high-value contracts.
- d) Build the capacity of country clients to deliver on their commitments to enhance transparency and reduce corruption.
- e) Provide technical assistance and capacity building to implement standards and reporting requirements on beneficial ownership, including commitments made by G20 countries.
- f) Promote the principles of fiscal transparency in collaboration with the International Monetary Fund (IMF) and other partners through the Global Initiative on Fiscal Transparency (GIFT).
- g) Assist in strengthening public financial management systems, including support for the implementation of international accounting and auditing standards, encouraging the adoption of better fiscal transparency practices through active participation in international forums, and helping countries conduct Public Expenditure and Financial Accountability (PEFA) assessments.

4.2.3 United Nations Office on Drugs and Crimes (UNODC)

“Within UNODC, the overall substantive and implementation responsibilities and functions relating to the United Nations Convention against Corruption are vested with the Corruption and Economic Crime Branch (CEB) in the Division for Treaty Affairs (DTA). The CEB supports States in their efforts to ratify and effectively implement the Convention.”¹²¹

The United Nations Convention against Corruption (UNCAC) recognizes that the private sector is an important partner for improving transparency. UNCAC Article 12 (2) (c) specifically calls for “Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities”.

UNCAC Article 14 (1) (a) calls on UNCAC States Parties to institute comprehensive money laundering regulations and oversight for financial institutions, including a recommendation for record-keeping of beneficial ownership. States Parties are also supposed to apply such regulations to service providers involved in the transfer of money or other forms of value, whom the article recognizes as being a particular risk for money laundering.

At the beginning of October, UNODC hosted an international expert group meeting in Vienna, which addressed beneficial ownership transparency. The meeting discussed the work done by the joint StAR Initiative supported by UNODC and the World Bank to end safe havens and ensure the return of stolen assets.

4.3 INITIATIVES OF NON-GOVERNMENTAL ORGANIZATIONS

4.3.1 Transparency International - Under the Shell: Ending Money-Laundering in Europe

Transparency International recently carried out an assessment of national anti-money-laundering regimes across the EU focusing on beneficial ownership transparency, a key aspect of the fight against money-laundering. Under current rules and international standards, it is still possible and relatively easy to obscure the origins of money and assets and conceal the identity of the person who ultimately owns or controls them as revealed by the Panama Papers in 2016. This can be done by setting up complex structures involving shell companies and trusts in offshore secrecy jurisdictions, the use of bearer shares, using nominee directors as front men and proxies, or indeed a combination of all these.

TI research shows areas of serious concern, as well as a number of significant weaknesses both in law and practice in the countries reviewed. Certain sectors are found to be particularly vulnerable to money-laundering risks such as the real estate sector, the gambling sector, trust and company service providers and virtual currency service providers such as Bitcoin.

¹²¹UNODC, available online: <https://www.unodc.org/unodc/en/corruption/about.html>

Headline recommendations

Closing legislative gaps

Governments should strengthen their national legal AML framework, in particular:

- a) Extend the scope of national beneficial ownership registers to all domestic and foreign companies and trusts operating within the territory.
- b) Make those registers publicly and freely accessible and in open data format.
- c) Put in place robust data verification and sanction mechanisms in order to detect and prevent non-reporting or false reporting.
- d) Adopt a comprehensive and robust legal definition of beneficial owner lowering down the ownership threshold to 10 per cent or lower and removing the possibility to list senior managers as beneficial owners.
- e) Prohibit or strengthen regulations governing the use of high-risk instruments such as bearer shares and nominees. Bearer shares should be outlawed and until they are phased out, they should be converted into registered shares and held in a central register hosted by a public authority. Governments should also prohibit the provision of nominee services or alternatively require nominees to be more strongly regulated, i.e. be licensed, disclose the identity of their nominator to the company and any other relevant registry and keep records of the person who appointed them.

Closing enforcement gaps

Governments should promote more effective, proactive and transparent regulation and supervision of obliged entities, in particular:

- a) Adequately resource regulatory bodies including their capacity to survey and understand money-laundering risks; effectively coordinate with the entities under their supervision, for example providing feedback on suspicious activity reports and providing secure channels for information sharing; implement and adequately staff an effective whistle-blowing regime and provide for an effective and transparent control and sanction regime;
- b) Require that professionals such as real estate agents or trust and company service providers be licensed and regulated preferably by a statutory regulator with appropriate information and enforcement powers;
- c) Require professional bodies with regulatory duties to carry out their oversight activities in regular coordination with an independent public authority. They should take steps to ensure their advocacy and supervisory functions are operationally independent;
- d) Provide professionals with adequate and targeted training and guidance to raise awareness about money-laundering risks and help them implement the corresponding mitigation measures, for example properly carrying out their customer due diligence;
- e) Improve suspicious activity reporting by assessing the effectiveness of the current system and analysing the root causes for non- or under-reporting; by providing

guidance to professionals on how to fulfil their reporting obligations; and by giving feedback on the reports submitted;

- f) Ensure that control and sanction mechanisms for regulatory breaches and non-compliance with anti-money-laundering obligations are proportionate in relation with the risks identified and effectively enforced;
- g) Publish a comprehensive and harmonized set of annual statistics on AML efforts, including data related to beneficial ownership transparency obligations (e.g. number of breaches, suspicious activity report (SAR) submissions and sanctions related to failure to identify or verify beneficial ownership). To the extent possible, national statistics should follow the list of indicators recommended by the Financial Action Task Force (FATF) in order to foster data harmonization and comparability.

4.3.2 Tax Justice Network

Two TJN reports on beneficial reports were issued since 2016: one on flaws in global and EU anti-money laundering rules (May 2016)¹²²; and a second on Trusts (June 2016).¹²³

The first report “Drilling down to the real owners – Part 1” analyses the legal language in the fourth European Anti-Money Laundering Directive (2015/849), a common European framework designed to establish an EU-wide approach to preventing the laundering of the proceeds of crime. This first report focuses on just two aspects of the European anti-money laundering framework, all concerning the rules around the determining of the real owner(s) of companies – the so-called “beneficial” owner(s).

The report dissects the FATFs and the EU AMLDs language in both aspects and proposes alternative language to replace the existing flawed formulations and close those loopholes, making another Panama Papers less likely in the future.

The second report analyses the current definitions of beneficial ownership of trusts in the global context (based on the FATF Recommendations on Anti-Money Laundering) and the registration requirements in the European Union (based on the EU Fourth Anti-Money Laundering Directive). It identifies loopholes in both regulations and suggests amendments to address them, in relation to: the scope of covered trusts, the registration authority, the effects of such registration, the conditions that may trigger registration (i.e. the governing law of the trust, the tax consequences, having a resident trustee, the number or professional status of the trustee, location of trust assets, etc.).

It also explains the complexities of trusts and discusses how their proper registration can be ensured. It considers the potential number and roles of related parties within the ownership structure of trusts, the choice of governing law (between domestic and foreign), the available types of trusts and how they can be used for legitimate purposes as well as be abused to commit financial crimes (tax evasion, money laundering, defraud creditors,

¹²² Tax Justice, available online: http://www.taxjustice.net/wp-content/uploads/2013/04/TJN2016_BO-EUAMLDFATF-Part1.pdf

¹²³ Tax Justice, available online: http://www.taxjustice.net/wp-content/uploads/2016/06/TJN2016_BO-EUAMLDFATF-Part2-Trusts.pdf

etc.). The Annex of the report offers an empirical overview, classification and detailed description of the scope of trust registration in more than 100 jurisdictions based on the Financial Secrecy Index 2015 Edition.

Beside the reports, the 3rd International Conference on Beneficial Ownership Registries took place in Buenos Aires on June 21st-22nd 2017 at Argentina's Central Bank, which was co-hosted by TJN with Fundacion SES, Argentina's AML Prosecutor (PROCELAC), the Anti-Corruption Agency and Security Ministry. The agenda included the international context in this area, recent EU developments, Latin America developments and progress, and new risks including Argentina's new company law for the creation of companies in 24 hours with a bank account and a Tax Identification Number (TIN), developments around bitcoins.

Despite the progress made in developing new standards, recent scandals have shown significant weaknesses in the practical application of these standards. Law enforcement agencies and tax authorities continue to encounter problems in identifying the physical person(s) behind opaque vehicles such as trusts, LLM's, foundations and shell companies. National registries are a step in the right direction but unless comprehensive in coverage with the information being supplied being verified and regularly updated such registries are less than 100% effective. At the same time such registries are national and in most cases it is difficult to match up information from one country to another.

4.3.3. Open Governance Partnership

The Open Governance Partnership (OGP)¹²⁴ is an initiative launched in 2011 by governments, civil society and international organizations to address enhancing transparency in various areas of governance. Through the initiative, 75 jurisdictions have made commitments to increase the availability of information about governmental activities; support civic participation; implement the highest standards of professional integrity throughout administration; and increase access to new technologies for openness and accountability.¹²⁵ One of the policy areas of the initiative, anti-corruption, highlights the use of anonymous companies to hide corruption. This policy area recognized the need for beneficial ownership transparency and, so far, 21 OGP countries have committed to advance global norms on beneficial ownership transparency. As part of this initiative, Armenia, UK and Slovakia have introduced beneficial ownership information registers, whilst Kenya and Nigeria are in the process of introducing regulations.

4.3.4 Public Beneficial Ownership Registries

The heightened vulnerabilities arising from the revelations of the Panama Papers saw a renewed push by countries to effectively implement beneficial ownership transparency. In April 2016, Ministers of Finance or their equivalents in Germany, UK, Spain, France and Italy (G5), recognized a need for, "the development of a system of interlinked

¹²⁴ For more see: <https://www.opengovpartnership.org/process/>

¹²⁵ See Open Government Declaration: <https://www.opengovpartnership.org/process/joining-ogp/open-government-declaration/>

registries containing full beneficial ownership information and mandate the OECD, in cooperation with FATF, do develop common international standards for these registries and their linking”¹²⁶. Several countries, including the UK, Denmark, Ukraine and Slovakia, have since taken measures to introduce publicly accessible beneficial ownership information registers. Following the 2016 Anti-Corruption Summit several countries including Ghana, India, France, Kenya, Netherlands, Nigeria, and Tanzania made commitments to introduce public central registers. 4AML and 5AML also introduced controlled public access to beneficial ownership information registers in the context of AML/CFT.

Despite the actions taken by countries and the EU’s approach, the OECD, Global Forum and FATF have refrained from completely endorsing the use of beneficial ownership registries. The OECD have provided¹²⁷:

“Establishing a BO registry has several perceived advantages. For examples, it facilitates timely access to information on BOs because the authorities will already have the information and do not have to request it from the entity, corporate service provider, or bank. However, the registry in itself does not ensure accurate and up-to-date beneficial ownership information. The arguments against setting up a registry might include economic costs, political costs, privacy concerns, the bureaucratic demands raised by enacting changes in the law, or matters of legal tradition (for example, in those common-law countries where it is not customary to require trusts to be registered).”

FATF have made similar comments recommending that countries making use of registers of beneficial ownership information should consider the resourcing and expertise requirements associated with maintaining the, to ensure information included is adequate, accurate, up-to-date and accessible in a timely manner.¹²⁸

The hesitance of the two organisations, though justified, has not prevented countries from introducing their own systems and providing information on their experiences. In Slovakia, for example, following the establishment of the register in 2015 for companies participating in public procurement processes, despite the challenges faced in verification, and enforcement of non-compliance, one in four companies still included a beneficial owner not previously listed in the companies register.¹²⁹ The Tax Justice Network have prepared a beneficial ownership checklist that provides policymakers with the relevant issues that should be considered and addressed.¹³⁰ The success of beneficial ownership

¹²⁶ See: G5 Letter, April 2016, available online:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/516868/G5_letter_DOC140416-14042016124229.pdf

¹²⁷ IDB & OECD, *Beneficial Ownership Toolkit*, note

¹²⁸ FATF, *Concealment of Beneficial Ownership*, note 167, at para. 239 - 240

¹²⁹ OGP, *Anti-Corruption Initiatives: Beneficial Ownership*, 2019, available online at:

https://www.opengovpartnership.org/wp-content/uploads/2019/05/Global-Report_Beneficial-Ownership.pdf

¹³⁰ Andres Knobel, *Technology and Online Beneficial Ownership Registries*, Tax Justice Network, 1 June 2017, available online: <https://www.taxjustice.net/wp-content/uploads/2017/06/Technology-and->

registries is reliant on not just the use of technology to enhance information collection, verification and maintenance, but also inter-agency cooperation within and across jurisdictions to provide this information.

Despite the notable initiative in a number of African countries, progress in implementation of this and other recommendations has not been sufficient.¹³¹ There is now a need for regional institutions to play a stronger role in maintaining political momentum to tackle illicit financial flows and in guiding national responses.¹³² For instance, regional economic communities could support in setting standards that are adaptable to local contexts.¹³³

5. CONCLUSIONS AND RECOMMENDATIONS

Regulation relating to the detection and prevention of illicit financial flows continues to increase at an exponential rate. Globally, 198 jurisdictions have now committed to implementing the FATF Standards on AML/CFT. Of these, the Member States of the EU and the EEA are also subject to the added requirements of the 5th AMLD, and the EU Directives on Administrative Cooperation. Of the 160 jurisdictions that are members of OECD Global Forum, almost all have already made commitments to start automatically exchanging financial account information under the CRS, while most jurisdictions have either signed or reached an agreement in substance on FATCA IGAs.¹³⁴ Altogether, more than 1,300 bilateral AEOI relationships are now in place across the globe.¹³⁵ However, the scope of regulation and the complexity may represent a challenge for law enforcement and tax agencies to achieve full and effective implementation, especially in African countries. The CRS, for instance, requires in excess of 600 pages worth of explanatory materials, while the US government has issued over 2,000 pages of guidance, notices, and instructions in relation to the actual FATCA regulations. As regulation deepens in complexity and scope, the cost of compliance continues to rise—global spending on financial crime compliance is set to grow to more than US\$8 billion by 2017, representing a compounded annual growth rate of almost 9%.¹³⁶

Yet despite this veritable cornucopia of regulations, directives, standards, and guidelines, the Panama Papers leaks and subsequent cases of large scale money laundering and tax evasion have revealed that opaque corporate vehicles and secrecy jurisdictions are still being used to facilitate both the commission of predicate offences—including bribery, corruption, miss-invoicing and tax evasion—and the

[online-beneficial-ownership-registries-June-1-1.pdf](#)

¹³¹ Miyandazi & Ronceray (2018) in AU, *Domestic Resource Mobilization: Fighting Against Corruption and Illicit Financial Flows*, AU, 2019, pg.94. Available online at:

https://au.int/sites/default/files/documents/37326-doc-k-15353_au_illicit_financial_flows_devv10_electronic.pdf

¹³² Ibid

¹³³ Ibid

¹³⁴ U.S. Department of Treasury, *Foreign Account Tax Compliance Act*, available online at: <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>

¹³⁵ OECD Press Release, 22 December 2016, available online at: <http://www.oecd.org/tax/over-1300-relationships-now-in-place-to-automatically-exchange-information-between-tax-authorities.htm>.

¹³⁶ PwC, *Global Economic Crime Survey 2016*, available online at: <http://www.pwc.com/gx/en/services/advisory/forensics/economic-crime-survey.html>.

laundering of the subsequent proceeds. While conceding that the leaks focused attention on the need to strengthen controls against the misuse of corporate structures, the FATF concluded in its October 2016 report to the G-20 that analysis of recent peer reviews did not point to any specific gaps or inadequacies in the international standard. Rather, the FATF argued that the issue remains the so-called “effectiveness gap” that exists between countries’ *technical* compliance with international standards on paper, and *actual* implementation of the rules in practice.¹³⁷ Particularly in identifying the ultimate physical owner of these opaque vehicles.

