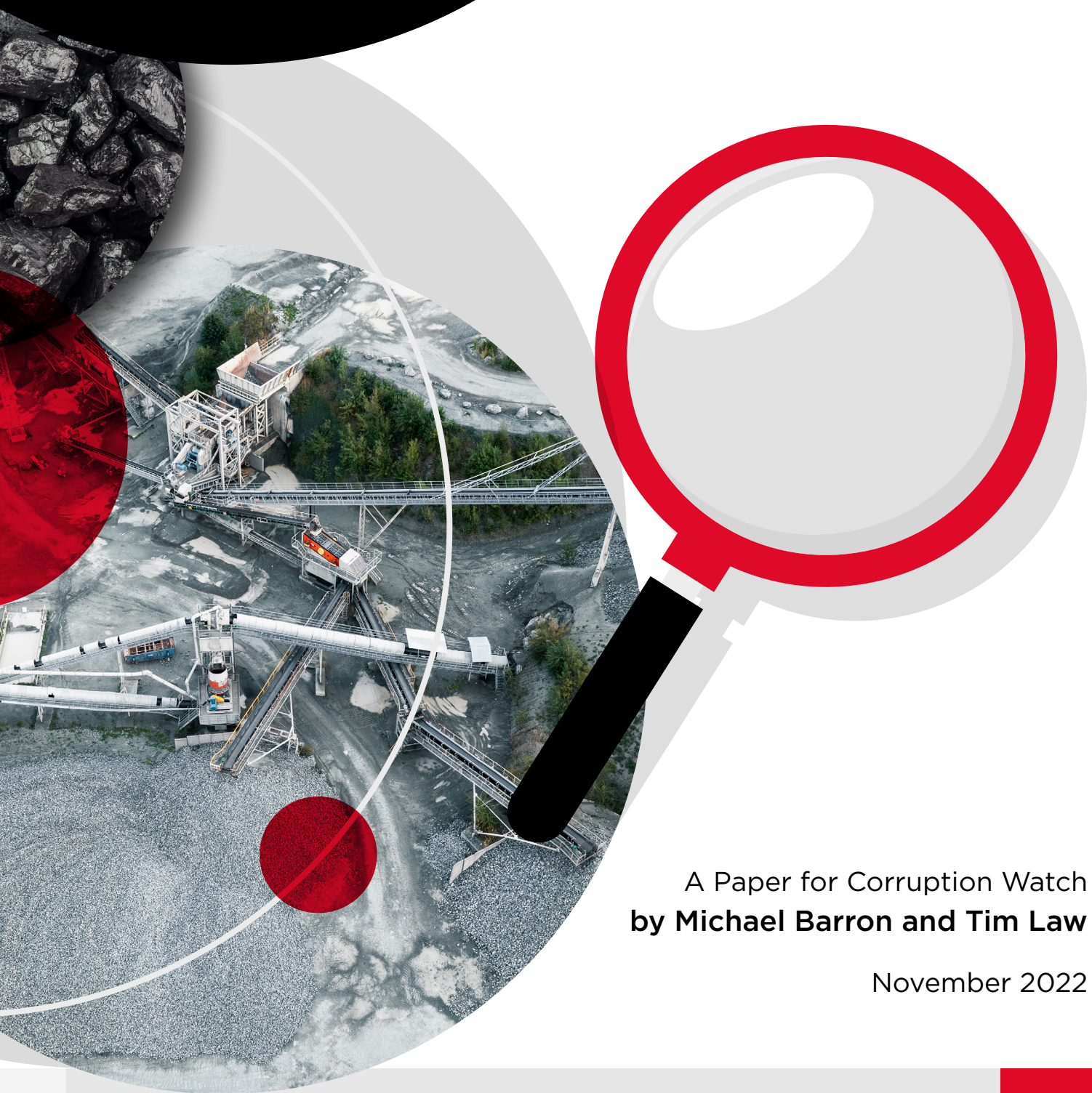
Beneficial Ownership Transparency in South Africa's MINING SECTOR

corruption watch
10 YEARS PUSHING FOR CHANGE
2012 2022



A Paper for Corruption Watch

by Michael Barron and Tim Law

November 2022

TABLE OF CONTENTS

ABBREVIATIONS & ACRONYMS

AML	Anti-money laundering
AMLD4	EU 4th Anti-Money Laundering Directive
AMLD5	EU 5th Anti-Money Laundering Directive
BBBEE	Broad-based Black Economic Empowerment
BO	Beneficial ownership
BODS	Beneficial Ownership Data Standard
BOT	Beneficial ownership transparency
CFT	Countering the financing of terrorism
CIPC	Companies and Intellectual Property Commission
DMRE	Department of Mineral Resources and Energy
DTI	Department of Trade and Industry
EITI	Extractive Industries Transparency Initiative
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
EU	European Union
FATF	Financial Action Task Force
FIC	Financial Intelligence Centre of South Africa
GDPR	EU General Data Protection Regulation 2016/679
MSG	Multi stakeholder group
NGO	Non-governmental organisation
OGP	Open Government Partnership
OO	Open Ownership
PEP	Politically exposed persons
POPIA	Protection of Personal Information Act
PRI	Principles for Responsible Investment
SARS	South African Revenue Service
SME	Small and Medium Sized Entities

EXECUTIVE SUMMARY

South Africa has made significant progress on beneficial ownership transparency (BOT), and currently has legislative proposals to create a legal obligation to report beneficial ownership (BO). However, there are flaws in the current proposals.

In an effort to get a BO register in place, it is a possibility that South Africa will move towards a non-public register of BO. Though it will provide important information to law enforcement agencies investigating corruption, this will do nothing to increase public understanding of the real owners of businesses. Furthermore, it takes away any use case for the register for potential private sector users.

This report makes six recommendations, including the implementation by government of a BO regime that meets international best practice, and a strategic communications campaign to raise awareness of the benefits of BOT, especially for the private sector.
The report also makes recommendations for Corruption Watch, including maintaining advocacy efforts on BOT and building alliances with other civil society organisations (CSOs) and the private sector to reinforce those efforts.

1 INTRODUCTION

Independent consultants Tim Law and Michael Barron (the Consultants) are pleased to present this report on research into beneficial ownership transparency (BOT) in South Africa's mining sector.

This report sets out:

- Why BOT is important to South Africa and the link to tackling corruption in the mining sector,
- The international context and drivers of BOT and case studies of what other countries are doing,
- An analysis of the current status of beneficial ownership (BO) in South Africa,
- Recommendations on next steps for the Government of South Africa, Corruption Watch, and other stakeholders in the BOT agenda in the country.

The need for action on improving the transparency of who really owns companies and other legal entities in South Africa has risen up the political agenda in 2022 as part of a greater focus on anti-money laundering (AML) measures. This increased focus followed the publication in October 2021 of a mutual evaluation report (MER)[1] by the Eastern and Southern Africa AML Group, an affiliate of the Financial Action Task Force (FATF).

The MER identified significant gaps in the country's AML regime. As a result, South Africa faces the risk of being placed on FATF's list of "Jurisdictions under Increased Monitoring"[2], informally known as "greylisting". Countries on this list face greater scrutiny and increased costs in accessing international finance. Placement on the list can also negatively affect a country's sovereign credit risk rating.

On the FATF Recommendations related to beneficial ownership (Recommendations 24 and 25), South Africa received a rating of "partially compliant". For Immediate Outcome 5, which rates the effectiveness of BO measures, South Africa received a rating of "low".

The MER noted:

> *"Obtaining of adequate, accurate and current BO information compared to basic, also varies but in the majority of cases it is not easily available and when available, it often takes a long time to obtain. The authorities could not demonstrate that they apply sanctions for failure to comply with information requirements."*

[1] https://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html

[2] https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/?hf=10&b=0&s=desc(fatf_releasedate)

Since the MER's publication, the government of South Africa has taken steps to improve BOT. In late 2021, it published a bill to amend the Companies Act to create a legal obligation on companies to record and submit their BO details to the government and for the government to establish a BO register. In early 2022, the government held a public consultation on these proposals. Corruption Watch's submission to the public consultation is attached as Appendix 4.

In mid-August 2022, the government announced that it would publish, in the third quarter of 2022, a bill to strengthen AML measures, including enhancing BOT. This bill would amend five relevant existing acts:

- Trust Property Control Act, 1988,
- Non-profit Organisations Act, 1997,
- Financial Intelligence Centre Act, 2001,
- Companies Act, 2008, and
- Financial Sector Regulation Act, 2017.

LIMITATIONS

Stakeholder engagement formed an important part of the research in preparing this paper. A list of the stakeholder organisations interviewed can be found in Appendix 3.

There was constructive engagement from the private sector and civil society organisations. However, engagement from government agencies was limited. The Companies and Intellectual Property Commission (CIPC) and National Treasury responded. The Department of Mineral Resources and Energy (DMRE), the Financial Intelligence Centre of South Africa (FIC) and the Department of Trade and Industry (DTI) did not make themselves available for interviews.

MINING CORRUPTION

1.1. SOUTH AFRICA'S MINING SECTOR AND CORRUPTION

Much has been written on historic corruption in South Africa, particularly during the recent period when state capture was prevalent. The examples of unethical business practices linked to those in the highest offices in the country do not need to be expanded upon here. The significance of mining to the South African economy, and the value attached to natural resources and the companies licenced to exploit them mean that the mining sector always has been one of the main vehicles used for that corruption. So the focus here is on the hallmarks of that corruption which are most relevant to BOT.

Secrecy

Most financial crime, including corruption, requires a certain degree of secrecy and opacity, and corporate structures are a way in which criminals disguise their activities. Historically it has been difficult to ascertain who ultimately really controls or benefits from a particular company, making it difficult to spot and tackle corruption. Undisclosed businesses interests of those in positions of political influence are frequently associated with corruption.

Complexity

One of the other weapons in the criminal's armoury is complexity.

By using complicated multi-layer company structures that cross multiple jurisdictions, the criminal will aim to:

- Hide their identity, and
- Disguise the corrupt transactions to make them look innocent.

Traditional forms of corporate transparency have focused on the activities of the company itself and its legal owners, without looking further.

BOT addresses both of these issues. It requires the public disclosure of the natural person(s) who directly or indirectly own or control the company. By doing this, it looks through any complex corporate holding structure, however large, to the people at the top of that ownership chain. Transparency is recognised as one of the tools to tackle corruption in many forms. It empowers people to identify unethical behaviour and hold those responsible to account.

As President Cyril Ramaphosa put it at the 2019 Mining Indaba:

> *"We live in a world where people no longer want to have things happen around them without their knowledge and involvement. They want to have their views heeded."*

CORRUPTION MAY SOMETIMES BE SEEN AS...

those in positions of influence securing personal wealth through the illegal use of that influence. However, the other side of that coin is that corruption is about directing wealth away from those to whom it should justly accrue, who in many cases may be the poorest in society and those historically disenfranchised. BOT also has a role to play in preventing and identifying these forms of corruption.

1.2. WHAT IS BENEFICIAL OWNERSHIP TRANSPARENCY?

BOT is in many ways a very simple concept. It means understanding the natural person(s) who ultimately own or control a company. It cuts through complex ownership structures to identify the real owners.

But once you get into the details of the design of a regime, there is no single global standard of BOT. Indeed, BOT regimes vary significantly. At one end of the scale a country could have a public register that is free to access online and provides detailed verified information, and at the other end, the country could depend on companies registered there to maintain records of their beneficial owners and make these available to law enforcement on request.

