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TI Australia Submission to Revisions to Recommendation 24 - White Paper for Public Consultation

Transparency International Australia is pleased to submit some brief comments to the White Paper for Public Consultation.

TRANSPARENCY INTERNATIONAL AUSTRALIA

TI Australia (TIA) is part of a global coalition to fight corruption and promote transparency, integrity and accountability at all levels and across all sectors of society, including in government. TIA was launched in March 1995 to raise awareness of corruption in Australia and to initiate moves to combat it. TIA believes that corruption is one of the greatest challenges of the contemporary world. Corruption undermines good government, distorts public policy, leads to the misallocation of resources, harms private and public sector development and particularly hurts the poor. It drives economic inequality and is a major barrier in poverty eradication. Tackling corruption is only possible with the cooperation of a wide range of stakeholders. We engage with the private sector, government and civil society to build *coalitions against corruption*. Coalitions against corruption will help shape a world in which government, politics, business, civil society and the daily lives of people are free of corruption.

TI Australia is the national chapter of Transparency International (TI), the global coalition against corruption, with a presence in over 100 countries. TIA fully supports TI's Vision, Objectives and Guiding Principles and Mission and Strategy.

TI Australia, is registered with the Australian Charities and Not-for-Profits Commission (ACNC).

TI AUSTRALIA POSITION

Risk-based approach for foreign legal persons

1. Should countries be required to apply measures to assess the ML and TF risks to all types of legal persons created in the country and also to at least some foreign-created legal persons and take appropriate steps to manage and mitigate the risks?

Yes, an effective anti-money laundering regime requires a robust and up-to-date understanding of how criminals might misuse domestic and/or foreign legal persons to commit crimes and launder money. While there is sufficient evidence that legal vehicles are misused by the criminals to, among other things, make bribe payments, transfer embezzled funds, hide true ownership of assets and engage in tax evasion, the specific types and characteristics of legal structures may entail different levels of risk. Therefore, understanding the specific risks associated with each type of legal person or arrangement operating in a given country, for example, by taking into account the requirements for company formation, reporting obligations, level of disclosure and transparency and business operations, will allow countries to establish the necessary mitigation measures and appropriate regulatory environment. Given the cross-border nature of money laundering and many predicate offences, analysing the risks posed by foreign legal persons in a similar manner is also important. This is particularly relevant to Australia, as

FATF have indicated Australia is an 'attractive destination' for the proceeds of corruption in the Asia-Pacific region, particularly from China. [1]

2. What constitutes a sufficient link with the country? How should countries determine which foreign-created legal persons have a sufficient link with the country? Is there an alternative standard to "sufficient link" that could be used? What are the practical issues met/envisaged regarding the identification and risk assessment of foreign created legal persons?

A potential link could be a foreign company having investments in the country. Foreign investment in a country can take place in many different ways. A foreign company may sell a product, bid for government contracts, invest in real estate or in domestic companies, open bank accounts, or even participate in art auctions. Countries have different rules and requirements on what information a foreign company needs to disclose to make an investment. In Australia, a foreign company must be registered with the Australian Securities and Investments Commission (ASIC) to carry out business in Australia. Corporation's sole, exempt public authorities and unincorporated bodies that were formed outside Australia and cannot hold property, or sue or be sued in accordance with the law of their place of formation, are not foreign companies.[2]

For some (but not necessarily all) of the activities mentioned above, foreign companies already have to adhere to various requirements, including: (i) entering contractual engagements with a local representative to distribute, market and/or sell the foreign company's products; (ii) establishing a representative/liaison office; (iii) registering an establishment or branch office; (iv) registering a separate legal entity (subsidiary or affiliated company); (v) registering with the tax agency, the central bank, the ministry of economy and others.

This, however, does not necessarily mean that information on the beneficial owner or even shareholders of these companies is collected. In Australia, individuals can register a company without adequate due diligence checks, beneficial ownership (BO) disclosure, identification of potential links to politically exposed persons, or a robust assessment of their business activities and legitimacy.[3] Very often, foreign companies only need to provide the name of a manager or representative in the country, and there is no record whatsoever of who the beneficial or legal owners are. If needed, this information is to be collected with authorities where the company was incorporated. This could be a challenge if, for example, incorporation happened in a secrecy jurisdiction.