Though perhaps overstating the extent of technical compliance (of the jurisdictions assessed under the revised FATF Standards to date, 72% have been rated either Partially or Non-Compliant on Recommendation 24, with 65% rated either Partially or Non-Compliant on Recommendation 25), it is clear that jurisdictions across the board and particularly, in Africa, are facing significant implementation challenges on beneficial ownership information. Of the 29 jurisdictions that have been assessed under the revised FATF Standards, only four were found to have a substantial level of effectiveness in preventing the misuse of legal persons and arrangements. A number of common problems were identified in African jurisdictions, including:

1. Insufficient accuracy and accessibility of company identification and ownership information
2. Less rigorous implementation of CDD measures by key gatekeepers such as company formation agents, lawyers, and trust-and-company service providers
3. Lack of sanction on companies which fail to update information held by national company registries, or to keep information about their shareholders or members up-to-date; and
4. Obstacles to information sharing such as data protection and privacy laws which impede competent authorities from getting timely access to adequate, accurate and up-to-date basic and beneficial ownership information.

The international community is aware of these problems and have recently launched a series of capacity building efforts, this includes plans within ATAF to kickstart work in this area. Nevertheless, more needs to be done to provide guidance and support to countries considering the implementation of beneficial ownership, and especially in creating effective registries and using new technologies to facilitate cooperation on cross-sharing and verification of beneficial ownership information.

The recommendations that follow do not purport to be “solutions” to these or the myriad of other problems facing jurisdictions, but aim to facilitate discussion around potential tools, practices, and options that can be utilised by African governments operating in capacity-constrained environments, to achieve more effective implementation of the international standards on transparency. Set out below is an exhaustive list of suggested actions that African government could take:

1. Harmonisation of thresholds for determining ownership. Where jurisdictions seek to rely on the ‘threshold’ approach to determine a direct or indirect ownership

¹³⁷ See E. van der Does de Willebois, et al., *The Puppet Masters*, note 51 above.

interest, the threshold should be set no higher than 10% in order to promote consistency between AML/CFT compliance requirements and FATCA reporting obligations. While such an amendment would impose additional due diligence burdens on reporting entities, these would be largely offset through greater compliance efficiencies.

2. Harness technology to streamline reporting obligations and distribute costs, e.g. through the use of open ledger systems and blockchain based registries¹³⁸. Identifying beneficial owners of accounts and of corporations is key both to enabling automatic information exchange and to the prevention of money laundering. Existing CDD/KYC procedures often lead to complex and often redundant processes, whereby customers are forced to provide often-identical information to almost every institution they do business with. This increases compliance costs for the private sector in on-boarding new customers and monitoring existing relationships, and impedes timely access to information by law enforcement and other competent authorities.

Utilise a 'Shared Utility' model. Rather than each financial institution undertaking its own CDD procedures and compiling its own documentation, in a Shared Utility model they participate collectively in a service provided by a third party, paying only for the services and data they use. Customer information is kept in a single repository, which can then be accessed and shared among participating financial institutions, either locally or globally, depending on the registry model. Shared Utility models can be based on industry (e.g. SWIFT's KYC Registry, which is focused on correspondent banking partners), or jurisdiction (e.g. the newly-implemented Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI), which functions as a central KYC records registry for all domestic reporting entities).

3. Establish or enhance public central registries of beneficial ownership information. Central registers enable companies to know whom they are doing business with, financial institutions to know whom their customers are, citizens to see who benefits from public funds, and law enforcement and other competent authorities to prevent abuses of secrecy and hold individuals to account for crime and corruption. However, as noted in this paper, registers are only as good as the information they contain. By opening registers up to public scrutiny, civil society and the media are also able to participate in verifying the adequacy of the information provided.

Global Beneficial Ownership Register. In April 2016, Open Corporates, the B Team, Transparency International, Global Witness, the Web Foundation, and the ONE Campaign announced a collaborative effort to develop a global register of beneficial ownership. Some of the planned features of this register include:

1. A free, easy-to-use website that allows users to search for companies and their true owners around the world
2. A cloud-based platform, which can be accessed by all, that allows companies to self-disclose and update beneficial ownership information once, in only one place.

¹³⁸ See: J. Owens & M. Ołowska, *Recent Initiatives on Beneficial Ownership*, Tax Notes International, to be published in December 2017.

3. Information on legal entities founded on open data, using unique and non-proprietary identifiers.
4. A list of each company's contracts on the basis of open contracting.

African governments could commit to using “open” data, in accordance with the G-20 Open Data Principles. Open data improves the flow of information within and between governments and increases transparency around government activities, decisions, and expenditures, which promotes accountability and good governance.

4. Implement mechanisms to ensure policy coherence. Developing and implementing coherent policies to respond to the threats posed by illicit financial flows need to involve all competent authorities—including operational agencies—in order to resolve competing priorities and avoid unexpected or unintended consequences before they arise. Jurisdictions should ensure that the necessary laws and mechanisms are in place to allow officials from different agencies to share information¹³⁹.
5. The OECD *Oslo Dialogue on Tax and Crime* has focused on facilitating more effective inter-agency cooperation on tax and crime issues, and has produced several pieces of guidance enabling cooperation, including: *Effective inter-agency cooperation in fighting tax crimes and other financial crimes*; and *International Cooperation against Tax Crimes and other Financial Crimes: A catalogue of the Main Instruments*. These guidelines provide a useful framework for African countries.
6. Stricter liability for service providers and intermediaries, i.e. the ‘gatekeepers’. The recent Panama Papers leaks have placed a spotlight on the roles played by those professional intermediaries dubbed ‘gatekeepers’—lawyers, notaries, accountants, tax advisors, and trust and service company providers—in hiding illicit funds. Though required to report illicit activities under the FATF Standards, gatekeepers often abuse their positions to hide the commission or proceeds of crime under the veil of professional privilege.
7. Unlike financial institutions, these professions are largely self-regulating through their professional associations, and misconduct and misbehaviour is largely a civil as opposed to a criminal matter. Jurisdictions should give consideration to implementation of stricter legal and/or regulatory responses aimed at these professions and the responsible individuals within them, such as those imposed in the United Kingdom:
 - i. Section 7 of the United Kingdom’s *Bribery Act 2010* creates an offence of “failure to prevent bribery”. In proving this offence, it is irrelevant whether directors, managers, or senior officers had any knowledge of the bribery.
 - ii. Under the United Kingdom ‘Senior Managers Regime’ introduced in March 2016, named senior individuals in banks are explicitly responsible for particular areas of the business and for any regulatory breaches or compliance failures.

¹³⁹ See: Tax and Good Governance Project of the WU Global Tax Policy Center: <https://www.wu.ac.at/en/taxlaw/institute/gtpc/current-projects/tax-and-good-governance/>

- iii. Criminal Finances Bill, which passed the UK House of Commons in October 2016, introduces two new criminal offences for corporates and partnerships regarding tax evasion. Under the new provisions, an entity will commit an offence where it fails to prevent an associated person – someone acting for or on behalf of the entity – from criminally facilitating either: a UK tax evasion offence; or an equivalent offence under foreign law. For each offence, it will be a defence for the entity to show that it had reasonable procedures in place to prevent such facilitation, or that it was not reasonable to expect it to have such procedures.
8. Place limitations on corporate fiduciaries. As seen with investigations into the Panama Papers and recent reports from the Canadian Broadcasting Corporation/Toronto Star¹⁴⁰, a single agent may represent hundreds if not thousands or tens of thousands of corporations in a nominee capacity. In many countries, there are no limits to the number of positions that a person may hold, and it is common for these people to hold no real connection to or with the operations or ownership of the company. In order to ensure the proper fulfilment of fiduciary obligations, jurisdictions should consider placing limits on the number of ostensible management positions able to be held by one person.
9. Ensure that adequate protections are in place for whistle-blowers. Jurisdictions should ensure that strong whistle-blower protections are in place for public and private employees in regulated sectors. The recent data leaks have not only revealed tax avoidance and tax evasion on a massive scale, but have also exposed the identities of beneficial owners of thousands of shell companies, foundations, and trusts set up through thousands of intermediaries all over the world to evade taxes, launder money, and hide wealth. These disclosures should be encouraged and protected in all cases where the public interest is at stake.¹⁴¹
10. Encourage further research on relevant issues relating to illicit financial flows, e.g. trade-based money laundering.
11. Enhance inter-agency cooperation to evaluate their role in: the collection of beneficial ownership information; sharing, monitoring and verification of beneficial ownership information in their possession; and the establishment of central registries to make this data more accessible in a timely manner.

Of course, the implementation of practical measures such as those outlined above are a necessary, but not sufficient, condition for success in the fight against illicit financial flows. Achieving sustainable outcomes cannot be done through “one-off” approaches but requires an ongoing and long-term political commitment from leaders and decision-makers to prioritise the development of legislative and operational responses and the provision of sufficient resources to ensure their effective implementation. Enormous progress has been made over the past decade in setting up the legal and institutional frameworks needed to combat illicit financial flows, but there is a great deal of work still to be done. Given the inherently cross-border nature of many illicit financial flows, increased international and regional co-operation between domestic law enforcement

¹⁴⁰ CBC, *How 2 Canadians named in Panama Papers led nearly 200 companies they claim to know nothing about*, available online at: <http://www.cbc.ca/news/investigates/signatures-nominee-directors-panama-papers-1.3951784>.

¹⁴¹ J.E. Stiglitz & M. Pieth, *Overcoming the Shadow Economy*, November 2016, available online at: <http://library.fes.de/pdf-files/iez/12922.pdf>.

agencies, tax and other competent authorities will be essential to overcoming the challenges that countries now face. Regional institutions will need to take on a stronger role in standard setting and monitoring, and building networks between countries to access information, this may be a particular opportunity for organizations like ATAF, WATAF and others to evaluate their contribution to a multilateral effort. Governments must also continue to reach out and actively engage and work together with private sector stakeholders, including representatives from civil society organisations and the financial sector, as well as regulated professions such as lawyers and accountants. These professions stand at the front line as the gatekeepers to the international financial system, and are uniquely placed to identify gaps and weaknesses and provide valuable feedback on how policy is implemented in practice. By working together, public and private stakeholders can multiply the effectiveness of efforts to combat illicit financial flows by ensuring greater policy coherence.

DRAFT

Annex A. The Global Response to Beneficial Ownership Information Gaps – An Overview

1.1.1 OECD HARMFUL TAX COMPETITION INITIATIVE

The OECD responded to the G-7's call for a return to the *status quo ante* through its 'Harmful Tax Competition' project, which called for the development of "measures to counter the distorting effects of harmful tax competition on investment and financing decisions and the consequences for national tax bases."¹⁴² In 1998, the OECD published its first report entitled 'Harmful Tax Competition: An Emerging Global Issue'.¹⁴³ The report identified two primary contributors to the harmful tax competition developing between States—so-called 'tax haven' jurisdictions and preferential tax regimes.

The identifying factors of preferential tax regimes and tax havens defined by the OECD 1998 report included the lack of transparency of a regime or in the operation of regulations and administration; and lacking effective exchange of information on taxpayers benefitting from these systems.¹⁴⁴ The report emphasized the tendency of tax havens to introduce laws or administrative practices that permitted businesses and individuals to benefit from strict secrecy and other protections preventing scrutiny by tax authorities.¹⁴⁵ In particular, the 1998 report identified that countries that introduced regimes constituting harmful tax competition often viewed a wide treaty network as an asset to facilitate and encourage use of their regimes by residents of third countries.¹⁴⁶ Countries with wide treaty networks often facilitate treaty shopping¹⁴⁷ by enabling persons not resident in either of the contracting parties to enjoy treaty benefits. In order to address this, the 1998 report recommended that, countries consider denying companies, with little economic substance, that are not considered beneficial owners of certain income formally attributed to them.¹⁴⁸ Whilst the issue of treaty shopping was first addressed by Working Party No. 21 (WP21) with significant from 1963 to 1977, it only amounted to the inclusion of a recommendation in Article 1 of the OECD Model Convention 1977 that countries should agree in bilateral negotiations that relief from tax should not apply in certain cases.¹⁴⁹ The publication of the 1998 report provided an additional option to address treaty shopping through beneficial ownership, but did not provide significant guidance until 2002.

The report announced the creation of the Forum on Harmful Tax Practices, which was tasked with identifying non-OECD member jurisdictions that met the criteria for designation as a secrecy jurisdiction. A follow-up report published in 2000 identified 35 such jurisdictions, which were to be identified in a future 'List of Uncooperative Tax Havens' unless they made a commitment to eliminating harmful tax practices by 2005.¹⁵⁰ Any jurisdiction that failed to comply would be liable to application of coordinated defensive measures by OECD Member States,¹⁵¹ such as non-deductibility of expenses.

¹⁴² OECD, Council at Ministerial Level, *Communiqué*: 21-22 May 2006 at para. 15(xv).

¹⁴³ OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD Publication Service: Paris, 1998) (hereafter the 'OECD 1998 report').

¹⁴⁴ *Ibid*, at para. 52 – 63

¹⁴⁵ *Ibid*

¹⁴⁶ See OECD, at note 13, para. 118

¹⁴⁷ Treaty benefits negotiated between parties to an agreement are economically extended to residents of a third country in a way that the parties did not intend. For more see: OECD, *Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstance*, OECD/G20 Base Erosion and Profit Shifting Project 2015 (final report) available online at: <https://www.oecd-ilibrary.org/docserver/9789264241695-en.pdf?expires=1578491775&id=id&accname=ocid177428&checksum=9802FC64AB60BA581AB697FA0129921B>

¹⁴⁸ See OECD, at note 12, para 119

¹⁴⁹ R. Vann, *Beneficial Ownership: What Does History (and Maybe Policy) Tell Us*, in M. Lang et al., *Beneficial Ownership: Recent Trends*, IBFD 2013, at pg. 295

¹⁵⁰ OECD, *Towards Global Taxation: Progress in Identifying and Eliminating Harmful Tax Practices*, Report to the 2000 Ministerial Council and Recommendations by the Committee on Fiscal Affairs.

¹⁵¹ Interestingly, the report only envisaged application of defensive measures against uncooperative secrecy jurisdictions; no corresponding provision was made for similar measures to be invoked against uncooperative OECD member states with preferential tax regimes. See R. Woodward, *The OECD's Harmful Tax Competition Initiative and Offshore Financial Centres in the Caribbean Basin*, in R. Ramsaran (ed.), *The Fiscal Experience in the Caribbean: Emerging Issues and Problems* (University of the West Indies: St Augustine, Trinidad, 2004), at 623-25.

However, by 2001 opposition from both within and outside the EU had forced the OECD to scale back the initiative.¹⁵² Switzerland and Luxembourg had vocally abstained from endorsing both the 1998 and 2000 reports, arguing that they represented a partial and unbalanced approach that resulted in unacceptable protection of countries with high-levels of taxation, while the incoming US Treasury Secretary had expressed concern to the G-7 Finance Ministers, noting:

The OECD initiative implicates low-tax regimes that may be designed to encourage foreign investment but that have nothing to do with evasion of any other country's tax law... the United States should attempt to refocus the OECD project on its core element: the need for countries to be able to obtain specific information from other countries upon request in order to prevent non-compliance with their tax laws.

This intervention by the US reflected ideological unease about the OECD's perceived increasing encroachment upon fiscal sovereignty. Traditionally, taxation was seen as an inherent or essential component of sovereign status, and any infringement of a State's right to self-determination concerning its system of taxation would be regarded as an infringement on sovereignty itself.¹⁵³ Instead, the US sought to align the work being done by the OECD on harmful tax practices with the work being done by the Financial Action Task Force (FATF) and others on anti-money laundering and counter-terrorism financing (AML/CFT). This shifted the focus of the project towards transparency and information exchange as mechanisms to be used in the detection and prevention of illicit financial flows.

