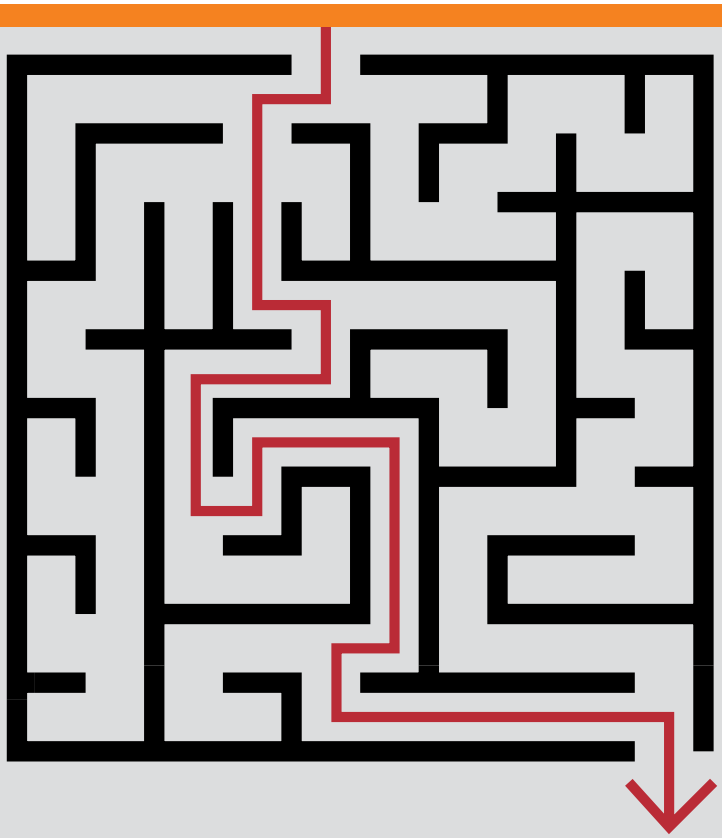
GEGAFRICA
GLOBAL ECONOMIC GOVERNANCE

DISCUSSION PAPER | FEBRUARY 2017

TRANSPARENCY IN BENEFICIAL OWNERSHIP

Mzukisi Qobo



GEGAFRICA
GLOBAL ECONOMIC GOVERNANCE

ABOUT GEGAFRICA

The Global Economic Governance (GEG) Africa programme is a policy research and stakeholder engagement programme aimed at strengthening the influence of African coalitions at global economic governance forums such as the G20, BRICS, World Trade Organization and World Bank, among others, in order to bring about pro-poor policy outcomes.

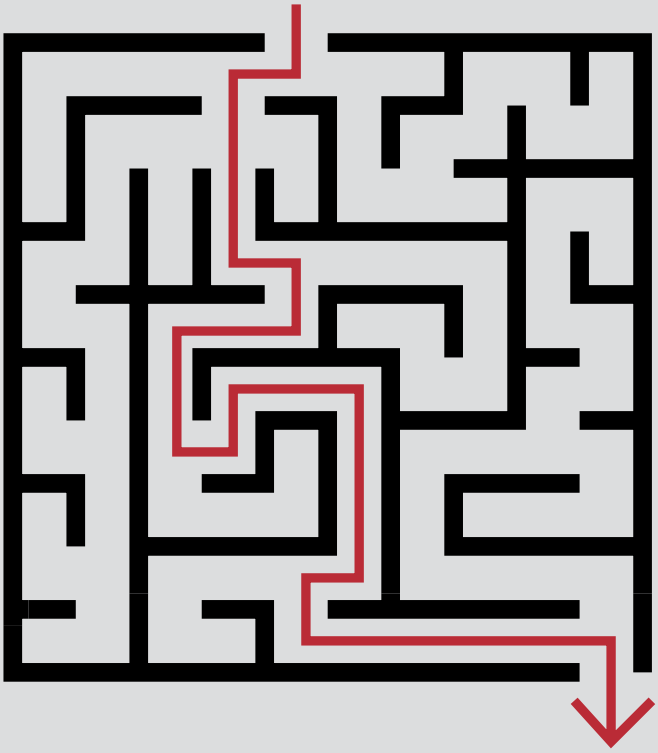
The second phase of the programme started in March 2016 and will be implemented over a period of three years until March 2019.

The programme is expected to help create an international system of global economic governance that works better for the poor in Africa through:

- undertaking substantial research into critical policy areas and helping South African policymakers to prepare policy papers for the South African government to present at global economic governance platforms;
- ensuring that African views are considered, knowledge is shared and a shared perspective is developed through systematic engagement with African governments, regional organisations, think tanks, academic institutions, business organisations and civil society forums; and
- disseminating and communicating research and policy briefs to a wider audience via mass media and digital channels in order to create an informed and active policy community on the continent.

For the next three years the work of the programme will be focused on three thematic areas: development finance for infrastructure; trade and regional integration; and tax and transparency.

GEGAFRICA is funded by the UK Department for International Development and managed by a consortium consisting of DNA Economics, the South African Institute of International Affairs and Tutwa Consulting.



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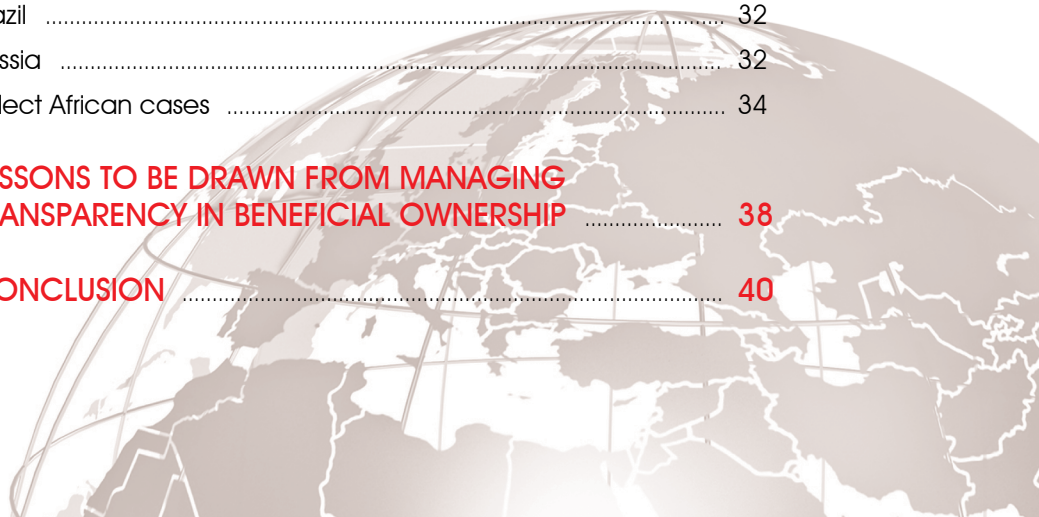
CONTENTS



ABSTRACT

Emerging global standards require countries to introduce measures that ensure transparency in beneficial ownership. These standards are set out in the G20 High-Level Principles on Beneficial Ownership. There are varying degrees of pressure that motivate countries to commit to this transparency agenda: some want to curb corrupt activities, including unseemly activities between corporates and politicians, thereby piercing the veil of corporate entities. Other countries aim to protect the integrity of the financial system from organised crime. Terrorist financing introduces its own exigencies for the banking sector and law enforcement authorities and, as such, banking regulations are enacted to curb abuse of the financial system. Yet others want to limit tax avoidance using legal entities and arrangements. For a country such as South Africa all these challenges are relevant. South Africa has been one of the forerunners in setting or adopting new regulatory measures in this area. It joined the Open Government Initiative in September 2011; became a member of the Financial Action Task Force in 2003; and adopted the G20 High-Level Principles on Beneficial Ownership in 2014. Reinforcing the country's commitment at the domestic level, the cabinet formally adopted a process that would ensure South Africa fulfils its obligations to the G20 process. This paper sets out the landscape of these processes, taking a global, African and domestic view. Its main thrust is that the global standard-setting process should be sensitive to institutional differences across countries, and that countries participating in the global processes that are setting up these standards should approach the policy discussions on the basis of their own needs and capacities.

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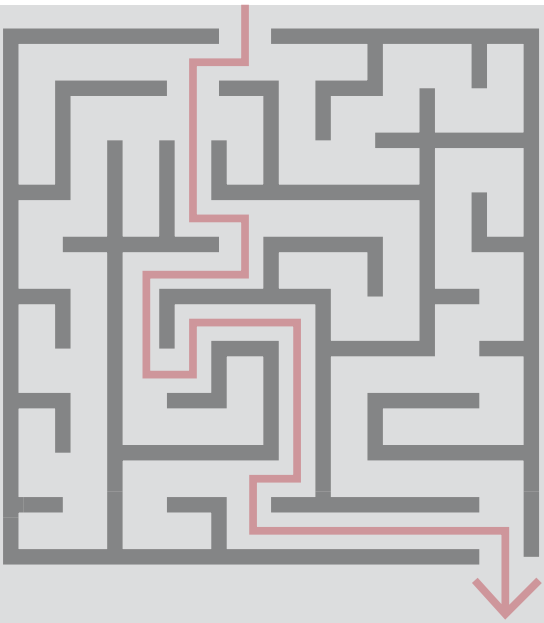

INTRODUCTION

Transparency in beneficial ownership falls under the broad umbrella of illicit financial flows (IFFs). It is cross-cutting in its scope and potential coverage, and encompasses a broad range of policy concerns relating to base erosion and profit shifting (essentially aggressive tax avoidance strategies using legal persons and arrangements), terrorist financing, money laundering and corruption. This agenda, although informed by the G20 High-Level Principles on Transparency in Beneficial Ownership as adopted at the Brisbane Summit in August 2014, has a very strong domestic governance rationale. Curbing illicit financial flows enables countries to mobilise much-needed resources for development, and to improve their prospect of achieving social and political stability.

Cutting the lifeline of organised criminality strengthens the basis for rule of law. It also helps to safeguard a country from risks to its financial system. Governance is central to anchoring the work on transparency in beneficial ownership. It is important to note that the major drivers in this area are largely developed countries, mainly responding to critical risks within their domestic economies that emerge from IFFs. At its core is the risk posed by legal persons and legal arrangements that act as a cover for individuals or groups that launder money, finance terrorists, or are involved in corrupt activities. In most instances shell companies registered by trusts and foundations in tax havens act as conduits for IFFs. The potential damage that these entities can wreak on financial systems – eg, through weakening the integrity

of certain sectors of the economy, such as real estate – is the main source of concern for developed countries.

Furthermore, the potential for tax avoidance (and therefore base erosion and profit shifting) is heightened when there are no clear regulatory instruments to identify beneficial owners and the extent of their wealth, and therefore their true tax liability. Given the globalised nature of finance and corporate activities, it is easy for individuals or groups to abuse the existing platforms that facilitate financial flows, international tax treaties, and loopholes in the regulations governing the designated non-financial businesses and professions as well as central registries for companies. Accordingly, effectiveness depends substantially on galvanising information sharing between tax authorities and law enforcement authorities. Progress at the global level requires that advanced industrial economies – essentially the G7 countries – lead by example, especially in regulating the activities of their banks, creating new disciplines to curb the activities of tax havens, forbidding nominee directors and bearer shares, and establishing public registers.

