

TOWARDS BENEFICIAL OWNERSHIP TRANSPARENCY IN KENYA

AN ASSESSMENT OF THE LEGAL FRAMEWORK



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KENYA

Transparency International Kenya (TI-Kenya) is a not-for-profit organization founded in 1999 in Kenya with the aim of developing a transparent and corruption-free society through good governance and social justice initiatives. TI-Kenya is one of the autonomous chapters of the global Transparency International movement that are all bound by a common vision of a corruption-free world. The vision of TI-Kenya is a corruption free Kenya. The mission is to champion the fight against corruption by promoting integrity, transparency and accountability.

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ABBREVIATIONS

DNFBPs	Designated non-financial business and professions
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
FATF	Financial Action Task Force
FIFA	Fédération Internationale de Football Association (International Federation of Association Football)
G20	Group of 20
OECD	Organisation for Economic Co-operation and Development
PEP	Politically exposed person
POCAMLA	Proceeds of Crime and Anti-Money Laundering
TCSP	Trust or company service provider
UNCAC	United Nations Convention Against Corruption

INTRODUCTION

Several cases of grand corruption featured in the media show that the lack of transparency of beneficial ownership facilitates these crimes in Kenya. The government of Kenya has recognised that the country has to take steps to tackle corruption and illicit financial flows. The steps taken have significantly improved the country's legislation and enabled authorities, business sector and civil society to prevent and uncover corruption. At the 2016 London Anti-Corruption Summit, Kenya was one of the five Sub-Saharan countries that made anti-corruption commitments. These included setting up a public company register and providing both domestic and foreign law enforcement bodies full and effective access to beneficial ownership information on companies and other legal entities registered within their jurisdiction. In its Open Government Partnership National Action Plan (2016-2018), Kenya committed to "create an open, usable and publicly accessible beneficial ownership register, including information of the 'actual owners' and 'Beneficiaries' of Companies". The office of the Attorney General is the lead implementing agency for this commitment.

The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) published its latest Mutual Evaluation Report on Kenya in 2011 and found Kenya largely "non-compliant" with the Financial Action Task Force's (FATF) recommendations on beneficial ownership. The next ESAAMLG review of Kenya is due in 2020-2021, but the country's money-laundering prevention laws and practice will be reviewed in the United Nations Convention Against Corruption (UNCAC) framework in 2019.

The country has amended the Companies Act, 2015 through Companies (Amendment) Act, 2017, which introduced definition of beneficial ownership, requirement for companies to keep a register of beneficial owners and to lodge a copy of beneficial owners with the Registrar of Companies. The companies' registry is currently working on setting up mechanisms to aid implementation of the above provisions.

Once the online, open, usable and publicly accessible Register of Companies becomes fully functional, Kenya's beneficial ownership transparency framework will be more robust than several of the most developed countries' in the world. There are few areas where there is room for improvement. This report contributes to these efforts.

EXECUTIVE SUMMARY

This report identifies strengths and weaknesses in the current beneficial ownership transparency legal framework in Kenya against the ten Beneficial Ownership transparency principles. The principles cover the following areas;

1. The definition of a beneficial owner
2. Risk assessment relating to legal entities and arrangements
3. Beneficial ownership information of legal entities
4. Access to beneficial ownership information of legal entities
5. Beneficial ownership information of trusts
6. Access to beneficial ownership information of trusts
7. Roles and Responsibilities of financial institutions and businesses and professions
8. Domestic and International cooperation in sharing of beneficial ownership information
9. Beneficial ownership information and tax evasion
10. Bearer shares and nominees

METHODOLOGY

The methodology applied for the assessment focused on the current level of compliance with each of the ten beneficial ownership principles. The assessment sheds light on how strong the current beneficial ownership transparency system is within Kenya, and which parts of the system should be strengthened.

Data collection and verification

The data was collected between end of May and August 2017 through desk research. The desk research was guided by a detailed questionnaire that captured the ten principles under interrogation. The research was conducted by a team of two Kenyan pro-bono lawyers. The sources consulted included relevant domestic laws, rules and regulations, as well as available reports and assessments produced by international and non-governmental organisations. Data for each question was recorded and the exact sources documented. The research was based on the latest available documentation. Where recent legislation has been adopted but not yet implemented, the researchers answered the questions by considering the legal framework in force.

All collected data was peer-reviewed by staff from Transparency International Kenya and pro bono lawyers. The data was also verified and checked for consistency by a researcher at the Transparency International secretariat.

The questionnaire was shared with government and Civil Society Organisations for their input based on their mandates but that did not yield much results as feedback was only received from one government department which granted the authors of the present report an opportunity for a one on one interview. Further, Transparency International Kenya held a validation forum with all the relevant stakeholders¹. The preliminary findings were shared and crucial feedback received more so on aspects of trust, beneficial ownership register, access to beneficial ownership information among others. Additionally, the forum provided an opportunity for the stakeholders to validate the scores after gauging the available evidence.

¹ Representatives from Kenya Revenue Authority, Kenya Private Sector Alliance, INFONET, Institute of Economic Affairs, Kenya Association of Manufacturers, ICJ-Kenya, FIDA-Kenya, Business Registration Services, Kenya Human Rights Commission, AG/Department of Justice, Mzalendo Trust, Public Procurement Regulatory Authority, Ethics and Anti-Corruption Commission, Hivos East Africa, GIZ, Asset Recovery Agency, Capital Markets Authority, Commission on Administrative Justice, Financial Reporting Center and Kenya National Commission on Human Rights

Questionnaire Structure and Scoring

Questions were designed in order to capture and measure the necessary components that should be in place for Kenya to adequately implement each of the 10 principles. The number of questions per principle, and thus the total number of points available per principle, varies depending on the complexity and number of issues covered in the original principle. Within this framework, the total number of possible points under each principle also varies.

A four-point scoring scale was used. The model answers pertaining to each are specific to each question, but the principles underlying each score are, generally, as follows:

4	The country's legal framework is fully in line with the principle.
3	The country's legal framework is generally in line with the principle, but with shortcomings.
2	There are some areas in which the country is in line with the principle, but significant shortcomings remain.
1	The country's legal framework is not in line with the principle, apart from some minor areas.
0	The country's legal framework is not at all in line with the principle.

The scores were averaged across questions for each principle and then a percentage calculated. The percentages were converted into grades from very weak to very strong as shown below;

	Scores between 81% and 100%	Very strong
	Scores between 61% and 80%	Strong
	Scores between 41% and 60%	Average
	Scores between 21% and 40%	Weak
	Scores between 0% and 20%	Very weak

Limitations

It is important to note that this research focuses specifically on assessing the legal framework related to beneficial ownership transparency in Kenya and it is beyond its scope to analyse how laws and regulations are implemented and enforced in practice. However, such research would be an important follow-up to this assessment.

Transparency International Kenya and Transparency International have not undertaken to verify whether the information disclosed on government websites or in reports is complete or accurate. Moreover, this assessment focuses on what we consider to be the key issues necessary to implement the ten principles and to ensure an adequate beneficial ownership transparency framework. There may be other issues that are also relevant but not covered by this assessment.

Finally, we have not weighted the principles. We are aware that some principles are more complex than others; however, we do not take a position within this report on whether some are more important than others. Therefore, the overall scoring is a general analysis of how Kenya is performing across all the principles.

KEY FINDINGS

Kenya's performance in realisation of the principles varies from one principle to another. It is notable that its performance ranges from average to very strong in nine out of the ten principles and that provides an opportunity for improvement of its beneficial ownership transparency framework.

The following are the main findings of the assessment;

- The Kenyan Anti-money Laundering Law adequately defines beneficial ownership and there are only minor shortcomings in the requirements of legal entities to maintain information on all natural persons who exercise ownership or control of the legal entity.
- Access to law enforcement bodies, tax agencies and the financial intelligence unit to beneficial ownership information is an area that can be improved, especially since the scope of the beneficial ownership information to be included in the Register of Companies is rather limited and no verification of the information is foreseen. Furthermore, access to beneficial ownership information of private companies is too limited.
- Access of competent authorities to beneficial ownership information on trusts could be bolstered. The main shortcoming of the rules concerning customer due diligence obligations of financial institutions and DNFBPs is that the Kenyan law does not cover trust and company service providers and dealers in luxury goods. Moreover, lawyers do not have any obligation to identify the beneficial owners of their clients.
- In the field of domestic and international cooperation of authorities, a fully functional Register of Companies will resolve most shortcomings. At the international level, an important step will be the ratification of the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters.
- In Kenya, it is not prohibited to use nominee shareholders and directors although it is not in line with the relevant beneficial ownership principle. The current legislative reform may remedy this weakness of the legal system.

SCORES

The following scores show the extent to which Kenyan laws match the ten beneficial ownership principles. These results are based on the findings of this assessment.

Principle 1: Beneficial ownership definition	100%
Principle 2: Identifying and mitigating risk	0%
Principle 3: Acquiring accurate beneficial ownership information	94%
Principle 4: Access to beneficial ownership information	68%
Principle 5: Beneficial ownership of trusts	100%
Principle 6: Access to beneficial ownership of trusts	58%
Principle 7: Duties of businesses and professions	86%
Principle 8: Domestic and international cooperation	71%
Principle 9: Beneficial ownership information and tax evasion	50%
Principle 10: Bearer shares and nominees	50%

RECOMMENDATIONS

1. Beneficial Ownership Definition

The definition is in line with the principle. The definition covers a natural person who directly or indirectly exercises ultimate control over a legal entity or arrangement, and the definition of ownership covers control through other means in addition to legal ownership.

No legislative change is needed.

2. Identifying and Mitigating Risk

- Conduct a national risk assessment, consult external stakeholders (e.g. financial institutions, designated non-financial businesses or professions (DNFBPs), non-governmental organisations), publish the results in a National Risk Assessment Report online and communicate the findings to financial institutions and relevant DNFBPs.

