



Global Forum on Transparency
and Exchange of Information for Tax Purposes
Inter-American Development Bank

A Beneficial Ownership Implementation Toolkit



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The Secretariat of the Global Forum on Transparency
and Exchange of Information for Tax Purposes

Inter-American Development Bank*

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ABBREVIATIONS

AEOI	Automatic exchange of information
AML/CTF	Anti-money laundering and counter-terrorist financing
BO(s)	Beneficial owner(s)
CDD	Customer due diligence
CRS	Common reporting standard
DNFBP	Designated non-financial businesses and professions
EITI	Extractive Industries Transparency Initiative
EIOR	Exchange of information on request
EU	European Union
FATF	Financial Action Task Force
FI	Financial Institution
GF	Global Forum on Transparency and Exchange of Information for Tax Purposes
IBC	International business corporation
IDB	Inter-American Development Bank
KYC	Know Your Customer
ML/TF	Money laundering and terrorist financing
NFE	Non-Financial Entity
OECD	Organisation for Economic Co-operation and Development
TCSP	Trust and company service providers

PREFACE

Tax transparency continues to be a key focus of governments and the public, as demonstrated by the continuing media coverage surrounding data leaks in recent years. These data leaks have also shown that tax evasion is not an isolated financial crime, but is commonly linked to a broad set of activities, including money laundering and corruption, that negatively impact societies. The leaks revealed the use of companies and trusts to hide the beneficial owners of assets and highlighted the key role that transparency of ownership information can play in preventing tax evasion, corruption and other related activities.

International standards require minimum levels of transparency concerning the beneficial owners of companies, trusts and other legal arrangements for tax as well as anti-money laundering purposes. It is more difficult for tax evaders and other lawbreakers to hide their criminal activities and proceeds of crime in jurisdictions where these standards are fully implemented.

This toolkit contains policy considerations that Global Forum member jurisdictions can use to implement legal and supervisory frameworks to identify and collect beneficial ownership information, which is now a requirement of the international standards.

No jurisdiction is a blank slate in the area of beneficial ownership, because some domestic framework related to anti-money laundering (AML) and countering the financing of terrorism (CFT) measures is inevitably already in place. With a focus on ensuring the availability of beneficial ownership information for tax purposes, this toolkit therefore provides general principles, in recognition of the fact that there is no one-size-fits-all approach to achieving compliance with the international tax transparency standards. It focuses on providing examples of various approaches that have been taken to ensure the availability of beneficial ownership information and offers practical suggestions to be taken into account when considering various policy options.

Each jurisdiction will have to carry out its own internal assessment of the best methods for implementation, taking into account the unique legal, policy, and structural frameworks already in place. This toolkit will continue to be updated over time, so as to capture further developments in relevant standards and best practices.

This toolkit was jointly developed by the Secretariat of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) and the Inter-American Development Bank (IDB).^{*} Some portions of the toolkit include material (including graphics) from a recent IDB publication on the regulation of beneficial ownership in Latin America and the Caribbean.¹

^{*} The IDB acknowledges the valuable contributions by Francesco De Simone, Roberto de Michele, Pamela Valderrama, Ubaldo Gonzalez de Frutos, and Alberto Barreix from IDB and the international consultants Leonardo Costa and Andres Knobel, and also thanks the Transparency Fund of the Inter-American Bank which is supported by the governments of Canada, Italy, Norway, Sweden, and the MasterCard Corporation.

INTRODUCTION

The availability of beneficial ownership information, i.e. the natural person behind a legal entity or arrangement, is now a key requirement of international tax transparency and the fight against tax evasion and other financial crimes. It is at the heart of the international tax transparency standards: both the exchange of information on request (the EOIR Standard) and the automatic exchange of information (the AEOI Standard). Consequently, the issue of beneficial ownership has been included in the reviews conducted by international organisations and bodies, such as the Financial Action Task Force (FATF), which makes recommendations on measures geared to anti-money laundering and combatting the financing of terrorism (AML/CFT), and the OECD-hosted Global Forum on Transparency and Exchange of Information for Tax Purposes (hereinafter, the Global Forum). The FATF Recommendations are the most widely established international standards for ensuring the availability of beneficial ownership information, and the FATF definition has been adopted in both the EOIR and AEOI Standards.

From a tax perspective, knowing the identity of the natural persons behind a jurisdiction's legal entities and arrangements not only helps that jurisdiction preserve the integrity of its own tax system, but also gives treaty partners a means of better achieving their own tax goals. Transparency of ownership of legal entities and arrangements is also important in fighting other financial crimes, such as corruption money laundering, and terrorist financing, so that the real owners cannot disguise their activities and hide their assets and the financial trail from law enforcement authorities using layers of legal structures spanning multiple jurisdictions.

One aim of this toolkit is to foster understanding of beneficial ownership as contained in the international tax transparency standards. A second aim is to provide awareness of laws in different jurisdictions, which are adapting their legislation and regulations to comply with new international transparency measures, especially in view of the Global Forum peer reviews. This toolkit is not meant to address beneficial ownership requirements laid down under other international standards¹.

Part I explores the concepts of beneficial owners and ownership, the criteria used to identify them, the importance of the matter for transparency in the financial and non-financial sectors, and the obstacles that may arise when efforts are made to identify beneficial owners. Given the connection between the FATF and Global Forum standards on beneficial ownership, Part II defines and describes the FATF recommendations on transparency with regard to beneficial owners and their linkages with Global Forum standards. Part III examines technical aspects of beneficial ownership requirements, distinguishing between legal persons and legal arrangements (such as trusts), and describes measures being taken internationally to ensure the availability of information on beneficial ownership (e.g. some countries are upgrading company registers to include such information). Part IV provides a series of checklists that may be useful in pursuing a specific beneficial ownership framework. Part V looks at various ways in which these principles on beneficial ownership can play out in practice in Global Forum

¹ The Financial Action Task Force (FATF) evaluates jurisdictions for compliance with anti-money laundering and combating terrorist financing (AML/CFT) standards. The purpose for which the FATF materials have been produced (combating money-laundering and terrorist financing) is different from the purpose of the EOIR standard (i.e. ensure effective exchange of information for tax purposes), such that this toolkit merely addresses the implementation of beneficial ownership requirements under the Global Forum standards.

EOIR peer reviews. Part VI explains why beneficial ownership information is also a crucial component of the AEOI regimes being adopted by jurisdictions around the world in relation to financial account information under the Common Reporting Standard (CRS). Part VII notes several technical assistance options available to jurisdictions.

CONCEPTS AND PRACTICE

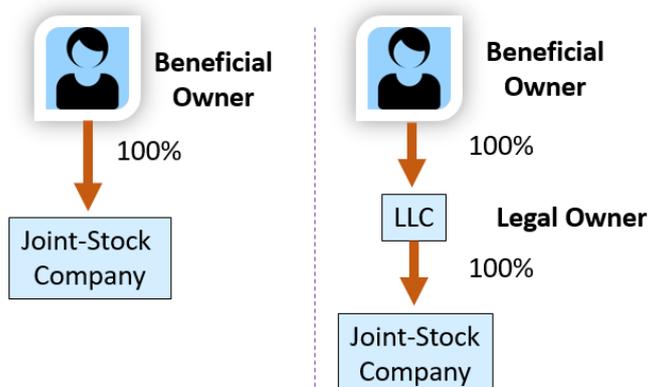
Part I: What Is Beneficial Ownership?

The issue of ultimate beneficial owners or controllers has become increasingly important internationally: it plays a central role in transparency, the integrity of the financial sector, and law enforcement efforts.

Beneficial owners are always natural persons who ultimately own or control a legal entity or arrangement, such as a company, a trust, a foundation, etc.

A simple example (depicted in Figure 1 below) demonstrates how the use of a legal entity or arrangement can obscure the identity of a beneficial owner. When an individual is the sole shareholder of a company and controls it directly, that individual is the BO of the company. However, there may be more layers involved in the ownership structure, perhaps a chain of entities between a legal vehicle and its BO. In Figure 1, the example on the right side shows an additional layer – the limited liability company (LLC) – between the legal vehicle (the Joint Stock Company) and its beneficial owner. The LLC, as the shareholder of the Joint Stock Company, is its direct legal owner, while the beneficial owner indirectly controls the joint stock company through the LLC.

Figure 1. Difference between a BO and a Legal Owner



Source: IDB.

Determining the Beneficial Owner

The BO is the individual or individuals who effectively owns or controls a legal vehicle. This ownership or control can be exercised in a variety of ways: for example, holding a controlling ownership interest (e.g. 25 per cent or more) of a legal person. Other ways include control of a significant percentage of voting rights, or the ability to name or remove the members of an entity's board of directors.

Effective control can be exercised in other ways. For example, control may be evident in influence over or a veto of the decisions that an entity makes, through agreements among shareholders or members, through family links or other types of connections with decision-makers, or by holding negotiable shares or convertible stock from an entity.²

Given that beneficial ownership can be exercised in many different ways, determining the BO can be a complex process that must be undertaken on a case-by-case basis. A country's domestic laws and regulations usually establish the criteria for deciding who should be considered a BO.

An important consideration to keep in mind is that determining the BO is independent of the BO's nationality. A functional legal framework must ensure that a legal vehicle identifies its BOs regardless of their nationality and place of residence.

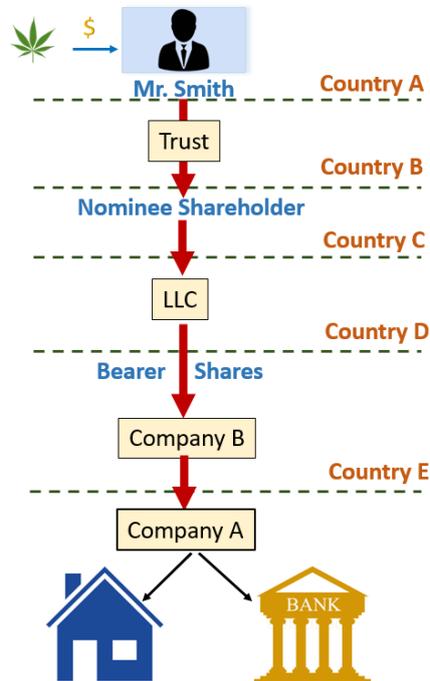
Why is it important to identify a BO?

Anonymity enables many illegal activities to take place hidden from law enforcement authorities, such as tax evasion, corruption, money laundering, and financing of terrorism. For example, money laundering can involve complex operations and transactions to make money from illicit sources, such as drug trafficking or tax evasion, appear legal. A drug trafficker, for instance, could set up a night club in order to appear to have legal sources of income from the sale of tickets and alcohol, while in reality the money is from the sale of drugs. In a business setting, it is therefore important to know the BOs of legal entities and arrangements to prevent misuse. That is why the FATF, and later the Global Forum, have included beneficial ownership requirements in their standards and conduct assessments across jurisdictions on availability of beneficial ownership information in their systems. Determining whether the countries have access to information on the BOs of legal entities and arrangements is important in combatting tax evasion, corruption, money laundering, and the financing of terrorism.

Imagine an individual, John Smith, who wants to evade taxation in his country A. If Smith owns several properties in country A, and holds bank accounts and investments there, all in his own name, it would be very easy for country A's authorities to detect that Smith is not paying taxes. The authorities would be aware of all his assets (for example, through systematic crosschecks with the agency responsible for the registration of real estate), that they have not been declared, and that the related taxes on wealth and income have not been paid.

But if Smith wants to obscure his income or property ownership, he can easily create corporate structures across various jurisdictions to make it much more difficult to identify his ownership.

Figure 2. Economic Activity through a Complex System of Legal Vehicles



The longer the chain of entities between a legal vehicle (in our example, Company A and its BO, John Smith), and the more jurisdictions the entities span, the harder it is to identify the BO, given the need to determine who controls each of the layers.

Another factor that makes it difficult to identify a BO is **nominees**. The use of nominees, whereby an entity allows its name to appear as a shareholder or owner in the name of someone else (whose identity remains concealed), is prohibited in some countries but legal in others. In some cases, nominee shareholders mask the real BO.

Bearer shares and bearer share warrants can also be used to hinder identification of a company's BO. If an entity issues bearer shares, the shareholder or owner of that entity is any person who holds the shares (on paper) at any given time. Dividends are paid against the presentation of paper shares, but the identity of the BO is not necessarily revealed. Bearer shares allow the transfer of ownership by simply handing the shares to another person. If the BO controls an entity through bearer shares, it is very difficult to determine his or her identity because the authorities would have to discover who holds the paper shares at any given time (and the shares can be held anywhere: in a safe deposit box, a bank, and so on).