These standards are important for developing countries too, both members and non-members of the G20. However, without leadership from advanced economies, and absent technical capacities to undertake national risk assessments as well as other tools that could aid transparency, it will be difficult for many countries to overcome vulnerabilities related to money laundering, terrorist financing and corruption. The global standard-setting process creates an opportunity for information exchange, as well as technology and knowledge sharing, to assist developing countries, in particular South Africa and other African countries, in building effective transparency systems.

In this light, this paper focuses on the choices faced by South African authorities. It also looks at initiatives undertaken by other African countries, in particular Nigeria and Ghana. First, it discusses transparency in beneficial ownership in the context of harmful tax practices. The section also traces the history of this agenda in relation to initiatives aimed at curbing tax avoidance.

Second, it offers an overview of the development of this agenda from the narrow confines of anti-avoidance measures to broader governance and security challenges. It looks in particular at the evolution of this process from the G7 through to the Financial Action Task Force (FATF) to the G20 High-Level Principles on Beneficial Ownership.

Third, it discusses challenges of global coordination and domestic regulation, especially in the context of institutional diversity among countries implementing these global standards. Fourth, it takes a closer look at how South Africa is approaching this agenda, and the kind of challenges that the country confronts at the institutional level. Fifth, it makes a cursory examination of the unintended risks of regulation, especially since there is a legislative overhaul that could affect various sectors of the economy.

Sixth, the paper looks at the process that the UK went through in carrying out its national risk assessment. It is one of a handful of countries that have actually

undertaken such an assessment within the G20. This is followed by a selection of other G20 countries to assess their implementation record. The last section casts the spotlight on two African countries – Ghana and Nigeria – that have stated their commitment to reform measures on transparency in beneficial ownership.

The main thrust of this paper is that more emphasis regarding implementation needs to be placed on improving institutional capabilities and properly evaluating the regulatory impact of the changes that will be required. The role of global processes should be to deliver support to close implementation deficiencies.

BENEFICIAL OWNERSHIP AND HARMFUL TAX PRACTICES

The FATF Guidelines define beneficial ownership as[1]

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

This definition is meant to be a guide that countries can use to develop a more contextual and tighter definition that is legally robust, simple and clear. The FATF issued the first guidelines on beneficial ownership in 2003. Initially the G8 countries, but later also the G20 countries, were meant to take the lead in implementing these standards. In all, 40 recommendations are contained in the FATF Guidelines, which are similar to mining standards: countries can go beyond them, but cannot fall below. Beneficial ownership information should be collected not only when establishing permanent business relationships but also during transactions that go beyond a certain threshold, especially as part of the customer due diligence process.

There are different ways in which beneficial owners may hide behind the veil of secrecy, and different layers such a film of secrecy may assume, for which the FATF Guidelines' definition does not necessarily provide. Others distinguish between a beneficial owner who may be both the owner of a legal person and the recipient of benefit, especially in cases where one corporate entity is owned by another corporate entity; and a true beneficial owner who hides behind complex layers of ownership structures, especially if some of these are incorporated as shell companies in tax havens. Nonetheless, one of the crucial distinctions the FATF makes in its definition is that this goes beyond legal ownership and control to consider[2]

> the notion of ultimate [actual] ownership and control rather than just the [natural or legal] persons who are legally [on paper] entitled to do so.

1 FATF (Financial Action Task Force), 'FATF Guidance: Transparency and Beneficial Ownership', October 2014, http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf, accessed 13 September 2016.

2 *Ibid.*

Ultimately, the chain of ownership that continues beyond legal identity is what should be of concern to company registrars, tax authorities and law enforcement agencies. In this respect, the identity of the ultimate beneficial owner at the end of the chain should be known.

At the international level, the notion of beneficial ownership became part of the Organization for Economic Cooperation and Development's (OECD) Model Convention with Respect to Taxes on Income and on Capital of 1977 (known as the OECD Model Tax Convention), aimed in particular at anti-avoidance, especially through treaty shopping.[3] The key question in the relevant articles was to whom does income accrue (in the form of dividends and interest), rather than who controls the underlying assets (shareholding) of companies that produce the income. Tax benefits (tax avoidance) are gained in one state, exploiting tax treaty provisions, where the corporate entity merely acts as an intermediary for managing dividends that accrue to a person (ultimate beneficial owner) resident in another state. There are volumes of case laws on these complex tax questions. Apart from dividends, the other categories of income included in Articles 10, 11 and 12 of the OECD Model Tax Convention are interest and royalty earnings.[4]

Individuals may use legal persons or arrangements as titleholders for the purpose of underplaying the extent of their wealth and thus limiting their tax exposure. In other instances, they may do this in order to avoid the appearance of conflict of interest where the true owner may be conflicted. All of this is done through the abuse of existing tax treaties between countries, which define the scope of taxation on the income and wealth of a taxpayer. This particular discussion on beneficial ownership has been in the domain of the OECD Fiscal Committee, with the participation of tax authorities.

In the context of the OECD Model Tax Convention, international tax treaties arose for the purpose, mainly, of avoiding double taxation. The political economy rationale for this had to do with the adverse impact of double taxation on international trade and investment, as well as on equity: the practice of double taxation undermined the notion of equitable tax treatment of both foreign and domestic income sources. Countries use bilateral tax treaties to set out how tax rights are defined over income and capital that accrue to residents of one or both contracting parties, and between the treaty parties in instances 'where tax jurisdictions have a legitimate claim to taxes'.[5]

3 Whereby someone uses a legal entity created in a state to obtain treaty benefits that would not otherwise be available directly. Vogel defines it as 'the practice of minimal presence in a jurisdiction in order to benefit from the jurisdiction's treaty network with other countries, without any real connection between the jurisdiction and the tax payer or the tax payer's economic activities'. Cruceru LB, 'Treaty Shopping and the Abuse of Income Tax Conventions', Unpublished thesis, McGill University, April 2005.

4 OECD (Organization for Economic Cooperation and Development), 'Model Convention with Respect to Taxes on Income and on Capital'. Paris: OECD, 2014, http://www.oecd.org/ctp/treaties/2014-model-tax-convention-articles.pdf, accessed 19 August 2016.

5 Crucero LB, *op. cit.*

The conundrum of treaty shopping, according to Mckie, arises as a result of conflicting incentives among various actors:[6]

> The tax payer hopes the treaty will prevent double taxation of his income; the tax gatherer hopes the treaty will prevent fiscal evasion; and the politician just hopes.

For some developing countries there is also the hope that treaty shopping will see multinational corporations shifting their operations from other countries that do not have bilateral treaties with the home country (thus suffering double taxation), to their country, which has a bilateral treaty with the home country and a low (or no) tax regime to take advantage of. There is a move towards coherence between transparency in beneficial ownership as falling exclusively under the domain of the OECD Model Tax Convention, and the work of the FATF as taken up by the G7/8 and the G20, focusing largely on governance and risks to the integrity of the global financial system.

BEYOND HARMFUL TAX PRACTICES: TRANSPARENCY IN BENEFICIAL OWNERSHIP IN GLOBAL ECONOMIC GOVERNANCE

Importantly, these debates have shifted substantively from the narrow sphere of taxation, in particular treaty abuse, to broader governance and crime considerations. The common thread is secrecy and tax avoidance. Both instruments – the OECD Model Tax Convention and the FATF Recommendations – share similar boundaries in seeking to pierce the complex layers of corporate and trust entities (as well as foundations) to achieve transparency and limit tax avoidance.

The FATF/G20-defined beneficial ownership transparency is far-reaching in its aim to curb illicit financial flows.[7] In many cases, tax authorities categorise tax evasion as an economic crime, and see contiguity between this and the criminal underworld. Therefore, tax authorities have created other layers of institutions that have a broader scope than just tax collection, to include as part of their remit special investigation, intelligence gathering and enforcement in ways that intrude into, or overlap with, the domains of other law enforcement or intelligence agencies.

The significance of this agenda for transparency in beneficial ownership grew with the recognition that criminal organisations and corrupt individuals frequently use companies to hide the proceeds of bribery, corruption and organised crime. In some senses, especially among developed countries, it was to be a means through which to track and curb the use of shell companies for nefarious purposes, including sanction busting.

6 Mckie A, 'Canada's tax treaties', Proceedings of the 22nd Tax Conference of the Canadian Tax Foundation, 1972.

7 See the detailed discussion in OECD Steering Group on Corporate Governance, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*, Report. Paris: OECD, 2011.

The work on transparency in beneficial ownership traces its roots to the FATF Recommendations, which have evolved since the early 1990s from merely focusing on drug-related money laundering to concerns about the rise in terrorist financing. Since the establishment of the G20 Anti-Corruption Working Group in Toronto, Canada in June 2010, more light has been cast on the need to support global and national anti-corruption efforts. The G20 Anti-Corruption Working Group is predicated on the understanding that corruption has adverse effects on the integrity of markets, fair competition, resource allocation, public trust and the rule of law.

Since its establishment, the G20 working group has placed a premium on enforcing anti-corruption legislation, combatting bribery (especially of foreign officials), setting standards on mutual legal assistance, creating a platform for sharing information to trace stolen assets within G20 jurisdictions, improving the integrity of public services, and encouraging provisions on whistle-blower protection. Some of these elements are integral to the discussions taking place in other organisations, such as the OECD's Anti-Bribery Convention and the UN's Convention against Corruption.

The work on transparency in beneficial ownership was further consolidated during Russia's presidency of the G20 summit held in St Petersburg in 2013. At this summit, the Strategic Framework for the G20 Anti-Corruption Working Group was adopted, with clear proposals on deepening the functioning of this working group. G20 members were encouraged to ratify the UN Convention against Corruption, urged to adhere to the OECD Anti-Bribery Convention, and nudged to sign the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. In addition, a few other ideas emerged in St Petersburg, including a call for the implementation of preventive measures related to transparency.

In fostering inter-agency cooperation, the St Petersburg Summit enjoined the anti-corruption working group to work closely with other international agencies such as the World Bank Group, the UN Office on Drugs and Crime, the FATF and the International Monetary Fund (IMF). This is significant, given the importance of inter-agency cooperation and the need to pool resources. This phase of work was critical in fostering close coordination between international agencies whose task it is to secure the integrity of the international financial system and reduce risks related to illicit cross-border activities. Further, it was recognised that for this initiative to have traction beyond governments, engaging the B20 and the C20 was essential. It is not clear how much of this has taken place yet. Finally, attention was focused on potentially high-risk sectors such as construction, forestry and fisheries. This reflected a progression from focusing just on countries that were said to be risky due to their 'strategic deficiency' in anti-money laundering and counter-terrorist financing, to looking at sectors of the economy that were seen as vulnerable.

GLOBAL COORDINATION AND DOMESTIC REGULATION: THE G20 HIGH-LEVEL PRINCIPLES

The work on transparency in beneficial ownership as adopted at the Brisbane Summit in 2014 is more specific: it sets out concrete actions that G20 countries should take to ensure that legal entities are transparent and not being misused for illicit purposes such as money laundering, tax evasion or corruption. Transparency in the use of legal persons and arrangements is thus at the core of this work programme. This is based on FATF Recommendation 24:[8]

> Countries should take measures to prevent the misuse of legal persons for money laundering or terrorist financing. Countries should ensure that there is adequate, accurate, and timely information that can be obtained or accessed in a timely fashion by competent authorities … Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs [Designated Non-Financial Businesses or Professions], undertaking the requirements set out in recommendations 10 and 22.