3. Acquiring Beneficial Ownership Information

- Fast track the removal of Section 104(1) of the Companies Act which states that “A company shall not accept, and shall not enter in its register of members, notice of any trust, expressed, implied or constructive” and Sub-section 2 which makes it an offence to contravene sub-section 1.
- Make explicit the obligation of shareholders to declare information on beneficial ownership and sanction the failure or delay of providing it.

4. Access to Beneficial Ownership Information

- Extend the scope of beneficial ownership information that has to be recorded in the register of members and in the Register of Companies to include identification or tax number, nationality, country of residence and description of how control is exercised.
- Mandate the Registrar to verify the beneficial ownership information or other relevant information such as shareholders / directors submitted by legal entities against independent and reliable sources (e.g. other government databases, use of software, on-site inspections, among others) and define rules of the verifications.
- Regulate the access to register of members of private companies to make it open for inspection by any person, as in the case of public companies.
- Regulate electronic access to the Central Register in line with open data principles.

5. Beneficial Ownership Information of Trusts

- Trustees to maintain information on the protector in a trust if the trust has a protector.
- Trustees to proactively disclose to financial institutions / DNFBPs or others information on the protector in a trust if the trust has a protector.

6. Access to Beneficial Ownership Information of Trusts

- Introduce mandatory registration of trusts.
- Specify a 'timely access' (e.g. in 24 hours) in law within which competent authorities can gain access to beneficial ownership information held by trustees.
- Extend the Proceed of Crime and Anti-Money Laundering Act, 2009 to provide competent authorities timely access to information held by trustees.

7. Financial Institutions, Businesses and Professions

- Amend the Proceed of Crime and Anti-Money Laundering Act, 2009 by adding lawyers, trust and company service providers and dealers in luxury goods to the list of DNFBPs
- Regulate businesses of dealers in precious metals and stones.

8. Domestic and International Cooperation

- Improve cooperation between domestic authorities by setting up a database where they can share information.
- Make the Register of Companies fully functional so that foreign authorities too can have direct access to beneficial ownership information held by the registrar.
- Make rules on sharing information across in-country authorities more effective.

9. Beneficial Ownership Information and Tax Evasion

- Improve the access of tax authorities to beneficial ownership information held by other domestic authorities by setting up a centralised database for sharing information.
- Ratify the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters

10. Bearer Shares and Nominees

- Amend the Companies Act and prohibit the use of nominee shareholders and directors.

1. BENEFICIAL OWNERSHIP DEFINITION

Why is this important?

An adequate legal definition of beneficial ownership establishes the framework from which all legal responsibilities and obligations emerge. A strong and clear definition assists relevant stakeholders, such as competent authorities or entities with reporting obligations, to understand the scope of their duties. Weak definitions lead to weaknesses in the regulatory and enforcement framework, and to uncertainty in the duties and obligations of reporting entities.

An adequate definition of beneficial ownership in national legislation should focus on the natural (not legal) persons who actually own and take advantage of the capital or assets of the legal person, rather than just the persons who are legally (on paper) entitled to do so. It should also cover those who exercise de facto control, whether or not they occupy formal positions or are listed in the corporate register as holding controlling positions.²

What should be in place?

Top scoring countries define a beneficial owner as a natural person who directly or indirectly exercises ultimate control over a legal entity or arrangement, and the definition of ownership covers control through other means in addition to legal ownership. Lesser scoring countries may define beneficial owners as natural persons, for example owning a certain percentage of shares, but there is no mention of whether control should be exercised directly or indirectly or if control is limited to a percentage of share ownership. Lowest scoring countries have either no legal definition of beneficial ownership or the control element is not included.

Findings

Score: 100 %

The Companies (Amendment) Act, 2017 dated 3 August 2017 defines a ‘beneficial owner’ as a “natural person who ultimately owns or controls a legal person or arrangements, or the natural person on whose behalf a transaction is conducted, and includes those persons who exercise ultimate effective control over a legal person or arrangement.”

The Capital Markets Act also clearly defines ‘beneficial ownership’ to mean a natural person who, whether alone or with associates, is the ultimate owner or controller of a legal person or arrangement, or, if there is no legal person or arrangement, the person on whose behalf a transaction is being conducted.³

² Transparency International, July 2015.

³ Section 2 of the Capital Markets Act

The Proceeds of Crime and Anti Money Laundering Regulations⁴ also define a ‘beneficial owner’ as a person who ultimately owns or controls a customer or the person on whose behalf a transaction is being conducted, and any person who ultimately exercises effective control over a legal person or arrangement, and this is the definition that was lifted into the Companies (Amendment) Act, 2017.

There is a pending proposal of the Kenya Revenue Authority which has through the Natural Treasury proposed that Parliament incorporates a definition of beneficial ownership into the Income Tax Act.

RECOMMENDATIONS

The definition is in line with the principle. However, there is need to fast-track the proposed amendment to incorporate a definition of beneficial ownership into the Income tax Act.

LAUNDERING OF KENYAN BRIBES IN JERSEY

In March 2017, the Government of Jersey and the Government of Kenya signed an agreement concerning the return of more than GBP 3 million of stolen assets to the people of Kenya. These funds were confiscated after Windward Trading Limited pleaded guilty to laundering the proceeds of corruption. [1] According to the judgment of 24 February 2016 of the Royal Court of Jersey, “the defendant company received and held the proceeds of criminal conduct perpetrated by its controlling mind and beneficial owner Samuel Gichuru. The company knowingly enabled Gichuru to obtain substantial bribes paid to him while he held public office in Kenya. The company played a vital role without which corruption on a grand scale is impossible: money laundering. Gichuru was the Chief Executive of Kenya’s power utility, the Kenya Power & Lighting Company (“KPLC”) from November 1984 until February 2003. He accepted bribes from foreign businesses that were contracted by that company during his term of office and hid them in Jersey.” [2]

In 2011 the Attorney General of Jersey requested from Kenya the extradition of Mr. Gichuru and Chrisantus Okemo, former Kenyan Energy Minister over alleged corruption and money laundering in connection with the activities of Windward. The extradition process is still ongoing. [3]

[1] <https://www.gov.je/news/2017/pages/kenyaassetsharing.aspx>

[2] http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Gichuru_Jersey_AG-v-Windward%20Trading%20Limited_2016_JRC_48A_24-Feb-2016.pdf

[3] <https://www.gov.je/News/2016/pages/jersey-confiscates-proceeds-of-corruption.aspx> and <http://www.nation.co.ke/news/Okemo-Gichuru-Jersey-millions-to-be-returned-to-Kenya/1056-3840598-97dwd/index.html>

Further details at: <http://star.worldbank.org/corruption-cases/node/18426>

⁴ Section 2

2. IDENTIFYING AND MITIGATING RISK

Why is this important?

An effective anti-money laundering regime requires a good and current understanding of how domestic and/or foreign corporate vehicles and other legal arrangements can be misused for criminal purposes within their jurisdictions, and an understanding of the areas that pose greater risks. A clear understanding of the types of legal persons and arrangements that exist in the country, their formation and registration processes, different forms and structures and the risks they pose, is crucial to a substantive risk assessment. If they do not understand where the risks lie, countries are not able to effectively regulate and detect money laundering-related offences. For instance, in some countries companies incorporated abroad may be frequently used for laundering the proceeds of corruption. The government needs, then, to ensure that the right policies are in place regarding the registration and operation of foreign companies in their countries. Risk assessments are important because the results help to inform and monitor the country's anti-corruption and anti-money laundering policies, laws, regulations and enforcement strategies. A national risk assessment is also a new requirement within the newly strengthened FATF recommendations, adopted in 2012.⁵

What should be in place?

High scoring countries have conducted recent risk assessments within the last three years, with the consultation of external stakeholders, such as financial institutions, designated non-financial bodies and professions (DNFBPs), such as accountants, lawyers, real estate agents and casinos, as well as civil society organisations. The results, including information on high-risk areas, will have been communicated to financial institutions and DNFBPs and the results of the assessment would have been made public. The risk assessment will at a minimum, identify specific sectors or areas at high risk that require enhanced due diligence measures.

Findings

Score: 0 %

To date, no national risk assessment report has been issued by Kenya. The Financial Reporting Centre (the "Centre") has however undertaken a sectoral assessment of DNFBPs.

The Proceeds of Crime and Anti-Money Laundering Act⁶ (POCAMLA Act) and the Proceeds of Crime and Anti-Money Laundering Regulations⁷ (POCAMLA Regulations) provide that financial institutions and DNFBPs must undertake a money laundering risk assessment to enable it identify, assess, monitor, manage and mitigate the risks associated with money laundering. Furthermore, financial institutions and DNFBPs are required to report suspicious transactions to the Financial

⁵ The FATF recommendations, http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

⁶ Act No. 9 of 2009 Laws of Kenya

⁷ Legal Notice No. 59

Reporting Centre (Centre). If a risk assessment was to be undertaken by the Government, the Government should use the compliance information provided by financial institutions and DNFBPs to produce the national risk assessment report.

RECOMMENDATIONS

- Conduct a national risk assessment, consult external stakeholders (e.g. financial institutions, designated non-financial businesses or professions (DNFBPs), non-governmental organisations), publish the results in a National Risk Assessment Report online and communicate the findings to financial institutions and relevant DNFBPs.

3. ACQUIRING BENEFICIAL OWNERSHIP INFORMATION

Why is this important?

Information on beneficial ownership should be adequate – that is, sufficient to identify the beneficial owner. This means that the information should contain the full name of the beneficial owner, an identification number, their date of birth, nationality, country of residence and an explanation of how control is exercised. Companies should ensure that the actual beneficial owners are identified, not just the legal owners. The information needs to be accurate and current, both at the time the legal entity is created and over time.⁸ This means that information about all changes in the ownership and control structure should be updated promptly. Companies should therefore be able to request information from shareholders to ensure that the information held is accurate and up-to-date and shareholders should be required to inform the company about changes to beneficial ownership.