Countries, therefore, should require foreign companies to follow the same rules on BO disclosure that apply to domestic companies in order to invest in the country, including when opening a bank account or purchasing real estate.

Multipronged approach to collection of Beneficial Ownership information

3. (a) What do you see as the key benefits and disadvantages of a BO registry, and (b) what are the alternative approaches to registries, such as BO information held by companies, FIs, and DNFBPs, and their key benefits and disadvantages?

Key benefits: the incorporation of companies and attesting their ability to function has been the responsibility of the state across all countries in the world. That means that all countries have some sort of company register that collect at least some information about companies. How these registers are structured (online, physical, centralised or decentralised), the exact type of information they collect and disclose, however, vary greatly. Currently Australia has 31 different commonwealth business registers and no verification or cross referencing of data. Yet, there is an understanding that this information should be collected by and held with authorities. It should not be different with BO information, which is an important piece to understand the control and ownership structure of companies, the risks they pose, and how they function. In Australia, the financial regulator, AUSTRAC, requires all reporting entities to identify the BO of their customers and assess the money laundering/terrorism financing risk they pose. This is

[1] http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/mutual-evaluation-report-australia-2015.pdf
[2] https://asic.gov.au/for-business/registering-a-company/steps-to-register-a-company/foreign-companies/
[3] https://transparency.org.au/wp-content/uploads/2021/04/TIA-Position-Paper_-Corporate-Registers_Final-5.pdf

despite the fact that ultimate beneficiary ownership confirmation is currently impossible as there is no BO register.[4] This is a stark contradiction that needs to be rectified.

Australia has recently announced it will follow several other countries and introduce Magnitsky-style legislation.[5] This is to make it easier for the federal government to seize the assets of human rights abusers and those guilty of serious crimes. It is likely that as Australia becomes more active at trying to stop stolen assets or assets under the control of human rights abusers from coming into Australia, those people will increase their use of associates to shift the assets into Australia. Magnitsky laws are a useful step in the fight against human rights abuses, but if the systems allows ultimate BO to maintain their anonymity, then ultimately the sanctions will be of little effect. For this legislation to be effective it requires the disclosure of the BO to prevent individuals from hiding behind anonymous shell corporations. A BO registry will therefore strengthen the effectiveness of Australian sanctions.

Research conducted by Transparency International in 2019 shows that the type of mechanism available in a country to ensure that competent authorities have direct access to BO information, directly impacts the ability of authorities to *de facto* accessing adequate and accurate BO data in a timely manner. By relying on companies themselves, financial institutions (FIs) and designated non-financial business and professionals (DNFBPs), authorities are unlikely to have access to adequate, accurate and up-to-date information in a timely manner (see challenges below). We found, however, that in countries where BO information is available from a register (company or dedicated register), authorities are more likely to timely access the information.[6]

The benefits of the registry approach include:

- direct, timely and unrestricted access by competent authorities
- the ability of authorities to use the register for proactive investigations once they can freely search the register and do not need to request specific information in a reactive manner
- more control over companies' compliance with the rules, ensuring that BO information is effectively available
- no risks of alerting or tipping-off companies/BOs, as authorities do not need to request the information and can access it directly
- more control over the type of information that is recorded and disclosed.
- more control over cases that could expose people at risk
- the ability to use the data for analysing money laundering risks and therefore improving policies, supervision and enforcement

If registers are open to the public, the benefits are even greater:

- foreign competent authorities have direct access and will not need to resort to often lengthy international cooperation requests
- obliged entities and other businesses can use the data as part of due diligence processes, to vet business partners and suppliers, make decisions on investments, among others
- other government bodies not directly tasked with anti-money laundering have access and can use the information to detect conflicts of interest, fraud and other wrongdoing, including auditors, procurement officials, competition authorities, anti-corruption agencies, election management bodies, environmental agencies, among others
- civil society and journalists can scrutinise the data, revealing conflicts of interest and wrongdoing as well as contributing to the accuracy of the data

[4] https://www.austrac.gov.au/business/how-comply-and-report-guidance-and-resources/customeridentification-and-verification/beneficial-owners

[5] https://www.allens.com.au/insights-news/insights/2021/08/magnitsky-and-more-major-changes-to-australias-sanctions-framework-are-coming/

[6] https://www.transparency.org/en/publications/who-is-behind-the-wheel-fixing-the-global-standards-on-company-ownership