Recommendation 25 is a variation of Recommendation 24, but only refers to legal arrangements (eg, trusts, etc.). Recommendation 10 refers to the customer due diligence and reporting that financial bodies need to undertake when dealing with customers, as well as the transaction threshold that should trigger vigilance. Recommendation 22 is a variation of Recommendation 10 but applies to DNFBPs and defines the various categories of these bodies and professions and the nature of applicable transactions. The categories include casinos, real estate agents, dealers in precious metals and precious stones, lawyers and other independent legal professionals, accountants, trusts, and company service providers.

The effectiveness of the work of financial institutions and DNFBPs to implement the customer due diligence requirements on corporate vehicles – including to identify the beneficial owner, identify and manage money laundering/terrorist financing risks and implement anti-money laundering and counter-terrorist financing controls based on those risks – is heavily dependent on timely access to accurate information.

More specifically, countries that are committed to this process are required to adhere to certain requirements:[9]

- They should have a clear definition of beneficial ownership.
- Information pertaining to beneficial ownership should be available to and accessible by tax and law enforcement authorities on a timely basis.

8 FATF, 'International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations', February 2012, http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf, accessed 19 August 2016.

9 G20, Australia Summit, 'High-Level Principles on Beneficial Ownership Transparency', https://www.ag.gov.au/CrimeAndCorruption/AntiCorruption/Documents/G20High-LevelPrinciplesOnBeneficialOwnershipTransparency.pdf, accessed 2 February 2017.

- The central registries should possess such information. These are company registration agencies.
- Financial and designated non-financial bodies and professional services entities must verify beneficial ownership of their customers.
- There should be cooperation by relevant authorities at the domestic and international level.

Not all countries possess the requisite institutional capacities to undertake these governance reforms, which makes it all the more important that technical assistance and knowledge sharing are integral to these commitments at the multilateral level

Not all countries possess the requisite institutional capacities to undertake these governance reforms, which makes it all the more important that technical assistance and knowledge sharing are integral to these commitments at the multilateral level. For example, the US has a number of initiatives under its International Narcotics Control Strategy to provide technical support to financial intelligence units, law enforcement authorities and bank supervisors, focusing mainly on money laundering counter-measures. This kind of support needs to be systematised and built into the undertakings made at the G20. This is not to be a quid pro quo for implementing the high-level principles: countries need to pursue these for their own sake. The primary drivers of implementation are vulnerabilities at the domestic level. However, to facilitate progress, it is important that those countries that lack the wherewithal to undertake extensive legislative reforms, which require a national risk assessment, are supported.

In summary, the High-Level Principles on Beneficial Ownership are as follows:

- Countries should have a definition of beneficial ownership that goes deeper than the legal person or arrangement.
- Countries should undertake national risk assessments associated with different types of legal persons and arrangements.
- Information on the results of risk assessments should be shared with competent authorities, financial institutions, DNFBPs and other jurisdictions.
- Effective and proportionate measures to mitigate the risks identified should be taken.
- High-risk sectors should be identified, and enhanced due diligence considered for such sectors.
- Competent authorities should have timely access to adequate, accurate and current information regarding the beneficial ownership of legal arrangements.
- Financial institutions and DNFBPs should identify and take reasonable measures, including taking into account country risks, to verify the beneficial ownership arrangements of their customers.

- Countries should ensure that their national authorities cooperate effectively both domestically and internationally, including participating in information sharing and exchange.
- Countries should support G20 efforts to combat tax evasion by ensuring that beneficial ownership information is accessible to their tax authorities and can be exchanged with relevant international counterparts in a timely and effective manner.
- Countries should address the misuse of legal persons and legal arrangements that may obstruct transparency.

The framing of the agenda on transparency in beneficial ownership straddles both the global and the domestic domains. It has wider implications for global standard setting and for the work of domestic institutions tasked with company registration, financial intelligence, taxation and public service governance, as well as law enforcement authorities. It imposes new regulatory requirements on banks and non-designated financial bodies and professionals. Its success depends on political will, institutional design, and frameworks for inter-agency coordination domestically and information sharing globally. Information sharing is a key transparency measure, and something that is often difficult to do for political and legal reasons.

More emphasis regarding the implementation of the high-level principles thus needs to be placed on improving institutional capabilities and properly evaluating the regulatory impact of the new changes that will be required. The role of global processes should be to deliver support so as to reduce implementation deficiencies.

It is important to underline the tensions and complementarities between global standard setting and domestic governance. At the global governance level, norms tend to be set at the pace of the most advanced country in the group. This is not to suggest that this should be turned on its head and that the slowest country be used as a pace setter, but rather that there needs to be recognition of the institutional diversities and political constraints that make it harder for certain countries to implement these rules.

Global standard-setting processes should build upon and support the initiatives that are currently underway in countries

Accordingly, a more realistic approach is required, especially when it comes to reporting to the G20 Anti-Corruption Working Group. There are real institutional constraints in terms of the resources required to drive this agenda. The greatest value of the global standard-setting process is increased peer learning, and delivering support to unlock constraints to implementation rather than enforcing implementation when there are hurdles that could retard progress further down the line. Essentially, global standard-setting processes should build upon and support the initiatives that are currently underway in countries.

In the case of South Africa there is a clear intent to implement the high-level principles and coordinate closely with all the structures that are needed to perform this task. It would therefore make sense that reporting focuses on these constraints and the support international partners can offer – including through technical capacity building and financing. Enforcing implementation simply to tick boxes in the name of mutual accountability is not always helpful. Implementation expectations should be cognisant of the available capacities within countries, with due consideration given to the delivery of technical support and knowledge sharing.

The G7/8 countries have had a long time to develop these principles, principally in terms of threats whose effects were mostly concentrated in advanced industrial economies. These countries have also had more time to have their regulatory systems and processes socialised into these norms. Many developing countries are still newcomers into these global standards. These standards are also important for them given the globalised nature of finance and the transnational operations of organised criminality and corporate structures that are susceptible to illicit activities. More importantly, these measures could, if implemented properly, help these countries to curb corruption. The challenge for a country such as South Africa is to adapt its regulatory processes to lessen vulnerabilities while also participating in the regime of information sharing and cooperation at the international level. For this, it will require institutional support.

SOUTH AFRICA'S IMPLEMENTATION CHALLENGES AND RESPONSIBILITIES: TRANSPARENCY IN BENEFICIAL OWNERSHIP

Apart from being a member of the G20 and expressing its commitment to the high-level principles, South Africa has also committed itself to the emerging global transparency standards. Its reasons for doing this have to do with promoting transparency at the domestic level, curbing harmful tax practices and promoting open government. This is consistent with the country's commitment to fighting terrorism, money laundering and corrupt practices. Long before it participated in the global standard processes on anti-money laundering and counter-terrorist financing, the South African government had put in place a slew of institutions and legislative frameworks.

One of the provisions it adopted was the Prevention of Organised Crime Act of 1998. In 1999 it established the Asset Forfeiture Unit within the National Prosecution Authority to fight organised crime; the Directorate of Special Operations (the 'Scorpions'); and the Special Investigations Unit. Furthermore, the emergence of complex criminality, especially commercial crimes and other illicit activities, saw a number of institutions established within the South African Revenue Service (SARS) to act on drug-related offences, corruption and organised crime; and to gather finance-related intelligence.[10] The Financial Intelligence Centre (FIC) was formed in 2001.

10 Van Loggerenberg J & A Lackay, *Rogue: The Inside Story of SARS' Elite Crime-busting Unit*. Johannesburg: Jonathan Ball, 2016, p. 28.

South Africa also developed a Public Service Anti-Corruption Strategy (2002) informed by the multi-stakeholder National Anti-Corruption Summit held in April 1999, with the multi-stakeholder National Anti-Corruption Forum established in 2001; passed the Prevention and Combating of Corrupt Activities Act of 2004; and promulgated the Protection of Constitutional Democracy Against Terrorist and Related Activities Act of 2004.

South Africa reports annually to the G20 Anti-Corruption Working Group on fulfilling its commitments. In 2003 it underwent the Mutual Evaluation Report process of the FATF (the next one is in 2019).

This process at the global economic governance level could be something much more than reporting for mutual accountability – a shared platform to deliver support to those countries that may be confronted with institutional challenges. Valuable contributions to the effectiveness of the standard-setting process would be to create an open system that enables countries to share institutional knowledge, tools that are effective in curbing illicit activities, and software and other efficiency-enhancing technologies for capturing information (for sharing across agencies in real time) at the company registry level.

For South Africa, this transparency theme is relevant from at least three perspectives. First, there are the global economic governance forums in which it participates, notably the G20, in particular from a global coordination and standard-setting point of view. South Africa projects itself as a global actor with a key interest in bolstering the global economic system's stability. Over and above that, South Africa needs to influence the nature of discussions in these forums, taking into account the institutional diversity among G20 countries and the unique challenges facing African countries. These African challenges include the centrality of the extractive industries, limited institutional capacities to monitor illicit outflows, and the general need to reform governance so as to effectively mobilise gains that can be captured from extractive sectors for development purposes. Transparency in beneficial ownership on its own will not help to mobilise resources if institutions, including bureaucratic capacities, are weak.

Second, a few African countries have shown commitment towards reforms related to transparency in beneficial ownership, beginning with the extractive sector. This is largely driven by domestic governance imperatives and achieving developmental outcomes.

This is the case even though these countries are not G20 members. Their efforts, especially those of Kenya, Ghana and Nigeria, are bolstered by their participation in the Open Government Partnership (OGP). In the case of Ghana and Nigeria, their participation in the Extractive Industries Transparency Initiative (EITI) lends them further impetus.

The OGP was launched on 20 September 2011 as a mechanism to encourage countries to embark on domestic reforms that would lead to open government through the adoption of principles of transparency, accountability and responsiveness to citizens. Empowering citizens and fighting corruption are among the goals of this

partnership.[11] South Africa was one of the founding members of the OGP, and has played a leadership role in this initiative. Under this partnership countries adopt national action plans where they make commitments to achieve certain goals aimed at improving transparency and empowering citizens.

Third, in light of its membership of the FATF since 2003, its commitment to the G20 High-Level Principles, its leading role in the OGP and its adoption of the third South Africa OGP Country Action Plan 2016–2018, as well as the domestic imperatives for transparency and its long-standing commitment to combat corruption, money laundering and terrorist financing, South Africa has a serious interest in the success of this agenda.

Overview of South Africa's progress so far

Some interest groups are already putting pressure on the government to move with celerity towards greater transparency in beneficial ownership, in particular in the context of the OGP. Among other things, civil society groups have written an open letter to the special envoy on the OGP, calling on the government to:[12]

- immediately establish a permanent, multi-stakeholder dialogue mechanism to ensure dialogue on the OGP that meets at least quarterly and incorporates a broad cross-section of interested civil society and community-based organisations;
- include civil society and organisations working on the commitment areas of the National Action Plan and on the OGP more broadly. This should include a minimum of 12 civil society members, representing the eight commitment areas and the overarching OGP area. The commitment areas are:
  - » strengthening citizen-based monitoring;
  - » ensuring open budgeting;
  - » adopting a back-to-basics programme;
  - » developing an integrated and publicly accessible portal of environmental management information;
  - » institutionalising community advice offices as part of a wider Justice network;
  - » developing a pilot open data portal for South Africa;
  - » rolling out an open government awareness raising campaign; and
  - » implementing South Africa's action plan on the G20 High-Level Principles on Beneficial Ownership;

11 See Open Government Partnership, 'Who we are', http://www.opengovpartnership.org/who-we-are, accessed 19 August 2016.

12 htxt.africa, 'Civil society pleads for transparency in Open Government letter', 6 May 2016, http://www.htxt.co.za/2016/05/06/civil-society-pleads-for-transparency-in-open-government-letter/, accessed 23 August 2016..