The information must be available in the jurisdiction where the company is incorporated, even when, as is often the case, a company does not have a physical presence there. An absence of information in the jurisdiction of incorporation makes it difficult for supervisors and law enforcement authorities to obtain information when necessary.

What should be in place?

Top scoring countries require legal entities to maintain information on all natural persons who exercise ownership or control of the legal entity, and that information needs to be maintained within the country of incorporation regardless of whether the legal entities have or do not have a physical presence in the country. The law would require shareholders to declare if control is exercised by a third person and there would be a requirement in place for beneficial owners and shareholders to inform the company when there are changes in ownership, or control.

Mid scoring countries may require legal entities to maintain information on natural persons who own or control shares but only in certain cases would shareholders need to declare if control is exercised by a third person. Lowest scoring countries will have no requirement for legal entities to hold beneficial ownership information, nor would nominee shareholders have to declare if they own shares on behalf of another person, nor if there is a change in the ownership of those shares.

Findings

Score: 94%

⁸ Transparency International, *Ending secrecy to end impunity, Tracing the beneficial owner*, February 2014, www.transparency.org/whatwedo/publication/policy_brief_02_2014_ending_secretcy_to_end_impunity_tracing_the_beneficial.

Beneficial Ownership Information Held By Companies

All Kenyan companies, both public and private, are required to “keep a register of its members which shall include information relating to beneficial owners of the company, if any”. This information has to include “the name and address of the beneficial owners, if any”.⁹ This provision implicitly also means that shareholders have an obligation to declare information on beneficial ownership to the company in order for the information to be recorded. However, a provision of the Companies Act contradicts with the above rules of beneficial ownership transparency. It provides that “a company shall not accept, and shall not enter in its register of members, notice of any trust, expressed, implied or constructive”.¹⁰ According to the office of the Companies Registrar, as communicated to Transparency International Kenya, the failure to repeal Section 104 of the Companies Act was an oversight, which should/ought to be amended in due course.

Each company has to keep its register of members at its registered office and has to lodge a copy of its “register of members including information relating to beneficial owners, if any” with the Companies Registrar. The law also foresees criminal fines for both the company and each officer of the company who is in default for non-compliance with these rules.¹¹

If there is any amendment to its register of members, the company has to lodge this amendment with the Registrar within fourteen days.¹² By this provision therefore, shareholders are required to provide the company with any information regarding the change in beneficial ownership. Failure to update the register of members of the company is an offence and attracts a fine of maximum Ksh 500,000. On the other hand, failure to provide an update on the change of particulars of directors is also an offence and attracts a fine of maximum Ksh 200,000 for the company, and each officer of the company who is in default.¹³

Open Government Partnership Commitment

The Republic of Kenya in its Open Government Partnership National Action Plan II (July 2016 – June 2018) made a commitment to “create an open, usable and publicly accessible beneficial ownership register, including information of the ‘actual owners’ and ‘beneficiaries’ of Companies” under the leadership of the Office of the Attorney General and with the involvement of the Kenya Revenue Authority. According to the OGP commitment, this register is due to be set up between December 2017 and February 2018. The already existing Register of Companies, which does not capture beneficial ownership information yet, will be extended to include beneficial ownership information. The Companies’ registry is currently developing draft forms that will aid in the collection of Beneficial Ownership information to realise the new provisions that have been introduced through the Companies (Amendment) Act, 2017. The information collected will assist in the development of the beneficial ownership register.

RECOMMENDATIONS

- Fast track the removal of Section 104 of the Companies Act
- Make explicit the obligation of shareholders to declare information on beneficial ownership and sanction the failure or delay of providing it.

⁹ Section 93(1) & (2) of the principal Act as amended by the Companies (Amendment) Act 2017

¹⁰ Section 104 of Companies Act

¹¹ Sections 93(8) and 94(1)-(2) as amended by the Companies (Amendment) Act 2017

¹² Section 93(9) of the Companies Act

¹³ Sections 93(10) and 138 (3) of the Companies Act

4. ACCESS TO BENEFICIAL OWNERSHIP INFORMATION

Why is this important?

Government bodies responsible for anti-money laundering and control of corruption and tax evasion / avoidance, amongst others, need to have timely access to sufficient, legitimate and verified, and up-to-date information on beneficial ownership in order for them to be able to conduct their work effectively. Obstacles to accessing information or delays in transferring the information make it harder for competent authorities to follow the money back to the source, and this increases the likelihood of impunity for those that have engaged in corrupt or illegal acts.

As an example, the US Department of Justice's June 2015 indictment of Fédération Internationale de Football Association (FIFA) officials outlined in detail the methods and mechanisms, including the creation and use of shell companies and nominees, which were used to hide and transfer stolen funds. Significantly, the indictment explicitly states that these mechanisms were "designed to prevent the detection of their illegal activities, to conceal the location and ownership of proceeds of those activities, and to promote the carrying on of those activities".¹⁴

What should be in place?

Top scoring countries explicitly state that all law enforcement bodies, tax agencies and the financial intelligence unit should have timely (that is within 24 hours) access to adequate (sufficient), accurate (legitimate and verified), and current (up-to-date) information on beneficial ownership. Higher scores are given for countries with a central beneficial ownership or company registry that includes all relevant information that grants access within 24 hours. Additional points are given to countries where this information is public. A public, central (unified) register is the most effective and practical way to record information on beneficial ownership and facilitate access to competent authorities.¹⁵ A central registry also supports the harmonisation of the country's legal framework, avoiding double standards.

Top scoring countries also have laws in place mandating the registry authority to verify the information against independent and reliable sources, and requiring legal entities to update the beneficial ownership information within 24 hours.

Lower scores are given to those with decentralised registries, with only partial information, and for those where competent authorities have access to information held by legal entities or other bodies, or who grant access only after a longer period of time. Lower scores are also given to countries where verification only happens in suspicious cases, and where legal entities are only required to update the beneficial ownership information over a longer period, or, indeed, over a non-specific timeframe.

¹⁴ United States District Court, Eastern District of New York, United States v Webb et al., 20 May 2015, www.justice.gov/opa/file/450211/download.

¹⁵ Transparency International, July 2015

Findings

Score: 68%

There are three main sources where beneficial ownership information is available: a) the register of members held by the companies, b) the Register of Companies and c) customer and transaction information held by financial institutions and DNFBPs.

Register of Members

In Kenya, each company has to keep a register of its members that includes among others the names and addresses of the members, details of the membership and details of the shares each holds.

A public company shall keep its register of members and its index of members (if any) open for inspection by any person on payment of the fee (if any). The company may require among others the person seeking to inspect the register to provide his/her name, purpose for which the information is to be used and whether the information will be disclosed to any other person.¹⁶ The company has to comply with or deny the request within five working days. The Companies Act has no specific provisions on making the register of members available to competent authorities in a timely manner. However, the provision on keeping the register of members of public companies open for inspection by any person and Part XIII of the POCAMLA Act enable authorities to access registers of members. Register of members of private companies are not open for inspection.

Register of Companies

The records maintained by the Registrar of Companies are accessible to the public, with some exceptions.¹⁷ Information on companies incorporated in Kenya is available online through the e-citizen portal. The law requires that information in the Register of Companies includes the shareholders of a company, the beneficial owners of a company, the directors of the company and the address of the company. However, this information can only be accessed through payment of an administrative fee.

The Register of Companies comprises company information that is contained in documents lodged with the Registrar, which means information on beneficial ownership is however limited to the name and the address of the beneficial owner.¹⁸ The law does not state that the Registrar should verify the beneficial ownership information or other relevant information such as shareholders / directors submitted by legal entities against independent and reliable sources. It is also silent on who should initiate such checks, the frequency of the checks and does not make either a provision for what happens in the event when a verification concludes with various outcomes.

As described in the previous chapter, each company has to file with the Registrar and keep the register of its members updated, including information relating to beneficial owners, if there is any. Amendments to register of members have to be lodged with the Registrar within fourteen days after making the amendment.¹⁹ The Registrar is required by law to keep all records “in such form as will enable all the information contained in the records to be readily retrieved for inspection and copied”.²⁰ The Companies Act has no specific provisions on making the register available to competent authorities in a timely manner, but the access to information provisions of the POCAMLA Act authorises the Attorney-General to have access to any registers, records, documents, and

¹⁶ Section 96 of the Companies Act

¹⁷ Sections 852-855 of the Companies Act

¹⁸ Sections 832 (1)-(3) and 93(2)(d) of the Companies Act

¹⁹ Section 93 of the Companies Act

²⁰ Section 832 (5) Companies Act

electronic data needed for anti-money laundering investigations. Once the Register of Companies which includes information on beneficial ownership becomes fully functional, authorities will have online and immediate access to beneficial ownership information held in it.

Customer and Transaction Information

The POCAMLA Act defines competent authority as a “public authority other than a self-regulatory body with designated responsibilities for combating money laundering”.²¹ Financial institutions and designated non-financial business and professions have to establish and maintain customer records (information on transactions and “where evidence of a person’s identity, is obtained in accordance with section 45, a record that indicates the nature of the evidence obtained”).²² Records on transactions include “the name, physical and postal address and occupation (or where appropriate business or principal activity) of each person (i) conducting the transaction; or (ii) on whose behalf the transaction is being conducted”.²³ These records have to be kept for at least seven years and “shall be made available on a timely basis to competent authorities”.²⁴ The category of competent authorities” is broad “a public authority other than a self-regulatory body with designated responsibilities for combating money laundering”.²⁵

RECOMMENDATIONS

- Extend the scope of beneficial ownership information that has to be recorded in the register of members and in the Register of Companies to include identification or tax number, nationality, country of residence and description of how control is exercised.
- Mandate the Registrar to verify the beneficial ownership information or other relevant information such as shareholders / directors submitted by legal entities against independent and reliable sources (e.g. other government databases, use of software, on-site inspections, among others) and define rules of the verifications.
- Regulate the access to register of members of private companies to make it open for inspection by any person, as in the case of public companies.
- Regulate electronic access to the Central Register in line with open data principles.²⁶

²¹ Section 2 of the POCAMLA Act

²² Section 46 (1) of the POCAMLA Act

²³ Section 46 (3) of the POCAMLA Act

²⁴ Section 46 (4) of the POCAMLA Act

²⁵ Regulation 2 of the POCAMLA Regulations, 2013

²⁶ <https://opengovdata.org/>

5. BENEFICIAL OWNERSHIP INFORMATION OF TRUSTS

Why is this important?