Key disadvantages: There are no disadvantages to the registry approach. There are challenges that need to be mitigated to ensure the register is useful and reliable. Most of these challenges involve the establishment of the register and the regulatory and institutional framework governing it. They include:

- Technical assistance: Some countries are still in the process of digitalising their company register and lack the expertise and know-how to establish an online, central BO register or even to start collecting this information to be included in existing company registers. These countries would need support to effectively go through this transition.
- The role of registers and quality of the information: Existing company registries are usually established to function as a repository of information and documents, and as such information provided by legal entities upon registration is rarely verified. If company registers or a separate BO register are to assume a more proactive role in supporting anti-money laundering efforts, it is also important that their functions and resources are adapted accordingly. BO registers should have the mandate and sufficient human, technical and financial resources to collect, verify and maintain BO information. This should also include the power to request information from companies and other authorities and to sanction legal entities for non-compliance (see questions 5, 9, and 11).

In 2020, the Australian government allocated funding for implementation of the Modernising Business Registers (MBR) program. This program aims to improve the administration of business registers and unify the Australian Business Register and the 31 business registers held with the ASIC. It goes some way in addressing the flaws in the current system, but greater reform is required for it to be fit for purpose. It appears it will assist with preventing phoenixing activities and tax evasion, but is a missed opportunity to overhaul the system to address arguably the more important issue of having a reliable system for due diligence. The ASIC undertakes only basic data entry functions on the corporate register. It does not verify the identity of individuals, entities or their addresses, and takes information provided at face value, without any due diligence or verification checks. The government has announced that the MBR Program will include additional validation steps, yet these still fall short. It is vital that validation goes beyond software assessing whether the data is in the correct format (e.g. a mobile number has the correct number of digits, or an email includes an @ symbol). It will still fail to verify the identity of individuals and entities, including their address, and takes information provided at face value, without any due diligence or proper verification checks. There will also continue to be no due diligence checks for politically exposed persons. [7] As stated, it will be vital for Australia to allocate sufficient resources to collect, verify and maintain and make public corporate and BO information. The response to question 5 makes clear what information should be disclosed.

There is a growing consensus of the importance of BO registers to ensure that authorities have the needed information to tackle financial crime. In fact, FATF's report on best practices on BO transparency also highlights that authorities are more likely to have timely access to information in countries that have a BO register as part of a multi-pronged approach where information is also available from other sources, like obliged entities.[8]

Earlier in the year, a report published by the UN High Level Panel on International Financial Accountability, Transparency and Integrity (FACTI Panel) that lays out a clear vision for a cooperative international framework to combat corruption, tax evasion,
money laundering and other financial crimes, called for an international anti-money laundering standard requiring all countries to create a central register of BO. The report also encourages countries to make the information public to avoid inconsistency between national approaches.[9]

Recently, the G7 also recognised the importance of BO registers for tackling wildlife and other crimes. The G7 Finance Ministers agreed to implement and strengthen registries of company BO information in their respective jurisdictions.[10]

[7] https://transparency.org.au/wp-content/uploads/2021/04/TIA-Position-Paper_-Corporate-Registers_Final-5.pdf
[8] https://www.fatf-gafi.org/media/fatf/documents/best-practices-beneficial-ownership-legal-persons.pdf
[9] https://www.factipanel.org/events/final-report-launch
[10] https://www.gov.uk/government/publications/g7-finance-ministers-meeting-june-2021-communique/g7-factsheet-beneficial-ownership

The political declaration of the first-ever UN General Assembly Special Session (UNGASS) against Corruption also highlights the importance of promoting BO disclosure and transparency through appropriate registers.[11]

Australia has made numerous commitments to progress BO disclosure on the global stage, but with no progress.[12] There is a lack of political will to implement commitments made at the 2014 G20 (High-Level Principles on Beneficial Ownership)[13], the 2016 UK Anti-Corruption Summit[14] and the 2018 International Anti-Corruption Conference.[15]

Civil society and private sector efforts to include BO disclosure in the third Open Government Partnership National Action Plan were also rejected by Federal Treasury.[16] There has also been no information released about what the Australian Government intends to do about BO transparency as part of the MBR program. The last consultation process on the issue was held in early 2017.[17] Having clear guidance and an international standard from recommendation 24 would help business and civil society build political will within Australia.

3.(b) Information held by companies.