Under the current benchmark for beneficial ownership, FATF Recommendation 24 (R24), both would be acceptable. However, in its latest version of R24, FATF has strengthened the language around the need for a central register but has stopped short of calling for public registers (see below, section 3.1).

THE APPROACH TO BENEFICIAL OWNERSHIP IN A COUNTRY PLACES IT SOMEWHERE ON THIS SCALE

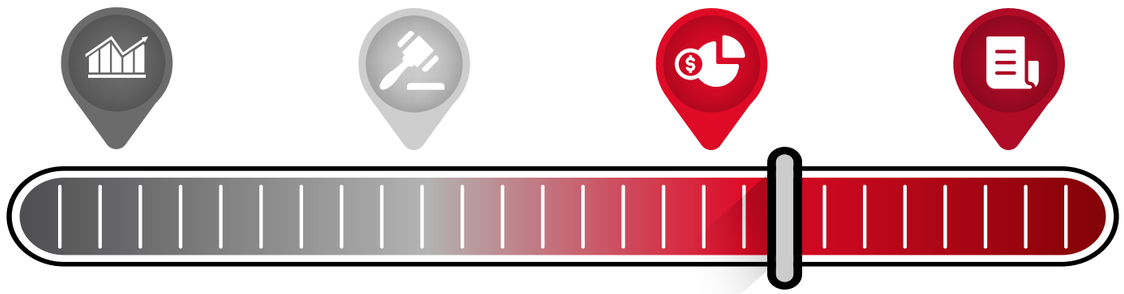


Figure 1: The range of approaches to beneficial ownership

ANTI-MONEY LAUNDERING

BOT is one of the most pressing topics on anti-money laundering and countering terrorism financing (AML/CFT). It is important across all aspects of financial crime and that includes corruption. As well as tackling financial crime, BOT is also an important tool in building trust and confidence in integrity of the business environment, including public procurement.

Specifically for South Africa, it can help to promote integrity in the mining sector and indeed more broadly across the whole economy. This brings benefits for citizens, government, private sector businesses, and investors, both domestic and foreign.

International investors take many factors into consideration in deciding when and how to invest, and financial transparency and integrity are more important than ever. The expectations of finance providers and other stakeholders are growing. At the same time, focus on the ultimate owners of companies is increasing globally as governments seek to meet international benchmarks such as those issued by the FATF.

The ratings issued by FATF are an important measure of the effectiveness of measures to build trust and clamp down on tax evasion, corruption, money laundering, and other illicit financial flows.

As a result, BOT is an increasingly important policy agenda item. It prevents the true beneficiaries of mining revenues from hiding behind opaque shell companies or using complex corporate or other legal structures to:

- Manipulate or hide income and profits,
- Evade lawfully due tax obligations,
- Disguise corruption and conflicts of interest,
- Manipulate the BBBEE regime, and
- Engage in money laundering activities, carry out corrupt practices, or finance criminal practices or violent activities, including terrorism.

WHO IS INVESTING IN THE ECONOMY

BOT also allows stakeholders to obtain a clear view of who is investing in the economy and any links to politically exposed persons. Many countries have introduced the concept of BOT into their legislation as part of anti-money laundering laws. Public disclosure of this information for companies engaged in the mining sector is particularly important and can bring further benefits through enhancing governance and accountability in the sector.

BOT is still evolving as a concept, evidenced by FATF currently revisiting its R24 on the subject.

FATF is not the only organisation that sets standards on BOT. The EU has legislated for public BO registers in all of its member states through its anti-money laundering directives (AMLD), especially AMLD 4 and 5.

In addition, BOT has been part of the Extractive Industries Transparency Initiative's (EITI) standard since 2016. South Africa is not currently an EITI implementing country, but there is pressure for the country to join[3].

[3] The Extractive Industries Transparency Initiative (EITI) and South Africa Report, Page 13

1.3. THE DIRECTION OF TRAVEL

FATF Recommendation 24 does not currently require a central register of BO, and although it has acknowledged the value of public registers, they are not required. However, the recent revisions to R24 appears to be putting much more focus on having a central register of BO, and is more supportive of making that register public.

Similarly, the EITI requirements on BO remain focused on the extractives sector. However, there are newer requirements around transparency in commodity trading, requiring disclosure of the BO of companies buying state shares of oil, gas and minerals from state-owned enterprises. There are also discussions about the importance of extractives supply chains.

These individual directions of travel combine to show that there is an overall direction of travel towards economy-wide public registers.

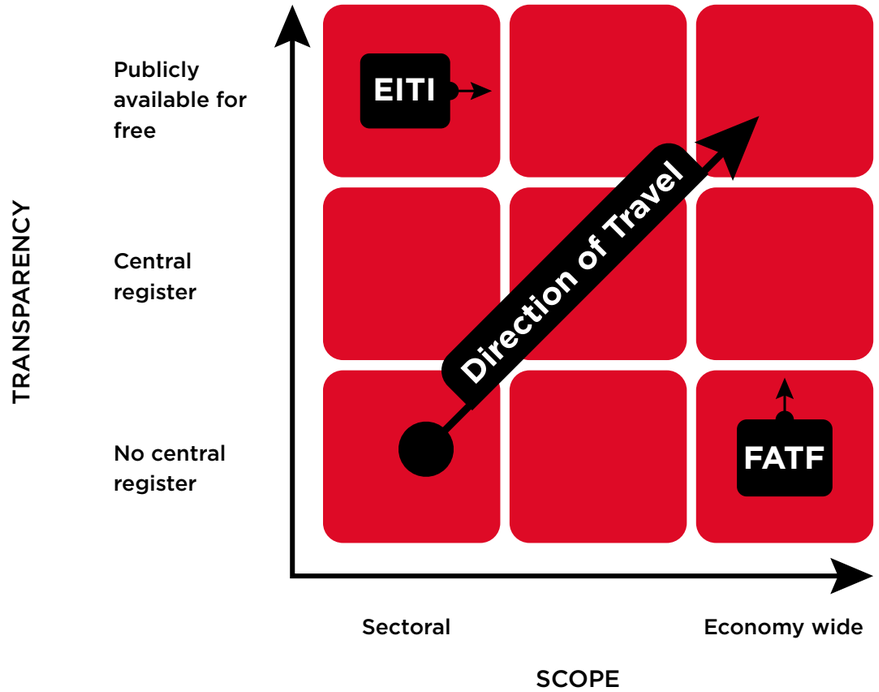


Figure 2: The direction of travel of BOT

2

THE IMPORTANCE OF BENEFICIAL OWNERSHIP TRANSPARENCY

2.1. LINK TO FINANCIAL CRIME

There is an undeniable link between financial crime and secrecy, whether that crime is corruption, money laundering, tax evasion, terrorism financing, or bribery. BOT is directly linked to the effectiveness of a jurisdiction's systems and processes to identify and investigate these crimes – it also acts as a deterrent.

The use of BO data by law enforcement agencies and regulators, including the South African Revenue Service, will provide a valuable tool in reducing crime. BO data also allows those investigating and prosecuting criminals to identify linked business assets and hidden wealth.

Corruption and other financial crimes frequently rely on disguising the origins and landing point of money, either by making the structures too complex and opaque to untangle, or by fronting them with seemingly bona fide activities. Criminals often use complex layers of legal corporate structures with companies in multiple jurisdictions to hide their illicit activity.

BOT IS ONE OF THE MAIN PILLARS OF THE FIGHT AGAINST FINANCIAL CRIME.

In introducing a robust BO reporting regime, South Africa is following the same path as many other countries. However, every country brings different challenges, and the use case for a South African BOT regime needs to recognise the unique nature of the country's recent history, including state capture.

STEINHOFF

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The Steinhoff corruption case is one of the most damning examples of the role that disguised ownership can play in criminal activity. It resulted in investors losing billions of rands when the truth was uncovered. The company had been over-valued through the creation of complex transactions with a string of companies in Europe and the Caribbean. These companies were part of anonymous company structures, ultimately linked back to former Steinhoff CEO Markus Jooste, or his close associates.

In March 2019 Steinhoff issued an overview of the investigation carried out by PricewaterhouseCoopers, which included the following finding:

> 3.1.3 Fictitious and/or irregular transactions were entered into with parties said to be, and made to appear to be, third party entities independent of the Steinhoff Group and its executives but which now appear to be closely related to and/or have strong indications of control by the same small group of people referred to in 3.1.1 and/or 3.1.2 above.

A public BO register in South Africa might not have prevented all of this, but secrecy around the ownership of the companies with which Steinhoff was dealing was an essential part of hiding this financial crime. If the natural persons owning and controlling these companies had been publicly known, it would have been significantly harder for the perpetrators of this corruption to keep it hidden for as long as they did.

2.2. PEPS AND RELEVANCE TO CORRUPTION

A politically exposed person (PEP) is someone in a position of influence. That normally includes politicians, senior government officials, the judiciary, senior military personnel, and people in senior roles in state owned enterprises and central banks. It also extends to the close family members and associates of those individuals who might also be in a position of influence through that relationship.

The importance of PEPs to any efforts to tackle corruption is very clear, and recent history in South Africa can provide many examples.

In the context of financial crime, FATF Recommendation 12 specifically considers PEPs. It requires regulated bodies (broadly banks, lawyers, and accountants), when doing their client due diligence, to not only understand the BO of the prospective client, but also whether any of the beneficial owners are PEPs.

So the identification of PEPs and their interests is a fundamental building block in tackling corruption. Unfortunately, this is not an area where South Africa is strong.

In its most recent FATF evaluation South Africa was rated as “non-compliant” on this front. **The FATF mutual evaluation report noted that:**

> ***Major shortcomings are found in South Africa’s implementation of R.12, where it concerns the definition of a PEP and regarding dealing with existing customers becoming a PEP. The definition of a PEP is limited in time and the inclusion of persons with functions in international organizations is limited to organizations based in South Africa. These limitations apply to family members and close associates of all types of PEPs. These limitations strongly undermine South Africa’s legal framework to mitigate ML/TF risks related to persons holding public functions. In addition, the lack of clear requirements for AIs to include in their RMCP a process to identify existing customers becoming a PEP, and to subsequently obtain senior approval for continuing the relationship with such customers when it becomes clear they’re PEPs, weakens the South African AML/CFT system to an important extent. In addition, the requirements are not applied to all FIs.”***
>
> **(Mutual evaluation report October 2021)**

Although PEPs may not be effectively dealt with under South Africa’s AML/CFT system, that does not mean there is not an opportunity to capture information on PEPs through the BOT regime. Some countries have built into their BO registers a requirement that reporting companies identify if any of their beneficial owners are PEPs. Indeed, in some jurisdictions, PEPs are subject to a more rigorous reporting regime. For example, Ghana has a lower reporting threshold for foreign PEPs, and no minimum threshold for domestic PEPs.

Another aspect of PEP reporting is the requirement for parliamentarians to declare their business interests on a register.

This concept exists in South Africa, although there is no independent verification of that register, so some cast doubt on the accuracy of what is on the register, and it would seem likely that if there are omissions, they are the very items which would be of most significance.

There are also suggestions that South Africa might introduce a separate register of PEPs.

This might be useful as a source of information on PEPs and their interests, and some countries including Ukraine have very good registers covering all the material assets held by PEPs, not just business interests. However, it is important to consider how these different systems work together. The most powerful solutions are those where information is joined up and consistent.

THE GUPTA FAMILY

One of the highest-profile corruption stories in recent years, not just in South Africa but around the world, has to be the case of the Gupta family, their businesses, and their links to the Zuma presidency.

Some of the largest South African companies, including state-owned enterprises such as Eskom and Transnet were caught up in the web of anonymous companies with links to the Gupta family, and are alleged to have entered into agreements on uncommercial terms.