- ensure that the Permanent Mechanism includes representatives of all the government departments and entities with express commitments mentioned in the National Action Plan; and
- commit sufficient resources to enable the proper functioning of the Permanent Mechanism.

The premise behind South Africa's commitment to implementing the 2014 G20 High-Level Principles is informed by concerns similar to those in the various guidelines and declarations from the FATF to the G8 to the G20, as reviewed above. It holds that:[13]

- Corporate vehicles (including companies, trusts, foundations, partnerships and other types of legal persons and arrangements) are misused by criminals for illicit purposes, including money laundering, bribery and corruption, insider dealings, tax fraud, terrorist financing and other illegal activities. As various investigations have shown, including the International Consortium of Investigative Journalists' exposé of offshore financial secrecy in Caribbean tax havens,[14] the HSBC Files,[15] and the 'Panama Papers',[16] these are also used by nominally reputable individuals or companies. This is because, for criminals trying to circumvent anti-money laundering and counter-terrorist financing measures, corporate vehicles are an attractive way to disguise and convert the proceeds of crime before introducing them into the financial system. Others use these corporate vehicles to avoid paying taxes.
- Corporate vehicles can be misused to circumvent controls by disguising the identity of known or suspected criminals and the source of funds or assets.

For South Africa, therefore, reducing the misuse of these vehicles requires access by authorities to accurate information regarding the legal owner and the ultimate beneficial owner, as well as the source of the corporate vehicle's assets and its activities, where readily available. The immediate task – after the national risk assessment has been undertaken to assess the nature and extent of the risks to economic sectors – is to assess the existing institutions for their effectiveness, positioning and relationships with one another. In October 2015, when cabinet decided to implement the G20 High-Level Principles, it designated the Department

13 DPSA (South African Department of Public Services and Administration), 'Project Proposal: Terms of Reference: Comprehensive National Risk Assessment of Beneficial Ownership Transparency' (unpublished/confidential).

14 See ICIJ (International Consortium of Investigative Journalists), 'Secret files expose offshore's global impact', 3 April 2013, https://www.icij.org/offshore/secret-files-expose-offshores-global-impact, accessed 11 January 2017.

15 See Treanor J, 'HSBC: Swiss bank searched as officials launch money-laundering inquiry', *The Guardian*, 18 February 2015, https://www.theguardian.com/news/2015/feb/18/hsbc-swiss-bank-searched-as-officials-launch-money-laundering-inquiry, accessed 1 November 2016.

16 See extensive discussion in Obermayer B & F Obermaier, *The Panama Papers*. London: One World, 2016.

of Public Services and Administration to coordinate the interdepartmental working committee tasked with driving implementation.

Accordingly, the priorities of the committee are as follows:[17]

- The development of a definition of 'beneficial owner' that includes the natural person(s) who ultimately own(s) or control(s) the legal person or legal arrangement in question. The amendments to the FIC Act (FICA) provide a definition that expands on the FATF Guidelines. Such a definition would then be incorporated into the amended Companies Act, administered by the Companies and Intellectual Property Commission (CIPC). According to the definition in the draft, beneficial ownership is a natural person who, independently or together with a connected person, directly or indirectly, including through bearer shareholdings, owns juristic persons or exercises effective control of the juristic persons.
- The assessment of the existing and emerging risks associated with different types of legal persons and arrangements, which should be addressed from both domestic and international perspectives. This process has to build in consultative processes with relevant institutions and agencies, as well as with civil society. Information arising from this assessment is to be shared on an ongoing basis with competent authorities, financial institutions, DNFBPs and, as appropriate, other jurisdictions.
- The undertaking of effective and proportionate measures to mitigate the risks identified.
- The identification of high-risk sectors, with enhanced due diligence appropriately considered for such sectors.

South Africa already has a registry that houses company-related information and is managed by the CIPC. Its information-storing platforms may need to be upgraded, and its requirements (especially for annual returns) for the provision of information related to beneficial information also need to be reconfigured. Competent authorities (including law enforcement and prosecutorial authorities, supervisory authorities, SARS and the FIC) should have timely access to information stored in the central registry. The changes are contingent upon the signing into law of the FIC Amendment Bill (see discussion below).

With respect to legal arrangements such as trusts, there is already an indication that provision will be made to bring greater transparency into their governance. The G20 High-Level Principles require that trustees of trusts should maintain adequate, accurate and current beneficial ownership information, including information on settlors, the protector (if any) of trustees and beneficiaries. The FIC Amendment Bill has related provisions. These G20 measures would also apply to other legal arrangements with a structure or function similar to express trusts. The existing Trust Property Control Act of 1988 may need to reflect the new transparency requirements, with the Master of the High Court reconfiguring how access to trust

17 DPSA, *op. cit.*

information is obtained, especially by relevant entities such as investigators, SARS, the FIC and law enforcement authorities.

Further, financial institutions and DNFBPs, including trust and company service providers, will need to identify and take reasonable measures that take into account country risks, to verify the beneficial ownership of their customers. It is also required that countries formulate appropriate penalties for non-compliance with these provisions.

South Africa has vulnerabilities in respect of measures aimed at ensuring that there is adequate, accurate and timely access to information on beneficial ownership

Currently, South Africa has vulnerabilities in respect of measures aimed at ensuring that there is adequate, accurate and timely access to information on beneficial ownership, as highlighted by the last Mutual Evaluation by the FATF/Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) in 2009.[18] The review found South Africa non-compliant with then FATF Recommendation 33 (now 24) on preventing the use of legal persons for illicit purposes; and partially compliant with provisions on then Recommendation 34 (now 25) covering legal arrangements. In addition, the Mutual Evaluation Report[19] stated that

> there are limited measures in place to ensure that there is adequate, accurate, and timely information on the beneficial ownership and control of legal persons.

It also enjoined both domestic and foreign companies to ensure that they are registered with the central registry, and added that the information held there should be verified. South African officials are keen to reduce these vulnerabilities, as borne out by the establishment of the interdepartmental committee on beneficial ownership.

A critical step in this respect was the amendment to FICA – the FIC Amendment Bill – which is yet to be signed by the president.

18 South Africa was evaluated by the FATF and the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) in 2009. This is a standard process that member countries undergo periodically to assess the extent of their regulatory conformity with the FATF guidelines and recommendations. Essentially, this process looks at the robustness of anti-money laundering and counter-terrorist financing laws. There were mixed outcomes in the 2009 review.

19 FATF, 'Mutual Evaluation Report 2009: South Africa', 26 February 2009, http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20South%20Africa%20full.pdf, accessed 3 February 2017.

FIC Amendment Bill 2015

The FICA amendments are still in suspense. These amendments focus, in the main, on customer due diligence by accountable institutions (eg, banks). Institutions are required to assess, monitor and manage the risks posed by clients. The core thrust is to identify the true owners or beneficial owners of the legal persons with which institutions are establishing businesses. Section 21 of the amended bill prohibits institutions from establishing a business relationship with anonymous clients or clients with fictitious names. If a client is acting on behalf of another client, the identities of both the client and the delegating client should be verified.

As part of risk management, entities are required to obtain information regarding the nature of the business relationship, the intended purpose of the business, the source of the funds, and the ownership and control structure of the client. In cases where there is no clear identity of a natural person behind a corporate structure, including where there is no clear controlling interest by a natural person, institutions are required to perform due diligence (including identity verification) on the executive officer, non-executive director, independent non-executive director or manager. This kind of case would probably apply to not-for-profit organisations, since companies have to have a beneficial owner at the end of the chain.

Regarding trust agreements, it is required that accountable institutions should verify the identity and registration number of the trust, and establish the address of the master court where the legal instruments are deposited, the identity of the founder, the identity of the trustees and persons acting on behalf of the trusts, and the identity of beneficiaries. Further, as set out in Section 21c, institutions are required to verify the source of funds. An important requirement for institutions is that they need to undertake ongoing due diligence, and keep records of transactions for a stipulated period of five years.

Other key measures set out in the amendment include those related to foreign prominent public official and domestic prominent and influential persons (otherwise known as politically exposed persons, or PEPs). These are covered under sections 21F, 21G and 21H. Institutions are required to treat these categories with heightened due diligence since they pose a greater risk. Their riskiness has been overwhelmingly established by FATF research.[20] Accordingly, the amended FICA requires senior management approval before a bank enters into a business relationship with persons or entities falling under the PEP category. Steps that should be taken include verifying the source of wealth and funds of the client, and ensuring enhanced and ongoing monitoring of the account of the client. It also defines who constitute this category of clients: immediate family members and known close associates. Immediate family members are defined as a spouse, civil partner or life partner, and previous spouse, children and stepchildren and their spouse.

20 FATF, 'FATF Guidance: Politically Exposed Persons (Recommendations 12 and 22)', June 2013, http://www.fatf-gafi.org/documents/documents/peps-r12-r22.html, accessed 10 September 2016.

Information sharing (Section 40) is only stipulated domestically and with pre-defined institutions, namely investigative authorities; SARS; intelligence services; the National Prosecuting Authority; the Independent Police Investigative Directorate; the intelligence division of the National Defence Force; the Special Investigative Unit; and the Public Protector. A request for information should be made in writing by an authorised person.

Failure to make progress on FICA may impair South Africa's status in the FATF in the next review, which is due in 2019

Failure to make progress on FICA may impair South Africa's status in the FATF in the next review, which is due in 2019. Delay can send a negative signal regarding a country's commitment to legislative reform. More importantly, it may undermine the country's existing efforts to combat money laundering, corruption and organised criminality that use legal persons and arrangements to hide the proceeds of crime or corruption. It may also make it harder to effect amendments to the Companies Act, and get the CIPC to obtain information related to beneficial ownership – an important step to correct the deficiencies identified by the Mutual Evaluation process in 2009. Furthermore, South Africa could face the risk of blacklisting by the FATF, especially because gaps were identified in the previous review. The major risk lies with vulnerabilities of institutions that are meant to combat corruption, money laundering and terrorist financing. FICA provides legal certainty and clear guidance for financial institutions and DNFBPs.

REGULATORY IMPACT ASSESSMENT

One aspect that could easily be overlooked in discussions about adherence to global governance mechanisms is regulatory impact assessment. It is worth underlining that the G20 High-Level Principles are new regulatory forms that will have an impact on how countries configure their institutions and regulatory bodies. They will have an impact on how financial institutions, designated non-financial businesses and professions do their work and process information.

Implementation of beneficial ownership requirements may very well cause long lead times in the processing of company registration applications or opening a bank account for legal persons or arrangements. Banks may, as part of de-risking, prejudice certain clients whose businesses they may find complex to maintain as clients, and who are perceived to present regulatory cost. In this case, banks may circumvent the elaborate due diligence process by simply discriminating against some clients. Still, transparency in beneficial ownership is a necessary agenda to implement. Whatever regulatory change will need to be affected should take into account the potential costs involved, and how these could be ameliorated. In the case of South Africa, the Department of Planning, Monitoring and Evaluation

(DPME) in the Presidency also requires that a socio-economic impact assessment be undertaken for any new policy initiative, legislation and regulation, as per the cabinet decision of 2007.