Companies should certainly be required to understand their own ownership and control structure, beyond legal ownership, and maintain this information. However, this should not be considered as a mechanism for authorities to gain access to BO information for numerous reasons, including:

- **Tip-off risks**. If competent authorities need to request information on BO from companies themselves, the risk that a company is alerted about a potential investigation or suspicions is great, which could lead to the company/BO destroying evidence or moving assets, for example.

- **Limitation to proactive investigations**. The reliance on this mechanism does not support proactive investigations by authorities. Authorities already need to know about the potential involvement of a company and will seek BO information only to confirm or gather more evidence on previous suspicions.

- **Challenges to ensure compliance**. The company-approach makes it difficult for authorities to oversee if companies are complying with the requirements and to assess the quality and accuracy of the information maintained. This is particularly problematic in company formation centres where the number of existing companies make oversight even more difficult, expensive and time-consuming. One example is Hong Kong, where according to the FATF Mutual Evaluation Review (MER) there are over 1.38 million companies registered and 150,000 new companies are incorporated every day.[18] These companies may do business in Hong Kong or elsewhere, which adds to the complexity and challenges for domestic and foreign authorities to access information. On top of that, the report also acknowledges that money laundering syndicates may “abuse the efficient and open business environment which allows easy formation of shell companies to launder proceeds of crime”.

Information held by financial institutions and DNFBPs:

The requirement that financial institutions and DNFBPs identify and collect their clients’ BO information as part of due diligence processes is an important pillar of a strong anti-money laundering framework. However, the information collected by these obliged entities cannot be the only source of beneficial information available to competent authorities.

[11] https://www.transparency.org/en/blog/ungass-2021-beneficial-ownership-transparency-political-declaration-or-same
[12] https://transparency.org.au/position-paper-beneficialownership/
[13] https://www.ag.gov.au/sites/default/files/2020-03/G20High-LevelPrinciplesOnBeneficialOwnershipTransparency.pdf
[14] https://www.gov.uk/government/topical-events/anti-corruption-summitlondon-2016/about
[15] https://iaccmonitor.org/wp-content/uploads/2020/08/Australia_National_Statement_2018.pdf
[16] https://ogpau.pmc.gov.au/nationalaction-plans/australias-third-open-government-national-action-plan-2020-22
[17] https://treasury.gov.au/consultation/increasingtransparency-of-the-beneficial-ownership-of-companies
[18] https://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-hong-kong-china-2019.html

There are several challenges and disadvantages of adopting this approach as a mechanism that is accepted on its own. A set of challenges is related to accessibility and the ability of competent authorities to access the information in a timely manner. They include the following:

- Information will only be available if the relevant legal entity has established or maintained business relationship with a financial institution or DNFBP.
- Competent authorities have to be aware of the relationship between the legal person and FIs/DNFBPs.
- FI and in particular DNFBPs are not always subject to registration or licencing requirements, which offer challenges for authorities to identify and contact relevant entities and professionals.
- Legal entities might have business relationship with FIs/DNFBPs established in a country different from the one where the legal entity was incorporated, making it harder for authorities to access information.
- Authorities need to request information and the procedures available for such request may cause delays. For instance, in many countries a court order is required, which may hamper timely access and limit intelligence work or more exploratory investigations. In some countries, request to access data is only possible in the context of criminal investigations. In cases where the FI/DNFBPs is in a third country, authorities will need to request assistance to foreign authorities to access the information, which will also delay access.

Another set of challenges is related to the adequacy and accuracy of the information collected by FIs/DNFBPs, including:

- Financial institutions and DNFBPs often record BO information exactly as their customers provide it, without conducting any independent verification. When checks are carried out, FIs and DNFBPs rely on information recorded in company registers.
- FIs and DNFBPs may not undertake ongoing monitoring of clients.
- FIs and DNFBPs may not have good understanding and knowledge to properly conduct due diligence and identifying the BO of complex legal structures.
- FIs and DNFBPs may not be adequately regulated nor supervised.