1.1.2 EMPHASIS ON MISUSE OF CORPORATE VEHICLES

In February 2000, the FATF undertook a review of the rules and practices that impaired the effectiveness of money laundering prevention and detection systems, and concluded that:

“Shell corporations and nominees are widely used mechanisms to launder the proceeds from crime, particularly bribery (e.g. to build up slush funds). The ability for competent authorities to obtain and share information regarding the identification of companies and their beneficial owner(s) is therefore essential for all the relevant authorities responsible for preventing and punishing money laundering.”¹⁵⁴

In April 2000, the Financial Stability Forum (FSF, now the Financial Stability Board) had also highlighted a number of prudential and market integrity concerns arising from their review of what they termed ‘problematic’ secrecy jurisdictions. Specifically, they expressed concern at the ease with which corporate vehicles—such as companies, trusts, foundations, partnerships, and other types of legal persons and arrangements¹⁵⁵—could be created and dissolved in these jurisdictions, and the lack of availability of timely information on their beneficial ownership.¹⁵⁶ The FSF subsequently issued a formal request to the OECD to examine the vulnerability of corporate vehicles to misuse for illicit purposes, and stressed the importance of ensuring that the authorities in each jurisdiction had the ability to obtain and share information on the beneficial ownership and control of corporate vehicles established in their jurisdictions.

In May 2001, the OECD issued its ‘Report on the Misuse of Corporate Vehicles for Illicit Purposes’ to the G-7 Finance Ministers and the FSF.¹⁵⁷ The report found that almost all economic crimes involve the misuse of corporate vehicles: money launderers exploit cash-based ‘front’ businesses and other legal entities to disguise the source of their illicit gains; corrupt officials conduct transactions through bank accounts opened under the names of corporations and foundations; and individuals hide or shield their

¹⁵² See J.C. Sharman, *Havens in a Storm: The Struggle for Global Tax Regulation* (Cornell University Press: Ithaca, 2006) at 61; D.M. Ring, *Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation*, Florida Tax Review 9 (2009), at 12-13.

¹⁵³ A. Christians, *Sovereignty, Taxation and Social Contract*, 18(1) Minnesota Journal of Int'l Law 99.

¹⁵⁴ Cited in FATF, *The Misuse of Corporate Vehicles, Including Trust and Company Service Providers*, 13 October 2006.

¹⁵⁵ ‘Legal arrangements’ refers to express trusts or other similar legal arrangements (e.g. fiducie, treuhand and fideicomiso), while ‘legal persons’ refers to any entities other than natural persons that can establish a permanent customer relationship with a financial institution or otherwise own property (e.g. companies, bodies corporate, foundations, anstalt, partnerships, or associations and other relevantly similar entities). See FATF, *Glossary of the FATF Recommendations*, October 2012.

¹⁵⁶ Financial Stability Forum (FSF), *Report of the Working Group on Offshore Centres*, 5 April 2000, available online at: http://www.fsb.org/wp-content/uploads/r_0004b.pdf?page_moved=1.

¹⁵⁷ Cited in OECD, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes* (OECD Publication Service: Paris, 2001), at 3, available online at: <https://www.oecd.org/corporate/ca/43703185.pdf>.

wealth from tax authorities and other creditors through trusts and partnerships.¹⁵⁸ In order to successfully combat and prevent the misuse of corporate vehicles for these purposes, the report concluded that it was essential that all jurisdictions establish effective mechanisms enabling their authorities to obtain, on a timely basis, information on the beneficial ownership and control of corporate vehicles established in their own jurisdictions, and that such information must be capable of being shared with other authorities both domestically and internationally.¹⁵⁹

The OECD report was followed by a succession of reports by other organizations exploring similar policy concerns, ensuring that the issue of corporate vehicle misuse and financial transparency remained firmly on the public agenda.¹⁶⁰

1.1.4 GLOBAL RESPONSES TO THE FINANCIAL CRISIS

The global financial crisis of 2008-09 brought secrecy jurisdictions back to the centre of the conversation about illicit financial flows and the need for greater transparency. Countries around the world were confronted with damaging combinations of large bailout costs and diminishing corporate tax receipts, and politicians and bureaucrats were acutely aware of the need to find additional revenue streams. Spurred on by contemporaneous media reports and prosecutions arising out of the Swiss UBS bank scandal¹⁶¹ and the Liechtenstein tax data leak,¹⁶² issues of tax evasion and tax avoidance suddenly found themselves high on the public agenda as attention turned towards the massive amounts of unreported private financial wealth concealed in the world's secrecy jurisdictions.¹⁶³

According to the European Commission: 'Tax evasion' generally comprises illegal arrangements where tax liability is hidden or ignored, i.e. the taxpayer pays less tax than he/she is supposed to pay under the law by hiding income or information from the tax authorities. 'Tax avoidance' is defined as acting within the law, sometimes at the edge of legality, to minimise or eliminate tax that would otherwise be due if a taxpayer were complying with the spirit and the letter of the law. It often involves exploiting the strict letter of the law, loopholes and mismatches to obtain a tax advantage that was not originally intended by the legislation.

How big is the problem of hidden wealth?

The most frequently cited estimate of the global extent of illicit financial flows comes from the International Monetary Fund (IMF) in the mid-1990s, which provided a 'consensus range' of between 2% and 5% of global GDP – or between US\$1.47 and US\$3.69 trillion (based on a global GDP of \$73.9 trillion in 2015).¹⁶⁴

These figures were endorsed in a recent meta-analysis conducted by the UNODC, which estimated total illicit financial flows at 3.6% of global GDP or around US\$2.7 trillion (adjusted) annually, of which 2.7% or US\$2 trillion was available for laundering through the international financial system—around the

¹⁵⁸ Ibid.

¹⁵⁹ Ibid., at 7-8.

¹⁶⁰ In 2002, the International Trade and Investment Organisation (ITIO) and the Society of Trust and Estate Practitioners (STEP) commissioned the report: *Towards a Level Playing Field: Regulating Corporate Vehicles in Cross-Border Transactions*. In 2006, the FATF issued its paper on *The Misuse of Corporate Vehicles*, and in 2010 the Caribbean FATF published *Money Laundering Using Trust and Company Service Providers*.

¹⁶¹ During U.S. Senate hearings, a Geneva-based whistle-blower from UBS bank, which at the time was partly owned by the Swiss government, disclosed that UBS was sending bank officials to U.S. cities to promote the use of its services by high-net-worth Americans; these officials told the Americans that they could successfully hide their monies offshore where the monies would remain undetected and untaxed by U.S. tax authorities. The U.S. government successfully forced the disclosure of roughly 4,450 account identities of U.S. taxpayers, leading to a host of penalties and prosecutions as well as a \$780 million fine payable by UBS to the U.S. government. See A. J. Cockfield, *Big Data and Tax Haven Secrecy* (2016) 18(8) Florida Tax Review 483 at 508-509.

¹⁶² The 2008 Liechtenstein tax affair originated when a bank employee surreptitiously copied bank records listing over 1,400 customers with anonymous bank accounts. A CD with this bank account information was purchased by the German government for €4.2 million, and was eventually transferred to governments and tax authorities throughout the world, leading to audits and prosecutions of non-compliant taxpayers. See A.J. Cockfield, note 17 at 507; M. Esterl, G.R. Simpson, D. Crawford, *Stolen Data Spur Tax Probes*, The Wall Street Journal, 19 February 2008.

¹⁶³ J.S. Henry, *The Price of Offshore Revisited*, Tax Justice Network, July 2012, available online at: http://www.taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf

¹⁶⁴ See World Bank, National accounts data, 2015, available online at: <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>.

midpoint of the earlier IMF consensus range.¹⁶⁵

Of course, not all illicit financial flows are hidden within, or routed through, secrecy jurisdictions. Of the amounts cited above, the Tax Justice Network estimates the total amount of private wealth held in secrecy jurisdictions at somewhere between US\$24 – US\$36 trillion.¹⁶⁶ Other models, based on differing data sets and utilising narrower assumptions, place the total much lower at around US\$7.6 trillion (roughly 8% of global GDP). There is no clear consensus on a definition of illicit financial flows or how to measure them, but identifying a definition is a distraction from the common objective of strengthening the administration of tax law.¹⁶⁷ Even if one uses the lowest estimates, and allowing for the lack of consensus on the methodology to measure such flows as well as the difficulty in obtaining robust data, this is giving rise to a global ‘tax gap’—the difference between tax actually collected and that which is theoretically due and payable—of US\$190 billion per year.¹⁶⁸ The ‘transparency and accountability of fiscal regimes, ending abuse of anonymous companies, tackling customs fraud and rationalizing and regularizing tax incentives are areas of common ground which necessitate collaboration’.¹⁶⁹

While illicit financial flows and the hidden wealth phenomena are global issues, their impacts are felt disproportionately within the developing world. It is estimated that developing countries lose US\$1 trillion each year as a result of corrupt or illegal cross-border deals, many of which involve anonymous companies.¹⁷⁰ Oxfam analysis shows that in Africa alone, approximately 30% of all financial wealth—a total of US\$500 billion—is held in secrecy jurisdictions. Although wealth can be legitimately held offshore, it has been estimated to cost African countries US\$14 billion a year in lost tax revenues.¹⁷¹ In 2015, the African Union (AU) published the report of the High Level Panel on illicit financial flows from Africa which established the need to address the growing problem of hidden wealth.¹⁷² It recognized the role of regional and global coordination to evaluate the mechanisms adopted to move illicit financial flows.¹⁷³ Ongoing work undertaken by the AU, the United Nations Economic Commission for Africa and other member states and organizations has focused on identifying the policy options available to curb illicit flows.¹⁷⁴

At the April 2009 London Summit, G-20 Member States again committed to taking action against non-cooperative secrecy jurisdictions. Announcing their capacity and willingness to “deploy sanctions to protect our public finances and financial systems,” the G-20 successfully pressured each of the jurisdictions identified by the OECD as being non-compliant with existing international standards on tax transparency to enter into a range of bilateral tax information exchange agreements (TIEAs).¹⁷⁵ The Summit was hailed as a watershed moment for global financial transparency, with the G-20

¹⁶⁵ UNODC, *Estimated illicit financial flows*. Figures in USD extrapolated from GDP figures and adjusted according to World Bank data as at 2015

¹⁶⁶ Initial estimates outlined in J.S. Henry, *The Price of Offshore Revisited*, and updated in 2015; see J.S. Henry, **Taxing Tax Havens**, Foreign Affairs, 12 April 2016.

¹⁶⁷ Maya Forstater, *Illicit Financial Flows, Trade Misinvoicing and Multinational Tax Avoidance: The Same or Different?* (2018), Centre for Global Development, pg.29. Available online at: <https://www.cgdev.org/sites/default/files/illicit-financial-flows-trade-misinvoicing-and-multinational-tax-avoidance.pdf>

¹⁶⁸ G. Zucman, *The Hidden Wealth of Nations: The Scourge of Tax Havens*, (2015), University of Chicago Press

¹⁶⁹ Forstater (2018), n.38, pg.30

¹⁷⁰ One, *The Trillion-Dollar Scandal*, available online at: <http://www.one.org/international/policy/trillion-dollar-scandal/>

¹⁷¹ Oxfam, *An Economy for the 1%*, available online at: https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp210-economy-one-percent-tax-havens-180116-en_0.pdf.

¹⁷² High Level Panel on Illicit Financial Flows, *Report of the High Level Panel on Illicit Financial Flows from Africa*, (2015) AU & UNECA. Available online at: https://www.unodc.org/documents/NGO/AU_ECA_Illicit_Financial_Flows_report_EN.pdf

¹⁷³ Ibid

¹⁷⁴ AU, *Domestic Resource Mobilization: Fighting Against Corruption and Illicit Financial Flows*, (2019), AU. Available online at: https://au.int/sites/default/files/documents/37326-doc-k-15353_au_illicit_financial_flows_devv10_electronic.pdf

¹⁷⁵ TIEAs were promoted by the OECD as a means for countries to administer and enforce their tax and criminal laws by facilitating the exchange of foreign tax information that can then be used in an examination of a taxpayer.

Leaders declaring at the conclusion of the Summit that “the era of banking secrecy is over.”¹⁷⁶ While arguably premature in light of subsequent critiques of the effectiveness of TIEAs,¹⁷⁷ the G-20’s call for jurisdictions to adopt high standards of transparency and information exchange in tax matters led to the restructuring of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes¹⁷⁸ and, ultimately, to amendments being made to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, which laid the foundations for the global shift towards Automatic Exchange of Information (AEOI).

1.1.5 POLITICAL RESPONSE TO THE OFFSHORE LEAKS DISCLOSURES

Another significant turning point in the global push for financial transparency came in April 2013, when the International Consortium of Investigative Journalists (ICIJ) released the first of what would prove to be several leaks involving vast quantities of financial data taken from within secrecy jurisdictions.¹⁷⁹ The cache of documents comprising the initial ‘Offshore Secrets’ leaks contained more than 2.5 million records, which revealed the previously secret dealings of over 120,000 offshore companies and private trusts, implicating more than 70,000 people from 170 countries and territories.¹⁸⁰ The leaked data provided a unique insight into the methods by which individuals were using networks of shell and shelf companies in tax havens to criminally evade taxes, launder illegal earnings, and finance cross-border terrorism,¹⁸¹ and provided objective evidence for the severity of the crimes and abusive practices that could be successfully perpetrated by taking advantage of both a globalised financial system and incomplete and fragmented national tax and financial transparency frameworks.

The ongoing disclosures from the Offshore Leaks database focused the attention of the G-8 on the central role played by the ultimate beneficial owners responsible for pulling the strings behind the veil of corporate secrecy. The issue featured prominently on the agenda for the June 2013 G-8 Summit held in the UK and in the final Leaders Communiqué the G-8 Leaders agreed:

A lack of knowledge about who ultimately controls, owns and profits from companies and legal arrangements, including trusts, not only assists those who seek to evade tax, but also those who seek to launder the proceeds of crime, often across borders. Shell companies can be misused to facilitate illicit financial flows stemming from corruption, tax evasion and money laundering. Misuse of shell companies can be a severe impediment to sustainable economic growth and sound governance. We will make a concerted and collective effort to tackle this issue and improve the transparency of companies and legal arrangements. Improving transparency will also improve the investment climate; ease the security of doing business and tackle corruption and bribery. It will support law enforcement’s efforts to pursue criminal networks, enforce sanctions, and identify and recover stolen assets.¹⁸²

The G-8 subsequently committed to taking concrete action, based on a number of principles considered fundamental to the transparency of ownership and control of companies and legal arrangements. These principles were later largely reiterated by the G-20 in adopting the ‘High Level Principles of Beneficial Ownership’ at the Brisbane, Australia Summit in November 2014, namely:

- a) Beneficial ownership is defined in a way that captures the natural person(s) who ultimately owns or controls the legal person or legal arrangement.
- b) Legal persons obtain and hold their beneficial ownership and basic information onshore, and that this information is adequate, accurate, and current.
- c) Trustees of express trusts (and other similar legal arrangements) maintain adequate, accurate and

¹⁷⁶ See Anti-Corruption Summit London 2016: Communiqué 12 May 2016, available online at: <https://www.gov.uk/government/publications/anti-corruption-summit-communication>.

¹⁷⁷ See, e.g.: D.S. Kerzner, D. W. Chodikoff, *The OECD’s War on Offshore Tax Evasion 1996–2014*, in International Tax Evasion in the Global Information Age (Palgrave Macmillan, 2016); A. Miller, L. Oats, *Principles of International Taxation*, Bloomsbury Professional: Hampshire (2012)

¹⁷⁸ Previously known as the ‘Forum on Harmful Tax Practices’.

¹⁷⁹ Measured at 260 gigabytes, the total size of the leaked files obtained by the ICIJ was more than 160 times larger than the leak of U.S. State Department documents by WikiLeaks in 2010. See G. Ryle, et al., *Secret Files Expose Offshore’s Global Impact*, ICIJ, available online at: <http://www.icij.org/offshore/secret-files-expose-offshores-global-impact>.

¹⁸⁰ Ibid.

¹⁸¹ See A.J. Cockfield, note 17 at 485.

¹⁸² Lough Erne G8 Leaders’ Communiqué, available online at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207771/Lough_Erne_2013_G8_Leaders_Communique.pdf.