Some countries prohibit bearer shares and warrants and others require that they be immobilised in a custodial arrangement, but a few countries still allow them to be used freely and these countries should take measures to address the risks from bearer shares immediately.

These barriers can be combined, as shown in Figure 2. To make it even more difficult to identify the BO, the chain of ownership can expand geographically, with each layer created in a different country. Investigators therefore have to obtain information from each country in order to find out who controls each layer. If one country in the chain does not exchange information with others, or if it does not even have the information, it is more challenging to identify the ultimate BO.

If all countries held information about BOs in every case, the strategy of hiding behind a chain of legal vehicles would be less effective where an EOI relationship exists. In our example, this would mean that the authorities would know that the building and the bank account belong to a limited company, but they would also know that the BO is John Smith. By contrast, if countries lack information on a BO, they must attempt to identify every layer in the chain of legal vehicles and understand the control structure in each layer until they reach the BO – a much more difficult, time consuming, and sometimes impossible task.

Part II: An International Focus on Beneficial Ownership

International initiatives

Several international bodies and organisations focus on issues related to beneficial ownership, each with their own particular mission. An important development in recent years has been the G20's call for more integrated cooperation between organisations on this issue, given the crucial role beneficial ownership information plays in tax transparency. The FATF and the Global Forum in particular have been given a mandate to align their technical work on beneficial ownership more closely, with a view to better serving the international community.

Based on the Global Forum's use of the FATF's definition on beneficial ownership, closer cooperation between the FATF and the Global Forum can lead to a greater synergy of work on beneficial ownership. This enhanced collaboration is being implemented in a number of ways, including participation in respective meetings at the institutional level and mapping exercises to analyse where the Global Forum and the FATF standards coincide.

The Global Forum on Transparency and Exchange of Information for Tax Purposes

The Global Forum has a mandate to ensure effective implementation of international tax transparency standards amongst its members and other relevant jurisdictions. It has adopted standards for tax transparency for both exchange of information on request (EOIR) and automatic exchange of information (AEOI), and members undergo peer reviews to assess their compliance. In 2015, the Global Forum took steps to enhance its EOIR tax transparency standard by including the availability of beneficial ownership information, as required by the FATF 2012 Standards, as a requirement in its revised Terms of Reference (2016 ToR). All Global Forum member countries have committed to implement the EOIR Standard and undergo a peer review process to assess its effective implementation.

The AEOI standard also includes the concept of beneficial ownership, similar to the definition in the FATF Standards, as a cornerstone in the reporting of financial accounts. Thus, reporting financial institutions must identify the BOs of certain financial accounts and the country of tax residence, and when appropriate, to report this information to partner tax authorities. More than

100 countries are committed to exchanging this information on an annual basis, with more member countries preparing to participate in AEOI in the near future.

As mentioned above, the Global Forum has adopted the FATF's definition of beneficial ownership and leveraged many of the same compliance procedures in both of its standards to efficiently align the definitions, which has been further encouraged by the G20.

Financial Action Task Force

The FATF is an inter-governmental body responsible for setting international standards and promoting effective implementation of legal, regulatory and operational measures to combat money laundering terrorist financing, and other related threats to the integrity of the international financial system. The FATF's standards (the FATF Recommendations as adopted in 2012), including the concept of beneficial owners, are applied by over 200 countries, through a global network of FATF-style regional bodies (FSRBs) affiliated to the FATF. The FATF and its regional bodies conduct mutual evaluations to examine the effective implementation and compliance with the Recommendations. Some of the FATF Recommendations relate to transparency and the availability of beneficial ownership information on legal persons and arrangements.

The Extractive Industries Transparency Initiative (EITI)

Anti-corruption groups are also pushing for greater transparency of BO information. For example, the EITI has developed a global standard to require countries and companies to disclose information on the governance of oil, gas and mining revenues. With regard to beneficial ownership, EITI expects implementing countries to maintain a publicly available register of the beneficial owners of the corporate entities that bid for, operate, or invest in extractive assets, including the identities of their beneficial owners, the level of ownership, and details of how ownership or control is exercised. EITI's definition is not identical to the FATF standard but it is similar in nature, although it allows some flexibility for each jurisdiction. EITI's limited focus on a particular industry, although instructive, is not sufficiently broad as a basis for the exchange of information (EOI).

The International Standard

The FATF Standard

The FATF has established the following definition of beneficial ownership:

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

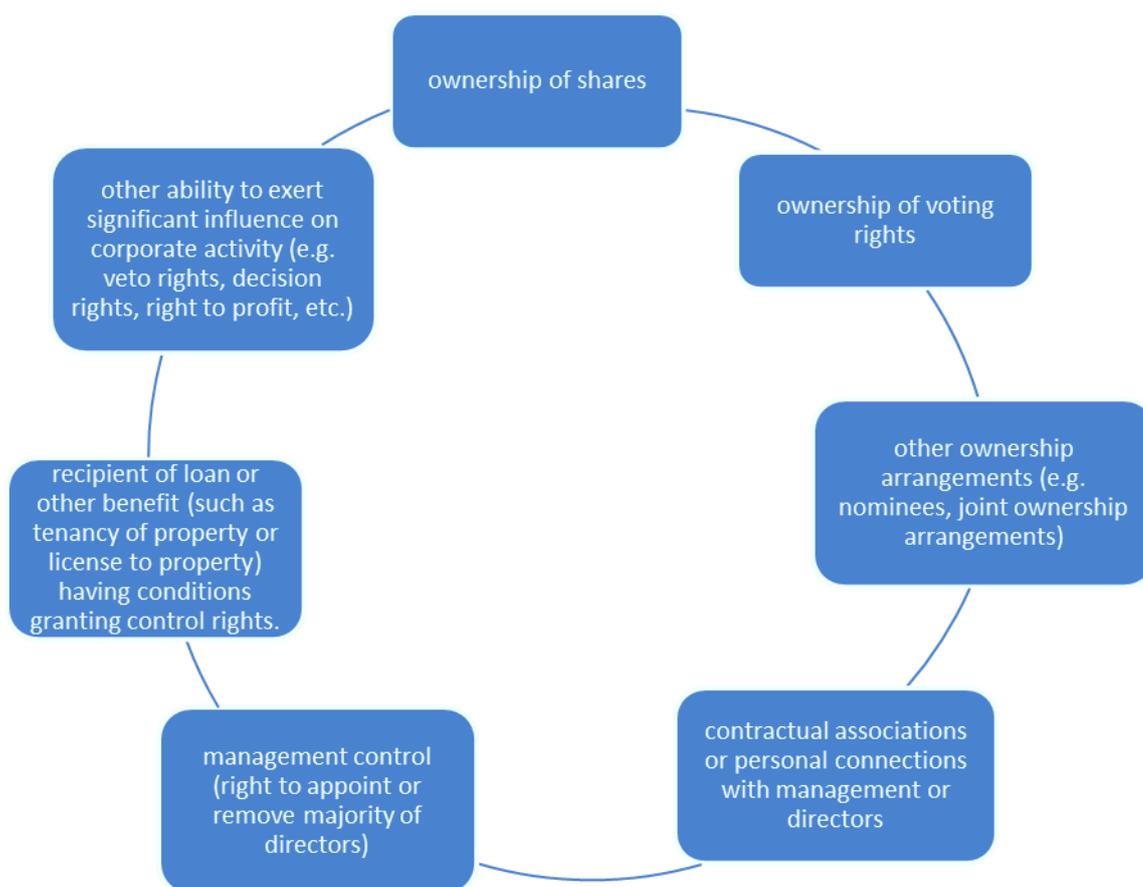
Because a beneficial owner can only be a natural person, a legal entity such as a company or organisation is not a beneficial owner and any such entity will have to be examined to determine

its beneficial owner. Moreover, there may be more than one beneficial owner of an entity or arrangement.

Matters of ownership and control

As already indicated, a beneficial owner can exercise ownership or control over a company in numerous ways, both direct and indirect. A common form of indirect control is through chains of ownership (see Figure 2). Common examples of both direct and indirect ownership and control are presented in Figure 3.

Figure 3. Forms of Direct and Indirect Ownership and Control



Any individual exercising ultimate effective ownership or control over an entity or legal arrangement, whether directly or indirectly (as described in Figure 3), should be identified as a beneficial owner (and could be subject to reasonable thresholds, as discussed below).

The essential FATF Recommendations

The part of the FATF’s work on beneficial ownership that is relevant to the Global Forum can be grouped into two main categories: (i) prescriptive recommendations applicable to AML-obliged entities (financial institutions and designated non-financial businesses and professionals (DNFBPs)) covering general customer due diligence (CDD) (**Recommendations 10 and 22**), record keeping (**Recommendation 11**), and introduced business (**Recommendation 17**); and (ii) general recommendations applicable to jurisdictions in

relation to transparency and beneficial ownership of legal persons and legal arrangements (**Recommendations 24 and 25**). The effectiveness of a jurisdiction's beneficial ownership framework is assessed under Immediate Outcome 5.

Recommendations 10 and 22. CDD by financial institutions and DNFBPs

These recommendations require that financial institutions and DNFBPs carry out CDD measures to identify and verify the identity of customers, including beneficial owners, when: entering into business relationships; carrying out occasional transactions above USD/EUR 15,000 (or above USD/EUR 1 000 for wire transfers); there is suspicion of money laundering or terrorist financing; or there are doubts about the veracity or adequacy of previously obtained customer identification data.

Recommendation 11. Record keeping

Financial institutions should be required to maintain CDD records for at least five years from the date of the transaction or end of the relationship, with such information available to relevant domestic competent authorities upon request. The concepts of R.11 apply equally to DNFBPs (as required by R.22).

Recommendation 17. Introduced business rule

Financial institutions may be allowed to rely on the CDD conducted by another entity or person, provided they are reasonably assured that the identification and verification processes meet the FATF requirements and that the underlying records are reasonably provided upon request without delay. R.17 applies equally to DNFBPs (as required by R.22).

Recommendation 24. Transparency of legal persons

Jurisdictions must ensure there is adequate, accurate, and up-to-date information on basic and beneficial ownership of legal persons formed in that jurisdiction, and that such information can be provided to a competent authority in a timely manner.

Recommendation 25. Transparency of legal arrangements

Jurisdictions must ensure there is adequate, accurate and up-to-date information on beneficial ownership of legal arrangements, and that such information can be provided to a competent authority in a timely manner.

The Global Forum Standards

In response to a G20 call in 2014 for collaboration between FATF and the Global Forum, building on the FATF Standards, the Global Forum decided that the EOIR Standard should include a requirement that beneficial ownership information be available in respect of relevant legal persons and legal arrangements.

The EOIR Standard requires jurisdictions to have beneficial ownership information available and accessible for:

- legal persons (companies, foundations, and partnerships) formed under a jurisdiction’s laws, or foreign companies with a sufficient nexus in certain cases;
- legal arrangements (trusts and similar arrangements administered in the jurisdiction, or if a trustee is resident there); and
- bank accounts.

As stated in the Global Forum’s [Terms of Reference for Peer Reviews](#), the EOIR Standard adopts the FATF definition of beneficial owner: “the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement”. The ToR further explains that, under the FATF Standards, “ultimate ownership or control and ultimate effective control refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.”

As discussed in Part VI, the AEOI Standard also incorporates the concept of beneficial ownership as reporting financial institutions must collect information and report on controlling persons of financial accounts, which is tied to the definition of beneficial owner under the FATF Recommendations.

Main differences

Although the Global Forum Standards use the FATF definition of beneficial owner and refers to the relevant FATF materials dealing with beneficial ownership information for both legal entities and legal arrangements, the EOIR Standard also makes it clear that the FATF standards have not been adopted in their entirety because of the differing focuses of the FATF (AML/CFT) and the Global Forum (exchange of information for tax purposes). For example, the EOIR Standard specifically recognises that while the definition of beneficial owner has been adopted in whole from the FATF Standards, “in applying and interpreting the FATF standards regarding ‘beneficial owner’, care should be taken that such application and interpretation do not go beyond what is appropriate for the purposes of ensuring effective exchange of information for tax purposes”.

The fundamental difference between the FATF and Global Forum approaches arises from the FATF’s use of a comprehensive, principles-based standard grounded in a detailed set of 40 Recommendations and an extensive assessment methodology. This contrasts with the more limited, tax-focused outcomes approach of the Global Forum (which, like the FATF, does not prescribe any particular method or criteria for complying with the expressed principles). For example, the FATF considers every type of legal vehicle because any can be used for the purposes of money laundering or terrorism, whereas the Global Forum may not focus on entities that do not pose a danger of tax evasion, such as public-interest foundations that meet certain criteria. Therefore, assessments under the Global Forum’s ToR do not evaluate issues that are outside the scope of its mandate.