This requirement entered into force on 1 October 2015. Accordingly, a cabinet memorandum introducing a new policy measure or regulation should be accompanied by an impact assessment that has been signed off by the Socio-Economic Assessment System located at the DPME. This requirement is a joint outcome of the efforts of the Presidency and the National Treasury. It was necessitated by the failure 'to understand the full costs of regulations especially the impact on the economy'.[21] In addition to the other regulatory costs mentioned, there will thus be a need to measure the extent of the socio-economic impact of these regulations.

The next section considers cases from around the world, looking at how various other countries have approached the G20 High-Level Principles.

INTERNATIONAL APPROACHES

UK

The 2015 National Risk Assessment of Money Laundering and Terrorist Financing casts a spotlight on the use of the UK's property market for money laundering. Following this, two sectors have been designated for transparency measures in beneficial ownership: real estate and public contracting.

While the rationale for the inclusion of the real estate sector is straightforward – to weed out criminality and improve the image of the sector – the rationale for focusing on public contracting is quite complex. Apart from preventing the abuse of public contracts by those involved in organised crime or criminal activities and ensuring that only legitimate businesses participate, the UK government also wants to achieve two other objectives. The first is to obtain good value for money in public contracts through greater levels of transparency. Second, it intends to use its purchasing power to raise the transparency norm for internationally active companies. Such information is to be made available to public authorities and law enforcement agencies.

UK incorporated entities are required to keep their own register of people with significant control over the organisation. Such a register should have information on the company's beneficial ownership and control, and this is to be supplied to Company House alongside the annual returns that companies submit. Companies are then issued with a unique registration number that can be used by third parties to review company details.

21 DPME (South African Department of Planning, Monitoring and Evaluation), 'Socio-Economic Impact Assessment System (SEIAS)', http://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/Pages/default.aspx, accessed 17 September 2016.

The intention is to have information on people with significant control available on a public register by June 2017. This would include their name, date of birth, nationality, address and details of the level of their interest in the company. Individuals with significant control are defined as those who directly or indirectly hold over 25% of voting rights in the company; directly or indirectly hold the right to appoint the majority of the board; and otherwise exercise significant influence over the company or trust. The UK Government's premise is that[22]

> the obligations placed on foreign companies should be broadly similar to those being placed on UK companies.

Issues related to national treatment, which is one of the cardinal principles of the World Trade Organization, may arise here, especially if there is a discrepancy between transparency requirements for domestic companies vis-à-vis those under foreign control. Policy design and implementation processes are not always best served by the agitation of non-governmental organisations or organisations such as Transparency International, especially in the absence of a national risk assessment and determination of capabilities to implement. In any case, there is divergence in how various institutions are structured in different countries – from how trust companies are managed to how bank supervision is undertaken to how provisions regarding access to information are formed in legislation, and to how various key agencies (for example, financial intelligence units and law enforcement authorities) are located in the institutional geography of power in government. Meeting an ideal standard could require an institutional overhaul for which capabilities may not be in existence or political will may be limited, thus posing a challenge to technocrat-led companies, in favour of the former.

Sanctions have been set out as part of these obligations. UK incorporated companies will be obliged to investigate and obtain information about their ownership, and keep this up to date; and this information should be available as part of their annual filings. Where companies deliberately fail to meet obligations, sanctions include a maximum criminal penalty of two years' imprisonment and a fine. Companies are obliged and empowered to obtain such information from their owners. The sanction for failure to supply such information could include freezing the interest that the person has in the company; in other words, their interest cannot be sold until the legal obligation is complied with.

It is unclear what sanctions would be meted out to foreign companies, as it would be difficult to impose criminal penalties. Apart from the critical points around the potentially differential treatment of foreign and national companies, one other weakness of the UK model is its fixation on companies and its overlooking of trusts. This is especially important since many of these have come under the spotlight in the context of the Panama Papers leaks. It is also not the first time the UK has

22 UK Department for Business Innovation & Skills, 'Beneficial Ownership Transparency: Enhancing Transparency of Beneficial Ownership Information of Foreign Companies Undertaking Certain Economic Activities in the UK', March 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/512333/bis-16-161-beneficial-ownership-transparency.pdf, accessed 14 September 2016.

Apart from the critical points around the potentially differential treatment of foreign and national companies, one other weakness of the UK model is its fixation on companies and its overlooking of trusts

attracted criticism. In the matter involving the HSBC tax files in 2015, the UK was heavily criticised for prosecuting just one out of the 1 000 individuals whose details were contained in the implicated files.[23] Further, tax evaders use British Overseas Territories and Crown Dependencies (eg, the Cayman Islands, Jersey and Gibraltar) as hiding places for cash, making the UK one of the leading players in financial secrecy. It would thus be premature at this stage to use the UK as a model. This is also because the major milestone of its implementation is June 2017, when it has promised to establish a public register. Yet, the methodology it has set out to guide its process is instructive.[24]

Methodological guide for the UK process

The following are some of the questions that provided a guide to the UK process on transparency in beneficial ownership:

- Are the registry's statutory objectives sufficiently broad to cover the roles of collecting, verifying and maintaining beneficial ownership information? Should the company registry be required to verify beneficial ownership information and should it be given anti-money laundering/counter-terrorist financing obligations?
- Does the company registry authority have sufficient human and capital resources to enable it to undertake the additional functions of collecting, verifying and maintaining beneficial ownership information? Is there legal knowledge?
- Are there mechanisms for ensuring that the beneficial ownership information provided to the registry is accurate and up to date?
- Are individual applicants who form legal persons required to submit accurate beneficial ownership information to the registry when the legal person is created? Does the registry verify the accuracy of the information it receives?
- How are changes in the beneficial ownership information monitored and recorded over time? Are legal persons and/or beneficial owners required to provide information to the registry within a defined time period once any changes are made?
- Is there a competent authority with responsibility for enforcing these requirements? Are there effective, appropriate and dissuasive sanctions for failing to comply with these requirements?

23 For background detail, see Treanor J, *op. cit.*

24 UK Department for Business Innovation & Skills, *op. cit.*

- Are legal persons and/or beneficial owners who fail to comply with disclosure and updating requirements (for example, by failing to disclose, or submitting inaccurate or incomplete information) subject to liability and sanctions?
- Is the information held by the registry available to competent authorities in a timely manner?

Although the UK is clearly a front-runner in undertaking measures to fulfil its G20 obligations, there are criticisms on the depth of its commitment towards transparency, and its treatment of trusts. Paragraph 8 of the UK Discussion Paper on Beneficial Ownership Transparency places stress on piercing the veil on companies.[25] This also needs to be extended to trusts. Moreover, the proposed public register should be extended to UK overseas territories and crown dependencies. While these jurisdictions are renowned for their stability, modern institutions, efficient tax processes and low taxes, they are also hiding places for tax evaders and illicit money. Accordingly, the UK should take visible leadership globally on regulating tax havens.

AUSTRALIA[26]

Australia is only fully compliant with Principle 1, concerning the beneficial ownership definition. No assessment of money laundering risks related to legal persons and arrangements has been undertaken, so the country is not compliant with Principle 2. However, although no comprehensive risk assessment has been undertaken, Australia has assessed national threats in respect of real estate and lawyers – two sectors regarded as risky.[27] There are weak requirements for beneficial ownership information by legal entities. There is also restricted access to beneficial ownership information by competent authorities, and no beneficial ownership registry. Information in the central registry only pertains to legal information rather than cutting deep into beneficial ownership. Further, the accuracy of information recorded in the company registry is not guaranteed.

There is good access by relevant authorities to financial transaction data, which is housed at Australia Transaction Reports and Analysis Centre (AUSTRAC). The focus in Australia is on areas such as drugs, fraud and tax evasion.

Regarding trusts, the legal framework is not fully aligned to the G20 principles. Trustees are not required to obtain, verify or retain information on beneficial ownership. The Anti-Money Laundering and Counter-Terrorism Financing Act of

25 *Ibid*.

26 The following section on other non-African countries draws extensively on Transparency International, 'Just for Show? Reviewing G20 Promises on Beneficial Ownership', 12 November 2015.

27 FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: Australia: Mutual Evaluation Report', April 2015, http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf, accessed 18 July 2016.

2006 provides that reporting entities are required to collect and verify information about a customer or beneficial owner.

However, new requirements for customer due diligence were introduced by the government in 2014, and they establish strict rules regarding the collection and verification of beneficial ownership information. Financial institutions are required to determine the beneficial owner of each customer, including each beneficial owner's full name, date of birth and residential address. Further, financial institutions are required to put in place procedures to identify whether any individual customer or beneficial owner is a PEP or an associate of a PEP. In such cases enhanced due diligence is required, and the continuation of the relationship requires senior management approval.

The supervision of financial institutions' anti-money laundering obligations rests on AUSTRAC, which is Australia's financial intelligence agency and combats money laundering and terrorist financing. Transparency International has suggested that the financial sector exerts influence over this body, something that might compromise its supervisory integrity.[28]

DNFBPs are not subject to anti-money laundering and counter-terrorism financing rules. Yet real estate is seen as an attractive destination for foreign corruption proceeds. Australia lacks a centralised database that can be used by domestic or foreign authorities to sight information on legal ownership and control, as required by Principle 8 of the G20's High-Level Principles.

Tax authorities in Australia also do not have access to a central beneficial ownership registry. However, Australia is a signatory to the OECD Convention on Mutual Administrative Assistance on Tax Matters and has signed tax information exchange agreements with 39 countries, as required under Principle 9.

With respect to Principle 10 on Bearer Shares and Nominees, nominee shareholders and directors are allowed in Australia, and there is no requirement that they should disclose the identity of beneficial owners. There are several companies in Australia that offer nominee services but there are no licensing requirements for these or obligations to keep records of the persons nominating them.

Canada

Canada's anti-money laundering and counter-terrorist financing regime combines a legislated framework under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and associated regulations, with over 40 other federal acts and regulations such as the Criminal Code, Customs Act and United Nations Act. Canada is, however, not compliant with many of the G20 High-Level Principles.

28 Transparency International, 'Just for Show? Reviewing G20 Promises on Beneficial Ownership', 12 November 2015, http://www.transparency.org/whatwedo/publication/just_for_show_g20_promises, accessed 11 October 2016.

Its recent legislative changes are aimed at improving tax compliance by cracking down on tax evasion and combatting tax avoidance.[29]

Canada has no definition of beneficial owner, and there is no requirement in legislation for such a definition. There are restrictions to access of beneficial ownership by authorities. Canada has recently undergone a national risk assessment focusing on risks related to money laundering and terrorist financing. These covered 27 economic sectors, with identified high-risk sectors such as domestic banks, corporations, express trusts and money services businesses.

In Canada, all high risks are covered by anti-money laundering and terrorist financing legislation, with the exception of legal counsels, legal firms and Quebec notaries. According to the FATF Mutual Evaluation Report on the country, this constitutes 'a significant loophole in Canada's anti-money laundering/counter-terrorist financing framework'.[30] Further, the FATF[31] observes that legal persons and arrangements are at a high risk of misuse for money laundering and terrorist financing. The transparency of legal persons and arrangements is hampered by the prevalent use of nominee shareholders.