- current beneficial ownership information, including information of settlors, the protector (if any) trustees and beneficiaries.
- d) Relevant authorities have timely access to adequate, accurate and current beneficial ownership information.
 - e) Authorities understand the risks to which their AML/CFT regime is exposed and implement effective and proportionate measures to target those risks.
 - f) The misuse of financial instruments and of certain shareholding structures that may obstruct transparency, such as bearer shares and nominee shareholders and directors, is prevented.
 - g) Financial institutions and designated non-financial businesses and professions (DNFBPs) are subject to effective AML/CFT obligations to identify and verify the beneficial ownership of their customers.
 - h) Effective, proportionate and dissuasive sanctions are available for regulated businesses that do not comply with their obligations.
 - i) National authorities cooperate effectively domestically and internationally to combat the abuse of companies and legal arrangements for illicit activity.

In practice, these principles broadly reiterate requirements regarding the transparency of ownership and control of companies and legal arrangements that had already been in place for many years under the FATF Standards.¹⁸³ Nonetheless, the commitment to action demonstrated collective buy-in into these issues at the highest political level, and paved the way for further strengthening of regulatory frameworks.

¹⁸³ The 'FATF Standards' comprise the FATF Recommendations, their Interpretive Notes and applicable definitions in the Glossary. These standards set out a comprehensive and consistent framework of measures that countries should implement in order to combat money laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction. The first iteration of the FATF standards were published in 1990 (the 'Forty Recommendations'), and were subsequently amended in 2001 to incorporate standards dealing with the issue of terrorism financing (the 'Eight Special Recommendations'). In 2003-04, the FATF made revisions to the existing Recommendations, and added a Ninth Special Recommendation (the '40+9 Recommendations'). A comprehensive review was again conducted in 2012, and the Recommendations were expanded to deal with the financing of proliferation of weapons of mass destruction, and to be clearer on transparency and tougher on corruption. It also introduced an assessment of the effectiveness of the standards.

Meanwhile, the European Commission sought to leverage this momentum, passing the Fourth Anti-Money Laundering Directive (4AMLD) in December 2014 and it came into force on 26 June, 2017. The new Directive brought the EU framework into line with the revised 2012 FATF Recommendations by extending the scope of the existing regime and strengthening obligations in a number of areas, including the risk-based approach, ongoing monitoring requirements, beneficial ownership identification and record keeping requirements, politically exposed persons (PEPs), scope of predicate offences, and third party equivalence. Controversially, 4AMLD also included express requirements for EU Member States to keep central registries of accurate and current information on the ultimate beneficial owners of legal entities. This requirement went beyond the wording of the final G-8 and G-20 communiqués, which noted only that central registries were a possible means of achieving compliance, rather than a necessary one. It is still unclear how many jurisdictions will follow the lead of the EU in mandating central registries for beneficial ownership information, nor how many will choose to make them publicly accessible. The UK, Slovakia and Ukraine have already implemented public registries, while France, the Netherlands, South Africa, Nigeria, Afghanistan, Kenya, Ghana, and Denmark have stated their intention to do so. Ireland, Australia, New Zealand, Indonesia, Jordan, Norway, Armenia and Georgia are reportedly considering doing the same.¹⁸⁴

In July 2016, the European Commission published further proposed amendments to reinforce the Directive (unofficially termed the '5AMLD'). 5AMLD requires that the central beneficial ownership registers for corporate or other legal entities are made accessible by establishing a clear rule of public access.¹⁸⁵ It also extends the scope of the central registries to include trusts and other forms of legal arrangements and enables the general public access on the basis of a demonstrated "legitimate interest" (which is to be defined by each Member State).¹⁸⁶ Member States may also choose to grant wider public access at their discretion, though if they do so they must have due regard to the balance between the public interest to combat ML/TF and the protection of fundamental rights of individuals, in particular the right to privacy and protection of personal data.

These proposals were strongly criticised in a February 2017 Opinion issued by the European Data Protection Supervisor (EDPS), which found that they significantly broaden access to beneficial ownership information by both competent authorities and the public, as a policy tool to facilitate and optimise enforcement of tax obligations.

We see, in the way such solution is implemented, a lack of proportionality, with significant and unnecessary risks for the individual rights to privacy and data protection.¹⁸⁷

The principle of proportionality requires that limitations to personal rights and freedoms may only be made if they: (i) are necessary; and (ii) genuinely meet objectives of general interest (in this instance, as determined by the EU) or the need to protect the rights and freedoms of others. Accordingly, the EDPS recommended that access to beneficial ownership information be limited only to those entities in charge of enforcing the law. After revision of the Commission and Council's proposal, European Parliament proposes that:

With regard to the disclosure of beneficial ownership information, the information disclosed by entities referred to in the first article of the Directive is made publicly available in accordance with data protection rules and open data standards, is subject to online registration, and that Member States may introduce a fee to cover administrative costs. When exemptions from compulsory

¹⁸⁴ Country Statements from the UK Anti-Corruption Summit 2016 available online at: <https://www.gov.uk/government/publications/anti-corruption-summit-country-statements> (France, the Netherlands, South Africa, Nigeria, Afghanistan, Kenya and Ghana); see also Global Witness, *Anti-corruption summit: Afghan commitments a step forward in the fight against corruption*, 13 May 2016, available online at: <https://globalwitness.org/en/campaigns/afghanistan/anti-corruption-summit-afghan-commitments-step-forward-fight-against-corruption/>.

¹⁸⁵ See: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0843>

¹⁸⁶ *Ibid*

¹⁸⁷ EDPS, *Opinion on a Commission Proposal amending Directive (EU) 2015/849 and Directive 2009/101/EC: Access to beneficial ownership information and data protection implications*, 2 February 2017.

disclosure are provided in national law, they should be granted following a detailed evaluation of the exceptional nature of the circumstances, which should be reassessed at regular intervals to avoid abuse. In addition, the evaluation of the circumstances should be available to the Commission and the exemptions granted should be indicated in the register. Lastly, Member States should ensure that competent authorities have adequate powers to effectively monitor and take the necessary measures, with a view to ensuring compliance with the requirements of the article (Article 7b)¹⁸⁸.

The amendments brought about by 5AMLD entered into force in July 2018 and member states were required to implement the new rules into national law by January 2020.

Appendix B. International Exchange of Information Frameworks

The bilateral exchange of information between tax authorities on request occurs through a range of international instruments, though the two most common are double taxation agreements (DTAs), and tax information exchange agreements (TIEAs).

Double taxation agreements

DTAs are comprehensive agreements between two jurisdictions to prevent income or profits from international economic activity being taxed twice. In negotiating a DTA, jurisdictions can choose from a number of model tax treaties, or draft their own clauses. Historically, the two most influential model tax conventions have been those of the OECD Model Tax Convention on Income and on Capital (OECD Model Convention) and the UN Model Double Taxation Convention between Developed and Developing Countries (UN Model Convention), although many countries and regional economic organisations have formulated their own models. Within Africa, the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), and the African Tax Administration Forum (ATAF) have each developed their own model tax treaties.

The majority of DTAs follow the OECD Model Convention, though adoption of the UN Model Convention is seen as offering greater benefits to developing regions, including Africa. The OECD Model Convention generally shifts more taxing powers to capital exporting countries, while the UN Model Convention reserves more for capital importing countries. A recent study of East African countries reveals reliance on both models,¹⁸⁹ though a review of actual treaties signed by developing countries shows that they contain on average many more OECD provisions than UN provisions.¹⁹⁰

Article 26 of both the United Nations and OECD Model Conventions provides for the

¹⁸⁸ See: http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/607260/EPRS_BRI%282017%29607260_EN.pdf

¹⁸⁹ V. Daurer & R. Krever, *Choosing between the UN and OECD tax policy models: An African case study*, EUI Working Papers, RSCAS 2012/60, Robert Schuman Centre for Advanced Studies, available online at: http://cadmus.eui.eu/bitstream/handle/1814/24517/RSCAS_2012_60rev.pdf?sequence=3.

¹⁹⁰ W. Wijnen & J. de Goede, *The UN Model in Practice 1997-2013* (International Bureau of Fiscal Documentation, 2013), cited in M. Hearson, *Tax Treaties in Sub-Saharan Africa: A Critical Review*, Tax Justice Network Africa, March 2015, available online at: https://martinhearsen.files.wordpress.com/2015/11/tjna_treaties.pdf.

exchange of information necessary to carry out the terms of the treaty. The scope of this Article has been extended considerably since the OECD Model Convention was first published, with the most significant revisions occurring in 2005. Earlier versions of Article 26 were much weaker, being limited to the exchange of information necessary for the purposes of the treaty. Many jurisdictions interpreted that provision as limiting the scope of the agreement solely to requests relating to double taxation, and had refused to provide information relevant to the prevention of tax evasion and avoidance.¹⁹¹

Note that the Model Convention does not clarify whether the term “ownership interests” refers simply to legal ownership, or whether it extends to beneficial ownership and/or control as defined in the FATF Standards. In light of the OECD’s ongoing work on the misuse of corporate vehicles, and the scope of the Global Forum peer reviews, it is suggested that the broader interpretation should be applied.¹⁹²

Tax information exchange agreements

TIEAs are intended either to complement DTAs where they are already in place, or for use with countries for which a DTA was not considered appropriate (mainly because they have no, or low, taxes on income or profits—such countries are, predominantly, secrecy jurisdictions). The majority of TIEAs are based on the 2002 OECD Model Agreement, which was developed by the Global Forum as part of the Harmful Tax Practices initiative. Though TIEAs are much narrower in scope than DTAs, they provide significantly greater detail on requirements for information exchange and procedures for how such exchange is to occur. As with the Model Convention for DTAs, Article 5 of the TIEA Model Agreement provides for the exchange of ownership information on request where it is foreseeably relevant to the administration and enforcement of the domestic tax laws of the requesting jurisdiction. The vast majority of African countries either have no, or a very limited number of TIEAs in place.

AUTOMATIC EXCHANGE OF INFORMATION

Multilateral Convention on Mutual Assistance in Tax Matters

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters,

¹⁹¹ Tax Justice Network, *Tax Justice Briefing – Tax Information Exchange Agreements*, available online at: https://www.taxjustice.net/cms/upload/pdf/Tax_Information_Exchange_Arrangements.pdf,

¹⁹² This view is supported by the example provided at paragraph 8(g) in the Commentary to Article 26(1) OECD MC 2014. This example describes a situation where the competent authority of State A wants to determine whether the directors of Company A also have a direct or indirect ownership in Company B, which is a shareholder of Company A. Should this be the case, the State A would apply its CFC legislation and would tax dividends paid to the Company B by Company A as income of the individuals X, Y and Z, all of them are resident in the State A. The Commentary clarifies that information on direct or indirect ownership may be requested and the exchange of information must be granted. Where information is not available on ultimate owners, at minimum information on shareholders should be provided so that the requesting state may continue its investigation. The Commentary further clarifies that where the requested authority has doubts regarding the “foreseeable relevance” of such a request, it should seek further information from the requesting competent authority to determine whether the latter standard is satisfied rather than refuse to exchange information. In this example the Commentary explicitly refers to indirect ownership, as ownership interest held either through shell companies or nominee shareholders.

developed jointly by the OECD and the Council of Europe, came into force in 1988. It was amended by Protocol in 2010 following calls by the G-20 at the 2009 London Summit to align it to the international standard on exchange of information on request,¹⁹³ and to open it to all countries for signature (having previously been restricted to members of the Council of Europe and the OECD). As amended, the Multilateral Convention provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes, in particular with a view to combating tax avoidance and evasion. Articles 4 and 6 provide the legal framework for AEOI, allowing two or more parties to mutually agree on the automatic exchange of any information that is foreseeably relevant for the administration or enforcement of their domestic tax laws. At present, over 135 countries, including 16 African countries have signed up to the Multilateral Convention (Burkina Faso, Cameroon, Cabo Verde, Gabon, Ghana, Kenya, Liberia, Mauritania, Mauritius, Morocco, Nigeria, Senegal, Seychelles, South Africa, Tunisia and Uganda). The amended Convention provides the legal framework for implementation of the new Common Reporting Standard (CRS).

Common Reporting Standard

The Standard for Automatic Exchange of Financial Account Information in Tax Matters was developed by the OECD in response to calls by the G-20 to develop a single global standard for AEOI in order to better fight tax evasion and ensure tax compliance. The Standard, which was approved by the OECD Council on 15 July 2014, contains two key parts: the Multilateral Competent Authority Agreement (MCAA), and the Common Reporting Standard (CRS). The MCAA is an administrative multilateral agreement that operationalises the AEOI provisions of the CRS on the basis of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, while the CRS sets out the information that will be exchanged, the different types of accounts and account holders covered, the financial institutions that will be required to report, and the procedures that financial institutions must follow. Currently, more than 60 countries have committed to implementation of the CRS.

Unlike the risk-based approach of the FATF Standards, the requirements of the CRS are highly prescriptive and rules-based. In very generalised terms, it imposes due diligence and reporting obligations on reporting financial institutions in respect of their financial accounts.

Whilst AEOI and EoIR standards adopted the FATF definition, they did not adopt the FATF standards in their entirety because of the differing focuses of the two organisations. The Global Forum's scope, in comparison, is slightly more limited, for instance little focus is given to entities that "do not pose a danger of tax evasion, such as public-interest foundations that meet certain criteria"¹⁹⁴. Although the findings of a FATF review may be considered in an EoIR assessment, "the Global Forum recognises that evaluations of the FATF cover issues not relevant for the purposes of ensuring

¹⁹³ C.f. Article 26 of the *Model Convention*.

¹⁹⁴ IDB & OECD, *Beneficial Ownership Toolkit*, note 61, at pg. 10

effective exchange of information on beneficial ownership for tax purposes”¹⁹⁵. In addition, whilst FATF considers the access to beneficial ownership information by a variety of authorities, they may not always consider access by tax authorities where they are not a competent authority for AML purposes.

The overall divergence in roles between FATF and the Global Forum, although reasonable, could be seen as a missed opportunity for effective interagency cooperation particularly considering FATFs acknowledgement of tax crimes as a predicate offence. An efficient and accurate registry of beneficial owners requires the cooperation of different actors involved in the administration of AML/CFT and tax. Despite the emphasis on the divide, the OECD relies significantly on FATF Recommendations for the implementation of AEOI and EoIR standards in practice.¹⁹⁶

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¹⁹⁵ IDB & OECD, *Beneficial Ownership Toolkit*, note 61, at pg. 11

¹⁹⁶ See recommendations made by the Global Forum, IDB and OECD for implementation into legal frameworks. IDB & OECD, *Beneficial Ownership Toolkit*, note 61

tax transparency & corruption



In association with

World Bank Group

United Nations Office on Drugs and Crime (UNODC)

And

African Tax Institute

Inaugural Conference on Tax Transparency and Corruption

Title: Note on Inter-Agency Cooperation

By WU Team

Session IV: Inter-Agency Cooperation to Counter Illicit Financial Flows

Date: Thursday, 24 September 2020

Collaboration between different law enforcement agencies is the key to combatting illicit financial flows (IFFs). IFFs thrive on secrecy, inadequate legal frameworks, ineffective tax regulation, poor enforcement and weak inter-agency cooperation. Since IFFs can violate a number of different laws, numerous government agencies should be involved at various stages of tackling these activities. Multi-agency cooperation to share information, gather intelligence, conduct joint investigations, initiate prosecution and recover assets is essential to targeting tax and financial crimes. The multifaceted nature of IFFs requires diversified functions, expertise and experience and, as such, calls for cooperation between the tax administrations, financial intelligence units and different law enforcement agencies.

Tax crimes, corruption and money laundering are often intrinsically linked, as criminals fail to report income derived from corrupt activities for tax purposes or over-report in an attempt to launder the proceeds of corruption.¹ The links between tax crimes, money laundering and corruption mean that tax authorities and law enforcement authorities can benefit greatly from more effective co-operation and sharing of information.²

The value of inter-agency cooperation is acknowledged by various organizations. The OECD Oslo Dialogue, held in 2011, recognized the significance of a whole-of-government approach to countering financial crimes by harnessing the skills and knowledge of different agencies through better domestic and international co-operation.³ Financial Action Task Force (FATF) work on inter-agency information sharing, has focused on developing good practices and practical tools to improve inter-agency cooperation to counter the financing of terrorism.