In Australia, current laws and regulations do not require legal entities, other than those with anti-money laundering obligations to maintain information on BO. Consequently, there is also no requirement that the BO information is maintained within Australia. The law only requires legal entities to maintain a register of members, including directors and shareholders. The Corporations Act 2001 requires a shareholder to advise the company that they are holding those shares “non-beneficially” and the company must indicate in the share register that those shares are not held beneficially. However, there is no requirement to disclose who the beneficial owner of these shares is. As such, BO information is only recorded if the legal owner of the shares happens to be the beneficial owner. Shareholders are also not required to inform the company regarding changes in shares ownership, making it more difficult to guarantee that basic information in the share registry is kept up to date.[19]

Examples from FATF mutual evaluation reviews illustrate some of the challenges mentioned above in countries that have been relying on existing BO information collected by DNFBPs and FIs as the main source of information available to competent authorities.

For instance, in Panama, while a law determining the establishment of a central BO register has been adopted in 2020, it has not yet been implemented, this means that BO information continues to be available only from financial institutions and DNFBPs, with a strong reliance on corporate services providers, such as lawyers and law firms, who function as resident agents for companies established in Panama (all companies incorporated in Panama require a resident agent). Resident agents have no legal obligation to verify, monitor or permanently follow up the customer’s activity in order to detect changes in BO, but are obliged only to collect this information at the beginning of the relationship. This means there is a great likelihood that the information held by them and

[19] https://www.transparency.org/files/content/publication/2015_BOCountryReport_Australia.pdf

made available to competent authorities on request is not reliable and up to date. The rules also require competent authorities to indicate to resident agents the reasons why they need the information, which could end up tipping off agents and ultimately their clients. Finally, while resident agents should register with the country's FIU for supervision, the review shows that out of the 4,216 resident agents authorised to operate at the time of the FATF on-site visit, only 522 had registered with the FIU, representing 12 per cent of the total.[20] This limit effective supervision and the ability to ensure that resident agents are complying with their obligations.

For more examples of the challenges faced by competent authorities to access BO information in countries where the information is only available from FIs, DNFBPs and company themselves, please refer to the table in annex 2.

4. What are the key attributes and role regulators play in ensuring that a BO registry has adequate, accurate and up-to-date BO information available for competent authorities? Does this make a difference if BO information is held by a BO registry and alternative approaches to registries (e.g. BO information held by companies, FIs, and DNFBPs))?

Regulators have an important role to play to ensure that BO registers have adequate, accurate and up-to-date BO information. They should ensure that the country's legal and institutional framework enables the collection of adequate, accurate and up-to-date information in BO registers. Regulators should also set coherent rules when it comes to information held by companies, FIs and DNFBPs to make sure that they can meaningfully complement the registry-approach.

Particular attention should be given to ensuring the adequacy of BO information. More information on the accuracy and up-to-datedness of the information can be found under questions 5, 9 and 11.

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

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

There should be one single BO definition in a given jurisdiction that applies to company registration, customer due diligence and any other sectoral disclosure requirements.

Regulators should specify and provide guidance on situations in which direct and indirect control over an entity should be considered. They should include, at a minimum, the right to appoint or remove members of the board or similar officers of the corporate entity, the ability to exert a significant influence on the decisions taken by the corporate entity, links with family members of managers or directors/those owning or controlling the corporate entity,

In cases regulators opt for establishing a threshold when control is exercised through ownership, the 25% + one threshold that appears in FATF guidance documents and have been implemented in several countries should not be automatically adopted. It is important that jurisdictions determine the ownership threshold based on an assessment of the money laundering risks posed by different types of legal entities in arrangements (as discussed under question 1). There is evidence that in some sectors or types of legal vehicles a lower threshold would be necessary to prevent and detect potential financial crimes. This is the case, for instance, for alternative investment funds. From an anti-money laundering perspective, it is important to understand who the end-investors who benefit financially from the funds are (as investment funds are comprised of pooled

[20] https://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/MER-GAFILAT-Panama-Jan-2018.pdf

investments made by these individuals), but are not necessarily in direct control.[21] In any case, if regulators decide on a threshold, a specified percentage shareholding or ownership interest should not automatically determine the beneficial owner, it should be one evidential factor among others to be taken into account by authorities and FIs/DNFBPs.

FIs and DNFBPs should be required to have a full understanding of the control structure of a legal entity or arrangement and of the nature and extent of control exercised by the beneficial owner(s). Registers should also include detailed information of the control structure of a legal entity and an explanation of the nature and extend of control exercised by the beneficial owner.