It is important to note that the FATF assesses technical compliance and effectiveness separately with different outcomes possible, whereas Global Forum EOIR peer reviews take a combined approach of looking at both the legal framework and effective implementation for each element with a single rating.

It should also be noted that the EOIR Standard focuses on the availability of beneficial ownership information irrespective of a risk-based approach. Under the FATF standards, the procedures applied to obtain and verify beneficial ownership information through CDD may reflect the risk profile of a particular customer or transaction. For example, different levels of verification of the BO, or enhanced CDD, may be applied to higher-risk clients (non-residents, for example) or transactions from other jurisdictions (based on factors related to those jurisdictions). That said, the FATF's allowance of a risk-based approach to CDD should generally be reasonably aligned with tax risks.

While on a case-by-case basis an EOIR assessment may take into account some of the findings made by the FATF, the Global Forum recognises that the evaluations of the FATF cover issues that are not relevant for the purposes of ensuring effective exchange of information on beneficial ownership for tax purposes. In addition, EOIR assessments may find that deficiencies identified by the FATF do not have an impact on the availability of beneficial ownership information for tax purposes; for example, because mechanisms other than those that are relevant for AML/CFT purposes exist within that jurisdiction to ensure that beneficial ownership information is available for tax purposes. These differences in the scope of reviews and in the approach used may result in differing conclusions and ratings.

In practice, a Global Forum assessment might disregard deficiencies identified in the assessed jurisdiction's implementation of FATF Recommendations 24 and 25 if beneficial ownership information is available for tax purposes under the legal framework.

The two bodies might also make different assessments of the issue of access to information. The FATF considers access to beneficial ownership information on the part of a broad range of authorities, including the police. The FATF may not consider the issue of access to such information by the tax authorities when the latter do not also comprise a competent authority for AML purposes, though it would be highly relevant for tax purposes.

Given the FATF's principles-based approach and the flexibility of the Global Forum's outcome-based approach, the latter's assessment of the beneficial ownership requirements will consider whether the jurisdiction relies solely on such requirements as set out in the AML/CFT rules, or whether there are other requirements for other purposes (tax requirements, commercial law requirements, and so on).

Where relevant, analysis of the beneficial ownership requirements under other laws (tax-related, commercial, and so forth), is included in the Global Forum's reports as well as the FATF evaluations.

Supervision and enforcement

It is not enough to just have a compliant legal framework; the laws must be effectively implemented and enforced in practice. If the likelihood of offenders being caught is low, the incentives to comply with laws disappear. Appropriate compliance, monitoring, and enforcement processes are therefore critical to ensuring that laws and regulations on beneficial ownership are observed. The Global Forum review process looks to see if, in practice, supervisory activities are carried out to ensure that relevant persons comply with applicable law. FATF does the same through its assessment of practical effectiveness in the Intermediate Outcomes. Global Forum reviews also seek input from peers to verify if jurisdictions being

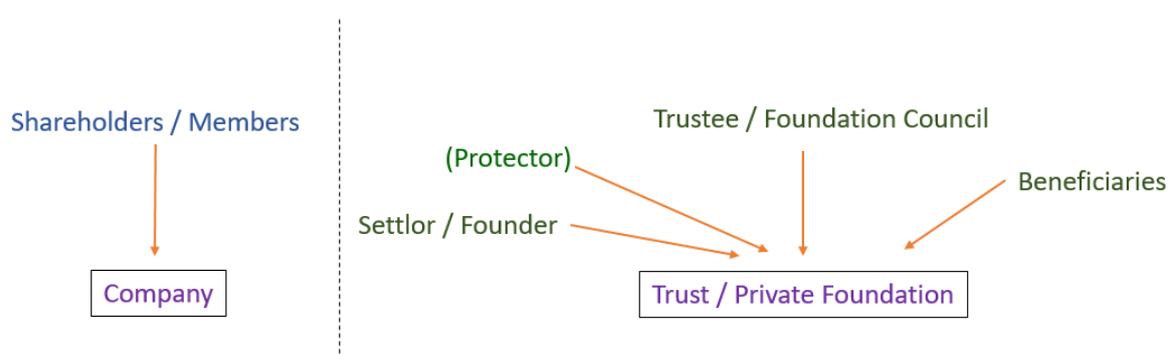
reviewed have been able to provide BO information when requested, where foreseeable relevance of the request is demonstrated.

Part III: Availability of Beneficial Ownership Information for Legal Persons and Arrangements

Differences between legal persons and legal arrangements

It is one thing to identify the BOs when ownership and control are exercised by shareholders or members who are of equal standing³ (left-hand panel of Figure 4), such as in a company or partnership.⁴ It is another thing to identify which individual is the beneficial owner of a trust, a private foundation, or an *Anstalt*.⁵ These arrangements have much more complex structures because they usually do not have owners but parties with different roles, rights, and obligations (right-hand panel of Figure 4).

Figure 4. Difference in the Control Structure between a Company and a Trust or Private Foundation



Source: IDB.

Although countries must have information on BOs for all the relevant legal vehicles available, the FATF has different requirements for legal persons (such as a company, partnership, or foundation) and for legal arrangements (such as a trust).

The FATF defines legal persons as “any entities other than natural persons that can establish a permanent customer relationship with a financial institution or otherwise own property. This can include companies, bodies corporate, foundations, *Anstalt*, partnerships, or associations and other relevantly similar entities”.⁶

Legal arrangements can take the form of express trusts (in which the settlor’s creation of a trust is deliberate, and is neither implicit nor the result of the application of a law) and similar structures, such as the *fideicomiso* (a trust in some civil law countries), *fiducie* (a French trust), *treuhand* (a German trust), or *waqf* (a form of trust under Islamic law).⁷ A trust is a structure in which a person (the settlor) transfers assets to another person (the trustee) who manages the entrusted assets following the settlor’s instructions, but for the benefit of the beneficiaries (either persons named by the settlor to receive income or the entrusted assets at some point, or a defined class of unnamed persons).

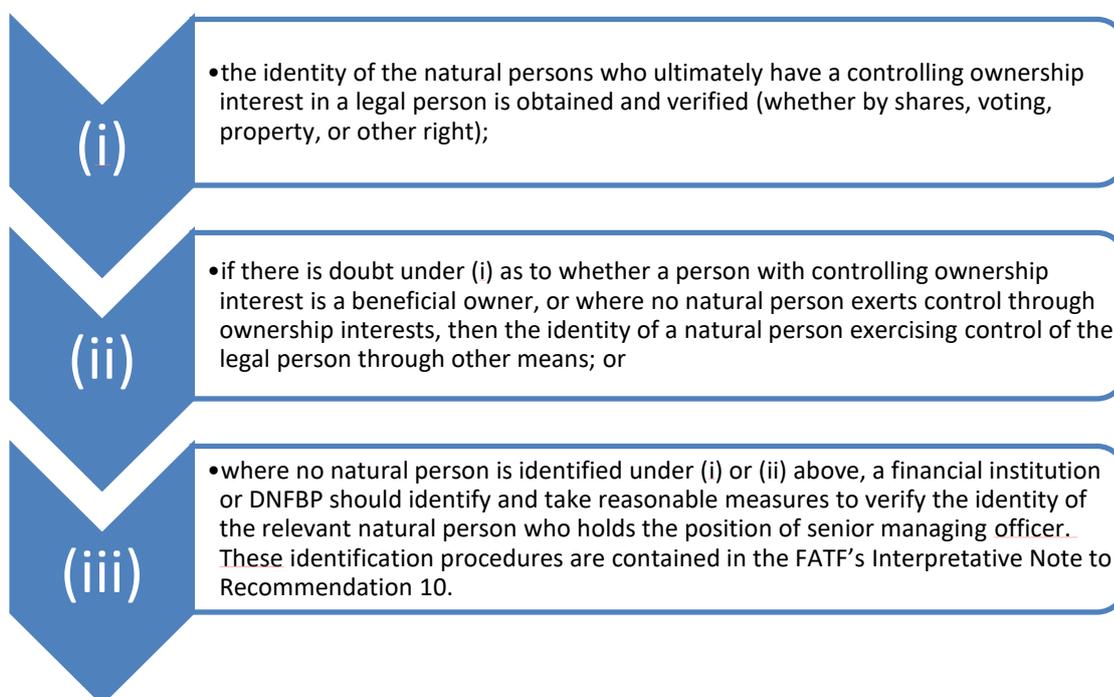
The distinction between legal persons and legal arrangements has practical implications for the availability of information because, in most countries, legal persons must be registered in order to have legal existence,⁸ and their owners are thereby more easily identifiable. Trusts, however, do not always have to be registered, except with the tax authorities when they have taxable income.⁹ In other words, it is usually easier for the authorities to obtain information on a legal person (since they must already be registered) than on a trust (since they are not always registered).

In distinguishing between legal persons and legal arrangements, which have slightly different identification requirements, in practice it can sometimes be difficult to determine the proper classification as depending on a jurisdiction's unique laws, some legal persons might have very similar structures to legal arrangements (e.g. a trust). For example, some private foundations look a lot like a trust: the settlor/founder is the person who transfers assets to the trust/foundation; the trustee/foundation council manages the assets of the trust/foundation on behalf of the beneficiaries.¹⁰ In some trusts, such as discretionary trusts, there may be a "protector" (generally named by the settlor) who oversees the trustee's actions.

Beneficial ownership information for companies and other legal persons

Cascading tests

The Global Forum's EOIR Standard seeks to ensure the availability of beneficial ownership information for all relevant legal persons and arrangements by adopting the FATF definition and using relevant FATF guidelines. Jurisdictions can follow those guidelines to identify the beneficial owners; generally, this requires using a tiered information-gathering approach where legal persons are concerned.



It is important to note that the above measures are a **cascading** process, to be used in succession when a previous step has been taken but has not resulted in the identification of the BO.

A first step, therefore, is to look for the individuals holding ownership interests either directly or through a chain of other entities or arrangements. Even if a threshold applies to the identification of a beneficial owner under the legal framework, the identification of persons with a particular level of ownership (direct or indirect) does not preclude the possibility of other persons meeting the criteria of a beneficial owner. The principle of control also applies to circumstances where persons act together to exercise control: for example, two or more persons, each with less than a controlling share of a company, may together control the company and therefore each person would be a BO.

Where it is not possible to identify persons with control through ownership, or if there is doubt that those persons are in fact the beneficial owners, then persons who control the company through other means, such as personal or financial influence, should be identified. Examples of control by other means include personal connections to those owning or controlling a legal person, financing the enterprise, historical or contractual association, or use/enjoyment/benefit of company assets.

Only when none of the previously described approaches is able to identify a BO should a jurisdiction, as a default step, require the identification of a senior manager of the entity.

The notion of effective control is important in situations where a BO may not have an ownership interest and/or is not a person on whose behalf a transaction is conducted or business relationship being established. Understanding the make-up and organisation of a legal person can help determine any individuals who have effective control.

Using thresholds

The FATF does not mandate a threshold for determining controlling participation, but in guidance¹¹ and through its assessment process has found a 25% threshold to be acceptable.

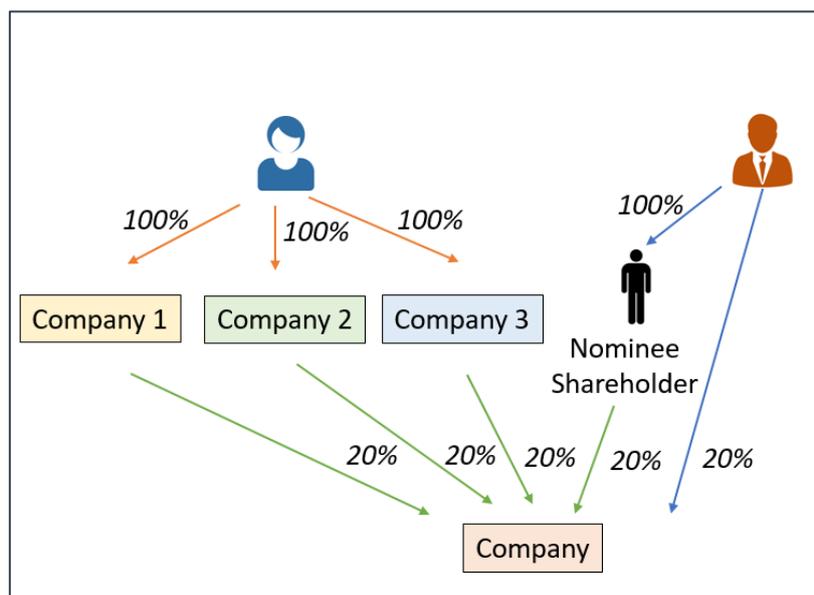
As a result, “25 per cent” or “more than 25 per cent” is used in many BO definitions, such as the Common Reporting Standard (CRS) for AEOI, and the European Union’s Fourth Anti-Money Laundering Directive. It is important to understand, however, that the FATF merely gives a threshold as one example of how to determine beneficial ownership. Further, any thresholds should also take into account the cascading tests as mentioned above.