Generally, obtaining beneficial ownership information in Canada is difficult. Authorities have insufficient access to beneficial information related to trusts. Much of the information collected by authorities is difficult to verify. Canada also has inadequate resources devoted to money laundering investigations and prosecutions. As a result, it is under enhanced review for technical compliance, and the country is required to submit progress reports to the FATF annually on its efforts to improve compliance with the FATF standards.[32] Essentially, Canada is substantively non-compliant.

Germany

Germany is fully compliant with only one of the G20 principles. The ability of competent authorities to access beneficial ownership in the country is restricted as a result of inadequate rules on bearer shares and nominee shareholders, and the lack of a central registry containing beneficial ownership information.

29 Government of Canada, Budget 2016, 'Chapter 8: Tax Fairness and a Strong Financial Sector', http://www.budget.gc.ca/2016/docs/plan/ch8-en.html, accessed 17 July 2016.

30 FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: Canada: Mutual Evaluation Report', September 2016, http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf, accessed 1 October 2016.

31 FATF, 'Recommendations', 2012, 'International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations', *op. cit*.

32 Based on Mcdonell R, Presentation at the Study Group Workshop on Transparency in Beneficial Ownership, DPSA, Pretoria, 31 October 2016.

Germany is compliant with G20 Principle 1 on definition. Its definition of beneficial owner, introduced as part of the country's Money Laundering Act, is:[33]

> [the] natural person who controls or owns the contractual partner or the natural person who causes a transaction or a business relationship. This covers unlisted companies; any natural person owning or controlling more than 25% of the capital stock or controls more than 25% of the voting rights.

This is in line with the FATF guidelines.

On Principle 2, Germany has not released an assessment of the money laundering risks related to legal entities and arrangements in the country in the past three years. There is, however, a commitment in the national action plan to conduct such a national risk assessment on money laundering.[34] According to assessments done by the Financial Intelligence Unit and the German Federal Criminal Police Office, in more than 20% of cases financial agents are involved in suspicious activities. The real estate sector and unlisted stock companies are also said to be highly susceptible to money laundering.

With respect to Principle 3, there is no requirement for legal entities, other than those with anti-money laundering obligations, to maintain information on beneficial ownership. There is also no requirement for limited liability companies to keep a share register, which makes it difficult to have a timely sighting of beneficial ownership information.

In terms of Principle 4, there are restrictions to timely access to beneficial ownership information by competent authorities in Germany. There is also no beneficial ownership registry in place. However, the Banking Act requires credit institutions to maintain a data file containing information on beneficial ownership. The Public Prosecutor's Office and tax authorities have access to beneficial ownership information collected by persons obligated by the anti-money laundering laws when necessary for task fulfilment, but there does not seem to be a well-structured eco-system of cooperation among relevant institutions, including tax and law enforcement authorities, to leverage beneficial ownership information for the purpose of minimising risk to the financial system.

Regarding Principle 5, there is no domestic trust law, but trust corporate service providers are subject to anti-money laundering rules and are compelled to identify the beneficial owners of clients. There are no requirements that all parties to the trust – trustee, settlor and beneficiaries – should be identified and recorded. Lawyers, accountants, notaries and tax advisors are also subject to anti-money laundering rules. Financial institutions, if they accept trusts as customers, are required to identify the beneficial owner and the contractual party. There is no requirement that all parties to the trust should be identified. This could make it harder to trace

33 G20, 'Germany's Action Plan on the Implementation of High-Level Principles on Beneficial Ownership Transparency', 28 September 2015, http://g20chn.org/English/Documents/PastPresidency/201512/P020151228355740142747.pdf, accessed 10 January 2017.

34 *Ibid.*

the proceeds of benefits to individuals using legal arrangements. Essentially, there is no specification in the law regarding which competent authorities should have timely access to the beneficial ownership information of trusts, as per Principle 6.

Germany is compliant with Principle 7, regarding the duties of DNFBPs. Current laws and regulations require financial institutions to identify the beneficial owner of customers when conducting customer due diligence. Financial institutions are required to identify and verify whether a customer is a domestic or foreign PEP, and as such senior management would need to approve the establishment of a business relationship with such individuals. The relationship with PEPs would also need to be monitored on an on-going basis. Where the beneficial ownership of a customer cannot be established, a business relationship must be terminated.

The German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, or BaFin) supervises financial institutions, and seeks to curb the use of financial institutions for money laundering, terrorist financing and other criminal offences. The DNFBPs covered by the anti-money laundering law are required to conduct customer due diligence and identify the beneficial owner under certain circumstances. Such DNFBPs include trusts and corporate service providers; lawyers (especially conveyancers) or those involved in investment management or other financial and securities-related activities; accountants and tax advisors; auditors; real estate agents; casinos and Internet gambling hosts; and persons acting in a fiduciary capacity.

Germany does not have a central database that can be used by all competent authorities to sight information on beneficial ownership (Principle 8). The Financial Intelligence Unit (FIU) can request and access information from BaFin – the banking regulator and supervisor. Information sharing within domestic competent authorities usually takes place via written requests. On the other hand, information sharing with foreign counterparts is mediated through bilateral agreements or Memorandums of Understanding (MoUs). This also applies to the FIU's international cooperation.

Regarding Principle 9, the tax authorities in Germany do not have direct access to beneficial ownership information, but they can request information from trustees or other government bodies. Where there is a tax case during anti-money laundering prosecution, the tax authorities are informed and beneficial information is forwarded to them. On Principle 10, related to bearer shares, the issuance of bearer shares is allowed in Germany, with no comprehensive mechanism to prevent their misuse.

Japan

Japan is fully compliant with Principles 1, 2 and 10. The country has effected amendments to domestic regulations to bring them in line with the G20 High-Level Principles. There is a clear definition of beneficial ownership, set out as ownership of more than 25% of the shares in a company. There is also clarity on underlining the natural person as a beneficial owner, and with controlling influence in the legal entity.

Japan has also fulfilled Principle 2. It undertook a detailed risk assessment through the country's National Policy Agency in December 2014. The agencies involved in the risk assessment included the Financial Services Agency and the Ministry of Finance. DNFBPs and other industry associations were consulted during the assessment. The areas singled out as posing risks included non-face-to-face transactions; cash transactions; international transactions identified by the FATF as having deficiencies; specific criminal gangs in Japan; PEPs; and entities with ambiguous beneficial owners.

Regarding Principle 3, there is no requirement for legal entities to maintain information on beneficial ownership. The Companies Act does not require a shareholder to declare to the company if they own shares on behalf of another individual. On Principle 4, there is no guaranteed access to beneficial ownership information by competent authorities in Japan. There is no beneficial ownership register, and only in a tax-related case do tax authorities require beneficial ownership information as part of the investigation.

Regarding trusts (Principle 5), competent authorities, including tax authorities, financial intelligence units and public prosecutors, cannot access information on the beneficial ownership of trusts since trustees are not required to hold this information about the parties to the trust and there is no registry to collect the information.

Banks require information on beneficial ownership when establishing a business relationship with a client. This is in accordance with the Prevention of Transfer of Criminal Proceeds Act. According to the amendments to the act that were due to come into force in October 2016, banks will be required to conduct due diligence when conducting business with foreign PEPs.

No restrictions are imposed on information sharing between national-level authorities in Japan. On the international front, the FIU is the designated central authority for mutual legal assistance matters. Information can be accessed through MoUs, and is only shared on an ad-hoc basis. However, while authorities in Japan have no access to a central beneficial ownership registry, the law does not impose any significant restriction on having beneficial ownership information held by other domestic authorities and shared with other tax authorities. Bearer shares are prohibited in Japan. The concept of nominee shareholder and directors does not exist in the Japanese legal framework.

US

The US is said by Transparency International not to be fully compliant with any of the G20 High-Level Principles and lacks an adequate definition of beneficial ownership. Its anti-money laundering laws are apparently riddled with loopholes, especially in relation to the real estate sector. The US conducted a national risk assessment in 2014, focusing mostly on the use of nominees and the misuse of legal entities, especially front, shell and shelf companies. Nonetheless, there is no requirement for legal entities to maintain beneficial ownership information.

The culture of institutional cooperation on tax issues beyond the Internal Revenue Service (IRS) and federal, state and municipal government agencies is weak. At the international level, even though the US has framed the global standard on exchange of information on tax-related matters through the Foreign Account Tax Compliance Act (FATCA) of 2010, it does not fulfil its own responsibilities towards other countries.

The US government enacted FATCA in order to gain insights into the accounts of US citizens abroad for the purpose of limiting tax evasion by those who use other jurisdictions to hide their assets. To deal with this malfeasance, the US has secured the cooperation of 110 governments, and 200 000 institutions have registered with the IRS for compliance. FATCA established the basis for a Common Reporting Standard (2014) at the global level, on the OECD platform, which was adopted by the G20 members during the G20 Summit in Australia in 2014. Within the OECD it is codified as the Convention on Mutual Administrative Assistance in Tax Matters.

Weaknesses in its system notwithstanding, the US has recently launched a regulatory reform process, kicked off with a letter from Jacob Lew, the US Secretary of Treasury, to Congress on 5 May 2016. His letter emphasised the urgency of reforming the Bank Secrecy Act of 1970 and for Congress to pass legislation on transparency in beneficial ownership on a bipartisan basis. The actual definition of beneficial ownership will be vested in the Secretary of Treasury, according to the proposed legislation.[35] The proposed legislative measures will require legal entities registered in the US to maintain reports and file records related to beneficial ownership. The various details include name, address and unique identifying number (such as tax identification, passport or driver's licence number) meant to trace the person behind the corporate entity. Failure to comply will attract a fine of $5,000 for each violation. The reform measures are framed to counter money laundering and corruption, and to combat tax evasion.

One of the main measures is the customer due diligence Final Rule, which is meant to require banks to identify and verify beneficial ownership information and to understand the risks posed by their customers. Other measures include the constant monitoring of suspicious activities; proposed beneficial ownership legislation; and proposed regulations related to foreign-owned, single-member entities that will now be required to register with the IRS and obtain an employment number. Although the definition is yet to be clearly crafted, the defined threshold for beneficial ownership for the purpose of verification is 25% ownership or more of a legal entity and an individual who controls the legal entity. Companies will be obliged to capture information related to beneficial ownership when they register at the Treasury Department, and when they undertake their annual filings.

It would seem that apart from financial system activities, the main sector that is under the spotlight is real estate. The monitoring of this sector will possibly rely

35 US Secretary of Treasury, 'Amending the Bank Secrecy Act to Require Reporting and Record Keeping on Beneficial Ownership of Legal Entities', May 2016, https://www.treasury.gov/press-center/press-releases/Documents/20160506%20BO%20Legislation.pdf, accessed 11 October 2016.

on the existing Geographic Targeting Order Authority, which has been used to capture information related to suspicious information in the cash purchase of real estate in the Borough of Manhattan, New York and Miami Dade County, Florida. This authority works by compelling property title holders (home owners) and insurance companies to record and report the beneficial ownership information of large entities that are making all-cash purchases in high-value residential estates.

China

Like the US, China is also said not to be fully compliant with any of the G20 High-Level Principles. According to the country's anti-money laundering legislation (2007),[36] the beneficial owner is defined as

> the natural person that actually controls a customer and the beneficial owner of transactions, but not limited to the following two categories of people: (i) the actual controller of a company; and (ii) the person who actually controls financial transaction process or is ultimately entitled to a relevant economic benefit (excluding a principal), however the relevant customer fails to disclose information on such person.