Inter-agency cooperation should embrace tax and customs administrations, Financial Intelligence Units (FIU), anti-corruption agencies, police, environmental authorities, public prosecutors and financial institutions. There are numerous ways in which law enforcement agencies may establish some channels, or platforms, that would make cooperation more effective. Some strategies for inter-agency cooperation include joint investigation teams, inter-agency centers of intelligence, secondments, and co-location of personnel, amongst others.

Countries should ensure that the government agencies that stand to benefit from inter-agency cooperation, have effective mechanisms in place that will facilitate effective cooperation. The agencies should also be able to coordinate domestically with each other through measures and provisions that enhance good tax governance policies and receive support from compatible technical platforms.

With this in mind, the Tax and Good Governance project (2015 – 2018), based on findings that the capacity in Sub-Saharan African countries to engage in cooperation required strengthening, identified measures to improve international and domestic cooperation between tax administration and law enforcement agencies. The project identified legal, practical, cultural and operational barriers to introducing and enhancing cooperation between agencies and provided solutions ranging from new legislation to the implementation of special training programs.

Through a series of workshop and based on extensive research, the project produced a best practices manual for inter-agency cooperation that included a template Memoranda of Understanding (MOU)

¹ OECD & World Bank, “Improving co-operation between tax authorities and anti-corruption authorities in combating tax crime and corruption”, 2018, OECD & World Bank, pg.13, <https://elibrary.worldbank.org/doi/pdf/10.1596/30911>

² Ibid

³ OECD, “Effective inter-agency co-operation in fighting tax crime and other financial crimes”, 3rd ed., 2017, OECD, pg.6, <https://www.oecd.org/tax/crime/effective-inter-agency-co-operation-in-fighting-tax-crimes-and-other-financial-crimes-third-edition.pdf>

for agencies to utilize or modify as necessary. The project was able to provide support the FIUs from Zambia, Sierra Leone and Nigeria to enter into an MOU for exchange of information in 2016. Countries were also able to identify some of the challenges of weak inter-agency co-operation and address them including:

- Lack of interconnectivity of government databases resulting in inaccessibility of information for some institutions.
- Exclusion of key agencies/authorities from negotiations with external actors particularly in the area of investments.

Key milestones were realized, for instance, in Zambia, where the Financial Intelligence Centre (FIC) and various agencies including the tax administration entered into MOUs on information exchange, engaged in capacity strengthening and enhanced the connectivity of certain government databases.

Although significant progress was made throughout the Tax and Good Governance project (2015 – 2018), there was still room for improvement and greater efforts to address the following:

- Unwillingness of some agencies to share information or provide quick access to certain information in some instances – often relating to differing objectives and political will.
- Manual systems of maintaining information.
- Data privacy.
- Maintenance of secrecy in some institutions despite enabling laws to share information.

A recent report carried out by the World Bank and OECD found that reporting and sharing of information between authorities often occurred on an ad-hoc basis rather than systematically.⁴ In addition, the scope of cooperation in prosecution and asset recovery both at national and international level now requires greater attention.

Overall, there is still some work to be done in the area of inter-agency cooperation to ensure that IFFs are not only investigated, but also prosecuted and assets returned to respective African countries. The objective of the Tax Transparency and Corruption project is to deepen the cooperation between tax authorities and other law enforcement agencies in countering tax evasion and other financial crimes. In addition, the project intends to examine how to use the expanding network of bilateral and multilateral exchange of information treaties to achieve better cooperation between countries.

Issues for Discussion:

- Why is interagency cooperation a key factor in countering IFF?
- What are the main barriers to achieving this: legal, regulatory, cultural, political?
- What are the solutions at the national level? And at the international level?
- Overview of country experiences - what has worked and lessons learnt, what more needs to be done? In this context, would it be helpful to have a short questionnaire?

⁴ OECD & World Bank, (2018), n.1

tax & good governance



TAX AND GOOD GOVERNANCE 2015-2018

Report on the project completed by the WU Global Tax Policy Center at the Institute for Austrian and International Tax Law at WU Vienna University of Economics and Business, together with the African Tax Institute (ATI) at the University of Pretoria's Faculty of Economic and Management Sciences, and sponsored by the Siemens Integrity Initiative

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Foreword

The problem of illicit financial flows has been prominent on the international agenda for the last decade. G20 Leaders, the OECD, the UN, the AU, and the WB, to specify a few, have devoted resources in order to identify methods that are more effective to deter, trace, and curb illicit financial flows. The UN High Level Panel on Illicit Financial Flows from Africa, for example, has illuminated the significance of the problem in Africa. The problem was also a focal point of the Third International Conference on Financing for Development in Addis Ababa which requested a redoubling of efforts to eliminate illicit financial flows.

Considering this, over the last three years, the Institute for Austrian and International Tax Law at the Vienna University of Economics and Business, in partnership with the African Tax Institute at the University of Pretoria have been cooperating together in a project that brought together officials, business, academics, and international and regional organisations to discuss and identify solutions to illicit financial outflows from Africa.

The project has involved research, workshops, training seminars, and conferences, all aimed at providing practical solutions that the participating countries can use to counter such outflows. It examined how to strengthen tax policy and administration, promoted effective implementation of international standards, and supported enforcement and investigations. It also emphasised the role of good practices for cooperation between financial intelligence units, customs and tax administrations, and law enforcement agencies. It identified improvements that are required for enabling the domestic and international legal and institutional framework to facilitate cooperation between different government agencies.

The project attracted the attention of over 800 participants from approximately 33 African countries. We worked together with politicians, officials, representatives of international organizations, judges, civil society, and academia who joined us for discussions at four conferences, six capacity building workshops, and researchers' meetings, which provided us with insight into the challenges that you have been facing in countering illicit financial flows.

We are very grateful for your support towards the project and the ideas that it has been promoting. We do hope we will further cooperate with you in the future.

Jeffrey Owens

Rick McDonell

Riel Franzsen

21 February 2018

Our African partners



... 33 countries involved only out of Africa

... 292 African participants from various public
and private institutions

... and many others: countries and institutions from around the world

TAX AND GOOD GOVERNANCE

Participation of International Organisations in the Tax and Good Governance Project

Event	Organisation
Kick-off Conference on the topic “Tax and Good Governance in Africa”, Vienna, 1-2 October 2015	Commonwealth Association of Tax Administrators (CATA)
	European Commission - Taxation and Customs Union (TAXUD)
	International Anti-Corruption Academy (IACA)
	International Monetary Fund (IMF)
	United Nations Office on Drugs and Crime (UNODC)
First Training Workshop on the topic “Inter-Agency Cooperation, Good Tax Governance and Illicit Financial Flows in Africa: Practical Steps for Tax and Law Enforcement Authorities”, Laxenburg, 14-16 March 2016	Delegation of the European Union to the International Organizations in Vienna
	International Anti-Corruption Academy (IACA)
	International Monetary Fund (IMF)
	United Nations Office on Drugs and Crime (UNODC)
High Level Conference on “Illicit Financial Flows: High-Level Conference on Illicit Financial Flows: Inter-Agency Cooperation and Good Tax Governance in Africa”, 14-15 July 2016, Pretoria	African Tax Administration Forum (ATAF)
	Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG)
	Extractive Industries Transparency Initiative (EITI)
	International Monetary Fund (IMF)
	United Nations Office on Drugs and Crime (UNODC)
	World Bank Group (WB)
	World Customs Organisation (WCO)
Capacity Building and Training Workshop on “Effective Legal Gateways for Inter-Agency and Business Cooperation in Africa” Pretoria, 2-4 November 2016	African Tax Administration Forum (ATAF)
	United Nations Office on Drugs and Crime (UNODC)
	World Bank Group (WB)
International Conference and Capacity Building Workshop on “The Use of Beneficial Ownership Information and The Recovery of Assets in Africa” Abuja, 26-28 April 2017	African Development Bank (AFDB)
	African Tax Administration Forum (ATAF)
	United Nations Office on Drugs and Crime (UNODC)
	World Bank Group (WB)
Workshop on “Cooperative Compliance, New Technologies and Dispute Resolution: More Effective and Efficient Tax Compliance in Africa”, Accra, 10-11 July 2017	African Tax Administration Forum (ATAF)
	Commonwealth Association of Tax Administrators (CATA)
International Conference and Capacity Building Workshop on Countering Treaty and Transfer Pricing Abuse: the Tax and Financial Crime Dimension, Accra, 12-14 July 2017	African Development Bank (AFDB)
	African Tax Administration Forum (ATAF)
	International Monetary Fund (IMF)
	United Nations Committee of Experts on International Cooperation in Tax Matters
	United Nations Economic Commission for Africa (UNECA)

TAX AND GOOD GOVERNANCE

Event	Organisation
	United Nations Office on Drugs and Crime (UNODC)
Researchers' Meeting on "Creating Mechanisms to Get Good Access to Beneficial Ownership Information", Vienna, 2nd October 2017	European Investment Bank (EIB)
	International Monetary Fund (IMF)
	United Nations Office on Drugs and Crime (UNODC)
	World Bank Group (WB)

Illicit financial flows

The concept of illicit financial flows (IFFs) is perceived by some as being vague and imprecise and its content controversial. As noted by the UNECA, it is “marred by a lack of terminological clarity which somewhat limits the emergence of effective policy options”.

Numerous definitions of IFFs have been posited, however, many do not reflect the true nature of illicit activities and are limited to only illegal actions. The conceptual basis to the Tax and Good Governance project is the definition of IFFs as money that is illegally earned, transferred, or used. First and foremost, this definition seems to indiscriminately group those activities that all organizations around the world (e.g., the World Bank, UNDP and GFI) recognize as IFFs. In particular, it is the definition that is adhered to by the most respected organizations that undertake some measures against IFFs, for instance the UN. Moreover, limiting IFFs to illegal activities clearly delineates the scope of IFFs and clarifies which activities should be targeted. It helps avoid explanations of what qualifies as IFFs. It should facilitate the agreement on common actions that must be taken to combat them. Finally, the suggested definition addresses the whole variety of issues that relate to the entire breadth of financial transactions.

G7, June 5, 2014, Brussel

We will continue to work to tackle tax evasion and illicit flows of finance, including by supporting developing countries to strengthen their tax base and help create stable and sustainable states.

Pravin Gordhan, ex-Finance Minister, South Africa, 14 July 2016

Tax crimes, money laundering and illicit flows are part of a complex set of phenomena, which is undermining good governance, ethical politics in government and civil society programmes intended to promote inclusive growth, reduce inequality and improve the standard of living of the poor and lower middle classes on this continent and elsewhere in the world.

UN, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1

16.4 By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime.



Delivery of the Kenynote Address by the then Finance Minister of South Africa, Pravin Gordhan, at the High-Level Conference on Illicit Financial Flows: Inter-Agency Cooperation and Good Tax Governance in Africa, 14th July, 2016, Pretoria, South Africa

Why is it relevant?

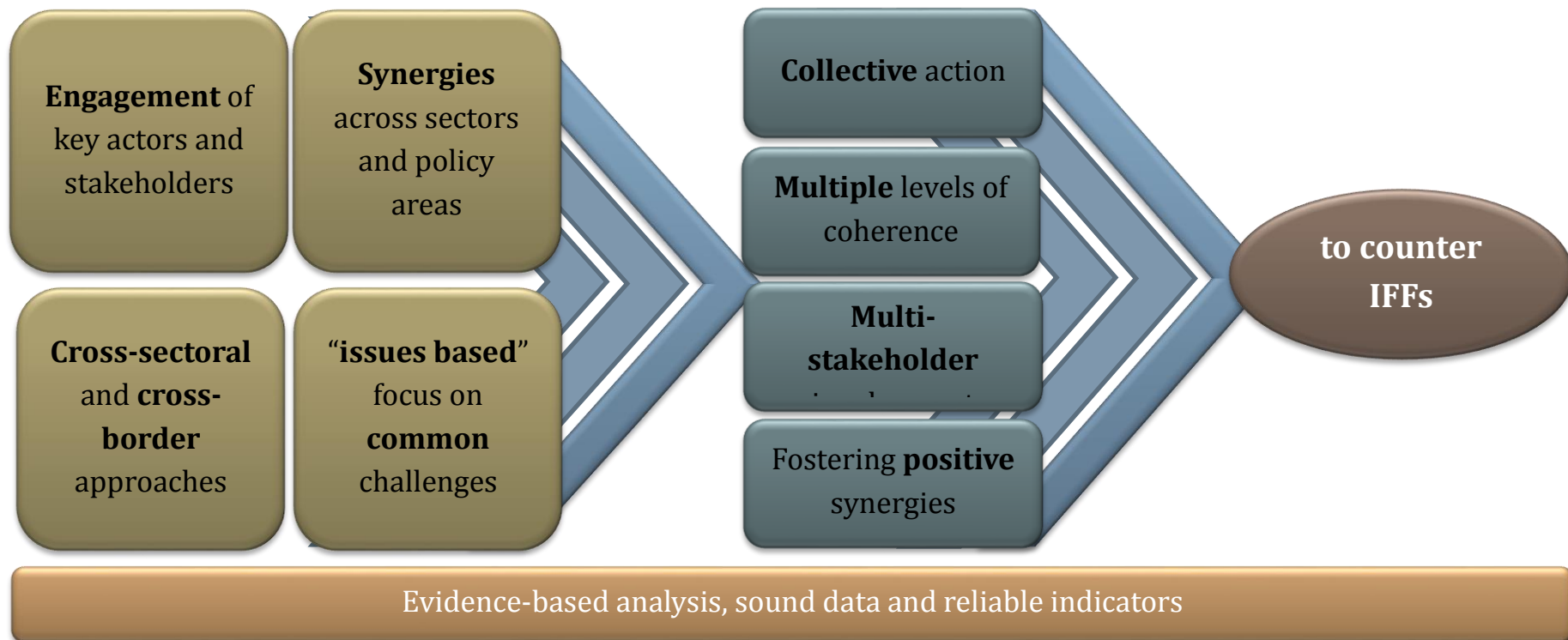
- Illicit financial flows undermine domestic resource mobilization by eroding the tax base. This occurs through the illicit transfer of private capital abroad; tax evasion and tax avoidance by individuals and corporations; and embezzlement of government revenue.
- Illicit financial flows result in greater dependency on official development assistance as a result of their negative effects on domestic resource mobilization.
- Illicit financial flows lead to slower economic growth which may subsequently hinder poverty reduction efforts.
- As a consequence of illicit financial flows, inequality flourishes. Wealthy residents benefit from opportunities to conceal their wealth abroad.



Source: Report of the High Level Panel on Illicit Financial Flows from Africa commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development, http://www.uneca.org/sites/default/files/publications/iff_main_report_26feb_en.pdf

TAX AND GOOD GOVERNANCE

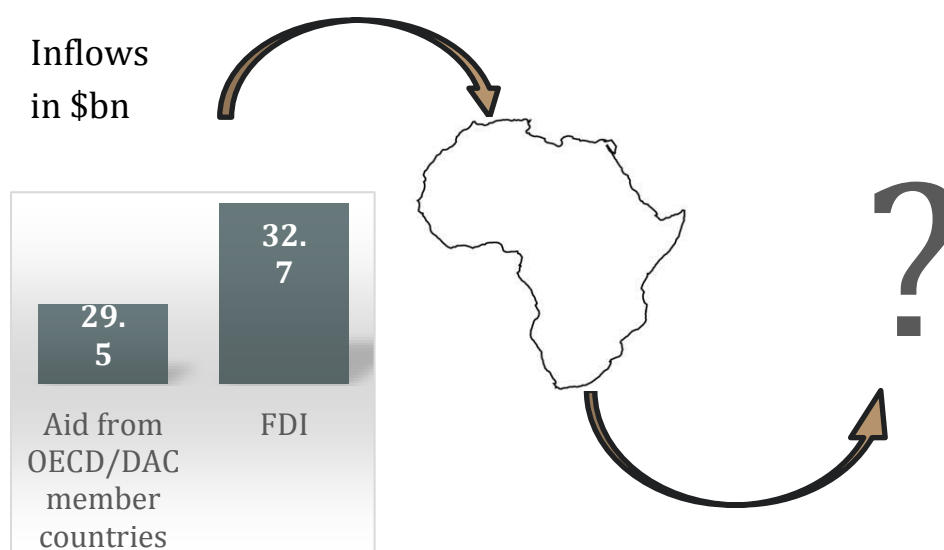
The nature of IFFs is such that multiple actors are involved. IFFs also target various sectors. This determines the type of actions that are essential to effectively and efficiently respond to IFFs. There is a need for collective actions that rely on multiple levels of coherence and involve various stakeholders. This should lead to fostering positive synergies that enable countering IFFs. These actions need to be documented. An evidence-based analysis of sound data may produce reliable indicators that are essential for informing policy makers.