In addition, property transactions in the UAE linked to the Gupta family, but believed to be related to then President Zuma involved anonymous companies.

BOT would have prevented the Gupta family from hiding their ownership or control of companies in South Africa, and would have assisted in understanding how significantly their business interests were interwoven into the state.

In Lord Peter Hain's submission to the Zondo commission on 31 October 2019, he specifically called upon South Africa to introduce a public register of BO as part of efforts to investigate the past and prevent future corruption.

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Credit: AFP/Getty Images

2.3. PUBLIC VS NON-PUBLIC REGISTERS OF BO

The debate is still ongoing as to whether South Africa is going to fully embrace BOT and have a public register which is freely accessible. In spite of the freedoms set out in the Constitution there remain concerns as to whether the BO data should be made public.

Although there are countries implementing non-public registers, and these can prove adequate for law enforcement purposes, there is a clear international trend towards public registers. However, making a register public does inevitably involve making available some personal details about natural persons. This could bring with it risks, including identity theft and threats to personal safety.

Existing BO registers sit on a scale from fully private to fully public.

A private register, which is one where BO data can only be accessed by the agency managing the register, and national law enforcement agencies The data may also be shared with foreign competent authorities upon request. E.g. British Virgin Islands and Panama	A public register, which is one where at least some BO data is accessible by the public. A freely accessible public register is one where the BO data can be directly accessed without the need to make a specific request. Users may be required to register and pay a fee. E.g. Some EU member states	The most completely open and public form of register is one where the BO data is publicly accessible for free, online, from anywhere in the world, and without the need to register. E.g. UK 

Table 1: Range of private vs public central registers

Current FATF recommendations 24 and 25 identify a central register as one option for securing access to BO data, but do not prescribe that a register must be established and certainly do not require public registers. However, FATF does support the principle of public registers, and has moved further in that direction during the recent public consultation process on revisions to R24.

The EU's fourth anti-money laundering directive introduced a requirement for all EU member states to implement public registers of BO by 2020, although not all have got there yet. Also, there is some variation in how member states have interpreted the requirement and the level of freedom to public access to BO data.

OTHER COUNTRIES WHICH HAVE OR ARE IMPLEMENTING PUBLIC REGISTRIES INCLUDE THE UK, UKRAINE, GHANA, AND INDONESIA.

In addition, it has been announced that the BO registers in British overseas territories (e.g. Cayman Islands) will be public by 2023.

There are arguments on both sides when it comes to public vs. non-public BO registers, and although the trend is towards more rather than less transparency, it is important to consider all the complications and consequences of making BO data public in order to ensure that the risks are appropriately mitigated.

It is not clear that this analysis has been carried out in South Africa.

2.4. CORRUPTION CASE STUDY

Corruption can come in many forms, and South Africa has suffered from many of these over the years, despite being widely regarded by many as the leading African liberal democracy.

Recent focus has been on the issue of state capture, and events under the previous president, Jacob Zuma. A month after Zuma was removed from office, the Judicial Commission of Inquiry into Allegations of State Capture launched its public hearings, led by then Deputy Chief Justice Raymond Zondo. It ran for nearly four years, with a mandate to “investigate allegations of state capture, corruption, fraud, and other allegations in the public sector including organs of state.”

It had three key areas of focus:

- State capture,
- President Zuma’s links to the Gupta family, and
- Misappropriation of state funds and abuse of power.

The fifth and final report of the Zondo Commission was delivered on 22 June 2022.

Evidence and examples of corruption, illicit enrichment, and state capture extending to nearly 5 500 pages identified multiple cases where secrecy of interests or influence were critical.

Although BOT alone would not have prevented this corruption, it would have created a significantly more challenging environment for those attempting to use shell companies, disguise conflicts of interest, and misappropriate money. All of the criminal activity during the state capture period was at least in part facilitated by secrecy.

3 INTERNATIONAL

DRIVERS OF BOT

The advantages of identifying the ultimate owners of companies have long been recognised at a global level, but individual government efforts to introduce BO registers are a relatively recent development. In the late 1990s and early 2000s, BO was seen as a tool in fighting organised crime and corruption and especially in tracing the financial gains from such crimes.

In 2014, Ukraine became the first country to legislate for a publicly available register of beneficial owners of companies and in 2016, the UK became the first country to implement a public BO register. This was years after the United Nations (UN) enforced its Convention Against Corruption in 2005, calling on participating governments to identify "natural persons involved in the establishment and management of corporate entities" (Article 12.2.c). This convention, negotiated by the UN's Office on Drugs and Crime, had its origin in UN General Assembly resolution 55/61 of 2000.

Two trends propelled BOT up the international agenda. One was the fallout from the 2007-2008 global financial crisis. The second trend was growing appreciation of the potential of national extractive industries to help transform developing economies and remove obstacles to achieving that transformation.

The financial crisis of 2007-2008 and the subsequent recession in many countries caused further attention on BOT from governments, regulators, and international organisations, beyond its contribution to help combating organised crime. Recession-hit governments sought to maximise revenues and looked to close tax avoidance loopholes and crack down on tax evasion. These governments came to view BOT as a tool in improving tax collection. The importance of mobilisation of tax resources for effective development also received greater attention, resulting in the 2015 Addis Ababa Initiative launched by more than 30 countries.

By 2009-2010, extractive industry transparency had featured on the international policy agenda for around 10 years and pressure was growing for further measures. As well as initiatives such as EITI, which had been in place since 2003, civil society organisations were pressing for transparency legislation. In the US, the 2010 Dodd-Frank Wall Street Reform Act included clauses imposing project-by-project tax reporting on extractive companies. In 2013, the EU imposed similar legislative requirements.

In the same period, there was growing realisation amongst those involved in the transparency debate that reporting tax payments was insufficient to improve governance in the extractive sector and avoid leakage of value through tax avoidance or evasion.

In June 2013, during the UK's presidency of the G8, then British prime minister David Cameron spoke of the "golden thread" of trade, tax, and transparency, and specifically referenced BO:

> *It also means transparency about who owns which companies and who benefits from it – so called beneficial ownership.*[4]

It was not only the G8 that was focusing on this issue; the G20 was also promoting BO. At its 2013 meeting in St Petersburg, the G20 recognised the role of BO: ***"We encourage all countries to tackle the risks raised by the opacity of legal persons and legal arrangements".***[5]

The following year, at its meeting in Brisbane, Australia, the G20 issued its High-Level Principles on Beneficial Ownership Transparency. Also in 2014, FATF issued its Guidance on Transparency and Beneficial Ownership. This guidance supported R24 and R25 in its international standard on combating money laundering, used by many countries as the basis for incorporating BO requirements into anti-money laundering laws (see below, section 3.1).

The EITI used the FATF guidance to inform its own BO definition and guidance. In December 2014, the EU agreed on updated anti-money laundering legislation that obliged each member state to introduce a BO register (see below, section 3.3).

3.1. FINANCIAL ACTION TASK FORCE (FATF)

FATF was established in 1989 by the G7 as part of efforts to combat money laundering and the financing of terrorism (AML/CFT), and this remains FATF's primary area of focus. FATF sets standards, develops policies, and provides advice. It does not have law-making or law-enforcing powers, and is not underpinned by an international treaty or similar agreement but is open to membership from countries and regional organisations.

At its core sit FATF's 40 recommendations setting out standards for anti-money laundering and combating terrorism financing.

[4] Speech at G8 Open for Growth event, 15 June 2013

[5] Tax annex to the St Petersburg G20 Leaders' Declaration, September 2013

The prevailing recommendations initially date from 2012 and have since been updated periodically, most recently in March 2022. This update included a revision to R24 on beneficial ownership, which saw stronger language on a central register and emphasis on a multi-pronged approach to ensuring that accurate BO information is available to law enforcement in a timely manner.

FATF is expected to issue guidance on implementation of R24 in late 2022 or early 2023.

FATF's recommendations have become the international benchmark in the areas of anti-money laundering and combating terrorism financing. Its policy recommendations have been adopted by many countries — including those beyond its immediate membership — and have formed the basis for policy in other bodies.

FATF or its regional bodies evaluate the compliance of countries with the FATF recommendations and rate countries as non-compliant, partially compliant, largely compliant, or compliant with each recommendation. Counties are also assessed as to the effectiveness of those measures in combating AML/CFT under its 11 immediate outcomes.

R24 and R25 cover the BO of legal entities, trusts, and other legal arrangements. The effectiveness of a country's measures to address these recommendations will also be evaluated under Immediate Outcome 5 (IO5). Countries can achieve technical compliance on R24 and R25 but achieve a low rating for effectiveness under IO5, so it is important to consider measures to demonstrate effectiveness.

According to FATF, countries should:

- Conduct a risk assessment on the abuse of legal entities and legal arrangements for money laundering or financing terrorism,
- Ensure that there is adequate, accurate, and current information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities,
- Where they have legal persons that are able to issue bearer shares or bearer share warrants, or which allow nominee shareholders or nominee directors, they should take effective measures to ensure that they are not misused for money laundering or terrorism financing,
- Consider measures to facilitate access to beneficial ownership and control information by financial institutions and designated non-financial businesses and professions, and
- Ensure that either information on the beneficial ownership of a company is obtained by that company and available at a specified location in their country; or can be otherwise determined in a timely manner by a competent authority.

In order to meet such recommendations, countries should use one or more of the following mechanisms:

- Requiring company registries to obtain and hold up-to-date information on the companies' beneficial ownership (the registry approach),
- Requiring companies to obtain and hold up-to-date information on the companies' beneficial ownership or requiring companies to take reasonable measures to obtain and hold up-to-date information on the companies' beneficial ownership (the company approach), and
- Using existing information (the existing information approach). In practice, this means relying on information obtained by financial institutions or other regulated entities as part of their customer due diligence, or information held by other competent authorities or stock exchanges.

FATF does not specify the application of a reporting threshold, but it does suggest that a threshold of 25% or lower would be indicative of a compliant regime.

3.2. OPEN GOVERNMENT PARTNERSHIP (OGP)

OGP has played a role in placing BOT on the public policy agenda in several African countries, including South Africa. Governments and civil society organisations came together in 2011 to form the OGP and promote transparency, inclusiveness, participation, and accountability in government. Membership is open to national and local governments as well as civil society organisations. There are 78 national government members, including South Africa and 13 other African countries. There are also 76 local government members including Makhanda in South Africa and another 13 local governments from across Africa, as well as several thousand civil society members.

At the heart of OGP are action plans (at national and local level). These are developed by government in consultation with civil society, in a process that OGP terms "co-creation", and are subject to a quality assurance process known as "the independent review mechanism".

The action plans cover a two-year time period and include a number of commitments for improving transparency, inclusion, participation, and accountability.

Open Government Partnership

BOT is one of the focus areas for OGP and features in the action plans of a number of African countries, including South Africa (see below, section 4.3 for more details).

While OGP has played a role in creating awareness of BOT, its impact on the implementation of effective BO reporting regimes is less clear. There are a number of examples where BO commitments in OGP action plans have not been implemented on time or at all. This includes South Africa (see below).

The reasons for this low impact include lack of legislative imperative, insufficient resources dedicated to implementation, and low levels of interaction with the private sector. Companies (the providers of BO information and an important user group) are not formally part of the OGP structure.

3.3. EUROPEAN UNION (EU)

The EU has acted as a key driver of BOT. In 2015, it passed the fourth anti-money laundering directive (AMLD4) which obliged all member states to establish BO registers for both companies and trusts. The fifth such directive (AMLD5), passed in 2018, amended that obligation to require public registers by 2020. Implementation by member states is patchy and not all EU members have yet met the obligation. However, the obligation has set a benchmark for international best practice. In addition, the EU offers technical assistance to non-members to improve their AML measures including BO registers.