There has not been any national risk assessment conducted in China. There is no requirement for information on beneficial ownership by authorities, except those vested with anti-money laundering responsibilities.

Like the US, China is also said not to be fully compliant with any of the G20 High-Level Principles

The information required of the limited liability companies by the Company Law is of generic nature. There is no guarantee of timely access to beneficial ownership information by competent authorities. The Trust Law has no requirements for beneficial ownership information other than the general information pertaining to trusteeship, the trustor and beneficiary. DNFBPs are not subjected to anti-money laundering rules. Further, nominee directors and bearer shares are allowed in China.

Regarding information sharing on tax matters, China has entered into various international agreements. It is a signatory to the Multilateral Convention of Mutual Administrative Assistance in Tax Matters and the Common Reporting Standard. In the absence of requirements for legal entities to provide beneficial ownership

36 People's Republic of China, Anti-Money Laundering Law, 2007, http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content_21900160.htm, accessed 2 February 2017.

information, it would seem China might rely on banks to undertake this activity, with a focus on curbing money laundering.[37]

Certain administrative measures applying to financial institutions require customer due diligence, including identifying beneficial owners and political status. The various institutions that are subjected to these measures include policy banks; securities companies; insurance companies; and trust companies. These institutions are required to monitor clients and keep records. Article 7 of the July 2007 administrative measures require policy banks to identify a beneficial owner who is a natural person in instances of cash transfers (remittances) to the value of CNY[38] 10,000 ($1,000) at the time of this order.[39]

Brazil

Brazil is also not fully compliant with G20 High-Level Principles. It has no definition of beneficial ownership and has not undertaken a national risk assessment. Current laws and regulations do not require information pertaining to beneficial ownership. However, banks, as part of customer due diligence, do require information on the natural person behind a corporate entity (beneficial owner). While the law has no conception of trusts domestically, foreign trusts can be administered through a resident trustee. There are clearly identified DNFBPs with anti-money laundering responsibilities: corporate service providers; lawyers; accountants; auditors; real estate agents; dealers in precious metals and stones; dealers in luxury goods; notaries; and agents for sports athletes, artists and event managers.

Russia

Russia is only fully compliant with Principle 1 regarding the definition of beneficial ownership. It scores poorly on domestic and international cooperation. It is not clear how Russia is mitigating the risks of money laundering. There is also no requirement on legal entities to maintain information on beneficial ownership. Only those with anti-money laundering obligations face this requirement. There is only a basic requirement that companies need to keep information on members' details and their allocation of share capital. There are also restrictions on timely access to beneficial information by competent authorities.

37 South China Morning Post, 'Anti-money laundering crackdown to shift onus to China banks', 15 September 2014, http://www.scmp.com/business/banking-finance/article/1592715/anti-money-laundering-crackdown-shift-onus-china-banks, accessed 23 September 2016.

38 Currency code for the Chinese yuan.

39 People's Republic of China, 'Measures on the Administration of Client Identity Identification and Materials and Transaction Recording of Financial Institutions: Order of the People's Bank of China, China Banking Regulatory Commission, China Securities Regulatory Commission, and China Insurance Regulatory Commission', (No. 2 [2007]), 21 June 2007, http://www.ms-ins.com.cn/uploadfile/jp/%E5%8F%8D%E6%B4%97%E9%92%B1/20097151112148163 6%5b1%5d%20falv3.pdf, 23 September 2016.

Authorities have to rely on information collected by financial institutions and DNFBPs, since there is no central register on beneficial information. The central registry only collects information on legal information (ie, pertaining to legal ownership rather than beneficial ownership, which may not be on paper). Russian law does not allow for the establishment of trusts, except regulated investment unit trusts. Trustees and those providing services to foreign trusts, however, are not prohibited from operating in Russia. Where financial institutions have trusts as customers (probably foreign trusts) there is a requirement to provide beneficial ownership information – trustee, settlor and beneficiaries.

Russian authorities can request, via the courts, information on the beneficial ownership of trusts. This is weak, since trustees are not required to maintain beneficial ownership information by law. There is a requirement for financial institutions to have procedures for identifying beneficial owners when establishing business relationships with customers. This includes verifying the identity of the beneficial owner. There are restrictions on the information to be shared among authorities within the country, especially with respect to beneficial owners, related to public bodies, state-owned enterprises, embassies and international organisations. There is also no requirement for the independent verification of beneficial ownership information.

Financial institutions do not have full access to company registry information, and they can use their discretion on whether to proceed with the transaction, in spite of insufficient information. For all transactions above RUB[40] 600,000 (approximately $10,000) as well as all suspicious transactions, financial institutions are to notify the financial monitoring service. Money laundering can attract a penalty of five years' imprisonment. Regarding clients who are foreign PEPs, the bank's chief executive officer is required to sign an order authorising a business relationship.

On DNFBPs, there is a requirement for the identification of beneficial owners in transactions above RUB 600,000 ($10,000) and all real estate transactions above RUB 3 million ($50,000). This requirement extends to accountants, real estate agents, dealers in precious metals and stones, dealers in luxury goods, lottery vendors and bookmakers, lawyers and notaries. Trust and service providers are not included. Requests for information among authorities are notified to the Financial Monitoring System, which is a federal agency. This agency is also responsible for handling requests for international cooperation. Tax authorities can request beneficial information, but are required to provide motivation for such a request. Russia has signed 19 mutual information exchange treaties with 19 jurisdictions. It does not allow the use of bearer shares. The concept of nominee shareholder does not exist under Russian law, since there is no separation between ownership and control.

40 Currency code for the Russian rouble.

Select African cases

Three African countries have undertaken to institute policy processes that will lead to transparency in beneficial ownership: Ghana, Kenya and Nigeria. Since, with the exception of South Africa, no African country is a member of the G20, it is difficult to assess progress against the G20 High-Level Principles. However, there are other intergovernmental forums where these countries have made commitments. These include the OGP and ESAAMLG. There is also the Intergovernmental Working Group Against Money Laundering in West Africa. Nigeria has also made various commitments and undertaken a pilot study under the rubric of the EITI, focusing on transparency in beneficial ownership in natural resources. These African study cases offer important lessons regarding the challenges encountered in contexts where institutions are relatively weak, and some of the obstacles to be overcome are quite unique to African governance experiences. A point worth highlighting is that since African countries are either latecomers to or on the margins of global governance processes such as the G20, their regulatory standards tend to fall behind.

Nigeria

Nigeria voluntarily submitted itself as a pilot country for the assessment of transparency in beneficial ownership under the EITI in 2013. This covered the oil and gas, and solid minerals sectors. Until this point, there were no requirements under Nigerian law for companies to provide beneficial ownership information. During the pilot process Nigeria focused on creating awareness around beneficial ownership disclosure, targeting mainly civil society and the media through training workshops on the EITI standards. The country assumed the EITI operational definition of beneficial ownership.[41]

The National Stakeholders Working Group, which is spearheaded by the National Extractive Industries Transparency Initiative (NEITI) residing in the Office of the President, approved the templates for the collection of company information and beneficial ownership data. This was after a series of consultative workshops, including a Gap Analysis of the new EITI standard on beneficial ownership and the existing conception under the NEITI. Companies in the relevant sectors were also consulted, in part to socialise them to the pilot scheme and in part to get their input on the proposed templates to glean information on beneficial ownership.

Since the OGP framework makes reference to the EITI standard, it is possible that there is a deliberate overlap in these processes, in ways that seek to elevate the process from the EITI to the OGP as part of broader governance reforms.

41 The section on Nigeria draws extensively from Nigeria's NEITI (National Extractive Industries Transparency Initiative), 'Pilot Assessment of Beneficial Ownership (BO) Disclosure: Nigeria's Experience', 2015, https://eiti.org/sites/default/files/nigeria_bo_pilot_report.pdf, accessed 3 October 2016.

The following were some of the challenges Nigeria encountered during the pilot scheme:[42]

- delays in completion and non-completion of beneficial ownership templates by some companies;
- outright refusal to fill in templates by some companies;
- companies owned by other corporate entities failing to produce further information on those companies;
- violation of the confidential agreements with companies in publishing details of beneficiary ownership;
- difficulties in capturing the relevant data on artisanal and illegal miners, who mostly dominate the solid minerals sector;
- discrepancies between information disclosed in beneficial ownership forms and information held by the Corporate Affairs Commission, where companies are registered;
- a perception of the beneficial ownership disclosure requirements as something of a witch-hunt of political opponents or PEPs;
- lack of political will to ensure that beneficial ownership disclosure is included in the economic agenda of the nation and lack of drive to ensure its implementation;
- the widespread practice of PEPs and senior government officials' using surrogates to front for them in companies;
- difficulties in reaching the focal points of the companies because of out-of-date contact details;
- lack of a statutory obligation to disclose beneficial ownership information; and
- a failure to pass new statutory laws on the extractive industry: the present laws are archaic and obsolete in light of the demands of global best practices.

In short, this process encountered institutional, regulatory and political challenges. The companies in the sector were not transparent and there were unseemly relationships between these companies and public figures. This made it difficult to execute a beneficial ownership disclosure process, let alone reach an agreement across various institutions on a new institutional and regulatory framework that could be embedded in law. Yet, although on the surface the pilot process seems to be a failure, its success lies in the lessons that it yields on how best to undertake this process across various sectors of the economy. The pilot scheme generated various recommendations on improving the process:[43]

- Build capacity on transparency in beneficial ownership, including through the provision of training workshops for stakeholders, with a stress on the importance of disclosing beneficial ownership-related information.
- Ensure better automation of data and records.

42 *Ibid.*

43 *Ibid.*

- Engage the National House of Assembly (Parliament) and civil society to exert pressure on the government to improve beneficial ownership disclosure, including through accurately capturing production agreements/relationships (eg, joint ventures, production-sharing contracts, sole risk or service contracts with the government, and the relationship between individual companies involved in production agreements) on the beneficial ownership template.
- Ensure that, in bidding for extractive industries licences and contracts, bidders are required to declare the beneficial ownership of the shares in the bidding companies.
- Work with regulators to create a web portal that has the full text of:
  - » all contracts, concessions, production arrangements and other agreements (and their addendums) granted by or entered into by the government that provide the terms attached to the exploitation of extractive resources; and
  - » all licences, leases, titles or permits (and their addendums) by which the government confers on a company(ies) or individual(s) rights to exploit extractive resources.
- Enact new laws to cover the dynamics of the extractive industry.

Ghana

Against the backdrop of the UK anti-corruption summit in 2016, Ghana has expressed its commitment to prevent the misuse of companies and legal arrangements to hide the proceeds of corruption. It has also committed to strengthening the Companies Bill and the Petroleum (Exploration and Production) Bill that are currently before Parliament. Accordingly, there will be requirements for beneficial ownership information and a central register for all sectors, including oil and gas, in line with the UN Convention against Corruption, the FATF Recommendations and the EITI standards. Ghana has further stated that it will ensure that accurate and timely company beneficial ownership information, including in the extractives sector, is available and accessible to the public. Ghana has an overarching National Anti-Corruption Action Plan (2015–2024) and is a participant in the Addis Tax Initiative[44] and Common Reporting Standards.

Moreover, Ghana has moved ahead with domestic reform processes, and these are at varying degrees of development. They have proceeded conterminously with stakeholder consultative processes. Like Nigeria, Ghana has committed under the EITI to establish a roadmap for beneficial ownership disclosure by January 2017 or risk losing its compliance status. There is, however, a commitment to take this process beyond the EITI to cover other sectors of the economy, and to have beneficial ownership included in the Companies Act of 1963 as part of its current review.