While the FATF is not categorical about the need to have a threshold, nor what it should be, it is unlikely that a higher threshold would satisfy the FATF and the EOIR Standards. Many countries or initiatives, however, use lower thresholds to identify a BO or the person considered to have a controlling share. For example, Argentina and the Dominican Republic use a threshold of 20 per cent; Uruguay, 15 per cent; Barbados, the Bahamas, Belize, and Jersey, 10 per cent; and Colombia, 5 per cent.

Threshold and indirect ownership

The BOs of legal persons or trusts must always be individuals (natural persons), who are their owners or controllers, either through direct or indirect means. Neither nominees nor chains of companies should prevent the BO from being identified. As Figure 5 shows, a company can have two BOs (a woman with 60 per cent through three commercial companies and a man with 40 per cent, including through a nominee), although no direct owner holds more than 25 per cent of the assets (in Figure 5, each legal shareholder holds only 20 per cent).

Figure 5. Direct and Indirect Ownership



Source: IDB.

“Exception” for publicly traded commercial companies or public collective investment vehicles

In principle, all legal persons must identify their BOs. As part of financial institutions’ CDD processes, however, the Interpretive Note to FATF Recommendation 10¹² suggests that financial institutions do not have to request information on the BO of a publicly traded company if these are already otherwise subject to disclosure requirements ensuring adequate transparency of beneficial ownership information. In other words, it is not that the companies listed on the stock market do not have to identify their BOs, but rather that the exchange is supposed to have done so already and the information on BOs is available elsewhere. Nevertheless, for R.24, all companies should maintain beneficial ownership. So there is a slight divergence in the recordkeeping obligations between R.10 and R.24, but together they ensure beneficial ownership information is available.

The 2016 ToR treats public collective investment funds in the same way as listed companies for the same public policy reason in that there should be a regulator maintaining this information that would be available to a competent authority. However, non-regulated companies or bodies corporate should remain subject to beneficial ownership identification rules.

Legal arrangements (e.g. trusts)

Requirements

The FATF’s Recommendation 25 on legal arrangements (such as trusts) is similar to Recommendation 24 (on legal persons), inasmuch as it requires that the authorities have access to BO information and that it be kept for five years. With trusts, however, it is generally the

trustee who must keep the information (rather than the company itself or a company registry for legal persons), whether the trustee be a professional or non-professional. Some jurisdictions have also introduced trust registries.

Given that trusts generally do not have to be registered in order to be legally valid (unlike legal persons), an individual in Country X can create a trust according to the laws of Country Y even if no party to the trust (i.e. settlors, trustee or beneficiary) nor any of its assets are located in Country Y. It is therefore unlikely that country Y would know that the trust exists.

Recommendation 25 mandates that a jurisdiction allowing for express trusts require trustees of trusts governed by its trust law to keep adequate, accurate, and current information on the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust. FATF Guidance also recognizes that, in some situations, the requirement to make information available may fall on a country with more substantial contact with the trust and its assets; i.e., the reporting burden is placed on the trustee (independently of the law that governs the trust) as the person managing the trust and in whose name the trust's assets are held. In other words, a trustee resident in Country X should be required to keep and provide to the authorities information on the BO of the trust that he or she manages, regardless of whether the trust was created under (and is regulated by) Country X law or the law of another country or jurisdiction, and irrespective of whether Country X has a trust law in its legal framework.

Identification of beneficial owners

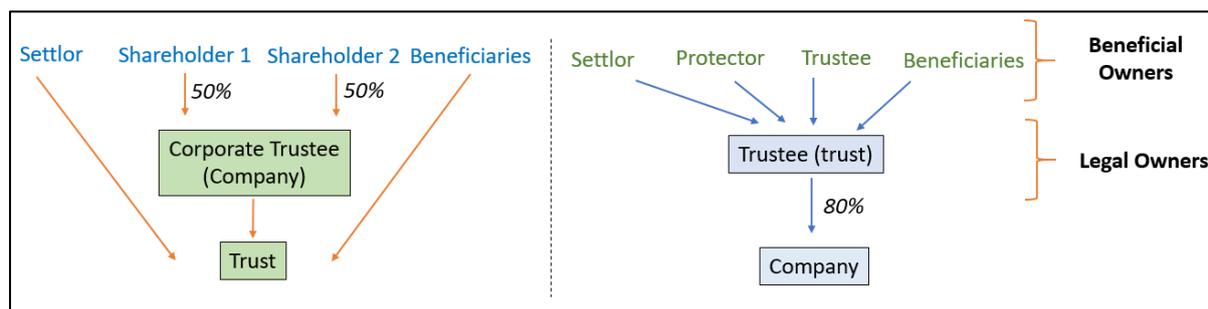
As regards financial institutions' identification of a trust's BOs, rather than identifying based on the cascading tests (as for legal persons), financial institutions should identify all parties of the trust, including:

- settlor
- trustee(s)
- protector (if any)
- beneficiaries or classes of beneficiaries¹³
- any other person exercising effective control of the trust.

This list is always identified as beneficial owners regardless of whether or not any of them exercises control over the trust.

In some countries, trusts are usually complex structures that can include additional parties. In the Cayman Islands, for example, "STAR" trusts have an "enforcer", which is similar to a protector. There may even be fewer parties than usual—"purpose" trusts, for example, may have no beneficiaries. There may also be confidential documents such as a letter of wishes with the settlor's instructions, a circumstance that can make it very difficult to determine who really has effective control of the trust. Requiring all parties to the trust to be identified is the answer to this problem.

Figure 6. Combination of Legal Persons and Trusts



Source: IDB.

Determining the BO when natural persons and legal arrangements are combined

A trust may have ownership of a company, with the trustee holding the shares or other rights as the titled legal owner. In some such situations, the trustee or settlor may be a legal person itself (such as a “corporate trustee”). When a party to a trust (such as the trustee) is not a natural person (such as a company or foundation), the BOs of that legal person (but not the legal person itself) should be identified as BOs of the trust. In other words, non-natural persons who are party to a trust should be looked through to identify the BOs. In the left-hand panel of Figure 6, the BOs of the trust are the settlor, the beneficiary, and the two BOs of the corporate trustee.¹⁴

As the right-hand panel of Figure 6 shows, if a trust holds more than 25 per cent of the shares of a commercial company, the BO of the commercial company is not the trust, but rather would be individuals that are parties to the trust (e.g. the settlor, protector, trustee, and beneficiary) and any other person exercising effective control of the trust, based on the nature of controlling ownership interest exercised.

Consistent with FATF Recommendation 25, the Global Forum Standards’ requirement for beneficial ownership information on legal arrangements covers not only express trusts but also other similar arrangements such as the *fiducie*, *treuhand*, *fideicomiso*, and *waqf*. The transparency requirement for these arrangements goes beyond focusing on one BO and requires the trustee (or similar agent) to obtain information on any settlor (the person donating assets), other trustees, the protector (an intermediary between the settlor and trustee), beneficiaries (or class of beneficiaries), and any other natural person exercising ultimate effective control over the arrangement. Thus no threshold can be applied to exempt identifiable beneficiaries from being identified as a beneficial owner.

Example: trust B is created under the laws of country B, which enacts a law requiring trusts to maintain beneficial ownership information for any natural person with more than a 10 per cent controlling or ownership interest. Despite this designated threshold, the EOIR Standard requires that every trustee, settlor, beneficiary, and protector be identified as a BO, regardless of the individual's level of ownership, or managerial control, in the trust.

Conceptually, there are three potential sources of information on trusts: the trustee, financial institutions/DNFBPs doing business with the trust/trustee, and registries or other government authorities such as the tax authorities. As mentioned earlier, FATF Recommendation 25 confers the main responsibility on the trustee to obtain and keep accurate and up-to-date BO information and make all required information available.

Beneficial ownership information should also be obtained by financial institutions and DNFBPs doing business with the trust in meeting their CDD obligations under the FATF standard. Importantly, competent authorities are expected to be able to access BO information on trust accounts held by financial institutions and DNFBPs, irrespective of whether the jurisdiction provides for the creation of trusts under its own laws. As with legal ownership information, financial institutions and DNFBPs must keep their beneficial ownership information up-to-date by conducting ongoing due diligence over the course of the relationship.

Example: trust F is created under the laws of country G but has a professional trustee resident in country H. The presence of the trustee in country H is sufficient to require that country H hold beneficial ownership information on the trust. Since the trustee should be subject to AML rules in country H (by virtue of the FATF's requirements), beneficial ownership information on trust F should be available in country H under the AML framework, subject to the AML rules being adequate.

Example: trust J is created under the laws of country K and has a bank account there. Because the trust's account is in country K, beneficial ownership information on trust J should be available at the bank in country K.

Some jurisdictions, such as the United Kingdom and Bahrain, have facilitated competent authorities' access to trust information by setting up a system for the central registration of trusts. These registration requirements often include information to be recorded with the registrar on the trust's settlors, trustees, and beneficiaries; sometimes the trust deed and/or assets must also be registered.

Other jurisdictions, especially civil law jurisdictions in which the establishment of trusts is not possible under the law, have decided to go a step further and require their tax residents to report or register their participation in a foreign trust. Hence the tax authorities do not have to resort to the exchange of information in order to obtain information on whether a particular person is linked to a trust.

Registries and public information

Some jurisdictions have begun creating specific beneficial ownership registries, whether for legal persons, for trusts, or for both. On 20 May 2015, the EU approved the Fourth Anti-Money Laundering Directive, which requires member states to ensure that the BOs of legal persons and some trusts¹⁵ (or similar entities) be known and registered with an authority. The Directive

includes a minimum standard that all EU member states must have implemented by 30 June 2017. On 19 April 2018, the EU approved changes in the Fifth Anti-Money Laundering Directive, which requires that BO registries for companies and legal persons be publicly accessible, and that trusts' BO information be accessible by competent authorities, financial institutions and DNFBPs, and anyone who can demonstrate a legitimate interest.¹⁶

Additionally, on 1 May 2018, the U.K. Parliament agreed to amend the Sanctions and Anti-money Laundering Bill so as to require all British Overseas Territories to introduce publicly available registries of companies' beneficial ownership in the coming years.¹⁷

Other countries, including many in Latin America, have begun setting up BO registries or requiring that this information be included in company registers or sent to the authorities. In Argentina, for example, legal entities must provide information on BOs to the company registry in Buenos Aires. In Brazil, the tax authority collects BO information. In Costa Rica and Uruguay, the Central Banks must be informed of BOs. Colombia, the Dominican Republic, Peru, and Trinidad and Tobago are considering setting up BO registries as part of the EITI process; in Colombia a bill has already been sent to Congress.

Establishing a BO registry has several perceived advantages. For example, it facilitates timely access to information on BOs because the authorities will already have the information and do not have to request it from the entity, corporate service provider, or bank. However, the registry in itself does not ensure accurate and up-to-date beneficial ownership information. The arguments against setting up a registry might include economic costs, political costs, privacy concerns, the bureaucratic demands raised by enacting changes in the law, or matters of legal tradition (for example, in those common-law countries where it is not customary to require trusts to be registered).¹⁸

Case Study: Isle of Man



The Isle of Man amended its beneficial ownership regime in 2017 to address previously identified deficiencies, such as a definition that was inconsistent with the EOIR Standard, as well as to strengthen verification requirements. The 2017 BO Act created a central register of beneficial ownership information that is available to certain government regulators within the framework outlined below.

Definition: generally, a BO is defined as the natural person who ultimately owns or controls a legal entity through direct or indirect ownership, or control of shares or voting rights, or other ownership interest in the entity, or who exercises control via other means.

Affected persons: every legal entity covered by the Act—companies, LLCs, limited partnerships and foundations—must appoint a nominated officer (either a resident individual or licensed service provider) to collect and hold beneficial ownership information. The nominated officer must take reasonable steps to verify the information, and ultimately must provide information on registrable beneficial owners—those BOs who own or control more than 25 per cent of the entity—to the Central Registry for inclusion in the BO database.

Identification: each legal owner of an entity is required to identify its ultimate beneficial owner(s) and provide this information to the nominated officer; this information must be updated in the event of any change. Legal owners, as well as BOs, who fail to comply with the identification process or provide false information are subject to penalties.