AMLD4 obliges member states to establish a central BO register but does not prescribe what BO information that must be collected. However, anyone with a legitimate interest must be able to access at least:

- Name,
- Month and year of birth,
- Nationality,
- Country of residence,
- Nature of control, and
- Size of interest

Although AMLD4 does not have a specific beneficial ownership requirement for PEPs beyond the general reporting requirement, other elements of the directive refer to politically exposed persons, and therefore it includes a PEP definition.

As well as introducing the obligation to make the register public, AMLD5 also requires that the register of trusts be accessible to anyone who has a legitimate interest (therefore not freely available to the public). AMLD5 also requires that the member states' BO registers are interconnected.

AMLD4 and AMLD5 do not set out a specific verification process but oblige companies to ensure that information is accurate. Under the process for transposing EU directives into national law, it is up to each member state to set the penalties for non-compliance.

European Union

3.4. THE EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI)

Since its launch in 2003, EITI has become a benchmark for transparency in the extractives sector, and the EITI Standard has provided a clear framework for that transparency. The EITI Standard 2013 introduced a recommendation on disclosure of BO information, and after two years of pilot studies, the EITI Standard 2016 introduced a BO reporting requirement. Currently, Requirement 2.5 of the EITI Standard 2019 requires all EITI implementing countries to collect and publish the beneficial ownership of all companies holding, operating, or bidding for extractives licences.

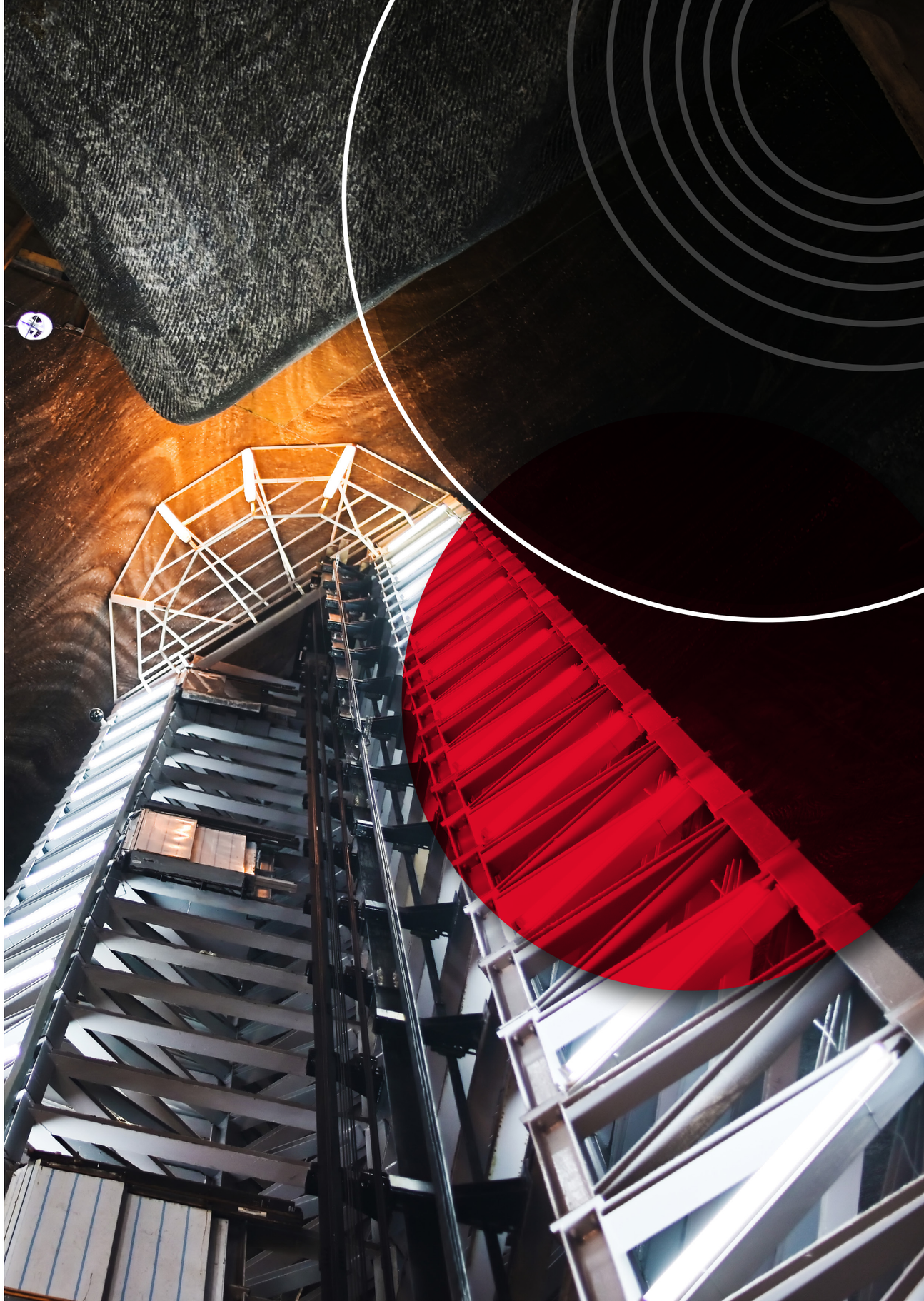
Although the EITI Standard does not prescribe a detailed BO definition for use by countries, it sets out, along with its supporting guidance, some clear criteria which the definition should meet:

- A beneficial owner of a company means the natural person(s) who directly or indirectly ultimately owns or controls the corporate entity,
- This applies to corporate entity(ies) that apply for or hold a participating interest in an exploration or production oil, gas, or mining license or contract and should include the identity(ies) of their beneficial owner(s), the level of ownership and details about how ownership or control is exerted,
- The definition should also specify reporting obligations for politically exposed persons,
- Publicly listed companies, including wholly owned subsidiaries, are required to disclose the name of the stock exchange and include a link to the stock exchange filings where they are listed,
- Information about the identity of the beneficial owner should include the name of the beneficial owner, the nationality, and the country of residence, as well as identifying any politically exposed persons. It is also recommended that the national identity number, date of birth, residential or service address, and means of contact are disclosed, and
- EITI also recommends the adoption of a reporting threshold for BO and has identified 5% to 25% as the appropriate range of thresholds.

EITI requires the multi-stakeholder group in an implementing country to consider the local context, existing reporting requirements, and the nature of the extractives sector in adopting an appropriate scope and definition of BO.

The EITI Standard requires implementing countries to report on an annual basis, and for these reports to include BO information. However, more recently there has been a move toward the systematic disclosure of EITI information, meaning that countries are increasing the amount of data automatically made available on a real-time basis. But in general, BO information remains an annual data collection and publication process at present within the EITI world.

Extractive Industries Transparency Initiative



4

BOT COUNTRY

CASE STUDIES

4.1. UK

The UK has demonstrated significant global leadership on BO, and BOT is a central part of the government's anti-corruption strategy. In 2016, the UK launched a register of people with significant control"[6] over companies and other relevant legal persons, which was the first freely accessible economy-wide public register of company beneficial ownership worldwide.

The regulations require each company to maintain a register of its beneficial ownership, to submit that information to Companies House (the UK company register), to report any changes within 14 days and to provide an annual confirmation that the information remains accurate.

The register has been widely used by companies (including SMEs doing customer and supplier due diligence), law enforcement agencies, and civil society. Concerns over poor quality of data resulted in the UK government consulting in 2019 on proposals to improve the accuracy of data on the register, including BO information. The overall aim is to give Companies House greater powers and a more proactive role in improving data quality.

The UK in August 2022 also introduced a register for foreign beneficial owners of real estate. Foreign registered companies who own real estate in the UK must register their beneficial owners with Companies House, which will maintain a public register of the information.

4.2. MONGOLIA

Mongolia has been selected as a case study country as, like South Africa, it has an economy heavily linked to the mining sector, and the sector has a well-established regime in place. Mongolia is a long-standing EITI implementing country, but has also made moves towards an economy-wide beneficial ownership regime.

Mongolia was an early implementer of BO reporting under EITI, first introducing it as part of producing its 2013 EITI annual report. In these early years the level of BO reporting was quite high, with 215 of 250 reporting companies then providing ownership details. However, this level of compliance has decreased over time, with only 291 out of 2093 companies provided at least some beneficial ownership information in the 2019 EITI. EITI Mongolia continues to collect and publish BO information as part of its annual reporting process.

Part of the reason for the current low level of reporting of BO is the lack of a legal obligation on companies in scope to comply.

[6] The term "Beneficial Owner" is not used in relation to the register to avoid a confusion with other UK legal terms.

The EITI model has relied on companies voluntarily reporting the information required, influenced by the EITI multi-stakeholder group. But in the absence of EITI requirements in legislation, there are limited sanctions EITI can apply to enforce disclosure. Work is ongoing in Mongolia on an extractives sector transparency law.

Moving beyond EITI, in March 2019 Mongolia amended its law to include BO data on the list of documents which legal entities are required to file on incorporation. The Law on Procedures to Implement the General Taxation Law was adopted at the same time. This introduced the legal obligation on legal entities incorporated prior to 1 January 2020 to disclose BOs. This BO data is collected in a central register, which is currently only available to government agencies such as regulators and law enforcement agencies. There are proposals for a right to information law which would make this data publicly available.

Mongolia's introduction of reporting obligations on BO formed part of its response to being placed on FATF's watchlist after its mutual evaluation.

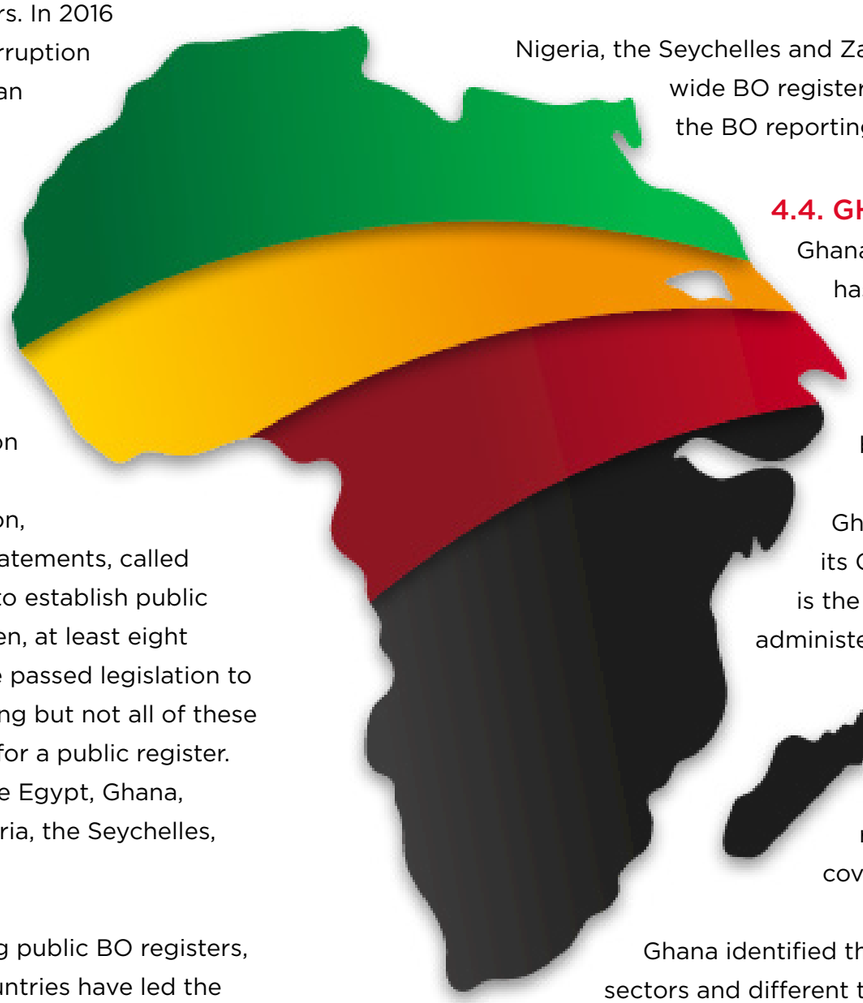
The key lessons to learn from Mongolia are:

- EITI can be an effective route into BO disclosure,
- EITI compliance may be limited where there is no legal obligation,
- An economy-wide regime must be supported by legislation, and
- FATF evaluations can drive reforms.