44 The Addis Tax Initiative is a multi-stakeholder partnership in capacity building in the area of domestic resource mobilisation (DRM) that assembles more than 40 countries and organisations, committed to step up their efforts to enhance DRM in partner countries. Its goal is to help countries mobilise their resources to support development.

A beneficial ownership definition already exists in Ghana, within the anti-money laundering legislative framework, but this does not pervade other key laws such as the Companies Act. Accordingly, a beneficial owner is defined as[45]

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

So far the approach to beneficial ownership disclosure seems inchoate, if not fragmentary. The following are among the legislation recommended for reforms, which are still to be determined:

- Companies Act of 1963 (Act 197)
  - » Section 32 of the Companies Act to include beneficial ownership;
  - » Section 122 to require beneficial owners to provide an annual filing of legal ownership;
  - » Section 196 to require companies to keep a register of beneficial owners, detailing the name, quantum of ownership, nationality and country of residence;
  - » Sections 205, 206 and 207 to be amended to include the threshold for beneficial ownership disclosure; and
  - » Section 179 to introduce a target turnaround time of 48 hours for beneficial owners to provide beneficial ownership information.
- Minerals and Mining Act of 2006 (Act 703);
- Exploration and Production Bill;
- Paragraph 17 of the Seventh Schedule to the Income Tax Act of 2015 (Act 896) on records of shareholders of a company;
- a beneficial ownership register; and
- Section 122 of the Companies Act 1963, with proposed reforms aimed at making it obligatory for beneficial owners to provide an annual filing of legal ownership information for all companies.

This process is also aimed at defining sanctions and penalties for non-compliance. Such sanctions, for example in the resources sector, could entail revoking licences and permits until compliance requirements are met. The emphasis is on dissuasive, persuasive and proportional sentences. Essentially, there will not be a blanket approach to penalties – the carrot will be balanced on a stick.

Possible barriers to achieving the objective of beneficial ownership disclosure have also been identified by the Ghanaian process:

- discomfort among companies and the government, especially if there is an unseemly relationship between the two;

45 EITI (Extractive Industries Transparency Initiative), 'Draft Report on Beneficial Ownership Consultative Workshop', April 2016, https://eiti.org/sites/default/files/documents/ghana_bo_workshop_report_0.pdf, accessed 11 October 2016.

- perception of political risk – or, rather, risk to politicians – as a result of disclosure and transparency requirements. Countering this measure requires political buy-in. A process is currently underway to obtain a cabinet memorandum for legislative reforms;
- possible resistance from owners of extractive companies. This may be attenuated by a public declaration by some of the companies in support of this process, something that has been happening;
- unintended barriers posed by existing legislation such as the Data Protection Act of 2012 (Act 843) and policies around privacy. Anti-reform interest groups can use these measures to frustrate efforts to achieve transparency in beneficial ownership. The effect could be lessened through a process of legislative reform to ensure alignment between various pieces of legislation and deepen institutional collaboration;
- delays arising from cumbersome parliamentary procedures and consultations; and
- A thin base of human, financial and technical resources to drive implementation. A well-resourced and capable bureaucracy is essential to ensuring success.

Despite its not being a member of the G20, Ghana has set its sights on implementing the beneficial ownership transparency process beyond the EITI and to align with the FATF and G20 High-Level Principles. It has yet to find consensus, however, on the extent to which beneficial ownership information should be made available to the public, and how such disclosures can be managed. One mechanism that has been suggested to facilitate public access is through the Right to Information Bill, which is currently in the pipeline.

Some of the key recommendations proposed by this Ghanaian consultative process to take this process forward include:

- strengthening institutional collaboration;
- inserting a beneficial ownership definition into the amended Companies Act;
- gaining political buy-in to achieve horizontal alignment. There is already a proposed inter-ministerial committee to drive horizontal coordination and address any conflicting legal and regulatory issues; and
- defining a threshold of beneficial ownership, as well as the true beneficial owner.

LESSONS TO BE DRAWN FROM MANAGING TRANSPARENCY IN BENEFICIAL OWNERSHIP

Although many countries are still significantly non-compliant with the G20 High-Level Principles, African countries can draw various lessons from the experiences of G20 countries. There are also lessons that African countries could share among themselves.

- There is a need for a clear intent to implement transparency in beneficial ownership, and for the key government departments and agencies to speak

with one voice. This requires not only political buy-in – which in the case of South Africa was expressed through a cabinet memorandum – but also ongoing political support to the institutions that are at the heart of this agenda.

- Institutions such as the FIC require more independence given the sensitive nature of their work, if they are to be effective. As is clear in the South African case, the FIC has limited autonomy as it reports to the National Treasury, and is not empowered to subpoena information from other state agencies. Its remit is limited to the banking sector, yet corruption and money laundering have a wider space for diffusion. One aspect to consider, which comes up in the Chinese experience, is the need for regulating development finance institutions in particular, to tighten disciplines related to PEPs and limit any possibility for corruption.
- Many countries – developing and developed alike – battle with inter-agency cooperation. Territoriality and silo mindsets tend be negative features in many governments. Yet the success of anti-money laundering, anti-corruption and counter-terrorist financing work requires strong inter-agency cooperation. The effectiveness of such cooperation depends on political will and drive at the top. At the institutional level, collaborative work needs to be promoted. Secured platforms for sharing information and intelligence should be created, especially among financial intelligence units, revenue collecting authorities, investigative authorities and law enforcement authorities.
- In terms of the National Risk Assessment, the experience of various countries suggests that there is no one-size-fits-all format. As Rick Mcdonell, an expert on tax and governance, puts it, 'national risk assessment is more of an art than a science'.[46] The UK provides a useful methodological guideline that is clear and simple. This can be adapted. It would also make sense that the national risk assessment initially focuses on a few sectors where vulnerabilities are greatest. These should not only be economic sectors but also professions. A few countries, including Australia and Brazil, list lawyers as a profession that needs to be observed for risks. Legal firms tend to be custodians of annexures to ownership agreements or help to structure nominee directorships. There could be any number of sectors that may act as channels for IFFs within countries. South Africa could draw from the various countries that have been evaluated by the FATF, and those that have undertaken national risk assessment, to identify those sectors that feature prominently.
- Nominee shareholders and share bearers should, as low-hanging fruit, be prohibited since their purpose is to create ambiguity with respect to the true beneficial owner. In some instances they are used to mask any appearance of conflict of interest. In others, they may serve to circumvent sanctions or hide the true extent of wealth for the purpose of evading tax. Commitment to transparency requires that any opaque and multi-layered ownership structure be phased out. As the African cases show, legislative review is an important part of ensuring transparency in beneficial ownership. Along with improving inter-agency cooperation, there needs to be alignment in legislation so that there is a

46 Based on Mcdonell R, *op. cit.*

shared purpose and greater focus on curbing illicit financial activities. One area where regulatory tensions may exist is data protection laws and public registers. However, where registry is only available to relevant authorities it reduces the possibility of a constitutional challenge. Such legislative review should meet a constitutional or sound legal test.

- The work with the private sector at the global level, through the B20, and domestically with business groups that are likely to be affected by legislative change, should be expedited. Some of these entities, such as the Banking Association of South Africa, could be important sources of information for identifying risks to economic sectors.
- The African cases and the difficulties that they encountered underline the importance of coordinated action on the continent. The work on transparency in beneficial ownership should be elevated to regional economic communities, the African Development Bank and the AU Commission.

CONCLUSION

It is clear that the work on transparency in beneficial ownership is just beginning, and no country can be held up as a standard bearer for best practice. G20 countries have a weak record of compliance. This applies to developed, emerging and developing countries alike. Nonetheless, there are lessons that can be gleaned from advanced industrial economies for African countries, which have faced the Herculean task of seeking to reform what seems unreformable in the face of deeply entrenched political interests.

Since no national economic system exists in isolation, global cooperation on new norms and standards is the ultimate antidote to IFFs

Given the globalisation of the financial sector, the rise of organised crime and terrorist financing, and the threat of corruption to development, this agenda is both urgent and important, primarily to buffer domestic financial and economic systems from risks. Since no national economic system exists in isolation, global cooperation on new norms and standards is the ultimate antidote to IFFs. Preserving the stability of the global system requires a great deal of global coordination and the evolution of new regulatory standards to limit IFFs, whether they be for terrorist financing, organised crime or corruption. When such activities are allowed to multiply they capable of undermining the integrity of the financial system, and could open up governments to infiltration by the perpetrators of illicit activities. The illicit financial outflows from the African continent are already worrying.

There are, however, challenges in implementing this agenda. Different countries are at varying levels of institutional development. While a commitment to global rule-making processes is imperative for ensuring the stability of the system and

fostering progress on domestic reforms, it could stretch the already thin institutional capacities of developing countries.

Advanced industrial economies have been grappling with these challenges for some time, and their thinking is quite advanced on many of the issues on the table. They can also deploy regulatory tools with greater celerity than developing countries.

The implications for South Africa's involvement in this process could very well be institutional overstretch with respect to human, technical and financial resources. Institutional frictions could also emerge, especially given that many of these are still inchoate. Yet this is an important process that must be undertaken.

In order for South Africa to get a clear sense of its own interests and priorities, it is thus critical that a number of steps are taken. These include:

- Undertaking a national risk assessment to understand the nature of the vulnerabilities facing South Africa now and in the future. This needs to be grounded in South Africa's own review of risks across a range of economic sectors and requires a period of 12–18 months. Given that the next FATF Mutual Evaluation Review is in 2019, there is time for South Africa to conduct this process properly. The core focus of this exercise should be to address the gaps that were identified in the last FATF Mutual Evaluation Review in 2009. The starting point should be threats that may have already been identified by various state agencies, including law enforcement authorities, the FIC, SARS and the intelligence community. On the basis of this, a more detailed threat evaluation could be embarked upon. Financial institutions may contribute to such an information-gathering exercise.
- Instituting a legislative review that looks at the discrepancies and unnecessary overlap between various institutions. The idea here should be to achieve a fair degree of alignment and cooperation across key institutions. This should also aim at ensuring coherence in the implementation of standards on transparency in beneficial ownership.
- Crafting a clear definition of beneficial ownership that satisfies the FATF guidelines. The FICA amendments contain a standard definition.
- Undertaking an extensive multi-stakeholder consultative process to define a common platform for pursuing transparency in beneficial ownership. This is perhaps one of the most important steps as it will not only help to create awareness of the issues related to the transparency agenda but will also ensure that South Africa's approach is informed by broader civil society perspectives. This would also help in gaining a better sense of how South Africa can best contribute towards the evolving global economic governance processes. Further, there is a need to forge an intergovernmental platform for collaboration at the regional and continental level, especially since African countries may be confronted with unique challenges, as the cases of Nigeria and Ghana show, and their experiences need to be articulated at the G20 level.

Engaging in deep institutional reforms will not be possible without the systematic delivery of capacity-building initiatives, and building awareness of the importance

of transparency in beneficial ownership among a range of stakeholders. The latter may turn out to be more effective in raising the stakes of accountability than forcing domestic reform measures to conform to the ideal of advanced industrial economies in conditions where there are sometimes deep structural weaknesses and institutional stasis.

GEGAFRICA

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