TAX AND GOOD GOVERNANCE

What is the scale of IFFs?

When commenting on the scale of illicit financial flows, it must be emphasised that the proceeds from these activities are difficult to measure. Estimates vary substantially and are heavily debated. This is due to the nature of illicit finances. Nevertheless, it is worth analysing data provided by different bodies to help in understanding why this phenomenon deserves in-depth research and widespread recognition as that data clearly indicate that illicit financial flows are a global issue.



Some estimates

The primary reason for the varying estimates of IFFs is the lack of agreement on the definition of IFFs. Specifically, it has been heavily disputed whether the definition should include legally compliant taxpayer behaviour. As a result, some estimates include corporate tax planning and others do not.

\$50 bln	• Mbeki Report's estimation of annual IFFs lost by Africa
\$160 bln	• Christian Aid's estimation of annual losses suffered by developing countries due to trade misinvoicing
\$880 bln	• GFI's estimation of trade-based money laundering in developing countries in 2014
\$20 bln	• UNDP's estimation of annual capital flight from the least-developed countries

Inter-agency co-operation

Leaders of the G20, convened in Los Cabos on 18-19 June 2012

“We also welcome efforts to enhance inter-agency cooperation to tackle illicit flows”.

G7 Bari Declaration on Fighting Tax Crimes and other illicit financial flows, 13 May 2017

“We support a holistic approach to fighting tax and financial crime based on effective interagency and international co-operation, especially through improved access to and effective exchange of information, with consideration of domestic circumstances”

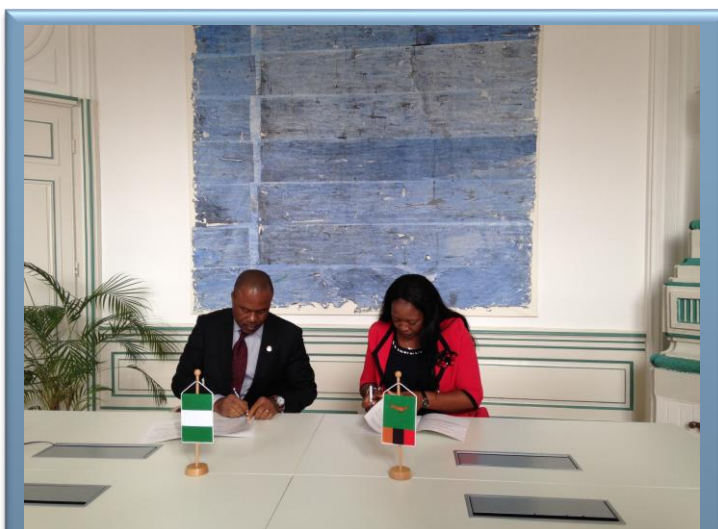
Why is it relevant?

Capacity in Sub-Saharan African countries is limited and further complicated by the need to significantly improve cooperation between existing institutions. The effective fight against IFFs demands participation of different sets of actors. Among them, tax authorities, customs administrations, police, judiciary, financial intelligence units, and anti-corruption agencies play the most significant roles. However, in many Sub-Saharan African countries, there is insufficient cooperation between these institutions. Responsibilities are duplicated and information is very limited.

Inter-agency cooperation may provide an opportunity to overcome limited capacities and conduct investigations that are more effective and efficient.

In the project, we discussed legal, practical, and other barriers to introducing and enhancing cooperation between different tax administrations and law enforcement agencies. We subsequently suggested solutions ranging from new legislation to implementation of special training programs.

The results of our discussion were published in our research papers (see list of research papers on Page



At the first training workshop on the topic “Inter-agency cooperation, good tax governance and illicit financial flows in Africa: practical steps for tax and law enforcement authorities” (14-16 March 2016), the FIU directors of three African countries (Zambia, Sierra Leone, and Nigeria) **signed mutual Memoranda of Understanding on exchange of information** at their own initiative.

TAX AND GOOD GOVERNANCE

12). In addition, we have prepared an electronic training manual that should assist countries in contemplating how to develop their own strategy on inter-agency cooperation.



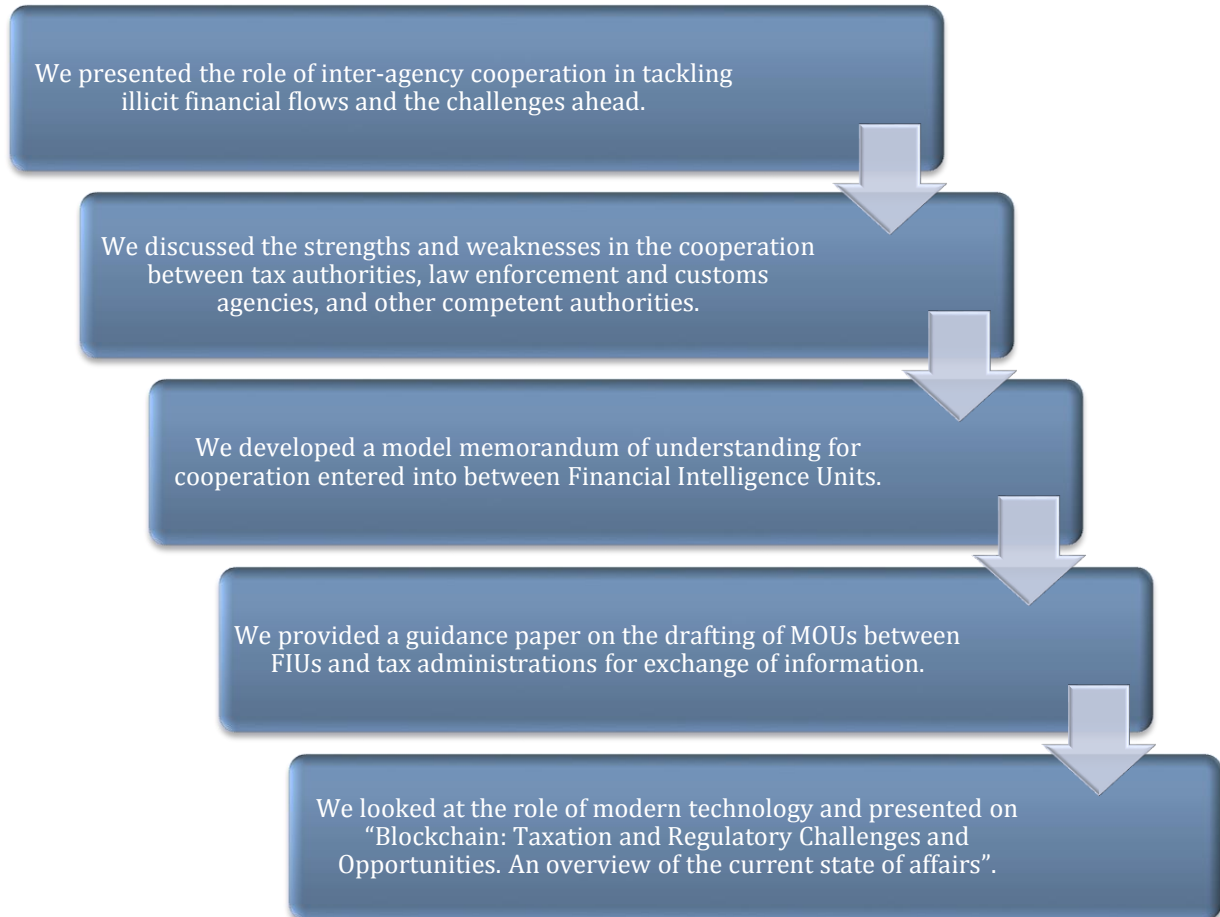
Participants of the High-Level Conference on Illicit Financial Flows: Inter-Agency Cooperation and Good Tax Governance in Africa organized in cooperation with United Nations Office on Drugs and Crime, 14th-15th July, 2016, Pretoria, South Africa.

What are the identified challenges?

- Obstacles to inter-agency cooperation: legal, regulatory, cultural, and operational.
- Fitting the pieces together: cooperation between FIUs, law enforcement, tax and customs investigations, and supervisors for investigations of large illicit financial networks.
- Legal and practical barriers that may prevent tax administrations from sharing information that is received in the country-by-country reports and the master file on transfer pricing with other competent authorities, including FIUs.
- Undertaking effective risk management: What can FIUs and tax administrations learn from each other?
- Facilitating effective exchange of information: What can FIUs and tax administrations learn from each other?
- The implications of the FinTech/RegTech for countering illicit financial flows.

TAX AND GOOD GOVERNANCE

What have we done so far?



Our **selected research outputs** on the topic:

- Owens/McDonell/Franzsen/Amos (eds), *Inter-agency Cooperation and Good Tax Governance in Africa*, Pretoria University Law Press 2017.
- J. Owens, A. Majdanska, R. McDonell, *Interagency Cooperation Illicit Financial Flows, and Sustainable Development Goals*, *Tax Notes International*, Feb. 27, 2017, 819-826.
- Majdanska, C. Migai, L. Ngwenya, B. Schlenther, *Inter-Agency Cooperation and Illicit Financial Flows in Africa*, 2nd Annual African Tax Researchers Network, Seychelles, 05.09-07.09.2016.

Beneficial ownership information

At the UK Anti-Corruption Summit held in London in May 2016, individual countries and international organisations emphasized:

“The misuse of companies, other legal entities and legal arrangements, including trusts, to hide the proceeds of corruption must end. We will enhance transparency over who ultimately owns and controls them, to expose wrongdoing and to disrupt illicit financial flows. As recent events have shown, we need to take firm collective action on increasing beneficial ownership transparency...” (Paragraph 4 of the Communique issued in London on May 12, 2016).

Why is it relevant?

Greater transparency may significantly contribute to curbing IFFs. Public registers of beneficial owners, country-by-country reports, and automatic exchange of information facilitate a modern understanding of transparency in respect to taxation and could be very advantageous for administrations in developing countries, particularly in Sub-Saharan Africa. Different international organisations including the Financial Action Task Force (FATF), Organisation for Economic Co-operation and Development (OECD), Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum), European Union (EU), United Nations Office of Drugs and Crime (UNODC), and World Bank have initiated a number of efforts to improve the identification of the ultimate beneficial owners of accounts and corporations, which is crucial to detecting, tracking, and preventing IFFs.

Central registers of beneficial ownership information are now suggested as a method for providing access to beneficial ownership information. The initiative has been supported by many fora. The European Union has recently imposed an obligation to create national-level registers of beneficial ownership information on its Member States. We have also witnessed some initiatives at the domestic level. Denmark, Ghana, Ukraine, and the United Kingdom are only a small number of examples of countries that have committed to creating fully public beneficial ownership registers of companies. The Open Government Initiative has initiated a dialogue on a “globally publicly accessible registry”.

In the project, we conducted a study on the broader transparency agenda with a particular emphasis on what is meant by the concept of beneficial ownership and what its effective implementation requires. An important point in the discussion about the new tool, the beneficial ownership registry of companies, is whether or not it should be public. This is linked to the question of how to ensure that data stored would be accessible for foreign authorities.

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What are the identified challenges?

- Adequate and accurate identification and verification of the beneficial owner(s) of legal persons and arrangements.
- Examination of the role played by professional intermediaries and complex offshore structures in concealing beneficial ownership.
- Development and implementation of central registries of beneficial ownership information.
- The opportunities and risks posed by new payment methods and technologies, including, e.g., virtual currencies, in concealing beneficial ownership. The implications of FinTech/RegTech for countering illicit financial flows.
- Timely access to beneficial ownership information by Financial Institutions, Designated Non-Financial Institutions, FIUs, and relevant LEAs.



Participants of the International Conference and Capacity Building Workshop on the Use of Beneficial Ownership Information and The Recovery of Assets in Africa, 26th-28th April, 2017

Selected **research papers** on the issue of identification and verification of beneficial ownership information:

1. Majdanska A., *The Legal Entity Identifier: Towards Improved Corporate Transparency*, forthcoming.
2. A. Mayer, M. Somare, *Discussion on Transparency and Beneficial Ownership in the African Context: Nigeria, Ghana and South Africa*, Working Draft.
3. De Jong, J., Meyer, A., Owens, J., *Using blockchain for transparent beneficial ownership registers*, *International Tax Review*, June 2017.

Asset tracing and recovery mechanisms

Article 51 of United Nations Convention against Corruption provides that

“the return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.”

Why is it relevant?

Asset tracing and recovery of proceeds from IFFs are complex and require coordination and collaboration with different domestic agencies. For effective and efficient investigation, law enforcement agencies cannot limit their operations to applying only criminal tools. All legal options — whether criminal confiscation, non-conviction based confiscation, civil actions, or other alternatives — should be considered.

The process of asset tracing and recovery of proceeds often extends beyond national borders. Thus, the mechanisms must involve cross-border cooperation as well as the application of different legal systems and procedures. There are different mechanisms that have been developed for that purpose. Among these are: direct enforcement of freezing or confiscation orders made by the court of another state party; confiscation of property of a foreign origin by adjudication of an offence of money laundering or other offences; court orders of compensation or damages to another state party and recognition by the courts of another state party’s claim as a legitimate owner of assets acquired through corruption; spontaneous disclosure of information to another state party without prior request; and international cooperation and asset return.

The project focused on practical steps that law enforcement agencies may want to consider for efficient and effective processing of asset tracing and recovery. It pointed out differences between various procedures and analysed their practical application. Some beneficial practices and case studies were presented and discussed.

What are the identified challenges?

- Legal and practical barriers to asset recovery.
- Recovery of assets: civil or criminal route?
- Dual criminality as a barrier to the recovery of the proceeds of tax crime.
- How can we most efficiently link existing international networks dealing with asset recovery and with tax crimes?
- Do we need a new international architecture to facilitate the recovery of the proceeds of tax crime?
- Overcoming legal professional privilege.

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Speakers from UNDP, AfDB, WATAF, ARINSA and ATAF at the conference in Nigeria, 26th-28th April, 2017

Cashgate in Malawi: case study on asset recovery

Drawing on a sample of 501 suspicious transactions between April and September 2013, the auditors found that approximately 6.1 billion kwacha (\$14.5m) had been paid out to 16 companies for services that had not been supplied.

Overall, the State was defrauded of around \$32m, almost 1% of Malawi's annual GDP, in just six months.

A cheque was written and deposited into the bank account of a dormant company used solely for money laundering. The cheque was cashed, and the transaction was then erased from the accounts so the fraud could be repeated.

The business person and former People's Party senior member, Oswald Lutepo, has been convicted with his own plea of guilty on charges of money laundering and conspiracy to defraud the government of K4.2 Bn between April and September 2013.

Treaty and transfer pricing abuse

Why is it relevant?

Tax treaties can be bilateral or multilateral. In general, they are designed to allocate taxing rights between Contracting States thereby preventing double taxation (avoiding taxing the same profit twice). They usually also contain provisions for the purpose of assisting tax administrations and taxpayers to exchange information and resolve disputes.

Many developing countries have been entering into tax treaties with the primary goal of attracting foreign direct investments into their countries. However, there is ongoing debate regarding the actual impact of tax treaties on investments and revenues. Tax treaties, if poorly negotiated, open up the possibility of a network which could plausibly be abused by enterprises operating across many different jurisdictions to minimise their tax returns and derive benefits not intended for them under the tax treaties.