4.3. BOT IN AFRICA

BOT has risen up the public policy agenda in Africa in recent years. In 2016 at the London anti-corruption conference, four African countries – Ghana, Kenya, Nigeria, and Tanzania – made commitments to establish public BO registers. In 2018, the African Union declared the African Anti-Corruption Year and issued the Nouakchott Declaration, which among other statements, called on all member states to establish public BO registers. Since then, at least eight African countries have passed legislation to implement BO reporting but not all of these countries have opted for a public register. The eight countries are Egypt, Ghana, Kenya, Mauritius, Nigeria, the Seychelles, Tunisia and Zambia.

In terms of introducing public BO registers, EITI implementing countries have led the way. Four of the African countries that have legislated for BO reporting are EITI implementing countries: Ghana, Nigeria, the Seychelles and Zambia. Of these, Ghana is the first African country to implement a public BO register, having passed legislation in 2019 as part of amending its Companies Act. The Ghana legislation applies to the whole economy, not just the extractive sector.



Ghana's BO register became operational in mid-2020 with technical assistance funded by the British government.

Nigeria, the Seychelles and Zambia have also passed legislation to implement economy-wide BO registers but are still in the process of designing and developing the BO reporting regime.

4.4. GHANA

Ghana has been an EITI implementing country since 2007, but has more recently taken a leadership role on economy-wide public BOT in Africa, and has become the first to put a register in place. One of the prime drivers for this was Ghana's evaluation against the FATF requirements on beneficial ownership (R24 and R25).

Ghana legislated for BOT in 2019 through amendments to its Companies Act. Implementation of these amendments is the responsibility of the country's Registrar-General, which administers Ghana's corporate registry. In 2020, with the support of technical assistance funded by the British government, the Registrar-General introduced regulations to implement the legislation and started the process of companies reporting their beneficial owners. The BO register is accessible to the public on payment of a fee to cover the Registrar-General's costs.

Ghana identified that the risk profile associated with different business sectors and different types of beneficial owner are not all the same, and so the regime should reflect this. As a result, there are reporting thresholds set out in the regulations. For example, a company must report any foreign PEP who is a beneficial owner of any entity registered in Ghana with a threshold is 10%, whereas a domestic Ghanaian PEP must report any beneficial ownership, however small.

4.5. ZAMBIA

Zambia is a resource-rich country and a major producer of copper, gold, and coal, with mineral exports accounting for 77% of total exports, according to the 2019 EITI report. The country joined EITI in 2009 and was one of 11 countries that took part in EITI's BO pilot project in 2013-15. Zambia is in the process of implementing its EITI BO roadmap and has included BO disclosure activities undertaken in its latest EITI report as of 31 December 2019.

In November 2017, the country legislated for BO disclosure in the Companies Act 10 of 2017 but has yet to implement the legislation in full. This legislation includes a beneficial owner definition with a reporting threshold of 25% and applies economy-wide.

The information that will be collected under Zambia's 2017 Companies Act will be:

- Name,
- Date of birth,
- Nationality,
- Country of residence,
- Residential address,
- Service address, and
- Nature of the beneficial ownership and level of voting rights.

Although Zambia's EITI roadmap contains a suggested definition for PEPs, this has not been implemented either by Zambia's EITI or in the amended Companies Act. Disclosure of PEPs is not yet required as part of the reporting process.

Under the Companies Act, a Zambian-registered company will be obliged to maintain a register of its beneficial owners and report that information to the Patents and Companies Registration Agency, which will maintain a public register. This register will be accessible for a fee. Companies will also have to provide BO information for free on request by a member of the public.

As in other EITI countries where there has not been a legal obligation to publish, Zambia's EITI has experienced challenges in obtaining BO information as part of its EITI reporting cycle. Zambia's EITI has attempted to include BO reporting as part of its annual reporting since the 2013 report. In addition, in 2015 it issued a separate BO report. However, the response rate to the request for information was low. For the 2015 report, 10 out of 30 companies in scope provided a full response on their beneficial owners.

The 2017 Companies Act does not contain a specific verification process for BO information. Companies are under an obligation to ensure that information provided is accurate. False declarations and failure to provide information are criminal offences, punishable by fines and prison terms. For its BO reporting, Zambia's EITI relied on companies self-reporting and confirming that the information supplied was accurate.

5

CURRENT BOT SITUATION IN SOUTH AFRICA

South Africa has the opportunity to design and implement an effective BO reporting regime and provide leadership on BOT both in Africa and globally. However, the current situation suggests there is considerable work to be undertaken to capture this opportunity.

As a starting point, transparency is enshrined in South Africa's Constitution [7]. Section 32 states that: ***"Everyone has the right of access to any information held by the State."***

The country made one of its earliest commitments to BOT in its third OGP action plan for 2018-2020. It has re-affirmed this commitment in the current (fourth) action plan for 2020-2022. However, these commitments were described in an OGP independent review as "vague and do not include clear activities or actionable milestones, making their potential for results impossible to predict or verify". [8]

The country has recently undergone a mutual evaluation by the regional FATF affiliate, the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG). The mutual evaluation report (MER) was published in October 2021. South Africa was rated "partially compliant" for R24 and R25 and was given a "low" rating for IO5. In the executive summary, the MER stated, ***"Obtaining of adequate, accurate and current BO information compared to basic, also varies but in the majority of cases it is not easily available and when available, it often takes a long time to obtain. The authorities could not demonstrate that they apply sanctions for failure to comply with information requirements."*** [9]

[7] https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1
[8] https://www.opengovpartnership.org/documents/south-africa-action-plan-review-2020-2022/
[9] South Africa Mutual Evaluation Report, ESAAMLG, October 2021

The experience in other jurisdictions is that the findings in a FATF MER drive reform in the country, as FATF ratings can impact on credit ratings and the country's reputation amongst investors and financial institutions. In some cases, FATF evaluations can even lead to countries being placed on FATF's list of Jurisdictions under Increased Monitoring.

In the meantime, the government is moving ahead with legislation to create a legal obligation on companies to report their BO. On 1 October 2021, the DTI invited public comment on the draft legislation, requiring responses by 31 October. The Consultants supported Corruption Watch in preparing a written response to this invitation, which can be found in Appendix 4. In mid-August, the government announced that they would publish, in the third quarter of 2022, a bill to strengthen AML measures, including enhancing BOT.

This bill would amend five relevant existing acts:

- Trust Property Control Act, 1988,
- Non-profit Organisations Act, 1997,
- Financial Intelligence Centre Act, 2001,
- Companies Act, 2008, and
- Financial Sector Regulation Act, 2017.

THE STARTING POINT FOR BOT IN SOUTH AFRICA BRINGS OPPORTUNITIES BUT ALSO CHALLENGES.

South Africa has an effective and well-resourced agency in CIPC which already captures information on all registered companies.

5.1. THE ROLE OF BOT IN BBBEE

The concept of broad-based black economic empowerment (BBBEE) was developed during the early 2000s and set out in the Broad-Based Black Economic Empowerment Act (Act 53 of 2003).
It is a programme intended redress the historical disadvantages faced by black people as a result of inequalities under the apartheid system. It provides a framework for encouraging businesses to diversify their workforce, support businesses owned and run by black South Africans, and provide support to poor black communities.

Businesses can be awarded a BBBEE certificate which impacts on their opportunities to win government contracts. Certificates are awarded based on a points system, with a total of 105 available. Out of these, 25 points relate to "ownership" and 15 to "management control" of the company, so these measures are important to companies seeking to gain a certificate.

For that reason, some businesses have attempted to claim greater black involvement in ownership and management than actually exists. This can be through the use of shell companies, nominee arrangements, or other opaque structures. BOT can be a valuable tool in addressing this form of corruption.

Verified information on the real owners and controllers of companies could provide additional governance around the allocation of BBBEE points and ultimately certificates.

However, to achieve this, the BOT regime would need to collect data on ethnicity, race and gender. Also, the BOT regime would need to cover all forms of legal person, including co-operatives.

the dti
Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

BBBEE

5.2. PHASED IMPLEMENTATION

Countries introducing BOT frequently take a phased approach. This phasing can be based on more than one variable, such as:

- Entity size – requiring larger businesses with greater resources and potentially greater risk to report first, with smaller businesses having a later implementation date; or
- Sectors – requiring businesses in higher risk sectors such as extractives to report first. Extractives is clearly a high-risk sector in South Africa.

Either of these approaches would work. The benefit of a phased approach is to allow those managing the register to develop hands-on experience from initial implementation and further integrate key learning and lessons to design a more robust BOT system. It also allows for awareness raising and training of reporting entities to be phased and targeted.

The other option for phasing, and one which is being considered in South Africa, is to start with the BO register being accessible to government agencies and law enforcement, with a move to a public register at a later date. This has the advantage that any early issues with data quality can be addressed without undermining the credibility of the register. The UK register faced criticism for having obviously incorrect data, and it has taken a lot of effort to build confidence in the system.

However, in the wake of state capture there is public impatience for greater transparency. Any delay in making BO data publicly available may be seen as an attempt to hide ongoing corruption.

5.3. COMPLIANCE BURDEN

It is clear that any BO regime brings with it some compliance burden, and some have suggested that the burden arising from the proposed new BO regime in South Africa is significant, and perhaps so significant as to be a disincentive to foreign investors.

In breaking this down, it is important to start by understanding what the burden really is.

In most cases the introduction of a register of BO does not mean that a company will need to consider its BO, having never done so before. Many countries have introduced AML/CFT rules which require obliged entities (banks, lawyers and accountants) to establish the BO of any prospective client before taking them on. They are also usually obliged to revisit that BO status on a regular basis.

So, any South African-registered business which has a bank account, a lawyer, or an accountant will need to have considered this question already. The exact rules and reporting thresholds may be different, but the concept remains the same.

Secondly, there is the scale of that burden. Many companies are directly owned by natural person shareholders, making the identification of BO very straightforward. Other companies may have to look through a holding company to find the beneficial owners. Of course, some companies sit at the bottom of much more complex structures, with layers of holding companies in different countries before you get to any natural persons.

For these companies there may be more effort involved in ascertaining BO, but companies with complex ownership structures pose a higher risk of corruption or other financial crime.

If South Africa makes the BO register publicly accessible there is a benefit to those same companies which potentially significantly exceeds the burden. Those companies will then have access to the BO data on every other company, allowing them to undertake high-level due diligence on customers, suppliers, and even competitors which would otherwise be prohibitively expensive.