Penalties: failure to provide the required beneficial ownership information can lead to administrative fines of up to £5,000.

Observations: the Isle of Man BO Act (2017) does not apply to trusts (or other legal arrangements), and so the BO registry on its own would not be completely aligned with the EOIR Standard (although beneficial ownership of trusts is provided for elsewhere in the jurisdiction's legal and regulatory framework, such as obligations under the AML/CFT code).

Making BO information publicly available

In many jurisdictions, to the extent that there is a registry of beneficial ownership information, it is generally available only to specific competent authorities within the jurisdiction and public access to the information is limited.

There is ongoing discussion about whether information in BO registries should be made public. Some sectors are opposed to making the identity of BOs public because they regard it as a violation of privacy or are concerned that it could lead to higher risks, such as kidnapping or extortion. Public registries may also create over-reliance by financial institutions and DNFBPs on such information rather than performing thorough independent checks to verify the identity of BOs of legal persons and arrangements.

The United Kingdom (since 2016) and Denmark (since 2017) require BO information on commercial companies and other legal persons be publicly available in an open, online registry. Ukraine also has a public BO registry and the Netherlands will introduce one soon. As already indicated, the European Union's 5th Anti-Money Laundering Directive will further require all member states to implement public BO registers for legal entities. At a 2016 Anti-Corruption Summit held in the United Kingdom, Afghanistan, Ghana, Mexico, and Nigeria made a commitment to set up public BO registries, and other countries will consider doing so. EITI recommends creating public BO registries for corporate entities related to extractive industries such as oil and mineral resources.

Public BO registers are not a requirement under either the EOIR or FATF standards, although some jurisdictions are heading in that direction and some civil society groups hope to convince government policymakers to make it a global standard.

Part IV: Policy Options for Implementation

The requirements to identify BOs necessarily involve acquiring access to information on the legal ownership of a legal person by following the chain through to a natural person who is the BO. While some of the legal ownership information may be publicly available in company registries or equivalent sources, in the case of complex corporate structures significant work may be required to identify the natural person at the end of the chain.

The EOIR Standard has no requirement that a jurisdiction implement a particular mechanism in order to collect and store beneficial ownership information and to grant access to competent authorities. As mentioned earlier, jurisdictions are free to implement any method that ensures the availability of and access to beneficial ownership information consistent with the FATF definition adopted by the EOIR Standard.

The following conceptual model can help in thinking about how a jurisdiction might approach adopting or revising a beneficial ownership framework:

Considerations in Implementing Beneficial Ownership

A jurisdiction has many decisions to make in creating a legal framework that is consistent with the Global Forum's tax transparency standards and ensuring it is effective in practice. With regard to beneficial ownership, a jurisdiction may consider the following activities as part of its policy decision-making process:

- ✓ Gap analysis and review of existing legal provisions (See Annex 1 for the BO gap analysis tool)
- ✓ Deciding where to place the beneficial ownership requirements in the legal framework
- ✓ Ensuring coverage of all relevant legal entities and arrangements
- ✓ Deciding on whom to put any obligations for information collection, reporting, etc.
- ✓ Deciding what information, e.g. name, date of birth, address, nationality, nature of interest, date of acquisition, etc., is to be kept and in what format
- ✓ Ensuring appropriate sanctions exist
- ✓ Ensuring appropriate access exists by the competent authority to where the beneficial ownership information is held
- ✓ Ensuring the beneficial ownership information is accurate, complete, and up-to-date
- ✓ Creating and implementing an effective enforcement and supervision framework

FATF Recommendation 24 provides a range of mechanisms to ensure that beneficial ownership information can be obtained in a timely manner. Its Interpretive Note sets out recommended alternatives for the prompt determination of the BO.

1. **Registries:** requiring a centralised company registry to obtain and hold accurate and up-to-date information on beneficial ownership.

As discussed in Part III some jurisdictions, such as member states of the European Union (EU), have established central registries as a means of making such information more readily available to competent authorities.

Example: all companies registered in country J (or a foreign company with a branch in country J) must obtain information on their BOs and keep it accurate and up-to-date. The information is provided to the commercial registry upon registration, and is regularly updated within 30 days of any changes. The registry's clerk must verify the BO information. Penalties can be imposed for non-compliance, including criminal sanctions or a management ban on individuals who fail to file or file inaccurate information about the BOs.

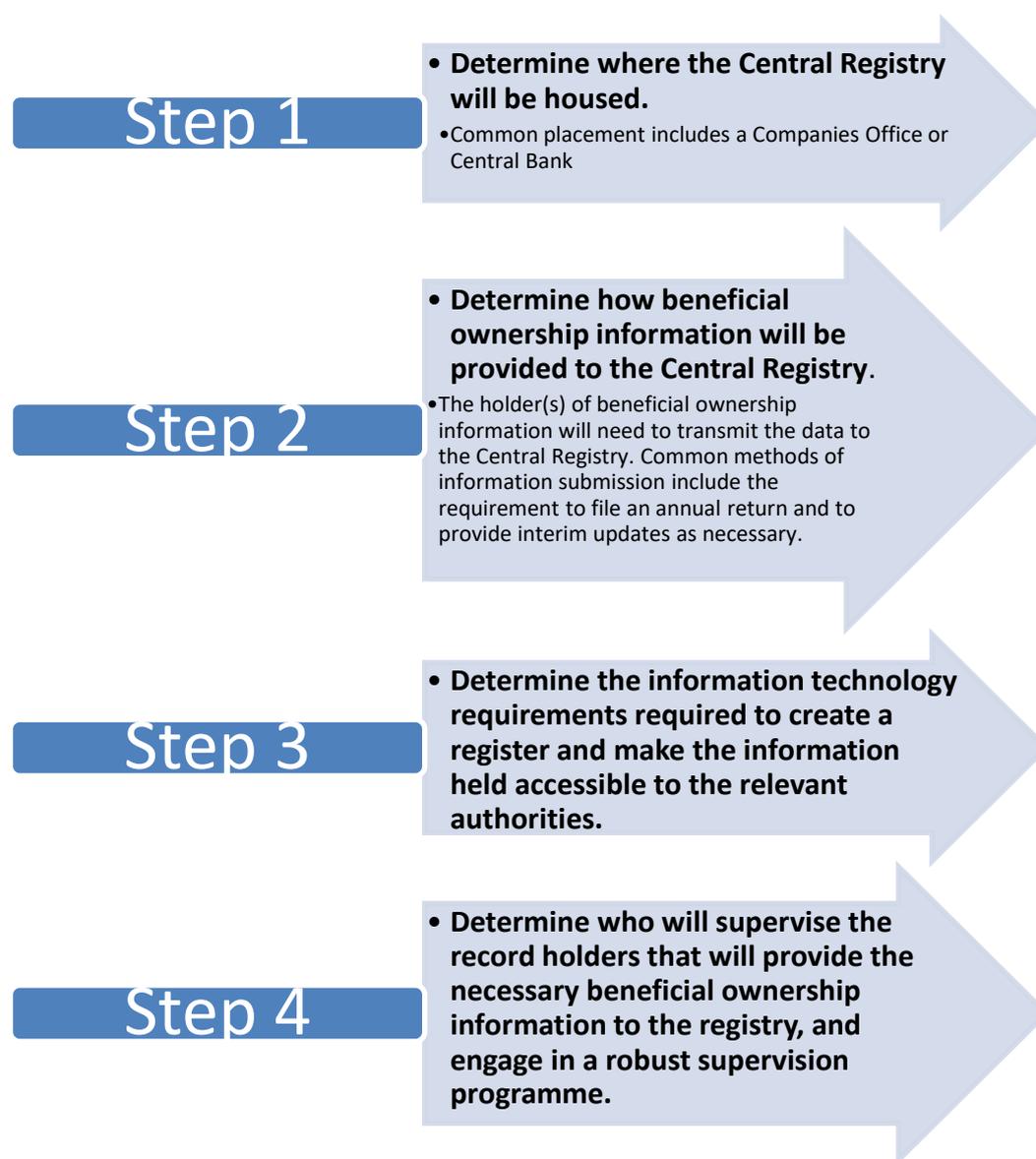
For jurisdictions looking to use a central registry to make BO information available, here is a checklist of issues to consider:

Checklist A: Checklist for a Central Registry

A central registry is a mechanism for collecting and maintaining beneficial ownership information. The benefits of using a central registry include: a single contact point for queries by competent authorities; ease of access by requesting competent authorities (often simultaneous access); and greater ability to identify particular ownership holdings by a specific individual and/or overall ownership trends. A potential negative effect of central registries is the higher resource costs required to implement them.

- ✓ Who is responsible for maintaining the first collection of beneficial ownership information?
- ✓ Who is responsible for providing beneficial ownership information to the central registry?
- ✓ How is the information provided to the central registry (for example, an information return, online portal, etc.)?
- ✓ Is beneficial ownership information verified, and how?
- ✓ What technology requirements are necessary for the central registry to maintain beneficial ownership information ?
- ✓ Who has access to the central registry?
- ✓ What methods can be used to access the information? Do any necessary permissions or access methods cause delays in the acquisition of beneficial ownership information from the central registry?
- ✓ What supervision practices will be established to verify the accuracy of the beneficial ownership information submitted to the central registry?
- ✓ How often should the information be updated in the central registry?
- ✓ What penalties apply for non-compliance with the requirement to provide, update, and/or ensure the availability of accurate beneficial ownership information?
- ✓ Are these sanctions effectively applied in cases of non-compliance?

The following steps can also be useful to follow:



2. **Companies:** requiring a company to take reasonable measures to obtain and hold such information.

Companies should have the best access to information on their beneficial owners, so some jurisdictions require entities (and, perhaps, a registered agent) to maintain the information and make it available upon request. Restrictions (such as penalties) should exist for both the company to hold and make available the beneficial owner information, as well as the shareholders (or other responsible persons) for failure to provide the company with necessary information regarding the beneficial owners. Otherwise, the framework may not be effective if there is no enforcement mechanism to ensure that the company can obtain information on the entity's ownership structure and/or beneficial owners.

For jurisdictions looking to place the requirement to maintain beneficial ownership on companies themselves, here is a checklist of issues to consider:

Checklist B: Checklist for Placing BO Obligations on Legal Persons/Arrangements

A possible means of ensuring the availability of beneficial ownership information is to require legal persons and legal arrangements to maintain the information. The perceived benefits of imposing the obligation to identify the BOs on the entity or arrangement include: a simplified collection mechanism; it is easier to incorporate this approach into an existing statutory regime. Potential negatives effects of requiring the relevant entities and arrangements to provide beneficial ownership information include: difficulties in ensuring the obligation is followed; potential delays in receiving information.

- ✓ Have all relevant legal persons and arrangements in my jurisdiction been identified?
- ✓ Is there a statutory or regulatory basis requiring all relevant legal persons and arrangements to identify all BOs?
- ✓ Are there any verification requirements with regard to beneficial ownership?
- ✓ How must an entity or arrangement maintain such information, and in what form?
- ✓ How often must an entity or arrangement update the beneficial ownership information it maintains?
- ✓ What rules require an entity or arrangement to provide beneficial ownership information to a requesting competent authority?
- ✓ Are there specific timelines in which a requested entity or arrangement must provide the information to the competent authority ?
- ✓ Does such a timeline cause any potential delays in the provision of beneficial ownership information to a partner making an EOI request?
- ✓ Are there sanctions to penalise entities and arrangements that fail to maintain the required beneficial ownership information, and BOs themselves if they fail to provide it to the entity or arrangement?
- ✓ What supervision programmes ensure that all relevant legal persons and arrangements are keeping the required beneficial ownership information?
- ✓ What supervisory practices exist to verify the accuracy of the beneficial ownership maintained by relevant entities or arrangements?

3. **Other AML mechanisms:** using existing beneficial ownership information mechanisms, such as the data collected as part of CDD or from other authorities (the tax authority, financial regulator, DNFBPs, etc.).

DNFBPs

A jurisdiction's domestic legal framework may already have reporting mechanisms in place that can also be utilised for reporting of beneficial ownership information. For example, DNFBPs are a frequent source of BO information – notaries, formation agents, company service providers, auditors, etc., are often key intermediaries linked to an entity's life cycle and can be sought out by a competent authority. The mechanisms for applying BO information collection requirements to DNFBPs may look similar to what is expected of financial institutions. Here is a checklist to consider:

Checklist C: Checklist for Placing BO obligations on DNFBPs

DNFBPs often engage with relevant entities and arrangements in the life cycle of business or financial activities. To the extent that DNFBPs are already required to undertake CDD requirements under the AML framework, this should be sufficient for a competent authority to obtain beneficial ownership information for the persons that the DNFBPs engage with. However, if the AML framework does not extend to all relevant DNFBPs or not all relevant entities and arrangements have relationships with DNFBPs or other AML obligated financial institutions, jurisdictions might seek to either expressly include them or provide for separate reporting mechanisms. Similar requirements would also be applicable to financial institutions, but for complete coverage all relevant entities and arrangements would need a relationship with an AML-obliged financial institution.