Trusts are the second most used vehicles for corruption, after companies.²⁷ Efforts to tackle money laundering must also tackle secrecy and misuse of trusts, foundations and other legal structures. Trusts enable property or assets to be managed by one person on behalf of another and one challenge to tackling the misuse of trusts is that control and ownership are explicitly separate. Multiple individuals with different statuses (settlor, beneficiary, trustee, for example) could qualify as beneficial owners, making it difficult for law enforcement agencies to follow money trails if not all relationships are captured.²⁸

What should be in place?

Top scoring countries require trustees to collect beneficial ownership information for the trusts they administer, including information on the settlor (who donates the assets), the trustee (who manages the arrangement and is the legal owner), the protector (who may act as an intermediary between the settlor and the trustee) and the beneficiaries (who receive the funds).²⁹ Lower scoring countries typically require trustees to maintain information on only some parties to the trust, or only impose such obligations on professional trusts. In countries where domestic trusts are not allowed but the administration of foreign trusts is possible, high scoring countries require trustees to proactively disclose beneficial ownership information to financial institutions and DNFBPs with which they establish a relationship.

Findings

Score: 75%

In the context of registered trusts, it is not mandatory to register documents not relating to immovable property.³⁰ The Trustee Act of Kenya focuses on the powers and duties of the trustee, and does not make any provision for what type of information the trustee should hold. However, when registering a trust at the Documents Registry, information on beneficiaries of the Trust would have to be disclosed, as a copy of the Trust Deed is deposited with the Registrar. Therefore, trustees would be required to maintain this information for purposes of registration.

Other legislation in Kenya also require that trustees disclose all relevant information about the parties to the trust. For example, Section 54B of the Income Tax Act requires that in the case of a trust, the full identity and address details of trustees, settlors and beneficiaries of the trust be disclosed to the Kenya Revenue Authority.

²⁷ World Bank/UNODC, 2011: 3

²⁸ Transparency International, February 2014.

²⁹ Transparency International EU Office, *Fighting money laundering in the EU: From secret companies to public registries*, January 2014, www.transparencyinternational.eu/wp-content/uploads/2014/01/TI-EU-Policy-Paper-Beneficial-Ownership.pdf.

³⁰ Section 4 of the Registration of Documents Act

The Trustees Act does not make a distinction between domestic trusts and foreign trusts. Regulation 16 of the POCAMLA Regulations states that financial institutions and DNFBPs have to request foreign trusts to provide information (trust deed; full names of the trustee, beneficiaries or any other natural person exercising ultimate effective control over the trust; full names of the founder of the trust) about the parties to the trust before entering into a transaction with the trust. The POCAMLA Regulations do not differentiate between domestic and foreign trusts either.

RECOMMENDATIONS

- Trustees to maintain information on the protector in a trust if the trust has a protector.
- Require trustees to proactively disclose to financial institutions / DNFBPs or others information on the protector in a trust if the trust has a protector.

6. ACCESS TO BENEFICIAL OWNERSHIP INFORMATION OF TRUSTS

Why is this important?

Trustees should be required to share with legal authorities all information deemed necessary to identify the beneficial owner in a timely manner, preferably within 24 hours of the request. This is necessary to identify or exclude individuals that are sought in relation to investigations. Competent authorities should have the necessary powers and prerogatives to access information about trusts held by trustees, financial institutions and DNFBPs. Transparency International also believes that tax and law enforcement authorities should have timely, preferably immediate, access to the information (within 24 hours) held by trustees, but we have been unable to score this in this analysis.

What should be in place?

Top scoring countries have laws in place that allow competent authorities to request and access information on ownership and control of trusts held by trustees and other parties, such as financial institutions or DNFBPs. In high scoring countries, the law also clearly states which competent authorities are granted access. In lower scoring countries, competent authorities are not permitted access or only a limited number of authorities are granted access. Finally, additional points are given to countries that collect and maintain information on trusts in a registry. Lower scoring countries may have a registry that is either non-compulsory or does not collect adequate information to identify beneficial ownership.

Findings

Score: 58%

The Registry of Documents records information on trusts under the auspices of the Registration of Documents Act. A trustee will be required to deposit a copy of the Trust Deed with the registry if the trust relates to immovable property, otherwise the registration is not mandatory.³¹ The Trust Deed would have to indicate the particulars of the beneficiaries to the trust. A trustee may also take a further step of making an application for a certificate of registration of a trust which is awarded by the Minister of Lands.

Financial institutions and designated non-financial business and professions have to “take reasonable measures to establish the true identity of a person on whose behalf or for whose ultimate benefit the applicant may be acting in the proposed transaction, whether as trustee, nominee, agent or otherwise”.³² These records have to be kept at least for seven years and “shall be made available on a timely basis to competent authorities”.³³ The Trustee Act has no specific

³¹ Section 4 of the Registration of Documents Act

³² Section 45 (4) POCAMLA Act

³³ Section 46 (4) of the POCAMLA Act

provisions on providing access to information held by trustees to competent authorities, but the access to information provisions of the POCAMLA Act authorises the Attorney-General to have access to any registers, records, documents, and electronic data needed for anti-money laundering investigations.

RECOMMENDATIONS

- Introduce mandatory registration of trusts.
- Specify a 'timely access' (e.g. in 24 hours) in law within which competent authorities can gain access to beneficial ownership information held by trustees.
- Amend the POCAMLA Act to provide competent authorities timely access to information held by trustees.

7. ROLES AND RESPONSIBILITIES OF FINANCIAL INSTITUTIONS, BUSINESSES AND PROFESSIONS

Why is this important?

Corrupt figures require financial institutions to be willing to receive and transfer their money, and often seek out the help of professional intermediaries, such as accountants, lawyers and Trust and company service providers (TCSPs) to facilitate the process. Corrupt money often then ends up in the hands of another set of designated non-financial business professions (DNFBPs), such as real estate agents, casinos and luxury goods dealers. This is for two purposes: to enjoy the proceeds of their criminal activities; and to launder the money to allow it to enter the market later as seemingly “clean” assets.

As an example, two TCSPs based in Latvia acted as the nominee directors and shareholders for a number of companies involved in criminal activities ranging from defrauding governments and investors to arms dealing in Eastern Europe. They acted as nominees for hundreds of companies incorporated in jurisdictions that included the British Virgin Islands, Panama, Cyprus, New Zealand, the US, the UK and Ireland, many of whom were in turn nominal shareholders of many other companies.³⁴

In addition, a review conducted by the UK Financial Standards Authority in 2011 showed that 75% of the banks surveyed failed to carry out proper checks to detect and stop the proceeds of corruption.³⁵ In order to make it less lucrative and less easy to launder money, financial institutions and this group of professionals must be supervised so as to not be complicit in money laundering, and they must face sanctions if they do not comply with their obligations under law. Among other measures to curb money laundering, financial institutions and DNFBPs should be required to identify and verify the identity of the beneficial owners of clients when establishing a business relationship or conducting transactions for occasional customers, and to report all suspicious activities in accordance with existing anti-money laundering regulations.³⁶ Where financial institutions and DNFBPs cannot properly identify the client’s ownership, they should not enter into a business transaction.

Furthermore, it is crucial that both financial institutions and DNFBPs conduct enhanced due diligence on clients who are politically exposed persons (PEPs), individuals (and often relatives or close associates of individuals) who hold or have held a prominent public function, such as a head of state or government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, or important political party officials.³⁷

³⁴ Alex Marriage, *Secret structures, hidden crimes: Urgent steps to address hidden ownership, money laundering and tax evasion from developing countries*, EUODAD, 2013, p. 12, <http://eurodad.org/files/integration/2013/01/Secret-structures-hidden-crimes-web.pdf>.

³⁵ UK Financial Services Authority, *Banks’ management of high money laundering risk situations*, June 2011, www.fsa.gov.uk/pubs/other/aml_final_report.pdf.

³⁶ Transparency International, *Transparency of legal entities and arrangements*, May 2014, www.transparency.org/files/content/activity/2014_TI_G20PositionPaper_BeneficialOwnership_EN.pdf.

³⁷ Transparency International, *Financial Jargon Buster*, www.transparency.org/glossary#/beneficial-ownership.

What should be in place?

Financial institutions and DNFBPs should be required by law to identify the beneficial owners of their customers. DNFBPs that should be regulated include, at a minimum, casinos, real estate agents, dealers in precious metals and stones, lawyers, notaries and other independent legal professions when acting on behalf of the legal entity, as well as TCSPs providing services to legal entities.

Higher scoring countries require financial institutions and DNFBPs to verify the beneficial ownership information of their customers and clients and in high-risk cases this should be done independently.

Enhanced due diligence, including ongoing monitoring of the business relationship and provenance of funds, should be conducted when the customer or the beneficial owner is a domestic or a foreign PEP or a close associate of a PEP. If the financial institution or DNFBP cannot identify the beneficial owner, in high scoring countries would not be permitted to proceed with the transaction. In high scoring countries, if the financial institution or DNFBP cannot identify the beneficial owner, the transaction will not be permitted to proceed. High scoring countries require a suspicious transaction report submitted if they cannot identify the beneficial owner.

Financial institutions and DNFBPs should have access to beneficial ownership information collected by governments. High scoring countries would make that information available online for free – for example within a beneficial ownership registry. Lower scoring countries would make it available online, upon registration or upon payment of a fee. Limited points are awarded to countries in which information is only made available upon request or in person.

Finally, high scoring countries permit the application of sanctions to financial institutions' directors and senior management.