5.4. PROTECTION OF PERSONAL INFORMATION ACT

South Africa's Protection of Personal Information Act (POPIA) took effect on 1 July 2020 and enforcement began on 1 July 2021. POPIA is intended to protect personal information from misuse, in a similar way to the GDPR rules introduced in the EU. Indeed, POPIA closely resembles GDPR in many ways.

When EU member states were starting to work on implementing public BO registers, as required under AMLD4, some commentators claimed that GDPR and BOT are incompatible, with public access to BO data being in breach of the privacy protections afforded by GDPR. This debate continued until the EU BO regime was fine-tuned under AMLD5, when a specific carve out was established to remove any potential conflict.

However, things are not quite as straightforward in South Africa with POPIA. Firstly, POPIA specifically includes companies in scope, whereas GPDR focuses on information relating to individuals. Also, there is not currently the same carve out in either POPIA or the proposed amendments to the Companies Act.

So there remains a potential issue with a public BO register in South Africa being at odds with POPIA.

5.5. THE PRIVATE SECTOR VIEW

As the suppliers of BO data, private sector businesses are a key stakeholder group. The types of businesses reporting their BO vary significantly, from owner-managed businesses to large multi-national groups. And the views of those businesses on BOT are equally varied.

Some companies see BOT as a positive. They take the view that measures to improve governance and create a level playing field for business create a better environment for growth, and reduce the risk of corrupt or anti-competitive behaviour.

This support becomes greater when there is a use case for the private sector, when BO data is made public and allows businesses to carry out their own high-level due diligence. This business use case for BO remains poorly understood by many. Large businesses have established due diligence processes and may not have considered the use of public BO data. Smaller businesses need to understand the type of data which can be available and how to use it. But the use case is certainly there, as can be seen from the UK where the largest user group of the UK BO register is small and medium sized enterprises.

However, private sector support is not universal. There are also those in the business community who see BO transparency as purely an administrative burden which adds to the existing long list of obligations placed on businesses. Some see the imposition of further administration as undermining efforts to make South Africa an attractive destination for inward investment.

Ease of doing business clearly is important, but it could be argued that better governance and anti-corruption measures will attract the right sort of businesses and dissuade those South Africa might not necessarily be looking to attract.

Further, there are businesses which have concerns about providing private information about those who own or control businesses. There are concerns that this information could place those individuals and their families in personal danger. This is a valid concern, and public BO registers need to consider the risk of identity theft or to personal safety when designing their regime.

There are also mixed views as to whether BO data should be submitted to a central register. Some view this as unnecessary, and that businesses should only be obliged to submit BO data when there is a genuine concern about the existence of corruption or other crimes.

It is important that the views of private sector businesses are taken into account in designing and implementing an effective BO regime. However, it is also important that those business views are based on a clear understanding of what BOT means, the implications, and use case.

6 FINDINGS

- South Africa has made significant progress on BOT, and although there are flaws in the current legislative proposals, the fact that South Africa is embedding BO in law is an important step.

- There is a possibility that the current efforts will move towards a non-public register of BO, which although it will provide important information to law enforcement agencies investigating corruption, will do nothing to increase public understanding of the real owners of businesses.

- In addition, a non-public register takes away any use case for the register for potential private sector users.

- There does not appear to have been any systematic evaluation of the relative merits of a public vs non-public BO register.

7 RECOMMENDATIONS

1. The government of South Africa should implement a BOT regime that meets international best practice. This should provide a robust definition, and include all types of legal entities in scope, minimal exemptions, a strong verification process, and a public register that is free to access.

2. The government of South Africa should conduct a strategic communications campaign to build awareness of the rationale and benefits from a BO regime with all relevant stakeholders, particularly the private sector.

3. Corruption Watch should continue to monitor closely the government's proposed legislation on BO and its passage through the legislative process.

4. Corruption Watch should build an alliance of CSOs to advocate for BOT and press for South Africa's BO regime to meet international best practice, including a public register that is free to access.

5. Corruption Watch should engage with the private sector to harness its support for BOT and undertake an engagement campaign to build awareness of the benefits of BOT for companies.

6. Corruption Watch should engage with OGP to ensure commitments on BOT are meaningful and are implemented.

APPENDIX 1

THE EITI STANDARD 2019 – REQUIREMENT 2.5

2.5 BENEFICIAL OWNERSHIP

a. It is recommended that implementing countries maintain a publicly available register of the beneficial owners of the corporate entity(ies) that apply for, or hold a participating interest in an exploration or production oil, gas or mining license or contract, including the identity(ies) of their beneficial owner(s), the level of ownership and details about how ownership or control is exerted. Where possible, beneficial ownership information should be incorporated in existing filings by companies to corporate regulators, stock exchanges or agencies regulating extractive industry licensing. Where this information is already publicly available, the EITI Report should include guidance on how to access this information.

b. Implementing countries are required to documents the government's policy and multi-stakeholder groups discussion on disclosure of beneficial ownership. This should include details of the relevant legal provisions, actual disclosure practices and any reforms that are planned or underway related to beneficial ownership disclosure.

c. As of 1 January 2020, it is required that implementing countries request, and companies disclose, beneficial ownership information. This applies to corporate entity(ies) that apply for, or hold a participating interest in an exploration or production oil, gas or mining license or contract and should include the identity(ies) of their beneficial owner(s), the level of ownership and details about how ownership or control is exerted. Any significant gaps or weaknesses in reporting on beneficial ownership information must be disclosed, including naming any entities that failed to submit all or parts of the beneficial ownership information. Where a country is facing constitutional or significant practical barriers to the implementation of this requirement by 1 January 2020, the country may seek adapted implementation in accordance with Article 1 of the EITI Board's procedures for oversight of EITI implementation.

d. Information about the identity of the beneficial owner should include the name of the beneficial owner, their nationality, and their country of residence, as well as identifying any politically exposed persons. It is also recommended that their national identity number, date of birth, residential or service address, and means of contact are disclosed.

e. The multi-stakeholder group should assess any existing mechanisms for assuring the reliability of beneficial ownership information and agree an approach for corporate entities within the scope of 2.5(c) to assure the accuracy of the beneficial ownership information they provide. This could include requiring companies to attest the beneficial ownership declaration form through sign off by a member of the senior management team or senior legal counsel, or submit supporting documentation.

f. **Definition of beneficial ownership:**

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

ii. The multi-stakeholder group should agree an appropriate definition of the term beneficial owner. The definition should be aligned with (f)(i) above and take international norms and relevant national laws into account, and should include ownership threshold(s). The definition should also specify reporting obligations for politically exposed persons.

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

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

g. Implementing countries and multi-stakeholder groups should also address disclosure of legal owners and share of ownership.

APPENDIX 2

SOUTH AFRICA MUTUAL EVALUATION REPORT OCTOBER 2021

RECOMMENDATION 24 – TRANSPARENCY AND BENEFICIAL OWNERSHIP OF LEGAL PERSONS

In its previous MER, South Africa was rated NC with this requirement. The major deficiencies were that there were limited measures to ensure adequate, accurate and timely information on beneficial ownership and control of legal persons which could be accessed in a timely way by competent authorities. Since then, a new Companies Act has come into force – see chapter 1.

Criterion 24.1 – South Africa has mechanisms that identify and describe the different types, forms and basic features of legal persons formed and created in South Africa (Companies Act No 71 of 2008, s.8). The kind of documents and information they must file with the CIPC is described in s.13 and Reg.14 of the Regulations to the Act. The Act also provides a process for foreign companies to transfer their registration from a foreign jurisdiction to be incorporated in South Africa (s. 13(5), (6)). This information is also publicly available on the website of the CIPC[10]. However, information which can be obtained at the CIPC offices and on its website on processes of creating legal persons only covers basic information and no processes for obtaining and recording of BO information are covered.

Criterion 24.2 – South Africa has not assessed the ML/TF risks that all types of legal persons created in the country are exposed to. The nearest exercise was focused on transparency of BO and it did not consider ML/TF risks.[94]

Criterion 24.3 – Legal persons created in South Africa must be registered with CIPC (Companies Act, ss.13 and 14). The form to incorporate each type of company requires who incorporated it, the company name, the number of directors, the number of authorized shares, and the objects and powers (Companies Act Regulation, Reg.15). Full details of the directors are required (s.13(1) as read with. Reg.14, Form CoR 14.1). The CIPC assigns the company a registration number; enters information about the company from the incorporation forms in the companies register (s.14(1)); and issues the company a registration certificate. Companies must maintain an office in South Africa, provide the address of the registered office to the CIPC, and notify the CIPC about any changes of the registered address (s.23(3)(b) as read with Reg.21). All the information entered in the companies register is publicly available at the CIPC and on its website[11].

Criterion 24.4 – Companies must maintain the information required by this criterion (ss.24, 36, 37 and 50) within South Africa and must notify the CIPC of the location where the information is maintained or can be accessed, if not at the company's registered office (s.25).

Criterion 24.5 – There are some mechanisms to ensure that some of the information referred to in c. 24.3 and c.24.4 is accurate and up to date. Companies must file annual returns at the CIPC confirming the status of the information previously provided (s.33). They must also file notices with the CIPC when: the registered office changes (s.23(3)(b)(ii)) as read with s. 23(4)(a-b)); directors change (s.70(6) as read with Reg.39); there are changes to the class of shares the company can issue (s.36(4) as read with Reg. 15(3)); and changes in the location of where the company's records are accessible (s.25(2)(b)). However, there is no time limit for filing the latter. Securities registers on shareholding must also be maintained although there is no requirement for these to be kept up to date (s.50(1)(b) as read with Reg. 32). The CIPC is not obliged to verify for accuracy any of the information submitted to it but uses the DHA database (which it can access directly) to verify the ID information of company officials at the time of registration.

Criterion 24.6 – South Africa addresses the requirements under this criterion through option (c) (FIC Act, s.21B). Refer to c.10.10 and c.22.1 for detailed analysis. In addition, the FIC can obtain information from AIs (FIC Act s.27A) subject to the limitations to the scope of AIs (see Recs 10 and 22). Further, the FIC can request any person with a reporting obligation to provide information, including on BO information (FIC Act, s.27). The FIC then uses this information to determine with which FI, DNFBP, or VASP a legal person is a client and provides the information to LEAs who then can apply for a subpoena to compel provision of any BO information held (CPA, s.205). Not all persons with reporting obligations are AIs (including VASPs) and thus must obtain and maintain BO information. The above processes do not guarantee timely access to BO information by LEAs.

Criterion 24.7 – South Africa does not have a comprehensive mechanism to ensure that all legal persons keep accurate and up-to-date information on BO, including the CIPC. Other mechanisms, like keeping accurate and updated BO information through a BO register are also not available. Although, BO information obtained by AIs must be kept up-to-date and accurate (FIC Act, ss. 21C(b) and 21D), these do not cover all FIs and DNFBPs (see c.1.6). Where BO information can be obtained through share registers, any amendments to shareholding are supposed to be entered in the share register within ten days (s.36.4 as read with Reg.15(3)).

[10] www.cipc.co.za/index.php/access/disclosures

[11] http://www.cipc.co.za/index.php/access/disclosures

[94] *NRA for BO Transparency in SA.* A report prepared for the Government's Inter – Departmental Committee on BO Transparency, May 2018

Criterion 24.8 – Companies created in South Africa must have directors (s. 66) whose obligations to the company include having to comply with any lawful requests to provide basic and shareholder information from the securities register which in some cases could include BO information. Prescribed officers (essentially those with executive control) must also provide this information (Companies Act Reg. 38). However, nothing requires directors or prescribed officers to be resident in South Africa. Furthermore, the scope of BO information obtained would be very limited as companies are not required to collect and maintain BO information in their securities register; only information on legal ownership (Companies Act, s.50). DNFBPs providing such services, other than attorneys are not regulated for AML/CFT, therefore their co-operation with competent authorities might be limited. No other comparable measures are identified by the authorities.