The project explored the potential gaps or avenues presented by tax treaties that facilitate abusive tax practices. It provided an avenue for discussing how bilateral, multilateral, and regional tax treaty instruments, as well as specific provisions within these instruments, can be used to counter abusive tax practices.



Press conference at the International Conference and Capacity Building Workshop on the topic “Countering Treaty and Transfer Pricing Abuse: the Tax and Financial Crime Dimension”, organized in cooperation with United Nations Office on Drugs and Crime (UNODC) and the World Bank Group and hosted by the Ministry of Finance, the Ghana Revenue Authority (GRA) and the Ghana Financial Intelligence Centre, Accra (Best Western Accra Airport Hotel), 12-14 July 2017

The project also examined the issues raised by transfer pricing. This has been in sharp focus in the recent past due to its potential for base erosion and profit shifting. The OECD BEPS Project recognised that, whereas the arm's length principle has proven to be beneficial as a practical and balanced standard for tax administrations and taxpayers to evaluate transfer prices between associated enterprises and to prevent double taxation, it is vulnerable to manipulation. This can be due to its perceived emphasis on contractual allocations of functions, assets, and risks.

As a result, Actions 8-10 of the OECD BEPS Project seek to ensure that transfer pricing outcomes related to intangibles are in accordance with value creation. Additionally, Action 13 has led to a re-examination of transfer pricing documentation and new requirements for maintaining a "master file", a "local file", and "country-by-country" reporting.

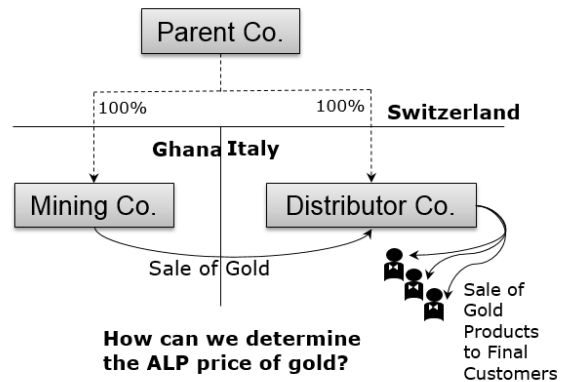
The Mbeki High Level Panel acknowledged that the challenges faced by African countries in implementing transfer pricing requirements have contributed to IFFs. It acknowledged that the effective implementation of transfer pricing rules is significantly dependent on the availability of comparable pricing data on goods and services in international transactions. It requested African countries to require disaggregated financial reporting on a country-by-country or subsidiary-by-subsidiary basis and for African Tax Administrations to forge a united front and develop a reporting format suitable for multiple jurisdictions.

What are the identified challenges?

- Inadequate capacity in a number of African tax administrations.
- Limited tax treaty network of African countries.
- Lack of clauses combatting aggressive tax avoidance and tax evasion in domestic and international legal frameworks.
- Deficiencies in the international and domestic legal framework for recovery of tax debts from assets held overseas.
- The need for effective procedures to enable tax authorities and FIUs to exchange information received from their foreign counterparts.
- Clarifying the difference between acceptable transfer pricing, abusive transfer pricing, mispricing, and misinvoicing.
- Examining the role of tax, FIU, and law enforcement agencies in combating illicit financial flows in the context of global value chains.
- Consideration of how to most effectively counter transfer mispricing by MNEs.

Example of TP Issue relevant for developing countries

L&P



ALP price of gold shall be based on reliable comparable uncontrolled transactions information

- **Possible sources of information**
 - commercial databases (not necessarily designed for TP purposes)
 - specialised databases
 - quoted prices from commodities or futures exchanges
- **Issues**
 - scarcity of domestic information (e.g. due to few market players)
 - access to databases might be costly or non-existent
 - Data based on the quoted prices of the commodities might not be completely reliable
- **Conclusion:** An obligation for companies to prepare financial accounts and to file them with a central registry (or similar) or otherwise make them publicly available is a prerequisite for access to any financial information contained therein. Absent a general obligation to prepare financial accounts and make them publicly available, the necessary data to assess comparability and apply the arm's-length principle may not exist

6

Case study presented and discussed at the capacity building workshop on transfer pricing in Accra, Ghana (13-14 July 2017).

Research studies

1. Braun J., M. Kasper, Majdanska A., Somare M. (2016) *Suspicious Transaction Reporting Levels: Evidence from a Legal and Economic Perspective*, Journal of Tax Administration, 95-125.
2. De Jong, J., Meyer, A., Owens, J. (2017) *Using blockchain for transparent beneficial ownership registers*, International Tax Review, June 2017
3. Majdanska A. (2016) *7 Talking Points from the Tax and Good Governance in Africa conference*, TaxTalk, 50-53.
4. Majdanska A., Migai C., Ngwenya L., Schlenther B., *Inter-agency Cooperation and Illicit Financial Flows in Africa*, Africa Tax Researchers Network (ATRN) 2016 Working Paper Series and Policy Briefs, 32.
5. McDonell, R., Owens, J. *Creating Mechanisms to get good access to beneficial Ownership information in international context*, forthcoming
6. Owens J., Majdanska A. (2015) *How good governance can curb illicit financial flows out of Africa*, International Tax Review, 10 July 2015.
7. Owens J., Majdanska A., and McDonell R., (2017) *Interagency cooperation, illicit financial flows, and sustainable development goals*, Tax Notes International, 3/17/2017.
8. Owens J., Sim TY, Petruzzi R., Romero J.S.T, and Migai C. (2017) *Blockchain, Transfer Pricing, Custom Valuations and Indirect Taxes: the Potential of the "Trust Protocol" to Transform the Global Tax Environment*, Bloomberg BNA 2017, 209.
9. Owens, J., Olowaska M., *Recent Initiatives on Beneficial Ownership*, Tax Notes International, to be published in December 2017.
10. Owens/McDonell/Franzsen/Amos (eds), *Inter-agency Cooperation and Good Tax Governance in Africa*, Pretoria University Law Press 2017.

Calendar of past events

DATE	VENUE	EVENT
1-2 October 2015	Vienna, Austria	Conference On Tax And Good Governance In Africa
14-16 March, 2016	Laxenburg, Austria	Training Workshop on Inter-Agency Cooperation, Good Tax Governance and Illicit Financial Flows in Africa: Practical Steps for Tax and Law Enforcement Authorities
14-15 July, 2016	Pretoria, South Africa	High-Level Conference on “Illicit Financial Flows: Inter-Agency Cooperation and Good Tax Governance in Africa”
2-4 November, 2016	Pretoria, South Africa	Capacity Building and Training Workshop on “Effective Legal Gateways for Inter-Agency and Business Cooperation in Africa”
26-28 April, 2017	Abuja, Nigeria	International Conference and Capacity Building Workshop on “The Use of Beneficial Ownership Information and The Recovery of Assets in Africa”
10-11 July 2017	Accra, Ghana	Workshop on “Cooperative Compliance, New Technologies and Dispute Resolution: More Effective and Efficient Tax Compliance in Africa”
12 -14 July, 2017	Accra, Ghana	International Conference and Capacity Building Workshop on “Countering Treaty and Transfer Pricing Abuse: the Tax and Financial Crime Dimension”
2 October, 2017	Vienna, Austria	Researchers’ Meeting on “Creating Mechanisms to Get Good Access to Beneficial Ownership Information”

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What is the linkage between COVID-19 and illicit financial flows (IFF)?

By

Jeffrey Owens and Bernd Schlenther¹

Abstract

Illicit financial flows have drained the ability of countries to respond to the COVID-19 pandemic. The linkage between IFFs and the pandemic are clear: corruption in health care sectors across the globe and the use of opaque cooperate vehicles to conceal the true beneficial owners of assets illicitly acquired, are at the heart of the matter. By addressing IFFs, the pandemic presents an opportunity to governments to claw back some of the urgently required finances to combat the COVID-19 virus and to rebuild economies. With political will and the implementation of strategies - such as creating beneficial ownership registers, use of technologies, rules and regulations that facilitate the detection of unexplained wealth, inter-agency cooperation and setting international standards that support asset recovery – the COVID-19 pandemic presents itself as a unique opportunity for governments to reconsider their response to all forms of IFFs.

1. Introduction

Civilization faced epidemics and pandemics throughout history, the earliest of which were recorded 5000 years ago at Hamin Mangha and Miaoziyou in China. In 430 B.C., an epidemic ravaged the people of Athens and lasted for five years. Approximately 100,000 people died. The Antonine Plague A.D. 165-180 laid waste to the Roman army and may have killed over 5 million people in the Roman empire. The Plague of Cyprian (A.D. 250-271) is estimated to have killed 5,000 people a day in Rome alone while the Plague of Justinian (A.D. 541-542), also known as the bubonic plague, marked the start of the decline of the Byzantine empire – estimates suggest that up to 10% of the world's population died. The Black Death (1346-1353) accounted for wiping out nearly half of Europe's population at the time and millions more when resurfacing centuries later in London, Marseille and Moscow. In the industrial age, the flu pandemic of 1889-1890 spanned the globe in a few months and killed 1 million people. The Spanish Flu of 1918-1920 killed an estimated 50 million people and the Asian Flu of 1957-1958 accounted for 1.1 million deaths.² The latest pandemic to hit civilization, is COVID-19,

¹ The Global Tax Policy Center (WU GTPC) at the Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business) has launched the Tax and Good Governance Project. Together with WU GTPC, the African Tax Institute (ATI) at the University of Pretoria's Faculty of Economic and Management Sciences, and in cooperation with United Nations Office on Drugs and Crime (UNODC) and the World Bank, the Project aims to build on the achievements of Tax and Good Governance Project in the fight against tax crimes and illicit activities in Africa.

² Jarus (2020); Slack (1988) 434.

which at the time of writing, accounted for close to 200 000 deaths globally and may claim at least up to 1 million people.³

Whilst scientific evidence of the exact cause of these diseases is lacking in some instances, popular theories have emerged such as that the black plague spread throughout Europe after plague-infested corpses were catapulted into the city of Kaffa during a siege with fleeing Genoese ships carrying the epidemic westward to Mediterranean ports.⁴ Theories on the outbreak of COVID-19 include a leak from a laboratory, consumption of infected farm animals and consumption of wildlife at wet markets in China.⁵ Whatever the reasons for such outbreaks government action, since the Middle Ages, ranges from imposing quarantines, restrictions on movements, banning consumption of wildlife goods⁶ and introducing stimulus programs, including by means of tax systems.⁷

Similar to the severe economic hardship inflicted on populations by past pandemics, the COVID-19 pandemic has pushed the world into a recession with an economic impact far worse than the financial crisis of 2008.⁸ Economic policies during this time are focused on ensuring liquidity and solvency whilst tax policy favours steps which include a whole range of measures from tax incentives to tax waivers.⁹

Whilst such policy initiatives are aimed at addressing the immediate crisis, a key question is why so many countries' health care systems are not able to respond to the crisis. Research shows that corruption in the health sector alone accounts for over USD 500 billion annually – the same it would cost to bring about worldwide universal health coverage.¹⁰ Corruption and all other forms of IFFs impact on the economic stability of countries by draining foreign exchange reserves, lowering tax receipts and reducing government revenue. IFFs divert resources from public spending, encourages criminal activity, and undermines the rule of law and the political stability of countries.¹¹ Research also shows that a lack of fiscal transparency leads to mismanagement of public finances, weakened governance and increased corruption.¹² This paper explores the opportunities and actions that can be taken, against the backdrop of the COVID-19 crisis, to more effectively counter all forms of IFFs.

This paper consists of six sections. Sections 2, 3 and 4 highlight the impact of COVID-19 on government budgets, draws linkages between the battles against IFFs and COVID-19 and

³ https://www.worldometers.info/coronavirus/?utm_campaign=homeAdvegas1?

⁴ Encyclopedia Britannica (2020).

⁵ Kuznia and Griffen (2020). 1

⁶ Decisions passed by the 16th meeting of the Standing Committee of the National People's Congress on 24 February 2020.

⁷ Zimmerman (2020). The church at that time imposed separate taxes from the government, requiring church members to tithe one-tenth of their earned income.

⁸ Bluedorn, Gopinath and Sandri (2020).

⁹ OECD (2020). Some measures suggested include adjustment of required advance payments on the basis of a revised expected tax liability; waiving or deferring employer and self-employed social security contributions, as well as payroll related taxes; deferring payments of VAT, customs and excise duties for imports; speeding up VAT refunds, introduce tax exemptions for those working overtime in the health sector and increase the generosity of loss carry forward provisions. Whilst such policies are aimed at ensuring liquidity, provision also needs to be made for fiscal consolidation post crises.

¹⁰ Bruckner (2019) 1.

¹¹ IMF (2020).

¹² IMF (2018) 6.

illustrates how new opportunities to gain political support to counter IFFs can arise during the crisis. Section 5 demonstrates how the inability of governments to address trans-national organised crime, may have inadvertently created an environment for the spreading of the COVID-19 virus and how lockdown measures may inadvertently increase IFFs. Section 6 shows how combatting IFFs (such as tax evasion, corruption and money laundering) can alleviate some of these budgetary pressures. Section 7 provides some concluding comments.

2. Linking the battles against COVID-19 and IFF

There are various definitions of IFFs, but essentially they are generated by methods, practices and crimes aiming to transfer financial capital out of a country in contravention of national or international laws.¹³ IFFs have bled resources from developing countries for decades and, whilst the size of IFFs and their impact on revenues is contested, few would deny that IFFs are large and increasing and that annual revenue losses for developing countries can range from USD 50-100 billion: money that could transform the health systems in these countries and help them to more effectively counter COVID-19.¹⁴

The use of opaque cooperate vehicles to conceal the true beneficial owners of assets is very much at the centre of this debate. These vehicles can take different forms: shell companies, trusts, limited liability partnerships and foundations, which are widely used to launder the proceeds of crimes and to evade taxes.

The FATF defines beneficial ownership as “the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.”¹⁵ Access to accurate and up to date information on beneficial owners is a key to countering all forms of IFF. Whilst progress has been made by the Financial Action Task Force (FATF) and the OECD Global Forum on Transparency, much remains to be done to improve the situation in developing countries. The *Luanda Leaks* suggest that wealthy politically exposed people (PEPs) continue to use this lack of transparency to hide their wealth offshore.¹⁶ In their 2015 *High Level Panel Report on IFFs* the AU suggests that Africa was losing an estimated USD 50 billion annually to IFFs. Yet many African countries have been slow to respond to the recommendations made, largely because there has not been the political will at the national level. COVID-19 could change that.

At the domestic level, the potential sources of information to detect IFFs are: company registries; land registries; tax data; stock exchange data; financial institutions data, Designated Non-Financial Businesses and Professions (DNFFBP’s) and other service providers. Yet in most countries these information sources are incomplete, out of date and are not fully exploited

¹³OECD (2014) 16. Schlenker (2019) points out that international organisations such as the IMF and OECD have taken a pragmatic approach in addressing IFFs by focusing on the “how to” aspects rather than getting stuck on the definition.

¹⁴ Global Financial Integrity (GFI) 2020 data estimates IFFs due to trade misinvoicing between and among 135 developing countries and 36 advanced economies, at USD 7.3 trillion.

¹⁵ FATF (2014) 8.

¹⁶ ICIJ (2020).

because of legal and technical barriers to combining the information into an easily usable and publicly available single source.

Despite the efforts of both the FATF and Organisation for Economic Development (OECD) Global Forum (GF), few countries fully meet the standards. The 2019 FATF Mutual Evaluation of its 25 core members found that only 11 were largely compliant, 12 were partially compliant and 2 non-compliant.¹⁷ A pattern which is supported by the OECD GF peer reviews for its 120 members. Developing countries appear to have major weakness in the implementation of the FATF recommendations. Foreign assets under dispute are massive in scale: the mean value is USD 450 million, with the median case still valued at USD 22 million.¹⁸ Although FATF Recommendations 4 and 38, provide a framework for asset tracing, recovery, confiscation and repatriation, countries have recorded limited progress in establishing well-functioning asset recovery units. In the absence of these, formal requests for legal assistance or accompanying evidence, more often than not, are not generated by “source/victim” countries.