Relevant DNFBPs can include:

- Lawyers, notaries, other independent legal professionals and accountants – this refers to sole practitioners, partners or employed professionals within professional firms. It is not meant to refer to ‘internal’ professionals that are employees of other types of businesses, nor to professionals working for government agencies, who may already be subject to AML/CFT measures.
 - Trust and Company Service Providers refers to all persons or businesses that are not covered elsewhere under the FATF Recommendations, and which as a business, provide any of the following services to third parties:
 - acting as a formation agent of legal persons;
 - acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;
 - providing a registered office; business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;
 - acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement;
 - acting as (or arranging for another person to act as) a nominee shareholder for another person.
-
- ✓ Is a particular relevant DNFBP already covered by the AML framework?
 - ✓ If not, is the type of DNFBP subject to regulatory oversight that already requires reporting or maintenance of a client’s beneficial ownership information?
 - ✓ Once gathered, is beneficial ownership information verified, and how?
 - ✓ Does a competent authority have access powers to obtain the BO information from the DNFBP?
 - ✓ Is the DNFBP subject to effective supervision and enforcement mechanisms?
 - ✓ What penalties apply for non-compliance with the requirement to provide, update, and/or ensure the availability of accurate beneficial ownership information?

See Checklists A, B, and D for consideration of verification, information maintenance, updates, timelines, supervision, and other practical measures that might be similarly applicable to DNFBPs.

Tax Authorities

A tax agency may also already collect some ownership information from the taxpayer during the registration process, the filing of a tax or information return, or some other procedure. Thus, tax reporting can be a useful process for acquiring BO information in the jurisdiction's framework, but it should be recognised that using tax reporting may not ensure that other competent authorities can access the information in a manner consistent with the FATF Standards. An appropriate sanction is often present in the tax code or tax regulations for failure to provide information in timely fashion, or for providing misleading or false information.

For jurisdictions thinking of using a tax reporting requirement to gather beneficial ownership information, the following checklist may be useful:

Checklist D: Checklist for Placing BO Obligations through Tax Reporting

A possible means of collecting and maintaining beneficial ownership information is to establish a comprehensive requirement that all relevant legal persons and arrangements have an annual tax reporting obligation and provide timely updates of information. The benefits of creating a tax reporting requirement to capture beneficial ownership information include: direct access to information; it is easier to ensure supervision of obliged entities and arrangements. Potential disadvantages of a tax reporting requirement for all relevant entities and arrangements include: the higher resource costs involved in implementing a comprehensive tax reporting regime, such as revised tax forms; a higher administrative burden in processing increased reporting.

- ✓ Have all relevant legal persons and arrangements in my jurisdiction been identified?
- ✓ Is there a statutory or regulatory basis in place to require all relevant legal persons and arrangements to submit an annual tax form (or other filed document) that identifies the BOs?
- ✓ Is the definition of BO used in the tax law consistent with the BO definition used in the AML framework (or otherwise FATF compliant)?
- ✓ Do the appropriate tax forms for each entity and arrangement properly require the necessary identification information on BOs?
- ✓ Are there sanctions to penalise entities and arrangements that fail to provide the required beneficial ownership information, as well as BOs themselves if they fail to provide it to the entity or arrangement?
- ✓ What supervision programmes ensure that all relevant legal persons and arrangements have filed a tax return (for example, crosschecking with the company registry or the central bank)?
- ✓ What supervisory practices are in place to verify the accuracy of the beneficial ownership information submitted to the tax agency?
- ✓ How often is the beneficial ownership information updated to ensure reliability?

Currently, most jurisdictions do not have a centralised company registry holding beneficial ownership information; this information is usually held by companies and/or AML-obliged financial institutions and DNFBPs as part of the required CDD process. Beneficial ownership information which is available outside of a registry may also be relied on for the purposes of the EOIR Standard. For example, if all companies operating in the country hold bank accounts at local financial institutions, the local authorities can obtain beneficial ownership information as a result of the banks' CDD. Appropriate sanctions (e.g. refusal to transact business, ending the customer relationship, and/or filing suspicious transaction reports) should apply in the event of failure to provide accurate information to the financial institution.

Example: in country K, registered companies are required to have local financial accounts at resident banks. As a result, country K should be able to obtain beneficial ownership information for any registered company from a bank or an AML-obliged agent, assuming that FIs adequately implement CDD obligations and the tax authorities can access it.

Part V: Practical Considerations for a Beneficial Ownership Framework

Ensuring beneficial ownership information for exchange of information on request (EOIR)

Pressure continues to increase on all countries to show that they can obtain beneficial ownership information and share it with other jurisdictions. Early results from the second round of EOIR reviews under the 2016 ToR show that most jurisdictions continue to face challenges in implementing a compliant legal framework and practical implementation. This is particularly the case where only one source of BO information exists in the legal framework; jurisdictions that utilise multiple sources for BO often receive better ratings because the combination of systems is broader (e.g., CDD rules under AML and commercial register or tax reporting).

What matters is not just nominal compliance but also implementation. In order to meet the enhanced EOIR Standard, the beneficial ownership information must be available under the legal framework and in practice, as well as accurate and up-to-date.

How the EOIR standard operates in practice is assessed over a three-year period that ends two quarters prior to the launch of the review. For most jurisdictions that are now going into reviews, the review period has already started. Consequently, jurisdictions should take steps now to ensure that they have the necessary legal and regulatory infrastructure in place.

Adopting a legal definition

It is probable that most jurisdictions already have a definition (or more than one) of beneficial ownership in existing AML or commercial laws. The EOIR Standard adopts the same definition of beneficial ownership as the FATF Standards, and so domestic definitions should be aligned as closely as possible. Other requirements to maintain information on beneficial owners, such as tax law, exchange control, or commercial law, often do not define “beneficial owner” in exactly the same manner as provided for in the EOIR Standard. It should be noted, however, that the fact that the definition of “beneficial owner” does not exactly conform to the wording of the definition in the EOIR Standard does not preclude the possibility that the requirement, in substance, meets the standard if all the core aspects of the definition are met.

Even where a jurisdiction’s definition of BO aligns completely with the FATF standard, however, certain problems can arise. Some key issues related to the application of the definition in practice are discussed below.

Using a threshold

It is possible that if a jurisdiction uses a minimum ownership threshold (such as 25 per cent), ownership may be dispersed widely enough that no BO is identified. In that case, a jurisdiction is expected to use the tiered identification process mentioned in Part III. If the first two tests fail to identify any person(s) as the BOs, then a senior managing official should be listed as the BO. The same applies in any case where a controlling ownership interest cannot be identified.

As mentioned earlier, it is unlikely that a threshold above 25 per cent would be considered reasonable.

Example: company A is created in country A, which enacts a law requiring companies to maintain beneficial ownership information for any natural person with more than a 25 per cent controlling ownership interest. Company A has four shareholders: (i) individual X, who owns 20 per cent of the shares; (ii) individual Y, who owns 40 per cent of the shares; LLC M, which owns 20 per cent of the shares; and (iv) individual Z, who owns 20 per cent of the shares. LLC M is solely owned by X. Given the identification rules in country A, the following should be identified as beneficial owners: (i) X, who is the ultimate controlling owner of 40 per cent of company A shares (through LLC M); and (ii) individual Y.

Exempted entities

Some jurisdictions exempt certain entities from having to report BOs under AML rules if there are already other requirements to disclose such information in a different setting. For example, a jurisdiction may exempt publicly listed companies from the requirement to collect and provide BO information, if such entities are already subject to disclosure requirements which ensure transparency of beneficial ownership. This type of exemption is consistent with the EOIR Standard to the extent that the BO information of such entities can be obtained in a timely manner from another source¹⁹.

The missing AML link

Even if a jurisdiction relies on an AML framework which complies with the FATF standards, in practice it might be the case that not all relevant legal entities and arrangements will have beneficial ownership information available because they have no relationship with an AML-obliged person required to conduct CDD. The basic rule is that beneficial ownership information should be available in respect of all domestic relevant entities and arrangements. Thus, if an entity or arrangement has no bank account or does not use an AML-obliged financial institution or DNFBP to collect BO information under CDD procedures (required under Recommendation 10), then an AML regime may fail to collect beneficial ownership information on relevant entities and arrangements as required for purposes of Recommendations 24 and 25. A jurisdiction would then have to show that BO information is available under another regime in order to meet the EOIR Standard.

Bearer shares

As previously discussed, the anonymity associated with bearer shares allows for potential abuses that impede compliance with the EOIR Standard. The Global Forum requires jurisdictions to implement some form of transparency mechanism, either by abolishing, immobilising, or dematerialising bearer shares/warrants. As a result, very few jurisdictions still

allow unregistered bearer shares. Because of the ongoing peer reviews by the Global Forum, more than 30 jurisdictions have amended their legal frameworks to eliminate or immobilise bearer shares (for example, the British Virgin Islands, Panama, the United Kingdom, and Uruguay).

Inactive Entities

A significant practical issue can arise if jurisdictions allow inactive entities to retain juridical powers even if the entity stops filing any required renewals or documents. Although inactive companies are not inconsistent with the EOIR standard, they should be expected to meet return filing obligations and keep statutory registers up to date. A seemingly inactive company may still hold assets or conduct activity in a foreign jurisdiction. But if a jurisdiction does not have an effective mechanism requiring these entities to submit returns and maintain updated beneficial ownership information, it may have no visibility into the entity's ownership or financial records.

Appropriate compliance, monitoring, and enforcement processes are critical to ensuring that laws and regulations on beneficial ownership are observed. Where inactive companies are concerned, many jurisdictions have struck-off entities, which do not comply with their filing requirements, from the commercial registry, after a particular period, e.g. 3 years, in order to remove legal personality. In EOIR peer reviews, jurisdictions may face the prospect of a low rating for certain elements if there is a large percentage of inactive companies for which no up-to-date beneficial ownership information or accounting records are available.

Introduced Business

The FATF Standards permit jurisdictions to allow financial institutions and DNFBPs (the Relying Person) to rely on third parties (the Introducer) for conducting certain parts of the CDD processes, such as introduced business (e.g. a foreign lawyer introduces a client to a bank). However, ultimate responsibility rests with the Relying Person, including the need to obtain and maintain the records.

In brief, these “introduced business” rules permit reliance on the customer due diligence previously conducted by a person introducing the customer. The EOIR Standard requires that legal and beneficial ownership information is available, but does not explicitly endorse or prohibit introduced business rules. The correct implementation of these rules should not compromise the availability of ownership and identity information in a jurisdiction. This is because the FATF Standards contain sufficient restrictions on the conditions under which the introduced business rules can be used, including:

- the Relying Person has the identity and ownership information (if not the underlying research) immediately;
- the Relying Person must have taken steps to ensure it can obtain the underlying research without delay;
- the Introducer should be subject to AML laws that reflect the CDD and record-keeping requirements of FATF Recommendations 10 and 11 (and Recommendation 22 for DNFBPs), and have measures in place to ensure compliance with these.

In order to show availability under the EOIR Standard, a jurisdiction must be able to effectively and obtain in a timely manner the underlying CDD information from the introducer. Where the

introducer is located in a foreign jurisdiction, the customer information may not always be readily available in the local jurisdiction.

Thus some jurisdictions permitting introduced business still require that the underlying CDD records be held in the jurisdiction to ensure timely access if such records are needed.

Dealing with foreign companies

The range of legal entities subject to the EOIR Standard's requirement on the availability of beneficial ownership information is generally the same as for legal ownership. For any entity incorporated in a jurisdiction, the jurisdiction should ensure that information on beneficial ownership is available. The EOIR Standard also requires that beneficial ownership information be available in a jurisdiction if an entity not incorporated therein has sufficient nexus with it. The concept of sufficient nexus offers a limited expansion of the circumstances in which beneficial owners should be disclosed, including residence for tax purposes or the presence of a headquarters in the jurisdiction. If there is sufficient nexus and a relationship with a financial institution or other AML-obliged service provider, then the jurisdiction is expected to have beneficial ownership information available. Generally, the list of AML-obliged service providers relevant for EOIR includes lawyers, notaries, accountants, tax advisors, and trust and company service providers (TCSPs).