Criterion 24.9 – AIs holding basic or BO information about companies must keep records for at least five years from the date of termination of the business relationship or from the date on which the transaction is concluded (FIC Act, s.23). There are no other requirements obliging either the CIPC or the companies to maintain records of a company for any period after it has been dissolved. While companies are obliged to keep records for at least seven years (Companies Act, s.24), the timeline does not apply to the period after the company was dissolved or otherwise ceased to exist.

Criterion 24.10 – Competent authorities, including LEAs have powers to obtain access to basic and, in theory, BO information. Basic information on legal persons is publicly available through the CIPC website (see c.24.3) meaning it can be accessed in a timely manner. Powers to obtain BO information through a company's securities register can only work to the extent that such information is available (see c.24.8).

Shareholder information requests can be lodged with the CIPC Disclosure Unit which may dispatch the documents electronically or if certified copies are requested, send the documents by mail, or physically. The CPA, NPA Act, and the POCA empower different competent authorities, including LEAs to compel production of information which may be relevant to an inquiry, or investigation (see details under R.31). These powers can be used to obtain both basic and BO information, in a fairly timely manner according to the authorities to the extent that such information exists. A summons pursuant to the NPA, s.28, specifies the date and time for the person's appearance and the process and procedure is determined by the DPP. A subpoena is generally granted immediately upon application. Once served, the served party is given a period specified in the subpoena to provide the information requested under oath or appear at a particular place on a specified date and time. Timelines for obtaining information using a subpoena vary from seven to ten days and in some cases, are longer and may need to be repeated several times to get to BO information. Therefore, timely access to such information is not always assured.

Criterion 24.11 – This is non-applicable as bearer shares or bearer share warrants are not recognized under the Companies Act.

Criterion 24.12 – A company's issued securities may be held by and registered in the name of one person for the beneficial interest of another person (Companies Act, s.56). Measures consistent with c.24.12(a) mitigate the risk of possible abuse of this type of security. These include: requiring the registered holder to disclose to the company the identity of the person on whose behalf a security is held; the identity of each person with a beneficial interest in the securities; number and class of securities held for each of the persons with beneficial interest and the extent of such beneficial interest (s.56(3)). This information must be disclosed in writing within five business days after the end of every month where a change has occurred in the identity information (s.56(4)(a)). Companies must keep a record of changes relating to identity of each person with a beneficial interest in the securities held in a register (ss.56(4)(a) and 56(7)(a)). Violations of these measures are an offense (see c.24.13). However, there is no requirement for the information to be filed with the registry. Nominee directors are recognized in South Africa and must comply with the requirements for directors under the Companies Act (ss. 66, 76, 77) and the common law practice of South Africa.

Criterion 24.13 – A range of proportionate and dissuasive administrative and criminal sanctions is provided for persons that fail to comply with the requirements under c.24.3, c.24.4, c.24.6, c.24.9 and c.24.12. These include sanctions under the Companies Act as well as the CPA and NPA Acts (for failing to provide requested information to competent authorities). Fines of up to R1,000,000 ($68,000) can be imposed as well as prison terms of up to 15 years, or both (Companies Act ss. 28(4), 171(1),(2), and (7), 175(1)(b), (2), and (5), 216; NPA Act, s.41, CPA s.189). AIs that fail to fulfill their obligations under c.24.6 and c.24.9 are subject to sanctions discussed under R.35. There are no sanctions for failure by a company to keep information at least for five years after it has dissolved (c. 24.9).

Criterion 24.14 –

a. Basic information is available to foreign competent authorities through the CIPC website (see c.24.4). Where information is required by a foreign country, a formal request by way of a subpoena issued through a Magistrates Court has to be made to the CIPC Disclosure Unit. It normally takes about ten working days to provide the information; longer if the file and documents related to the request are notreadily available. Thus, providing the information is not always predictable and timely. The Disclosure Unit does not have a formal MOU with any entity in respect of disclosures. and thus, this type of co-operation might not always be done in an efficient and timely manner (see Recs 37 – 40).

b. State disclosures for information relating to shareholding are requested electronically with a formal letter of request on the entity's letterhead attached or receipt of a subpoena in respect of a specific disclosure. Procedures of attending to international requests described in (a) above also apply to exchanging information on shareholding.

c. The FIU and FSR can obtain BO information on behalf of foreign counterparts (see R.40). The DPP and an Investigating Director, respectively, can summon anyone for information at a place, date and time specified by them (CP Act, s.205 and NPA Act, s.28) but these powers are only useful to the extent that the subject person possesses BO information and as already discussed the powers may not ensure that the information is provided rapidly.

Criterion 24.15 – South Africa does not have a clear mechanism for monitoring the quality of assistance received from other countries in response to requests for basic and BO information. The authorities consider factors such as whether the correct information was provided, whether it was adequate in terms of content and substance, and reliance on public information provided by some other jurisdictions to verify and validate information provided. However, this is not done in all cases as the authorities do not always have the requisite powers to share information (see R.40).

Weighting and Conclusion

South Africa meets some of the requirements but there are moderate deficiencies which remain. The ML/TF risks associated with the different types of legal persons have not been fully assessed and identified. BO information is not always timely available to competent authorities and there is still limited access to such information as not all FIs, DNFBPs and VASPs are subject to requirement to identify BO, and the BO information that AIs must hold suffers from limitations described in R.10. Some powers available to access BO information cannot obtain such information as the information is not required to be kept.

Recommendation 24 is rated partially compliant.

RECOMMENDATION 25 – TRANSPARENCY AND BENEFICIAL OWNERSHIP OF LEGAL ARRANGEMENTS

In the third Round of MEs, South Africa was rated NC with this requirement. The major deficiencies were that where a legal person was a founder, trustee or beneficiary, there was no obligation to obtain beneficial ownership information of the legal person and identification information on the founder and beneficiary was not verified by the trust register.

Criterion 25.1 – Both inter-vivos and testamentary trusts exist in South Africa and are mostly administered under the Trust Property Control Act, 1988 (TPC Act).

a. Inter-vivos trusts which have property present in South Africa must be registered with the Master (TPC Act, s. 4). However, none of the provisions in TPC Act give specific details as to who must be identified in the trust instrument and the kind of information which must be obtained by the trustee or must be part of the instrument at the time of lodging it for registration. Such duties can only be inferred based on the trustee's fiduciary duties under common law and statutory law in South Africa. Trustees designated as AIs (professional trustees95 or TSPs, FIC Act, sch.1) must comply with all due diligence measures intended to establish and verify the identity of the client or person either giving the instruction to create the trust, creating the trust or being appointed as trustee (FIC Act, s.21). Further, the requirement to keep the information current is not met.

b. There are no requirements on any trustees to hold information on agents and service providers to the trust.

c. Professional trustees, who are AIs must maintain information for at least five years from the date that their involvement with the trust ceases (FIC Act, s.23, also see c.11.1 and c.11.2). However, the information would not cover other natural persons who might be exercising ultimate effective control over the trust, nor information on agents and service providers to the trust.

Criterion 25.2 – Professional trustees who are AIs (see c.25.1(b)) must keep information which they obtain up to date and accurate (FIC Act, s.21D). However, this obligation does not extend to other trustees.

Criterion 25.3 – There are no explicit measures to ensure that trustees disclose their status to FIs and DNFBPs when forming a business relationship or carrying out an occasional transaction above the threshold. However, on the basis that trustees must deposit money they receive as trustees into a trust account in a bank (TPC Act, s.10), they must disclose their status to the bank when they open the trust account. The requirement does not apply to other FIs, DNFBPs, or VASPs.

Criterion 25.4 – There are no legal restrictions to prevent trustees from providing competent authorities with any information relating to a trust; or from providing FIs, DNFBPs, and VASPs, upon request, with information on the beneficial ownership and assets of the trust to be held or managed under the terms of the business relationship.

Criterion 25.5 – Competent authorities, in particular, LEAs have powers to obtain access to any information on trusts held by professional trustees and other AIs. However, the processes available to LEAs to access BO information do not always ensure timely access to such information. Trustees, who are not AIs, are not required to collect BO information (see c.25.1). The information available from other AIs having trusts or trustees as clients, is subject to the deficiencies identified under c.10.11. A FIC authorized representative can also access records kept by an AI to obtain further information to a report made to the FIC. Other powers to obtain timely access to information held by trustees, and other parties on the beneficial ownership and control of trusts exist under the FIC Act, the CPA, the NPA Act, and the POCA (see c.24.10). VASPs are not AIs and are not required to obtain and hold BO information.

Criterion 25.6 – South Africa has mechanisms to provide international cooperation for information on trusts but these mechanisms do not guarantee rapid provision of the information:

a. South Africa has mechanisms to provide international cooperation for basic information on trusts. Some information on trusts can also be obtained on the Master's website. However, not all basic information is collected and maintained by the High Court. Information on trusts can be formally requested and obtained through MLA from the DoJ&CD, which is the central authority for such requests, but the information is not always provided rapidly (see R.37 & 40).

b. Information can be exchanged by financial sector regulators, or designated authorities using mechanisms described in R.37 and R.40. Information on trusts can also be obtained through counterpart to counterpart requests: foreign FIU to FIC which may obtain information from AIs (FIC Act, s.40(1)(b),).

c. The SAPS can use its investigative powers under domestic law to obtain, on behalf of foreign counterparts, BO information on trusts, to the extent it is available, using the mechanisms described under R.37 and R.40. But this may not always result in rapid provision of the information.

Criterion 25.7 – Professional trustees that are TSPs are subject to sanctions under the FIC Act for non-compliance with requirements discussed under c.25.1(a) and (c), (see R.35). No administrative or criminal sanctions are applicable to other trustees.

Criterion 25.8 – Sanctions described in c.24.13 also apply for failure to grant competent authorities timely access to trust information described in c.25.1 However, not all trustees must obtain and hold information required under c.25.1 and not all information required under the same criterion is covered. The process followed by LEAs in obtaining information (c.24.6), which would also apply to a trust, does not in itself confirm LEAs having timely access to the information, particularly on BO. Most of the sanctions provided in the FIC Act, NPA Act and CPA only apply for failure to provide information (NPA Act, s.41, CP Act, s.205) not failure to grant LEAs timely access to information (see c.24.13).

Weighting and Conclusion

There are to a moderate extent, deficiencies relating to professional trustees being required to obtain full information on BO when they are creating trusts and AIs not being required to obtain BO information of any other natural person exercising ultimate effective control over a trust. Absence of such a requirement affects almost all criteria to this Recommendation. There are limitations on sanctions applicable to non-professional trustees.

Recommendation 25 is rated partially complaint.