Whilst most developing countries do have a range of company ownership registries, they are often hosted by different agencies which fail to cooperate and are under resourced which prevents in depth verification and regular updating. Inter-agency cooperation also tends to be weak. Penalties for non-compliance are puny and enforcement weak. In addition, many developing countries do not have the technical platforms that would allow them to use the data to track and identify sectors, groups of individuals and offshore locations which are most prone to IFFs.

This lack of a robust approach to identify the ultimate physical owners of companies is not just a problem for government, especially tax and custom authorities and FIU, but also for MNE’s that operate in developing and emerging countries. They also need to know who owns and controls their sub-contractors in the country. Are these just fronts for PEPs or companies engaged in genuine business activities? This shared interest should make it easier to move forward, especially at a time when governments are putting in place massive procurement projects in the health sector and billion dollar stimulus packages to counter the effects of COVID-19. We need to avoid that the funds for these programs end up in offshore accounts held by PEPs, which is a particular concern of the development agencies that are going to provide the bulk of this funding.

Every crisis opens up new possibilities for reforms that may have been blocked by a lack of political will, cultural barriers, inter agency competition or by lobbying on the part of those who have gained most from weak enforcement of the rules. COVID-19 is no exception and the scale of this crisis may be a powerful force to break down barriers to counter IFFs and to enable governments, especially in developing countries, to implement the actions that have been on the table for decades.

¹⁷ FATF (2020).

¹⁸ Lohaus (2019) 10. The World Bank and United Nations Office on Drugs and Crime (UNODC) jointly created the Stolen Assets Recovery Initiative (StAR) in 2007. According to StAR’s data, the member states of the OECD have frozen USD 2.6 billion between 2006 and 2012, but returned just USD 423.5 million to the respective countries of origin.

3. The impact of COVID-19 on government budgets

COVID-19 in combination with an increase in the value of the dollar and an oil price war between Saudi Arabia and Russia in 2020 has severely affected developing and emerging economies. In addition, cumulative capital outflows from developing countries since January 2020 are double the level experienced during the 2008 financial crisis (an estimated USD 83 Billion outflow of funds from emerging markets).¹⁹ Countries highly dependent on trade in both developed and developing countries as well as commodity exporters are projected to be the most negatively affected by the slowdown in economic activity associated with the virus.

Budgetary impact is seen in increased direct costs to respond to the public health emergency (e.g., expanding hospital and laboratory capacity; purchasing of medical supplies); increased indirect costs caused by changes in economies (job losses, diminishing incomes, collapse of industry sectors); and lower revenues as a result.²⁰ The net effect is to push budget deficits in developing countries into double digit figures. Governments are thus severely challenged to provide subsidies and liquidity to the private sector to compensate for the fall in demand.

Before the outbreak of COVID-19, developing countries were already burdened with immense resource demands to achieve development goals by 2030.²¹ To illustrate: before the crisis, economic growth in South Africa was forecast at 0.8%, on the back of 0.7% growth in 2019. Unemployment was effectively at 40 percent, and over 50 percent of young South Africans were unemployed. In addition, business confidence at the start of 2020 was at its lowest level in 20 years.²² Gross domestic product (GDP) forecast has now been revised down by 6.1 percent with economic growth expected to shrink to -2.9 percent or less. Efforts to boost revenues, improve spending quality, and better manage debt burdens in developing countries - especially so in the least developed countries (LDCs) - will therefore be even more critical to meeting these objectives than before.

4. COVID-19 and new opportunities for IFFs

The response to COVID-19 is likely to open up new opportunities for IFF as governments and international agencies put in place large government funding programs, not just to boost health systems, but also to sustain the economy. The size of these programs - between USD 1-2 trillion - and their speed of implementation may preclude robust oversight and transparency provision which will be exploited to engage in bribes, kickbacks, and contract malfeasance. In addition, the foreign assistance associated with relieving the worst of the pandemic may be subject to misappropriation. Much of the misallocated funds will be laundered and moved through the international financial system. Meanwhile, numerous transnational criminal organizations will still engage in money laundering and other illicit financial activity to maintain their criminal supply chains.²³ The FATF has flagged an increase in financial fraud and exploitation scams targeting innocent victims and vulnerable individuals as well as COVID-19-related insider

¹⁹ Jackson, J.K., Weiss, M.A., Schwarzenberg, A.B. and Nelson, R.M. (2020) 19, 20.

²⁰ LAO (2020).

²¹ IMF (2019) 21.

²² Hartley and Mills (2020).

²³ Vitorri (2020).

trading.²⁴ This is something that has also been recognised by the UK law enforcement agencies, such as the National Crime Agency.²⁵

In March 2020, Europol's Executive Director, Catherine De Bolle said:

“While many people are committed to fighting this crisis and helping victims, there are also criminals who have been quick to seize the opportunities to exploit the crisis. This is unacceptable: such criminal activities during a public health crisis are particularly threatening and can carry real risks to human lives. That is why it is relevant more than ever to reinforce the fight against crime.”²⁶

Analyses conducted by Gaspar, Mauro and Medas²⁷ shows that more corrupt countries collect less tax as people pay bribes to avoid them. This includes mechanisms such as specifically designed tax loopholes in exchange for kickbacks. Also, when taxpayers believe their governments are corrupt, they are more likely to evade paying taxes. Their analyses shows that also the least corrupt governments collect 4 percent of GDP more in tax revenues than countries at the same level of economic development with the highest levels of corruption. Importantly, the analyses shows that with strong actions by governments, higher revenues can be achieved and corruption can be reduced significantly.

The analyses also indicates that corruption distorts how governments use public money. Less corrupt countries dedicate a higher share of resources to social spending (e.g., among low-income countries, the share of the budget dedicated to education and health is one-third lower in highly corrupt countries). In addition, more corrupt countries overpay for building roads and hospitals, and their school-age students have lower test scores.

Fighting corruption requires mustering political will. To ensure lasting improvements, however, it also requires developing good institutions to promote integrity and accountability throughout the public sector. Over and above institutional improvements, it is important that countries promote transparency and accountability, encourage and protect whistle blowers and promote a vibrant civil society overview. These are critical steps needed because weak institutions dominated by patronage networks, can fail to detect outflows that end up in offshore jurisdictions, either through corruption, money laundering, tax evasion or avoidance strategies.²⁸

Attila²⁹ describes three mechanisms that link corruption and tax evasion: first, corruption decreases public revenues available for ‘productive public investments in areas such as roads, health and education’; secondly, through distortions in the tax structure corruption reduces growth; and, thirdly, as a possible countervailing impact, ‘by allowing economic agents, in particular private companies to reduce their fiscal burden’, an indirect ‘positive effect’ growth may be found if the unpaid revenue is utilised in productive investment spending.

²⁴ FATF (2020);

²⁵ Lee Lewis and Sowa (2020).

²⁶ EUROPOL (2020).

²⁷ (2020).

²⁸ Schlenther (2017) 239.

²⁹ (2008) 3.

In response to high levels of fraud, waste and abuse in health care that totalled ZAR39 billion a year³⁰, the South African government launched its Health Sector Anti-corruption Forum in 2019 to address “risk arising in supply chain processes, including medical products, pharmaceuticals and medical equipment.”³¹ According to the South African president, due to the large transactions, the sector, which is third largest item of government expenditure, experiences “fraudulent orders, tender irregularities, and fiscal dumping by government departments through non-governmental organizations, bribery, and over-pricing among other risks.”

South Africa is not alone in this regard since globally an estimated USD 450-500 billion of the USD 7.35 trillion spent on health care annually is lost annually to fraud and corruption. Furthermore, the OECD estimates that 45 percent of global citizens believe the health sector in their country is corrupt or very corrupt. Globally, 1.6 percent of annual deaths in children under 5, more than 140,000 deaths, can be explained in part by corruption.³² It is accepted that chronic government underfunding, insufficient regulatory oversight, and lack of transparency in governance can breed corruption and reduce the quality of health care. The quality of governance is therefore a key indicator of how public money is spent on health care.

Various strategies exist for reducing corruption and making the socio-economic environment less conducive to malpractice. These include adequate financing and oversight of the public health care system, ensuring social accountability, and strengthening institutions that are responsible for prosecution of those responsible for IFFs..³³

5. Organised crime, pangolins and COVID-19

The pangolin has gained the unfortunate distinction of being the most trafficked mammal on earth, with more than one million estimated to have been taken from the wild in the past decade, representing an estimated 80 percent decline in wild populations. Pangolin skins are used in exotic leather trade, their scales used in traditional medicine, and their meat consumed as a luxury food.³⁴ The outbreak of COVID-19 has provided an impetus to address illegal wildlife trade and China has moved to ban the consumption of wildlife meat as per Decisions passed by the 16th meeting of the Standing Committee of the National People's Congress on 24 February 2020. Furthermore, the linkage between the virus and the pangolin as the potential intermediary host, provides an opportunity for customs administrations and other stakeholder to drive impactful awareness campaigns that are premised in the customs mandate of protection (health and safety) trade facilitation and security. The transnational nature of wildlife crime, and particularly wildlife trafficking, means that these crimes often involve breaches of quarantine, customs and tax laws. The sheer volume of some shipments, and the complexity of shipping routes and concealment methods show that the criminal groups involved are very well organised and easily contravene domestic laws and international conventions set up to deal

³⁰ As a percentage of the current allocation of ZAR229 billion, it amounts to 17% of the national health budget.

³¹ The Presidency (2019). <http://www.thepresidency.gov.za/press-statements/justice-system-closes-health-sector-corruption>.

³² Bruckner (2019) 1.

³³ National Academies (2018).

³⁴ UNODC (2017) 11-12.

with organised crime.³⁵ On 21 January 2020, the FATF emphasised the need for cooperation in and amongst countries by announcing that it will make sure that “every Financial Intelligence Unit in the world is aware of this criminal activity and what they can do to stop it.”³⁶

Illegal wildlife trade is highly lucrative; and notwithstanding the challenges in accurately assessing the values involved, global proceeds from wildlife crime are estimated to amount to between USD 7-23 billion annually.³⁷ Such proceeds typically evade taxes and end up being laundered through the international financial system. The measures taken by the Chinese government illustrate the importance of recognizing a potential health risk resulting from illicit trade of wildlife commodities. Indirect consequences may lead to a lesser demand and less opportunity for organised criminal networks to benefit from such crime. Conversely, how countries go about implementing COVID-19 “hard” lockdown measures may have the opposite effect. Where commodities such as cigarettes and alcohol are classified as non-essential items and sales thereof are prohibited, it plays into the hands of organised crime syndicates as trade in these communities is driven underground with the net effect of enriching the illicit gains and reducing tax revenue.

6. How can developing countries use the COVID-19 crisis to counter more effectively IFF?

Responding to the COVID-19 crisis will require a significant increase in public expenditures and at the same time the crisis will lead to a fall in tax revenues, leading to growing public finance deficits. Already prior to the crisis many developing countries were suffering from excessive exposure to both public and private debt which has required a significant part of revenues to be allocated to paying interest on debt. Angola, for example, spend nearly six times more in 2016 servicing its debt than on its public health care. Throughout sub Saharan Africa more money was paid to creditors abroad than was spend on doctors and clinics at home. Ghana spends almost 40 percent of its revenues on debt servicing. Effectively countering IFFs can help shore up public revenues and may offer a quicker solution than the broadening of the tax base, although this will be required in the medium to long term. It may also be a response that would gain greater popular support both at home and abroad.

What actions can developing countries and the international community take in the coming months to ensure that developing countries are able to get better access to information on beneficial owners and to use this more effectively to counter IFF? Transparency in corporate structures and government actions is essential and therefore steps must be taken to promote public sector integrity, asset recovery, inter-agency and international co-operation.

The suggestions below set out a range of actions: some will take more time than others; some will be less relevant in certain countries; all will have to be adapted to the specific economic, social and political circumstances of each country. Whilst some will require additional resources many represent “low hanging fruit” implying more of a cultural change. But the key

³⁵ UNODC (2017) 12.

³⁶ FATF (2020b).

³⁷UNODC (2017) 12.

for making progress is political will and here the COVID-19 crisis could act as a strong push to finally get politicians on board.

So here are the proposals:

- Establish and improve existing national registries of ownership by devoting more resource for updating and verifying the existing information held in these registries;
- Strengthen the linkage between company registries, land registries, vehicles registries, securities and stock exchanges registries by removing legal and regulated barriers to such cooperation and provide all law enforcement agencies with quick access to the combined information base; more generally, there should be greater inter-agency cooperation between tax, customs, FIUs and auditor-general departments.
- Use modern technologies, in particular artificial intelligence (AI), Blockchain and Data Analytics, to build up digitalised central registries of ownership. These technologies are already being used for getting better compliance in a wide range of activities (e.g., customs controls and tracking trade in illicit goods) and can be easily adapted to counter IFFs. Here organisations like the World Bank and the African Tax Administration (ATAF) could play a key role in encouraging the technical providers to develop standardised platforms which could be adapted to the needs of each country.
- Place stronger obligations on service providers and the legal professionals (e.g., to collect a wider range of information and more risk based in depth verification where applicable) and enforce these by stronger sanctions for noncompliance, including the removal of licences to operate as a service provider and bringing criminal charges against individuals concerned.
- Put in place regulations which require that under public procurement contracts, the bidder has to provide full exposure of who the ultimate beneficial owner/s of the company is and implement real time audits of companies undertaking public contracts.
- Create legislation which puts in place “unexplained wealth orders” which would require that challenged HNWI would have to explain any discrepancies between their declared incomes and their assets. This can be backed up with provisions which require politically exposed persons (PEPs) to declare their wealth when they take and leave office.
- Limit the scope of the use of attorney-client privilege that intentionally frustrates investigations by financial intelligence units (FIUs) and tax authorities to counter money laundering and tax evasion. At the same time, introduce strong sanctions against legal professionals that have been found to abuse attorney client privilege by claiming blanket privilege over documentation and communications of their clients.
- Create a high level IFF coordinating body which reports directly to the President and which would do an annual report to Parliament on the progress made in interagency cooperation and improvements in the operation of registries of beneficial ownership information.

More generally what we have seen from the WU Tax and Good Governance Project³⁸, is that ineffective interagency cooperation emerged as a key weakness for a number of African law enforcement agencies. Tackling IFFs requires the participation of various agencies including tax administrations, customs administrations, FIUs, anti-corruption agencies, financial

³⁸ <https://www.wu.ac.at/taxlaw/institute/gtpc/current-projects/tax-and-good-governance/>

institutions, the judiciary and police. In many Sub-Saharan African countries, there is insufficient cooperation between these institutions, with significant duplication of responsibilities and limited access to information. Governments need to do more to remove the legal, practical and cultural barriers to cooperation and provided solutions ranging from draft enabling legislation to the implementation of special training programmes.

In parallel to these efforts at the domestic level the international community could explore:

- Broadening the definition of what constitutes a tax crime under the FATF standard;
- Speed up the existing capacity building programs to improve the technical skills of FIUs and tax administrations, using the Platform for Collaboration on Tax;
- Implementation of target 16:4 of the SDGs which calls on countries to “significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organised crime” by 2030.
- The World Bank, working closely with the private sector, should put in place a program which would develop a technical platform that developing countries could use to track ownership and to identify in real time trends in the misuse of corporate vehicles;
- Regional groupings such as ATAF, could explore how digital national registries of beneficial ownership could be linked up to provide a continental wide coverage.

7. Conclusion

The COVID-19 crisis offers a unique opportunity to more effectively counter all forms of IFFs. The need is clear: to recover the lost millions so that governments in developing countries can urgently commit these funds to strengthen health services (governments could, for example, commit to spending 50 percent of whatever they recover to this task). As many have said: never waste a good crisis!

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