Currently, there are big differences between the way financial institutions and businesses and professions are regulated, supervised and sanctioned. As a result, we separate the findings into two sections.

Findings

Score: 86%

Financial Institutions

The POCAMLA Act and POCAMLA Regulations require that financial institutions must take reasonable measures to satisfy themselves as to the true identity of any applicant seeking to enter into a business relationship with it.³⁸ It applies to both natural and legal person customers of financial institutions. Applicants seeking to enter into a business relationship must provide documentation establishing their true identity. Financial institutions have to “identify the beneficial owner, and take reasonable measures to verify the identity of the beneficial owner”.³⁹ Furthermore, the POCAMLA Regulations lists the documentation that is required from natural persons, corporate entities, trust and partnerships, to establish details of beneficial ownership.

The Central Bank of Kenya, the body mandated to monitor financial institutions, released Prudential Guidelines For Institutions Licensed under the Banking Act 2012, to cover the procedures that should be in place to verify beneficial ownership of customers.

³⁸ Section 45 (1) of the POCAMLA Act

³⁹ Regulation 12(b) of the POCAMLA Regulations

Financial institutions have to undertake customer due diligence measures with the objective of identifying the customer and “verify that customer’s identity using reliable, independent source documents, data or information”.⁴⁰ The law also prescribes that a financial institution shall always take reasonable measures to establish whether a person is acting on behalf of another person.⁴¹ If it appears to a financial institution that an applicant requesting to enter into any transaction, whether or not in the course of a continuing business relationship, is acting on behalf of another person, the reporting institution shall take reasonable measures⁴² to establish the true identity of the applicant.⁴³

An appropriate risk management system should be in place to identify whether a client is a PEP and financial institutions are also required to carry out enhanced due diligence in cases where their client is a PEP or a foreign branch or subsidiary.⁴⁴ Where a client is a PEP, additional information is required (example: information on immediate family members, information on the purpose of the transaction, information on source of wealth etc.) before a transaction can be entered into. Financial institutions are not allowed to proceed with a transaction if documentation required to prove beneficial ownership has not been provided or the beneficial owner has not been identified.⁴⁵ The financial institution must submit a suspicious transaction report if the beneficial owner cannot be identified.⁴⁶ Financial institutions upon payment of a nominal search fee have online access to beneficial ownership information collected by the government through the Register of Companies.

The POCAMLA Act and POCAMLA Regulations imposes duties on financial institutions to comply with its provisions. The obligation also applies to any person (including directors and senior management) who knows or ought to reasonably know that property forms part of the proceeds of crime or who fails to comply with monitoring and reporting obligations. Any person who fails to report a restricted activity under the POCAMLA Act and POCAMLA Regulations commits an offence.⁴⁷

Businesses and Professions

Designated non-financial businesses or professions are considered as “reporting institutions” under the POCAMLA Act and POCAMLA Regulations and have the same obligation in identifying beneficial ownership of their clients as financial institutions and to independently verify the information on the identity of the beneficial owner (s) provided by clients (discussed above). Also the same provisions apply to DNFBPs concerning enhanced due diligence on PEPs, prohibition on proceeding with a business transaction if the beneficial owner has not been identified and the obligation of submitting a suspicious transaction report, as well as on sanctions for violating these rules.

The anti-money laundering law coverage of businesses and professions shows a mixed picture.

The POCAMLA Act includes the following among designated non-financial businesses or professions:

- (a) casinos (including internet casinos);
- (b) real estate agencies;

⁴⁰ Regulation 12 (1) of the POCAMLA Regulations

⁴¹ Section 45 (3) of the POCAMLA Act

⁴² Section 45(5) of the POCAMLA Act states that in considering what constitutes reasonable measures, the financial institution shall have regard to the circumstances of the case, and in particular to -:

- (i) Whether the applicant is a person based or incorporated in a country in which there are in force applicable provisions to prevent the use of the financial system for the purpose of money laundering; and
- (ii) Any custom or practice, as may, from time to time, be current in the relevant field of business.

⁴³ Section 45(4) of the POCAMLA Act

⁴⁴ Regulations 22 and 23 of the POCAMLA Regulations

⁴⁵ Regulation 21(2) of the POCAMLA Regulations

⁴⁶ POCAMLA Act Section 44 (2) and Regulation 21(2) e) of the POCAMLA Regulations

⁴⁷ Section 39 of the POCAMLA Act

- (c) dealing in precious metals;
- (d) dealing in precious stones;
- (e) accountants, who are sole practitioners or are partners in their professional firms;
- (f) non-governmental organisations;
- (g) such other business or profession in which the risk of money laundering exists as the Minister (the Cabinet Secretary for the time being responsible for matters relating to finance) may, on the advice of the Centre, declare;

The POCAMLA Act does not use the category of *trust and company service providers*. In Kenya accountants sometimes carry out the work of company service providers. Accountants are required by law to identify the beneficial owner of the customer, when they are “preparing or carrying out transactions for their clients in the following situations —

- (a) buying and selling of real estate;
- (b) managing of client money, securities or other assets;
- (c) management of bank, savings or securities accounts;
- (d) organisation of contributions for the creation, operation or management of companies;
- (e) creation, operation or management of buying and selling of business entities”.⁴⁸

Lawyers do not have any obligation under the POCAMLA Act to identify the beneficial owners of their clients under the relevant anti-money laundering regulations. Lawyers may be covered by other provisions in the POCAMLA Act dealing with reporting money laundering offences. This does not include an obligation to ascertain beneficial ownership. Furthermore, the POCAMLA Act protects lawyer-client privilege in connection with giving advice “to the client in the course and for purposes of the professional employment of the advocate or in connection and for the purpose of any legal proceedings on behalf of the client”.⁴⁹

Notably, businesses of dealers in precious metals and stones are not regulated. There is no requirement by law for dealers in luxury goods to identify the beneficial owner of the customer.

RECOMMENDATIONS

- Add lawyers to the list of DNFBPs in the POCAMLA Act.
- Add trust and company service providers to the list of DNFBPs in the POCAMLA Act.
- Add dealers in luxury goods to the list of DNFBPs in the POCAMLA Act.
- Regulate businesses of dealers in precious metals and stones.

⁴⁸ Section 48 of the POCAMLA Act

⁴⁹ Section 18

8. DOMESTIC AND INTERNATIONAL COOPERATION IN SHARING OF BENEFICIAL OWNERSHIP INFORMATION

Why is this important?

Cooperation between domestic authorities that hold information on beneficial ownership or information that could be helpful in identifying the beneficial owner is essential. Governments should thus ensure that there is a good understanding regarding which parties / bodies hold and have an obligation to maintain basic and beneficial ownership information. This will also help to avoid duplication of work and resources.

Criminals often choose to conceal their identities behind a chain of different companies incorporated in different jurisdictions, thus making it harder for law enforcement authorities to locate and obtain information on the ownership and control structure. Accessing foreign data on beneficial ownership is one of the main challenges reported by legal authorities surveyed in the EU.⁵⁰ Against this backdrop, it is important that countries facilitate access to beneficial ownership information by foreign authorities in a timely and effective manner.

What should be in place?

Domestic and foreign authorities should be able to access beneficial ownership information held by other authorities in the country in a timely manner – for instance, through access to central beneficial ownership registries.

High scoring countries have no restrictions in place related to sharing information between domestic bodies, and accessing that information is efficient. A central database therefore scores more points than several databases. Lower scores are given to countries in which domestic authorities can only access beneficial ownership information through written requests or memoranda of understanding or worse, through court orders.

In relation to international cooperation, high scoring countries have clear procedural requirements to guide foreign jurisdictions making requests. High scoring countries have laws in place that allow competent authorities to use their investigatory powers to respond to international requests. Low scoring countries have significant legal restrictions in place that prevent good cooperation and sharing of information.

Moreover, Transparency International Kenya believes that ensuring information on beneficial ownership is accessible would help cross-border investigations, allowing foreign law enforcement authorities to access relevant information discreetly and at short notice. Public registries containing beneficial ownership information would also reduce the need to make lengthy mutual legal assistance requests, which is especially helpful for countries with limited resources.⁵¹

Findings

Score: 71%

⁵⁰ Transcrime, 2013

⁵¹ Transparency International, May 2014.

Domestic Cooperation

The Financial Reporting Centre is allowed to share information collected by it to any financial regulatory authority, supervisory body, fiscal or tax agency or fraud investigation agency to facilitate the administration and enforcement of the provisions of POCAMLA Act.⁵²

With regard to other domestic authorities sharing information, the respective legislations setting up these authorities do (in some instances) allow sharing of information but with certain conditions. For example, the Capital Markets Authority (that regulates market intermediaries and public listed companies), is allowed to share information if the information sharing is *inter alia* in the interest of the public.⁵³ Therefore, the relevant authorities are limited in their inter agency disclosure obligations depending on their respective legislations. If an inter-agency information request is denied, a court order compelling production would be required by the requesting authority.

The POCAMLA Act states: "...whenever any investigation is instituted in terms of this Act, including an investigation into any other offence, and an investigation into the property, financial activities, affairs or business of any person, the Commissioner General of the Kenya Revenue Authority or any official designated by that person for this purpose, shall be notified of such investigation with a view to mutual cooperation and the sharing of information".⁵⁴

There is no centralised database where domestic authorities can share information, although the Register of Companies is available to all authorities. In practice, a requesting authority would send a written request to the relevant authority requesting for the information and providing the producing authority with the information required as per their respective legislation.

International Cooperation

The Mutual Legal Assistance Act lays down the procedure for a foreign jurisdiction to request information (including beneficial ownership information) from the Central Authority who is mandated to deal with such requests.⁵⁵

Where a country requests assistance from Kenya in obtaining evidence for the purpose of an investigation or a proceeding in relation to any offence under the corresponding law of that country, the Attorney-General may nominate a court in Kenya to receive such information.