Example: company C is incorporated in country D, but has its headquarters and a bank account in country E. The presence of the headquarters and the bank account in country E obliges country E to ensure that beneficial ownership information is available on company C, even though it is a foreign entity.

Nominees and mandatarios

Common-law jurisdictions

Under common law, a nominee is a person or entity that is asked or named to act for another (such as an agent or trustee) and may hold legal ownership of another person's property. Where the legal owner acts on behalf of another person as a nominee or under a similar arrangement, that other person—rather than the legal owner—may be the beneficial owner. For example, most nominees hold shares or exercise other rights in an entity on behalf of another, but nominees can also hold bank accounts or act as directors. In some cases, the purpose of the nominee is to avoid disclosure of the BO. The goal of the EOIR Standard is to find instances of nominee ownership and scrutinise them to detect the true beneficial owner. Nominees can arise in many forms: corporate shell entities, trusts, professional advisors, or even family members.

Some jurisdictions have enacted laws or implemented regulatory regimes that require nominees to expressly identify themselves, either to the entity itself or to the regulatory authority. For example, TCSPs may act as a nominee or shareholder in a particular jurisdiction but be subject to registration or licensing requirements that allow a competent authority to easily identify and contact such persons. This mandatory self-identification is meant to make the search for beneficial owners more transparent, as well as to provide express penalties for nominees who fail to appropriately disclose their status.

Specific disclosure methods that apply to nominees include:

- requiring a nominee shareholder or director to self-disclose as a nominee to the entity and relevant registry, with such disclosure being appropriately recorded;
- requiring nominees to be licensed and to disclose on whose behalf they are acting, with such information being appropriately recorded and made available to a competent authority upon request.

Trustees, whether professional or non-professional, should also be required to disclose their status when acting on behalf of the trust (whether holding assets, creating a bank account, and so on).

Civil-law jurisdictions

The concept of nominee generally does not exist in civil-law jurisdictions. What often does exist, however, is the concept of *mandatario*, whereby a person receiving a mandate agrees to provide a service for the person giving the mandate. Under the mandate, the *mandatario* is given authority (either general or special) to act in respect of the business of the person giving the mandate; the *mandatario* is not the legal or beneficial owner of shares. A civil law jurisdiction should ensure that it can obtain legal and beneficial ownership information from *mandatarios*.

Trusts having their administration in a jurisdiction or having a trustee resident there

All jurisdictions, whether or not they have domestic law trusts, are examined in relation to the availability of beneficial ownership information on trusts, since trusts may be administered in the jurisdiction, or a trustee of the trust may be resident in the jurisdiction. Normally, the trustees will be the administrators of the trusts, and thus these two requirements overlap. Therefore, civil-law jurisdictions (where laws often do not allow for the creation of trusts) still have responsibilities to take reasonable measures to have information on the BOs of trusts when there is a resident trustee or the trust is administered there (for professional trustees).

Non-professional trustees

Many jurisdictions rely on AML or the licensing of trust service providers to ensure the availability of beneficial ownership information on trusts. Non-professional trustees are often excluded from these AML or licensing requirements. The materiality of this potential gap is normally examined in the course of a Global Forum peer review. Where exclusion of non-professional trustees from AML requirements is not considered material, the report reflects this.

Ongoing accuracy

The obligation to identify and verify the beneficial owner of a legal person or arrangement continues to exist after the initial occurrence. Jurisdictions are required to have mechanisms that ensure beneficial ownership information is kept accurate and updated within a reasonable period following any change, or restated at periodic intervals. Thus, information must be updated and accurate at the time the legal person is created, and must be promptly updated as changes occur.

Jurisdictions can ensure that the beneficial ownership information is up-to-date by requiring that any person or entity obliged to keep such information (for example, the registry, financial

institutions, or DNFBP) be notified of any relevant ownership or control changes within a certain period.

Example: country D requires all companies to notify the public registry within 30 days of any changes in ownership that cross the threshold in the beneficial ownership definition. Assume country D has a 20 per cent threshold in its beneficial ownership definition. If individual E increases his shareholding in an LLC from 10 per cent to 25 per cent, then the LLC must notify the registry within 30 days that E is a beneficial owner of the LLC.

Maintaining information

Under the EOIR Standard, all relevant entities and arrangements obliged to maintain beneficial ownership information are required to retain it for at least five years from the end of the period to which the information relates. A best practice is to also keep records for five years after the date of the dissolution of the entity, or five years after the time the legal person or arrangement ceases to be a customer.

Even if third parties are responsible for maintaining this information, a best practice is that the entity should still be held ultimately responsible for providing the information on request to the competent authority.

Example: lawyer F is a DNFBP in country N. Lawyer F helped an LLP to purchase real estate in country N, and was required to identify and verify the beneficial owners of the LLP. Lawyer F should retain that information in his or her records throughout the client relationship. If the LLP ceases to be Lawyers F's client, F should still keep the records for at least five years after the relationship ends.

Example: country P uses a liquidation procedure when legal entities are dissolved. Corporation G decides to dissolve. The liquidator in charge of G's dissolution should retain records of beneficial ownership information for at least five years after the completion of the dissolution. For circumstances involving other types of procedures for entities that cease to exist, the jurisdiction should ensure some person, entity, or authority is obliged to retain the requisite records (for example, a resident agent for a struck-off company).

Access powers

Regardless of the identification mechanism used, jurisdictions under whose law a company is formed should ensure that such entities cooperate with competent authorities to the fullest extent possible in determining the BO. It is critical that a competent authority has access to the source of beneficial ownership, whether located in a central registry or held by a financial institution, DNFBP, or the entity itself. For example, if a central registry holds the names of all BOs of legal entities, potential problems with access can be avoided if the tax authority has legal power to directly access the database in order to fulfil a treaty partner's EOI request.

Example: country H passed a law allowing its tax authority to have direct access to BO information maintained by the central bank. This allows the tax authority to quickly obtain BO information when necessary in order to respond to an EOI request.

If the tax authority has to obtain a judicial order in order to require the necessary information from the central registry, this hampers the acquisition of the information in a timely manner under the EOIR Standard. If a tax authority does not have direct access to BO information, then specific timelines for response can be helpful to ensure requests are answered promptly.

Example: country J requires its tax authority to send a request for beneficial ownership information on financial accounts to the banking superintendent. Country J passed a law requiring the banking superintendent to respond to the tax authority's request within 30 working days. In theory, this strict timeline ensures that there are no systematic delays in the tax authority's obtaining the beneficial ownership information it needs to fulfil a partner's EOI request.

Supervision and enforcement

A jurisdiction must have effective enforcement provisions in place, including adequate monitoring, as well as compulsory powers. The goal is to ensure that beneficial ownership information maintained by obliged persons, entities, institutions, or regulators is not only kept, but is also adequate, accurate and up-to-date. Hence a jurisdiction must implement procedures for oversight and enforcement with respect to the method(s) used to identify and verify beneficial ownership information.

Supervision and enforcement are crucial aspects for the second-round EOIR reviews. Supervision is necessary to detect possible wrongdoing in the first instance. Where there is no supervision, breaches will remain unidentified and there will be no basis for enforcement. The current round of EOIR reviews has already identified lack of supervision as a major problem in some jurisdictions (this is also prominently identified in FATF mutual evaluations).

The scope of a supervision programme should be broad enough to ensure that record-keeping requirements are being followed in practice. For example, a jurisdiction can perform on-site inspections or other risk-based review procedures of companies, agents, or service providers that maintain beneficial ownership information, so as to verify that the information is accurate and adequately maintained (whether through commercial law, AML, or tax mechanisms). The extent and frequency of examination programmes has been considered important in previous peer review reports. In general, where no or limited meaningful examinations were carried out in respect of entities or DNFBPs that are an important source of beneficial ownership information, this raises concerns and recommendations for improvement tend to be made.

Example: country R requires all resident agents of companies to collect information on BOs and make it available upon request by a competent authority. Country R should implement some supervision programme to ensure that resident agents are keeping the required beneficial ownership information. Supervision could take the form of compliance audits of selected resident agents, with sanctions for non-compliance.

Example: in country S, beneficial ownership information is only maintained by registered legal entities. Country S should put in place supervision programmes to check that entities are actually keeping beneficial ownership information, and also attempt to use some verification measures to determine that such information is accurate.

Enforcement has effects beyond just influencing the behaviour of individual wrongdoers, and helps create a regulatory system that maintains its integrity. Effective enforcement requires the capacity to impose sanctions in the event of non-compliance by the entities, but also non-compliance by the shareholders or BOs who would not disclose requested information to the entity. A track record of effective enforcement is likely to increase the overall deterrent effect in a jurisdiction.

Example: in country U, the registrar can impose fines on any company that fails to maintain beneficial ownership information in a corporate register. However, there is no applicable penalty for a beneficial owner who fails to provide information to the company. Although the registrar can penalise the entity itself (or an agent) if BO information is not maintained, the legal framework fails to appropriately subject the BO to penalties for non-compliance, which may make the system ineffective.

Where non-compliance is discovered, a jurisdiction should have effective, proportionate, and dissuasive sanctions that result in action(s) to successfully bring the person or entity into compliance, or else result in appropriate limitations on further activity.

Example: in country V, the registrar can strike off any international business corporation (IBC) that fails to submit a list of beneficial owners to the central registry in timely fashion, and can impose a financial penalty on the IBC's directors.

The ultimate goal of any supervision and enforcement mechanism is to ensure that a country's legal framework on beneficial ownership is working in practice. Being able to present verified results (such as statistics) that beneficial ownership information is available from obliged record holders confirms that the framework is operating as intended, and offers reassurance that non-compliance will be uncovered and dealt with.

Framework gaps versus practice

The Global Forum's approach is that positive EOI practice in itself is not determinative and cannot remedy systemic legal and practical gaps. For example, a jurisdiction's ability to use access powers to request beneficial ownership information is not fully sufficient to offset the gap that opens up when an insufficient range of entities is covered by the beneficial ownership requirement. It is therefore very important for a jurisdiction's legal and administrative framework to be sufficiently robust, regardless of its practical ability to provide information on request.

Part VI. Automatic Exchange of Information

Beneficial ownership is also a crucial component of the automatic exchange of information (AEOI) regimes being adopted by jurisdictions around the globe. As part of the Common Reporting Standard (CRS), committed jurisdictions are required to obtain identification

information about applicable financial institutions' account holders and controlling persons. If an Entity Account Holder is a Passive Non-Financial Entity (NFE) then the Financial Institution must "look-through" the Entity to identify its Controlling Persons. If the Controlling Persons are Reportable Persons then information in relation to the Financial Account must be reported, including details of the Account Holder and each reportable Controlling Person. A similar treatment applies to certain trusts that are investment entities which are considered to be financial institutions under the CRS.

The CRS provides a standardised set of detailed due diligence and reporting rules for financial institutions to apply to ensure consistency in the scope and quality of information exchanged. Jurisdictions will need to translate the reporting and due diligence requirement into their domestic law. Controlling Persons are just one aspect of the information that must be reported where passive NFEs are concerned. Other information that needs to be captured includes taxpayer identification numbers, account number, account balance or value and income.

However, as used in CRS, a "Controlling Person" corresponds to the term "beneficial owner" as described in Recommendation 10 and the Interpretive Note on Recommendation 10 of the FATF Recommendations, and must be interpreted in a consistent manner with such Recommendations. As a result, for the purpose of determining the Controlling Person of an Account Holder a Reporting Financial Institution may rely on the information collected and maintained pursuant to AML/KYC procedures provided these are consistent with Recommendations 10 and 25 of the FATF. A Controlling Person is identified through the cascade approach mentioned earlier: having (i) a controlling ownership interest; or (ii) persons exercising control through other means; or (iii) a senior managing official. For trusts, the CRS requires that settlors, trustees, protectors, and beneficiaries or classes of beneficiaries (and equivalent or similar positions in the case of other legal arrangements) must always be treated as Controlling Persons, regardless of whether or not any of them exercises control over the trust.

Determining a controlling ownership interest will depend on the ownership structure of the Entity. For example, Controlling Persons may include any natural person that holds directly or indirectly (e.g. through a chain of entities) more than 25 percent of the shares or voting rights of an Entity as a beneficial owner. To the extent there is doubt that the person with the controlling ownership interest is the beneficial owner or where no natural person that exerts control through ownership interests can be identified, the Controlling Person of the Entity is the natural person (if any) that is exercising control of the Entity through other means. For example, an Individual A may own 20 percent interest in Entity B and, although held in the name of Individual C, pursuant to a contractual agreement, Individual A also controls 10 percent of the voting shares in Entity B. In such instance, Individual A should meet the definition of Controlling Person.