APPENDIX 3

LIST OF STAKEHOLDER ORGANISATIONS INTERVIEWED

1. Anglo American plc
2. Association of anglophone Africa Auditors General
3. Business Leadership South Africa
4. CIPC
5. EITI International Secretariat
6. Herbert Smith Freehills
7. Minerals Council South Africa
8. National Treasury
9. NRGI
10. Open Government Partnership
11. Open Ownership
12. Oxfam
13. Tax Justice Network
14. Who Owns Whom

APPENDIX 4

CORRUPTION WATCH SUBMISSION ON AMENDMENTS TO THE COMPANIES ACT

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SUBMISSIONS ON THE COMPANIES AMENDMENT BILL [B-2018]

("The Companies Amendment Bill, 2018")

Introduction

1. Corruption Watch ("CW") is a non-profit civil society organisation. It is independent, and it has no political or business alignment. CW intends to ensure that custodians of public resources act responsibly to advance the interests of the public. CW's ultimate objectives include: fighting the rising tide of corruption and abuse of public funds in South Africa; promoting transparency; and accountability to protect the beneficiaries of public goods and services.
2. CW has a vision of a corruption free South Africa, one in which educated and informed citizens are able to: recognise and report corruption without fear; where incidents of corruption and maladministration are addressed without favour or prejudice; and where public and private individuals are held accountable for the abuse of public power and resources.
3. As an accredited Transparency International Chapter in South Africa, core to our mandate is the promotion of transparency and accountability within private sector and state institutions in order to ensure that corruption is addressed and reduced through the promotion and protection of democracy, rule of law and good governance
4. CW therefore welcomes the opportunity to make submissions on the Companies Amendment Bill, 2021 (**the Bill**).
5. We note the series of amendments in the 2021 Bill are aimed at achieving three main policy objectives - improving ease of doing business in respect of certain administrative related provisions of the Companies Act; providing for greater transparency on wage ratios at firm level and addressing true or beneficial ownership of companies aimed at addressing money laundering challenges.
6. Our submission is focused on ***enhancing transparency and accountability within the new provisions related to beneficial ownership in light of the global effort to address corruption,***

anti-money laundering and financing of terrorism as well as on appropriate triggers for disclosure and the content of the disclosure.

7. We note that the Bill proposes the following new provisions on beneficial ownership;
   7.1. An explicit obligation on companies to know and disclose the identity of their true shareholders who hold a beneficial interest amounting to 5% or more of the total shares in a company.
   7.2. Recognition that ultimate beneficial ownership by an individual may be held either by a single nominee or through multiple nominees holding smaller levels of shares. Importantly however, that nominee shareholders are not beneficial owners.
   7.3. A clear distinction is made between on the one hand, the company requesting information from shareholders and the shareholder disclosing such information to the company; and on the other hand, the company reporting or publishing the beneficial ownership information.
   7.4. All beneficial ownership be requested by and disclosed to the company concerned, further, that the company in turn be required to report/publish shareholding information only in instances where persons in the aggregate, alone or together with other persons own 5% or more of the beneficial interests of the shares in a class.
8. While we welcome the above mentioned provisions, most critically that the Bill incorporates the international best practice of the 5% threshold for reporting beneficial ownership. Our concern however is that the proposed amendments do not go far enough to enable effective transparency. ***The provisions, if implemented in this form, will not lead to the design and implementation of an effective beneficial ownership reporting regime that would be in line with international best practice and anti-corruption aims.***
9. It is with this in mind that we submit that the Bill fails to make sufficient provisions for the advancement of key parts of its objectives to tackle the vulnerabilities of beneficial ownership opacity as an enabler to grand corruption. We unpack these vulnerabilities under the following headings:

   9.1. Ambiguous scope of beneficial owners/ship.
   9.2. Uncertainty regarding the Central Register.
   9.3. Reporting Regime and Disclosure.

Ambiguous scope of beneficial owners/ship

10. Our primary concern is that the provisions in the entirety of the Bill, and the proposed amendments seem to only apply to shareholders, or that beneficial ownership is defined as a natural person who exercises influence or control over shares. ***We submit that this is an inappropriate scope of beneficial ownership and does not take into consideration other forms of direct and indirect ownership and control or other corporate structures***.
11. We highlight the inclusive, legal definitions of a beneficial owner is imperative to ensuring that regulatory loopholes are not exploited and for policy to create an ease for competent authorities and entities with reporting obligations to understand and apply their legal responsibilities and obligations. Where beneficial ownership is defined by the percentage of shareholding as proposed it will not always correspond with the reality of control and ownership of a legal entity particularly the legal entities that pose high money laundering risks such as partnerships – which the Bill does not cover in the proposed amendments.
12. We note that section 56 recognizes the potential for illegitimate use of trusts to disguise ownership and trustees as beneficial owners. We welcome this provision as our research in the mining space illustrates the concerning growing trend in South Africa of mining right holders use of trusts to hide identities and ownership of assets, especially using trusts as a final step in a complex ownership chain of companies.[1] ***We submit that identifying the beneficial owners of trusts and the BO data of trusts or similar legal arrangements, or/and where they might appear in the ownership structure of a legal entity can help reveal a trust's control and ownership structure, as well as any companies contained within.***
13. Our concern however is that the Bill does not provide the definition or an identifying criterion for the BO of trusts. In practice all the parties to a trust have to be identified from the beginning when establishing the business relationship. Whereas thresholds commonly feature in

[1] https://www.corruptionwatch.org.za/wp-content/uploads/2021/08/3727-CW-FLOW-OF-BENEFITS-MINE-COMM-REPORT-SPRD-LINKS.pdf at page 21-23 last accessed 25 October 2021. See also https://transparency.org.au/wp-content/uploads/2020/10/TIA_EITI_Paper.pdf last accessed 26 October 2021.

definitions of BO of legal persons e.g. 5% or more voting rights or shares for companies - because of the nature of trusts and the difficulty in establishing who exercises ultimate control, or who ultimately benefits from the arrangement, no thresholds apply to trusts.

14. ***We submit that in order to ensure no beneficial owners are left undeclared, the Bill follow the FATF recognized approach and consider all parties to a trust as beneficial owners.***[2] The FATF approach requires that all parties to a trust should be identified and verified from the beginning, regardless of the proof of control.[3]
15. We do note that the area of BO in trusts is rapidly developing therefore the definition across the various jurisdictions vary which has the potential to cause some uncertainty in their application at a practical level. ***Our submission however, is that the Bill must include disclosure obligations that cater to situations where; trusts appear in the ownership structure of a legal entity; and companies appear in the ownership or control of a trust.***
16. We further note Clause 13 which proposes that a holding company can be a beneficial owner. ***We submit that a holding company cannot be a beneficial owner and guide the committee to best practice definitions which concludes that beneficial owners should be natural persons in the vast majority of competent jurisdictions.*** We submit that in the case of government-owned companies, stock exchange-listed and employee-owned companies, the Bill must include specific reporting requirements as discussed in the section below.

Ambiguous Provisions regarding the Establishment of a Central Register

17. The provisions do not make clear whether there is obligation to set up a central register. ***We submit that beneficial ownership registers or an alternative mechanism with equal efficiency are a standard requirement for any form of beneficial ownership transparency and the Bill must explicitly state this position.***
18. We submit that this is supported by the Financial Action Task Force (FATF) Recommendation 24 amendments on beneficial ownership and the most recent Interpretive Note[4] focused on strengthening the global standard on corporate secrecy.[5]
19. We note that the FAFT Recommendations do not require centralised registers and has 'encouraged' countries to make the registers public. However, we bring to the attention of the committee that while Recommendation 24 requires countries to ensure that competent authorities have access to adequate, accurate and up-to-date information on the true owners of companies operating in their country, the FATF standard does not prescribe how access to BO information should be guaranteed. Each country decides through which mechanism this objective will be achieved.
20. ***We submit that the numerous investigative reports and scandals[6] highlight the clear value of company ownership information on companies' real owners. This is most conveniently achieved through implementation of beneficial ownership registers.***[7] Our concern is that without regulatory certainty and elevating the minimum standard to address the grand corruption peculiarities within South Africa that enable anonymous companies to fuel corruption, tax evasion, and illicit financial flows more broadly, we submit that this will continue to have devastating consequences to citizens, the rule of law and democracy.
21. ***We further submit that requiring a public central register is considerably advantageous*** to the ability to access information quickly and effectively, enables ease of financial crime and investigations as it manages the tip off risks and does not alert potential suspects, enables scrutiny of the information for suspicious patterns, addresses inaccuracies or discrepancies and; a public register provides a public good that can contribute to lower due diligence and risk management costs for business.

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[2] Guidance on Transparency and Beneficial Ownership, FATF, (Paris: FATF), October 2014, 9, https://www.fatf-gafi.org/media/fatf/documents/reports/ Guidance-transparency-beneficial-ownership.pdf last accessed 23 October 2021.
See also See: FATF Recommendations 2012 (as amended in October 2020), Interpretive Note to Recommendation 10, 60; EU AMLD, Article 31(1).

[3] A similar provision has also been incorporated in the OECD, Standard for Automatic Exchange of Financial Information in Tax Matters: Implementation Handbook (2nd edn, Paris: OECD, 2018), para 266, which states that "the definition of [BO for trusts] excludes the need to inquire as to whether any of these persons can exercise practical control over the trust.

[4] https://www.fatf-gafi.org/publications/fatfrecommendations/documents/public-consultation-r24.html last accessed 26 October 2021.

[5] Ibid.

[6] https://www.icij.org/investigations/pandora-papers/about-pandora-papers-leak-dataset/ last accessed 25 October 2021.

[7] https://www.transparency.org/en/news/fatf-consultation-global-standard-company-beneficial-ownership-transparency-key-fixes last accessed 25 October 2021.

22. We further emphasise that while financial institutions – such as banks – and Designated Non-Financial Business and Professions (DNFBPs) – such as real estate agents, accountants and lawyers – play an important role in anti-money laundering and anti-corruption efforts as the information they collect as part of their compliance and due diligence work on the individuals behind the transactions is crucial for the authorities investigating financial crime. ***We submit that it is equally important to note the significant corruption vulnerability and limited scope for scrutiny to have financial institutions as the only source of beneficial information available to competent authorities.[8] We submit that financial institutions and banks must be seen as supplementary measures to a centralised beneficial ownership register in order to help ensure that beneficial ownership information is accurate, complete and authorities can access it in a timely manner.***

Reporting Regime and Disclosure

23. We note the proposed amendment to section 56 of the Act places an obligation on companies to require from the registered share holder details of the identity of persons who hold beneficial interests. The provisions suggest two options as an obligation on companies: identify the true ownership of any shareholding in the company >5%; and identify the true ownership of all shareholdings, so as to avoid the vulnerabilities of fragmented holdings.
24. ***We submit that neither option is effective and that companies must be obliged to identify all true owners with an effective interest >5%. We further submit that this submission is most effective if the Act itself creates an obligation to report beneficial ownership***.
25. The DTIC must further enact implementing regulations and issue guidance on how to identify beneficial owners, as the success of this submission is case specific and will depend on the nature of the corporate structure and shareholdings.
26. Clause 8 proposes the companies must include BO information in the annual statement. As noted in the abovementioned section, without the explicit requirement of a central register with specific guidelines of reporting and enabling transparency for public scrutiny, ***we submit that this proposal is not an effective disclosure requirement for making BO information public nor is it effective as the only means of disclosing the information to the Companies' Register***.
27. We submit that BO information in annual statements can create data gaps and vulnerabilities for verification as the information could be out of date by the time of the disclosure and a company could make changes just before reporting to disguise ownership. Additionally, for listed companies annual reporting will only provide a snapshot at one moment of time which will not be helpful for effective public scrutiny.
28. We note and welcome the requirement for companies to report changes 5 days after end of month and submit that it is a necessary part of the reporting regime. However, we also want to bring it to the committee's attention that this form of reporting will only provide a snapshot for stock-exchange listed companies.
29. We hope our submissions are useful to the committee. Further, kindly note our request to participate in the parliamentary hearings and to make oral submissions before the committee.

Submitted by Corruption Watch on 28 October 2021

By Mashudu Masutha, Michael Barron and Tim Law

[8] https://www.transparency.org/en/press/reliance-on-information-from-banks-hindering-investigations-of-white-collar last accessed 26 October 2021.

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