In addition, where a country requests assistance from Kenya in obtaining and executing a search and seizure warrant, the Attorney-General may apply to the High Court for the warrant requested. The warrant will be issued if the High Court is satisfied that "(a) a proceeding or investigation relating to a serious offence has commenced in the requesting country; and (b) there are reasonable grounds for believing that evidence relevant to the investigation or proceedings is located in Kenya".⁵⁶

The Mutual Legal Assistance Act lists several grounds for refusing to offer legal assistance to a foreign authority.⁵⁷ All of these are standard elements of mutual legal assistance treaties. Kenya is a party to United Nations Convention Against Corruption (UNCAC) and has signed on to Mutual Legal Assistance Treaties with various countries.

⁵² Regulation 40 of the POCAMLA Regulations

⁵³ Section 13 of the Capital Markets Act CAP 485A Laws of Kenya

⁵⁴ Section 123 of the POCAMLA Act

⁵⁵ Section 8 and 9 of the Mutual Legal Assistance Act

⁵⁶ Section 118 and 119 of the POCAMLA Act

⁵⁷ Section 11 of the Mutual Legal Assistance Act

RECOMMENDATIONS

- Improve cooperation between domestic authorities by setting up a database where they can share information.
- Make the Register of Companies fully functional so that foreign authorities too can have direct access to beneficial ownership information held by the register.
- Make rules on sharing information across in-country authorities more effective.

9. BENEFICIAL OWNERSHIP INFORMATION AND TAX EVASION

Why is this important?

Current estimates of undeclared offshore wealth range from conservative estimates of US\$7 trillion⁵⁸ (which still amounts to 8% of the world's personal financial wealth) to US\$21–32 trillion.⁵⁹ Similar methods and vehicles are used by individuals wishing to evade or avoid paying tax as are used by those siphoning off corrupt funds out of a country. It is important that tax authorities also have access to beneficial ownership information to prevent tax evasion and recover funds, and that they face no restrictions on sharing information internationally in light of the cross-border nature of the theft taking place.

What should be in place?

High scoring countries permit tax authorities to access beneficial ownership information maintained by domestic authorities online and for free, for example through a registry. Countries receive fewer points if they can only access the information upon submission of a specific motivated request. Countries in which the law imposes significant restrictions on sharing beneficial ownership information with domestic tax authorities score worst.

With regard to the sharing of tax information internationally, points are awarded where there are mechanisms in place, such as memoranda of understanding or treaties, to facilitate the exchange of information between tax authorities and foreign counterparts.

Findings

Score: 50%

The Commissioner of Income Tax can request the production of documents and information concerning the tax liability of a person, this includes beneficial ownership information.⁶⁰ Parties carrying on business have to provide any information on change of particulars to the Kenya Revenue Authority.⁶¹ In the case of nominee arrangements, parties are required to disclose the particulars of the ultimate beneficiary, and in the case of trust arrangements, trustees are required to disclose full details of the trust, which include, information on the settlors and the beneficiaries.

The Commissioner General of the Kenya Revenue Authority or any official designated by that person for this purpose, has to be notified of any investigations under the POCAMLA Act, with a view to mutual cooperation and the sharing of information.⁶²

⁵⁸ "The True Cost of Hidden Money, a Piketty Protégé's Theory on Tax Havens", *New York Times*, 15 June 2014, www.nytimes.com/2014/06/16/opinion/a-piketty-protoges-theory-on-tax-havens.html.

⁵⁹ Tax Justice Network, *The Price of Offshore Revisited*, July 2012, www.taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf.

⁶⁰ Section 59 of the Tax Procedure Act

⁶¹ Section 54B of the Income Tax Act and Section 9 of the Tax Procedures Act

⁶² Section 123 of the POCAMLA Act

Tax authorities have no direct access to beneficial ownership information held by institutions or the Financial Reporting Centre and the POCAMLA Act imposes a duty of confidentiality on any person that obtains information during the performance of his duties under the Act.⁶³

The Income Tax Act allows the Minister of Finance to enter into Double Taxation Agreements.⁶⁴ The Double Taxation Treaties allow tax authorities to share information. According to the Kenya Revenue Authority, there are currently 18 Double Taxation Treaties that have been ratified by Parliament.

In 2016, Kenya signed the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters which is awaiting ratification by Parliament.

RECOMMENDATIONS

- Improve the access of tax authorities to beneficial ownership information held by other domestic authorities by setting up a centralised database for sharing information.
- Ratify the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters.

⁶³ Section 130 of the POCAMLA Act

⁶⁴ Section 41 of the Income Tax Act

10. BEARER SHARES AND NOMINEES

Why is this important?

Bearer shares are “company shares that exist in a certificate form... whoever is in physical possession of the bearer shares is deemed to be the owner”.⁶⁵ As the transfer of shares requires only the delivery of the certificate from one person to another, they allow for anonymous transfers of control and pose serious challenges for money laundering investigations.

Nominees act as the legal manager, owner or shareholder of limited companies or assets. They act on behalf of the real manager, owner or shareholder of these entities and often are the only names indicated in paperwork. These nominees obscure the reality of the company’s ownership and control structure, and are often used when the beneficial owners do not wish to disclose their identity or role in the company.

What should be in place?

Bearer shares should be prohibited until they are phased out, they should be converted into registered shares or required to be held with a regulated financial institution or professional intermediary. High scoring countries prohibit bearer shares by law. Lower scoring countries permit bearer shares but there is a process in place for them to be converted into registered shares. Limited points are available to countries where bearer shareholders should notify the company of their identity, and that information is recorded by the company.

Countries that also prohibit the incorporation of companies using nominees score highly. Where nominees are permitted, countries can gain points if nominees are required by law to disclose the identity of the beneficial owners on whose behalf they are working at the time of registering the company. Additional points can be gained by countries where nominees are licensed and if the law requires that professional nominees keep records of their clients for a certain period of time.

Findings

Score: 50%

In Kenya, bearer shares are prohibited by law.⁶⁶

The Companies Act does not expressly prohibit the use of nominee shareholders and directors. However, according to the Registrar of Companies office, this was an oversight and the necessary amendments will be made to the Companies Act. The Companies Act does not require nominee shareholders and directors to disclose, upon registering the company, the identity of the beneficial owner.

⁶⁵ World Bank/UNODC Stolen Asset Recovery Initiative, 2011.

⁶⁶ Section 504 of the Companies Act.

Professional nominees do not have to be licensed and do not have to keep records of the person who nominated them.

RECOMMENDATIONS

- Amend the Companies Act and prohibit the use of nominee shareholders and directors.

ANNEX 1 - QUESTIONNAIRE AND SCORING CRITERIA

Set out below are the questions that were asked, guidance on what we were looking to be in place and the number of points awarded for each type of response.

PRINCIPLE 1: BENEFICIAL OWNERSHIP DEFINITION

Guidance: The beneficial owner should always be a natural (physical) person and never another legal entity. The beneficial owner(s) is the person who ultimately exercises control through legal ownership or through other means.

Q1. To what extent does the law in your country clearly define beneficial ownership?

Scoring criteria:

4: Beneficial owner is defined as a natural person who directly or indirectly exercises ultimate control over a legal entity or arrangement, and the definition of ownership covers control through other means, in addition to legal ownership.

1: Beneficial owner is defined as a natural person [who owns a certain percentage of shares] but there is no mention of whether control is exercised directly or indirectly, or if control is limited to a percentage of share ownership.

0: There is no definition of beneficial ownership or the control element is not included.

PRINCIPLE 2: IDENTIFYING AND MITIGATING RISK

Guidance: Countries should conduct assessments of cases in which domestic and foreign corporate vehicles are being used for criminal purposes within their jurisdictions to determine typologies that indicate higher risks. Relevant authorities and external stakeholders, including financial institutions, DNFBPs, and non-governmental organisations, should be consulted during the risk assessments and the results published. The results of the assessment should also be used to inform and monitor the country's anti-corruption and anti-money laundering policies, laws, regulations and enforcement strategies.

Q2: Has the government conducted an assessment of the money laundering risks related to legal persons and arrangements during the last three years?

4: Yes

0: No

Q3: Were external stakeholders (e.g. financial institutions, designated non-financial businesses or professions (DNFBPs), non-governmental organisations) consulted during the assessment?

4: Yes, external stakeholders were consulted.

0: No, external stakeholders were not consulted or the risk assessment has not been conducted.

Q4. Were the results of the risk assessment communicated to financial institutions and relevant DNFBPs?

4: Yes, financial institutions and DNFBPs received information regarding high-risks areas and other findings of the assessment.

0: No, the results have not been communicated.

Q5: Has the final risk assessment been published?

4: Yes, the final risk assessment is available to the public.

2: Only an executive summary of the risk assessment has been published.

0: No, the risk assessment has not been published or conducted.

Q6: Did the risk assessment identify specific sectors / areas as high-risk, requiring enhanced due diligence?

4: Yes, the risk assessment identifies areas considered as high-risk where additional measures should be taken to prevent money laundering.

0: No, the risk assessment does not identify high-risk sectors / areas.

PRINCIPLE 3: ACQUIRING ACCURATE BENEFICIAL OWNERSHIP INFORMATION

Guidance: Legal entities should be required to maintain accurate, current, and adequate information on beneficial ownership within the jurisdiction in which they were incorporated. Companies should be able to request information from shareholders to ensure that the information held is accurate and up-to-date, and shareholders should be required to inform changes to beneficial ownership.

Q7: Are legal entities required to maintain beneficial ownership information?

4: Yes, legal entities are required to maintain information on all natural persons who exercise ownership of control of the legal entity.

3: Yes, legal entities are required to maintain information on all natural persons who own a certain percentage of shares or exercise control in any other form.

0: There is no requirement to hold beneficial ownership information, or the law does not make any distinction between legal ownership and control.

Q8: Does the law require that information on beneficial ownership has to be maintained within the country of incorporation of the legal entity?

4: Yes, the law establishes that the information needs to be maintained within the country of incorporation regardless whether the legal entity has or not physical presence in the country.

0: There is no requirement to hold beneficial ownership information in the country of incorporation or there is no requirement to hold beneficial ownership information at all.