In case Controlling Persons cannot be identified by applying the two steps above, the Financial Institution should identify the natural person(s) who holds the position of senior managing official in the Entity as the Controlling Person.

In practical terms, the test to determine the Controlling Persons of an Entity needs to be carried out at the level of each Entity in the chain of ownership, in accordance with the rules applicable under FATF. FATF Recommendations do not require the determination of beneficial ownership if an Entity is (or is a majority owned subsidiary of) a company that is listed on a

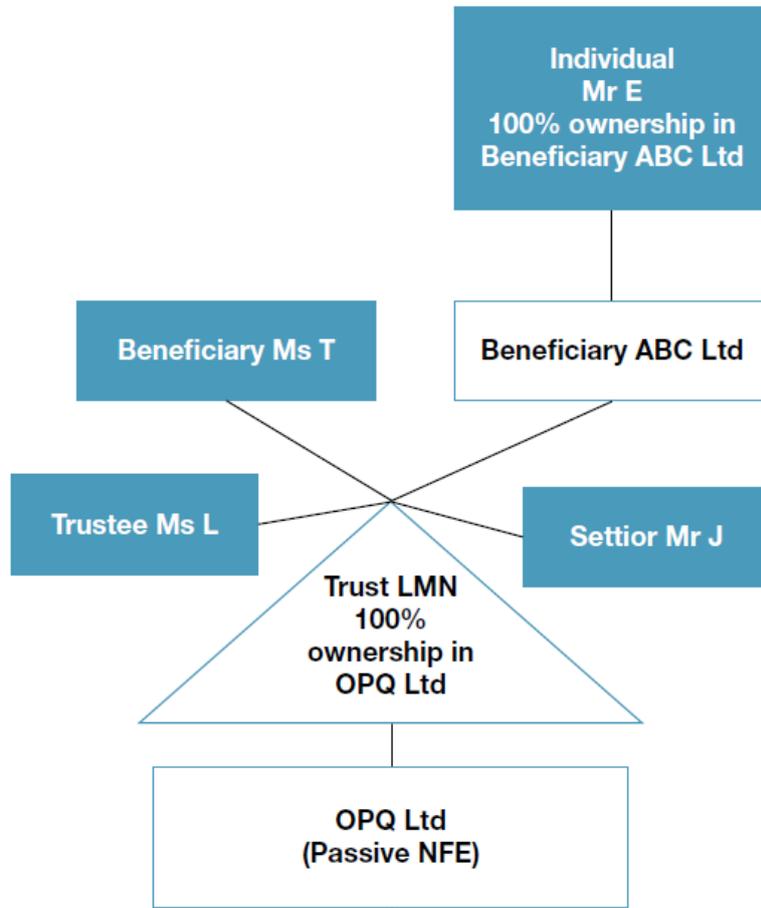
stock exchange and is subject to market regulation and to disclosure requirements to ensure adequate transparency of beneficial ownership. Thus, in such cases, it is accepted that a Reporting Financial Institution will not be required to determine the Controlling Persons for CRS purposes.

In the case of a partnership and similar structures, Controlling Person means, consistent with “beneficial owner” as described in the FATF Recommendations, any natural person who exercises control through direct or indirect ownership of the capital or profits of the partnership, voting rights in the partnership, or who otherwise exercise control over the management of the partnership or similar arrangement.

In the case of a trust (and Entities equivalent to trusts), the term Controlling Persons is explicitly defined to mean the settlor(s), the trustee(s), the protector(s) (if any), the beneficiary(ies) or class(es) of beneficiaries, and any other natural person(s) exercising ultimate effective control over the trust. If the settlor, trustee, protector, or beneficiary is an Entity, the Reporting Financial Institution must identify the Controlling Persons of such Entity in accordance with FATF Recommendations.

For example, where a trust classified as a Passive NFE opens a Financial Account with a Reporting Financial Institution, that Reporting Financial Institution is required to look through the chain of ownership and control to identify Controlling Persons, i.e. natural persons that are Reportable Persons. This means that in a chain of ownership, determination of the Controlling Person of a Passive NFE is made by reviewing the beneficial owners of subsequent legal persons. For the purposes of determining the Controlling Persons, the AML/KYC procedures pursuant to the anti-money laundering rules – as implemented in the domestic law and to which the Reporting Financial Institution is subject – apply provided they are consistent with Recommendations 10 and 25 of the FATF recommendations.

Figure 7. Controlling Persons of a trust in chain of ownership



Note: Boxes in blue are the BOs.
Source: CRS Handbook (2018)

CONCLUSION

Given that jurisdictions must implement the international transparency standards in a manner consistent with their national legislative and institutional systems, the methods by which compliance is achieved may differ from one jurisdiction to another. Hence the Global Forum does not universally prescribe any particular mechanisms of implementing beneficial ownership standards (for example, creating a central registry). However, the minimum rules to comply with the international tax transparency standards are quite clear, and so jurisdictions must act to make policy decisions and implement a compatible legal framework. Because of the amount of important work and number of agencies involved that may be necessary to achieve compliance, it is often a good strategy for jurisdictions to adopt a “whole of government” approach to engage all appropriate stakeholders in putting together a beneficial ownership regime that meets the standards.

PART VII. Assistance Available

The Global Forum’s Technical Assistance (TA) Unit can provide tailored assistance to jurisdictions that need help in complying with the enhanced international tax transparency standards. Regarding beneficial ownership, the TA Unit can assist in identifying gaps in the legal framework and supervision, reviewing draft legislation and guidance, and completing the EOIR questionnaire. For more information on support capabilities, please contact the Global Forum Secretariat at: gftaxcooperation@oecd.org.

The IDB also provides technical assistance to its member countries to enhance financial transparency and strengthen their AML/CFT systems. For more information on the Bank’s resources and activities, please contact: aaf/sectec@iadb.org.

ANNEX 1. BENEFICIAL OWNERSHIP GAP ANALYSIS TOOL

Note: This simplified questionnaire can be used to gather information from all appropriate government stakeholders in order to obtain an initial picture of a jurisdiction's existing legal framework and identify potential gaps that may exist with regard to the EOIR standard.

For each question below, please respond with as detailed a description as necessary.

1. How does your country define beneficial ownership?
2. Is beneficial ownership information required to be maintained in your country by the following institutions/persons? If so, with respect to which particular entities? Is the information required to be updated (what are the requirements and mechanisms for doing so?):
 - (a) the corporate registry?
 - (b) licensed financial institutions (such as banks)?
 - (c) licensed/regulated trust and company service providers?
 - (d) unregulated trust and company service providers?
 - (e) the entities themselves?
 - (f) the tax administration?
3. What sources would you access to gather information on beneficial owners of:
 - (a) legal entities registered in your country?
 - (b) legal entities registered in a foreign country with sufficient nexus in your country?
 - (c) trusts (or similar arrangements) registered in your country?
 - (d) trusts (or similar arrangements) registered in a foreign country with a trustee in your country?
4. What are the main problems you face in investigating the ownership structure and beneficial ownership of:
 - (a) domestic legal entities?
 - (b) cross-border legal entities?
 - (c) domestic trusts (or similar arrangements)?
 - (d) cross-border trusts (or similar arrangements)?
5. Are bearer or nominee shares, or any other nominee arrangement, permitted? If so:
 - (a) is there an effective mechanism that will allow the ultimate beneficial owner of the shares to be ascertained?
 - (b) what is that mechanism?
6. What monitoring exists for those institutions and entities that maintain beneficial ownership information by:
 - (a) the corporate registry?
 - (b) licensed financial institutions (such as banks)?
 - (c) licensed/regulated trust and company service providers?
 - (d) unregulated trust and company service providers?
 - (e) the entities themselves?
 - (f) the tax administration?

7. What enforcement activities (such as being struck off and penalties) are carried out with regard to beneficial ownership obligations, and what is the materiality of those:

- (a) by the corporate registry?
- (b) by licensed financial institutions (such as banks)?
- (c) by licensed/regulated trust and company service providers?
- (d) by unregulated trust and company service providers?
- (e) by the entities themselves?
- (f) by the tax administration?

8. What AML rules apply to any financial institution, intermediary or other obliged person? For example, describe any customer due diligence rules, thresholds to identifying beneficial owners, and so on.

NOTES

¹ Andrés Knobel (2018). “Regulation of Beneficial Ownership in Latin America and the Caribbean,” *Technical Note* IDB-TN-1341. Inter-American Development Bank, Washington, DC. <https://publications.iadb.org/handle/11319/8646?locale-attribute=en>.

² FATF 2014: 15.

³ There are also companies with different shares that grant either economic rights (such as payment of dividends) or political rights (such as voting rights). Additionally, there are companies whose capital is not included in the shares but rather through guarantees; or with different types of shareholders, some with limited liability and others with unlimited liability.

⁴ In common-law countries, partnerships are usually tax transparent and are not considered legal persons, particularly if the partners have unlimited liability. Although the Global Forum usually classifies legal persons from those countries as companies or partnerships, in civil-law jurisdictions this distinction is irrelevant, and they are all considered companies (*sociedades*). The World Bank report *Puppet Masters* explains that, in companies, capital contribution is the important thing; in partnerships, it is the person that is important; and traditionally in partnerships, all or some of the partners have unlimited liability. This is not the case, however, in limited liability partnerships (LLPs), in which even companies can be partners and all the partners can have limited liability.

⁵ This legal form provided under Liechtenstein company law is generally used either for commercial activities (e.g. manufacturing businesses, retail services, etc.) or as a company holding certain assets (e.g. financial assets, intangible assets, real estate) for the benefit of its beneficiaries. Depending on the Article of Association, an establishment can have legal characteristics similar to a company (i.e. where the holder of the founders’ rights can be considered equivalent to a shareholder) or to a foundation (i.e. where no founders’ rights exists or where the assets are held for the benefit of third parties). Establishments with founders’ rights are the most common type. For more information, see <https://www.liechtenstein-business.li/en/service-for-entrepreneurs/founding-a-company/legal-forms/the-establishment/> and https://star.worldbank.org/sites/star/files/liechtenstein_bo_guide_-_updated_sept_2018_-_final.pdf.

⁶ FATF 2012: 122.

⁷ FATF 2012: 119.

⁸ In the case of a company, registration may be necessary for it to be legally valid or to limit the liability of partners.

⁹ FATF *Guidance on Transparency and Beneficial Ownership* (2014): 32–33.

¹⁰ The EU’s Fourth Anti-Money Laundering Directive does equate the definition of beneficial ownership for a private foundation with that of a trust (Art. 3.6.b.c) although, like the FATF, it sets out different requirements for registration and transparency: foundations, like any other legal person, are governed by Art. 30, while trusts are governed by Art. 31.

¹¹ FATF Interpretive Note to Recommendation 24, para. 1 (fn 40): “Controlling shareholders as referred to in, paragraph 5(b)(i) of the interpretive note to Recommendation 10 may be based on a threshold, e.g. any persons owning more than a certain percentage of the company (e.g. 25%)”.

¹² FATF Interpretive Note to Recommendation 10: “Where the customer or the owner of the controlling interest is a company listed on a stock exchange and subject to disclosure requirements (either by stock exchange rules or through law or enforceable means) which impose requirements to ensure adequate transparency of beneficial ownership, or is a majority-owned subsidiary of such a company, it is not necessary to identify and verify the identity of any shareholder or beneficial owner of such companies.”

¹³ Trusts may have beneficiaries that are not determined but the class must be clear: for example, the victims of an accident X or all the descendants of Mr. Z. The way the class is identified must be known in order to identify the natural person when their rights are known and vested.

¹⁴ The OECD’s Common Reporting Standard for automatic exchange of information, in the definition of BOs of a trust (paragraph 134 of the CRS commentary), states that when the settlor of a trust is a legal person, the BOs of the legal person-trust must be identified.

¹⁵ Those trusts with tax implications.

¹⁶ http://europa.eu/rapid/press-release_STATEMENT-18-3429_en.htm.

¹⁷ https://publications.parliament.uk/pa/bills/cbill/2017-2019/0176/amend/sanctions_daily_rep_0430.1-7.html

¹⁸ Some jurisdictions have made political commitments to the European Union to develop interlinked beneficial owner registers.

¹⁹ The 2016 ToR notes that EOI competent authorities need only provide ownership information for publicly traded companies and public collective investment funds or schemes if such information can be obtained without disproportionate difficulty. But there is no consideration of disproportionate difficulty under the FATF Standards.

For more information
**Global Forum on Transparency and
Exchange of Information for Tax Purposes**
www.oecd.org/tax/transparency
www.eoi-tax.org
Email: gftaxcooperation@oecd.org