Q9: Does the law require shareholders to declare to the company if they own shares on behalf of a third person?

4: Yes, shareholders need to declare if control is exercised by a third person.

2: Only in certain cases do shareholders need to declare if control is exercised by a third person.

0: No, there is no such requirement.

Q10: Does the law require beneficial owners / shareholders to inform the company regarding changes in share ownership?

4: Yes, there is a requirement for beneficial owners / shareholders to inform the company regarding changes in share ownership.

0: No, there is no requirement for beneficial owners or shareholder to inform the company regarding changes in share ownership.

PRINCIPLE 4: ACCESS TO BENEFICIAL OWNERSHIP INFORMATION

Guidance: All relevant competent authorities, including all bodies responsible for anti-money laundering, control of corruption and tax evasion / avoidance, should have timely (that is within 24 hours) access to adequate (sufficient), accurate (legitimate and verified), and current (up-to-date) information on beneficial ownership. Countries should establish a central (unified) beneficial ownership registry that is freely accessible to the public. At a minimum, beneficial ownership registries should be open to competent authorities, financial institutions and DNFBPs.

Beneficial ownership registries should have the mandate and resources to collect, verify and maintain information on beneficial ownership. Information in the registry should be up-to-date and the registry should contain the name of the beneficial owner(s), date of birth, address, nationality and a description of how control is exercised.

Q11: Does the law specify which competent authorities (e.g. financial intelligence unit, tax authorities, public prosecutors, anti-corruption agencies, etc.) are allowed to have access to beneficial ownership information?

4: Yes, the law specifies that all law enforcement bodies, tax agencies and the financial intelligence unit should have access to beneficial ownership information

2: Only some competent authorities are explicitly mentioned in the law.

1: The law does not specify which authorities should have access to beneficial ownership information.

Q12. Which information sources are competent authorities allowed to access for beneficial ownership information?

4: Information is available through a central beneficial ownership registry/company registry.

3: information is available through decentralised beneficial ownership registries/ company registries.

1: Authorities have access to information maintained by legal entities / or information recorded by tax agencies/ or information obtained by financial institutions and DNFBPs.

0: Information on beneficial ownership is not available.

Q13. Does the law specify a timeframe (e.g. 24 hours) within which competent authorities can gain access to beneficial ownership?

4: Yes, immediately /24 hours.

3: 15 days.

2: 30 days or in a timely manner.

1: Longer period.

0: No specification.

Q14. What information on beneficial ownership is recorded in the central company registry?

In countries where there are sub-national registries, please respond to the question using the

state/province registry that contains the largest number of incorporated companies.

4: All relevant information is recorded: name of the beneficial owner(s), identification or tax number, personal or business address, nationality, country of residence and description of how control is exercised.

2: Information is partially recorded.

1: Only the name of the beneficial owner is recorded.

0: No information is recorded.

Q15. What information on beneficial ownership is made available to the public?

4: All relevant information is published online: name of the beneficial owner(s), identification or tax number, personal or business address, nationality, country of residence and description of how control is exercised.

2: Information is partially published online, but some data is omitted (e.g. tax number).

1: Only the name of the beneficial owner is published/ or information is only made available on paper / physically.

0: No information is published.

Q16: Does the law mandate the registry authority to verify the beneficial ownership information or other relevant information such as shareholders / directors submitted by legal entities against independent and reliable sources (e.g. other government databases, use of software, on-site inspections, among others)?

4: Yes, the registry authority is obliged to conduct independent verification of the information provided by legal entities regarding ownership of control.

2: Only in suspicious cases.

0: No, the information is registered as declared by the legal entity.

Q17. Does the law require legal entities to update information on beneficial ownership, shareholders and directors provided in the company registry?

4: Yes, legal entities are required by law to update information on beneficial ownership or information relevant to identifying the beneficial owner (directors/ shareholders) immediately or within 24 hours after the change.

3: Yes, legal entities are required to update the information on beneficial ownership or directors / shareholders within 30 days after the change.

2: Yes, legal entities are required to update the information on the beneficial owner or directors/ shareholders on an annual basis.

1: Yes, but the law does not specify a specific timeframe.

0: No, the law does not require legal entities to update the information on control and ownership.

PRINCIPLE 5: TRUSTS

Guidance: Trustees should be required to collect information on the beneficiaries and settlors of the trusts they administer. In countries where domestic trusts are not allowed but the administration of trusts is possible, trustees should be required to proactively disclose beneficial ownership information when forming business relationship with financial institutions and DNFBPs. Countries should create registries to capture information about trusts, such as trust registries or asset registries, to be consulted by competent authorities exclusively or open to financial institutions and

DNFBPs and / or the public.

Q18. Does the law require trustees to hold beneficial information about the parties to the trust, including information on settlors, the protector, trustees and beneficiaries?

4: Yes, the law requires trustees to maintain all relevant information about the parties to the trust, including on settlors, the protector, trustees and beneficiaries.

2: Yes, but the law does not require that the information maintained should cover all parties to the trust (e.g. settlors are not covered).

1: Yes, but only professional trusts are covered by the law.

0: Trustees are not required by law to maintain information on the parties to the trust.

Q19. In the case of foreign trusts, are trustees required to proactively disclose to financial institutions / DNFBPs or others information about the parties to the trust?

4: Yes, the law requires trustees to disclose information about the parties to the trust, including about settlors, the protector, trustees and beneficiaries.

0: Trustees are not required by disclose information on the parties to the trust.

PRINCIPLE 6: COMPETENT AUTHORITIES' ACCESS TO TRUST INFORMATION

Guidance: Trustees should be required to share with legal authorities all information deemed relevant to identify the beneficial owner in a timely manner, preferably within 24 hours of the request. Competent authorities should have the necessary powers and prerogatives to access information about trusts held by trustees, financial institutions and DNFBPs.

Q20. Is there a registry which collects information on trusts?

4: Yes, information on trusts is maintained in a registry.

2: Yes, there is a registry which collects information on trusts but registration is not mandatory or information registered is not sufficiently complete to make it possible to identify the real beneficial owner.

0: No, there is no registry.

Q21. Does the law allow competent authorities to request / access information on trusts held by trustees, financial institutions, or DNFBPs?

4: Yes, competent authorities are able to access beneficial ownership information held by trustees and financial institutions, or access information collected in the registry.

2: Competent authorities have to request information or only have access to information collected by financial institutions.

0: No.

Q22. Does the law specify which competent authorities (e.g. financial intelligence unit, tax authorities, public prosecutors, anti-corruption agencies, etc.) should have timely access to beneficial ownership information held by trustees?

4: Yes.

2: Some authorities.

0: No.

PRINCIPLE 7: DUTIES OF BUSINESSES AND PROFESSIONS

Guidance: Financial institutions and DNFBPs should be required by law to identify the beneficial owner of their customers. DNFBPs that should be regulated include, at a minimum, casinos, real estate agents, dealers in precious metals and stones, lawyers, notaries and other independent legal professions when acting on behalf of the legal entity, as well as trust or company service providers (TCSPs) when they provide services to legal entities. The list should be expanded to include other business and professions according to identified money laundering risks. In high-risk cases, financial institutions and DNFBPs should be required to verify – that is, to conduct an independent evaluation of – the beneficial ownership information provided by the customer.

Enhanced due diligence, including ongoing monitoring of the business relationship and provenance of funds, should be conducted when the customer is a politically exposed person (PEP) or a close associate of a PEP. The failure to identify the beneficial owner should inhibit the continuation of the business transaction and / or require the submission of a suspicious transaction report to the oversight body. Moreover, administrative, civil and criminal sanctions for non-compliance should be applicable for financial institutions and DNFBPs, as well as for their senior management. Finally, they should have access to beneficial ownership information collected by the government.

FINANCIAL INSTITUTIONS

Q23. Does the law require that financial institutions have procedures for identifying the beneficial owner(s) when establishing a business relationship with a client?

4: Yes, financial institutions are always required to identify the beneficial owners of their clients when establishing a business relationship.

2: Financial institutions are required to identify the beneficial owners only in cases considered as high-risk or the requirement does not cover the identification of the beneficial owners of both natural and legal customers.

0: No, there is no requirement to identify the beneficial owners.

Q24. Does the law require financial institutions to also verify the identity of beneficial owners identified?

4: Yes, the identity of the beneficial owner should always be verified through, for instance, a valid document containing a photo, an in-person meeting, or other mechanism.

0: No, there is no requirement to verify the identity of the beneficial owner.

Q25. In what cases does the law require financial institutions to conduct independent verification of the information on the identity of the beneficial owner(s) provided by clients?

4: Yes, independent verification is always required or required in cases considered as high-risk (higher-risk business relationships, cash transactions above a certain threshold, foreign business relationships).

0: No, there is no legal requirement to conduct independent verification of the information provided by clients.

Q26. Does the law require financial institutions to conduct enhanced due diligence in cases where the customer or the beneficial owner is a PEP or a family member or close associate

of a PEP?

4: Yes, financial institutions are required to conduct enhanced due diligence in cases where their client is a foreign or a domestic PEP, or a family member or close associate of a PEP.

2: Yes, but the law does not cover both foreign and domestic PEPs, and their close family and associates.

0: No, there is no requirement for enhanced due diligence in the case of PEPs and associates.

Q27. Does the law allow financial institutions to proceed with a business transaction if the beneficial owner has not been identified?

4: No, financial institutions are not allowed to proceed with transaction if the beneficial owner has not been identified.

0: Yes, financial institutions may proceed with business transactions regardless of whether or not the beneficial owner has been identified.

Q28. Does the law require financial institutions to submit suspicious transaction reports if the beneficial owner cannot be identified?

4: Yes.

2: Only if there is enough evidence of wrongdoing.

0: No.

Q29. Do financial institutions have access to beneficial ownership information collected by the government?

4: Yes, online for free through, for instance, a beneficial ownership registry.

3: Online, upon registration.

2: Online, upon registration and payment of fee.

1: Upon request or in person.

0: There is no access to beneficial ownership information collected by the government.

Q30. Does the law allow the application of sanctions to financial institutions' directors and senior management?

4: Yes, the law envisages sanctions for both legal entities and senior management.

0: No, senior management cannot be held responsible or there is no criminal liability for legal entities.

DNFBPS**Q31. Are TCSPs required by law to identify the beneficial owner of the customers?**

4: Yes, TCSPs are required by law to identify the beneficial owner of their customer when performing transactions on behalf of their clients.

2: TCSPs are partially covered by the law.

0: No, TCSPs are not covered by the law and do not have anti-money laundering obligations.

Q32. Are lawyers, when carrying out certain transactions on behalf of clients (e.g. management of assets), required by law to identify the beneficial owner of the customers?

4: Yes, lawyers are required by law to identify the beneficial owner of their customer when performing transactions on behalf of their clients.

0: No, lawyers are not covered by the law and do not have anti-money laundering obligations.

Q33. Are accountants required by law to identify the beneficial owner of the customers?

4: Yes, accountants are required by law to identify the beneficial owner of their customer when performing transactions on behalf of their clients.

0: No, accountants are not covered by the law and do not have anti-money laundering obligations.

Q34. Are real estate agents required by law to identify the beneficial owner of the customers?

4: Yes, real estate agents are required to identify the beneficial owner of their clients buying or selling property.

2: Real estate agents are partially covered by the law.

0: No, real estate agents are not covered by the law and do not have anti-money laundering obligations.

Q35. Are casinos required by law to identify the beneficial owners of the customers?

4: Yes, casinos are required by law to identify the beneficial owners of their customers or casinos are prohibited by law.

0: No, casinos are not covered by the law and do not have anti-money laundering obligations.

Q36. Are dealers in precious metals and stones required by law to identify the beneficial owner of the customers?

4: Yes, dealers in precious metals and stones are required to identify the beneficial owner of clients in all transactions or in transactions above a certain threshold.

0: No, dealers in precious metals and stones are not covered by the law and do not have anti-money laundering obligations.

Q37. Are dealers in luxury goods required by law to identify the beneficial owner of the customers?

4: Yes, dealers in luxury goods are required to identify the beneficial owner of their customer.

0: No, dealers in luxury goods are not covered by the law and do not have anti-money laundering obligations.

Q38. Does the law require relevant DNFBPs to also verify the identity of beneficial owners identified?

4: Yes, the identity of the beneficial owner should always be verified through, for instance, a valid document containing a photo, an in-person meeting, or other mechanism.

0: No, there is no requirement to verify the identity of the beneficial owner.

Q39. Does the law require DNFBPs to conduct independent verification of the information on the identity of the beneficial owner(s) provided by clients?

4: Yes, independent verification is always required or required in cases considered as high-risk (higher-risk business relationships, cash transactions above a certain threshold, foreign business relationships).

0: No, there is no legal requirement to conduct independent verification of the information provided

by clients.

Q40. Does the law require enhanced due diligence by DNFBPs in cases where the customer or the beneficial owner is a PEP or a family member or close associate of the PEP?

4: Yes, DNFBPs are required to conduct enhanced due diligence in cases where their client is a foreign or a domestic PEP, or a family member or close associate of a PEP.

2: Yes, but the law does not cover both foreign and domestic PEPs and their close family and associates.

0: No, there is no requirement for enhanced due diligence in the case of PEPs and their associates.

Q41. Does the law allow DNFBPs to proceed with a business transaction if the beneficial owner has not been identified?

4: No, a business transaction may only proceed if the beneficial owner of the client has been identified.

0: Yes, relevant DNFBPs are allowed to proceed with a business transaction regardless of whether or not the beneficial ownership has been identified.

Q42. Does the law require DNFBPs to submit a suspicious transaction report if the beneficial owner cannot be identified?

4: Yes, the law establishes that relevant DNFBPs have to submit a suspicious transaction report if they cannot identify the beneficial owner of their clients.

2: The law establishes that suspicious transaction reports should be submitted only if there is enough evidence of wrongdoing.

0: No, a business transaction may only proceed if the beneficial owner of the client has been identified.

Q43. Does the law allow the application of sanctions to DNFBPs' directors and senior management?

4: Yes, the law envisages sanctions for both legal entities and senior management.

0: No, senior management cannot be held responsible or there is no criminal liability for legal entities.

PRINCIPLE 8: DOMESTIC AND INTERNATIONAL COOPERATION

Guidance: Domestic and foreign authorities should be able to access beneficial ownership information held by other authorities in the country in a timely manner, though, for instance, access to central beneficial ownership registries. Domestic authorities should also have the power to obtain beneficial ownership information from third parties on behalf of foreign authorities or to share information without the consent of affected parties in a timely manner.

Governments should publish guidelines explaining what type of information is available and how it can be accessed.

Q44. Does the law impose any restriction on information sharing (e.g. confidential information) across in-country authorities?

4: No, there are no restrictions in place.

2: There are some restrictions on sharing information across in-country authorities.

0: Yes, there are significant restrictions on sharing information across in-country authorities.

Q45. How is information on beneficial ownership held by domestic authorities shared with other authorities in the country?

4: Information on beneficial ownership is shared through a centralised database, such as a beneficial ownership registry.

3: There are several online databases managed by different authorities that contain relevant beneficial ownership information (e.g. company registry, tax registry, etc.) that can be accessed.

2: Domestic authorities can access beneficial ownership information through written requests or memoranda of understanding.

1: Domestic authorities may only access beneficial ownership maintained by another authority if there is a court order.

0: Information on beneficial ownership is not shared.

Q46. Are there clear procedural requirements for a foreign jurisdiction to request beneficial ownership information?

4: Yes, information on how to proceed with a request for accessing beneficial ownership information is made available through, for instance, the domestic authority's website or guidelines.

0: No, information on how to proceed with a request is not easily available.

Q47. Does the law allow competent authorities in your country to use their powers and investigative techniques to respond to a request from foreign judicial or law enforcement authorities?

4: Yes, domestic authorities may use their investigative powers to respond to foreign requests.

0: No, the law does not allow domestic competent authorities to act on behalf of foreign authorities.

Q48. Does the law in your country restrict the provision or exchange of information or assistance with foreign authorities (e.g. it is impossible to share information related to fiscal matters; restrictions related to bank secrecy; restrictions related to the nature or status of the requesting counterpart, among others)?

4: No, the law does not impose any restriction.

2: There are some restrictions that hamper the timely exchange of information.

0: Yes, there are significant restrictions in the law.

Q49. Do foreign competent authorities have access to beneficial ownership information maintained by domestic authorities?

4: Yes, online for free through, for instance, a beneficial ownership registry.

3: Yes, online upon registration.

2: Yes, online upon the payment of a fee and registration.

1: Beneficial ownership information can be accessed only upon motivated request.

0: No.

PRINCIPLE 9: TAX AUTHORITIES

Guidance: Tax authorities should have access to beneficial ownership registries or, at a minimum, have access to company registries and be empowered to request information from other government bodies, legal entities, financial institutions and DNFBPs. There should be mechanisms in place, such as memoranda of understanding or treaties, to ensure that information held by domestic tax authorities is exchanged with foreign counterparts.

Q50. Do tax authorities have access to beneficial ownership information maintained by domestic authorities?

- 4: Yes, online for free through, for instance, a beneficial ownership registry.
- 3: Yes, online upon registration.
- 2: Yes, online upon the payment of a fee and registration.
- 1: Beneficial ownership information can be accessed only upon motivated request.
- 0: No.

Q51. Does the law impose any restriction on sharing beneficial ownership information with domestic tax authorities (e.g. confidential information)?

- 4: No, the law does not impose restrictions.
- 2: The law does not impose significant restrictions, but exchange of information is still limited or cumbersome (e.g. a court order is necessary)
- 0: Yes, there are significant restrictions in place.

Q52. Is there a mechanism to facilitate the exchange of information between tax authorities and foreign counterparts?

- 4: Yes. The country is a member of the OECD tax information exchange and has signed tax information exchange agreements with several countries.
- 2: There is a mechanism available, but improvements are needed.
- 0: No.

PRINCIPLE 10: BEARER SHARES AND NOMINEES

Guidance: Bearer shares should be prohibited and until they are phased out they should be converted into registered shares or required to be held with a regulated financial institution or professional intermediary.

Nominee shareholders and directors should be required to disclose to company or beneficial ownership registries that they are nominees. Nominees must not be permitted to be registered as the beneficial owner in such registries. Professional nominees should be obliged to be licensed in order to operate and to keep records of the person(s) who nominated them.

Q53. Does the law allow the use of bearer shares in your country?

- 4: No, bearer shares are prohibited by law.
- 0: Yes, bearer shares are allowed by law.

Q54. If the use of bearer shares is allowed, is there any other measure in place to prevent them being misused?

2: Yes, bearer shares must be converted into registered shares or share warrants (dematerialisation) or bearer shares have to be held with a regulated financial institution or professional intermediary (immobilisation).

1: Bearer share holders have to notify the company and the company is obliged to record their identity or there are other preventive measures in place.

0: No, there are no measures in place.

Q55. Does the law allow the incorporation of companies using nominee shareholders and directors?

4: No, nominee shareholders and directors are not allowed.

0: Yes, nominee shareholders and directors are allowed.

Q56. Does the law require nominee shareholders and directors to disclose, upon registering the company, the identity of the beneficial owner?

2: Yes, nominees need to disclose the identity of the beneficial owner.

0: No, nominees do not need to disclose the identity of the beneficial owner or nominees are not allowed.

Q57. Does the law require professional nominees to be licensed?

0.5: Yes, professional nominees need to be licensed.

0: No, professional nominees do not need to be licensed.

Q58. Does the law require professional nominees to keep records of the person who nominated them?

0.5: Yes, professional nominees need to keep records of their clients for a certain period of time.

0: No, professional nominees do not need to keep records.

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