Regulators should not permit senior managers to be identified as BO in the registry nor as part of due diligence conducted by FIs/ DNFBPs. In exceptional cases, where the BO cannot be identified, the company should provide an explanation and a justification detailing why there is no beneficial owner or why the beneficial owner could not be identified. The justification should be recorded in the register and kept by FIs and DNFBPs. In these cases, senior managers should be clearly identified as managers and not as the beneficial owner in both the register and on customer due diligence records. When the BO cannot be identified, FIs and DNFBPs should consider submitting a suspicious transaction report and not continuing with the relationship.

5. How should the accuracy of BO information disclosed to the BO Registry be confirmed?

BO registers should be mandated to independently ascertain and verify the BO information disclosed by legal entities. This means sufficient powers and resources should be given to registers to verify the information, request documents and further information from companies as well as to sanction non-compliance.

At a minimum, in order to confirm the identify of the beneficial owner, the register should record key information about the beneficial owner as well as the legal entity, including:

- Name of the beneficial owner
- Date of birth
- Identification number
- Address
- Place of residence
- Nationality
- Information on how control is exercised
- Name of the person making the declaration
- Detailed information on legal owners
- Commercial address
- Information on shareholders and directors

This information should be checked against original documents (digital IDs, passport) in addition to a more extensive verification process should be in place, which is discussed in detail under question 9.

6. What role should the private sector play, if any, in ensuring that the BO information is adequate, accurate and up-to-date? What lessons should be learned from private sector use of existing registries?

The private sector, and obliged entities in particular, have an interest in using the data from company and BO registers on their customer due diligence / know your customer requirements. However, current use of this data may be limited by the accessibility and reliability of registers. Many registers are not accessible to obliged entities and only very few registers have established mechanisms to verify the information provided by legal entities. A lack of verification is a big problem for Australia. To quote the former ASIC Commissioner John Price "The system in Australia for registration of directors is just that — it's a registration system, it's not a checking

[21] https://www.occrp.org/en/openlux/

system". [22] The ASIC undertakes only basic data entry functions on the corporate register. It does not verify the identity of individuals, entities or their addresses, and takes information provided at face value, without any due diligence or verification checks.

While the main responsibility to ensure the accuracy of the information should lie with government authorities, the private sector can still play a role in improving the accuracy and up-to-datedness of the data. They can do that by formally reporting discrepancies when the data collected as part of their due diligence process does not match the data recorded in the register.

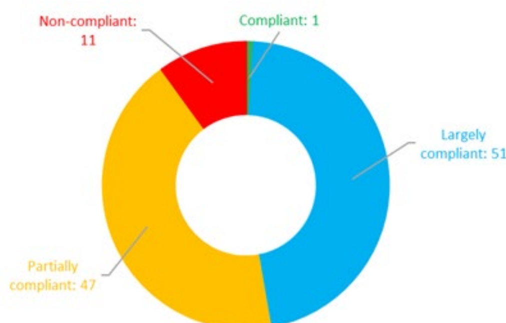
7. What effective mechanisms (aside from a BO registry) would achieve the objective of having adequate, accurate and up-to-date BO information for competent authorities? What conditions need to be in place for authorities to rely on financial institutions and DNFBPs to hold BO information? How could BO information held by obliged entities as part of their CDD be utilised in this regard?

Without BO information being collected and recorded in a register under the responsibility of the State is not possible to achieve the objectives set in the FATF recommendations, that is, that competent authorities have timely access to adequate, accurate and up-to-date BO information.

Since 2003, when the first FATF Recommendations were published, jurisdictions have had great flexibility to decide on the mechanisms they would use to ensure BO information is available to authorities. The great majority of them have been relying on FIs and DNFBPs almost exclusively. A 2019 review undertaken by Transparency International shows that information held by reporting entities was the main source of BO information available to authorities– usually on request – in nearly 85 per cent of the jurisdictions assessed. This approach has not been satisfactory, with the great majority of competent authorities in these jurisdictions stating that they do not have access to beneficial information in a timely manner and that this significantly impact their ability to investigate money laundering and predicate crimes and respond satisfactorily to international cooperation requests.

This is evident also from an analysis of jurisdiction's broader compliance with the FATF recommendation 24, where it becomes clear that a large degree of technical compliance (where reliance on a single mechanism would be considered sufficient) does not lead to an effective regime. A system is effective when its defined outcomes are achieved; thus, it is crucial to observe the difference between the implemented measures and their impact.

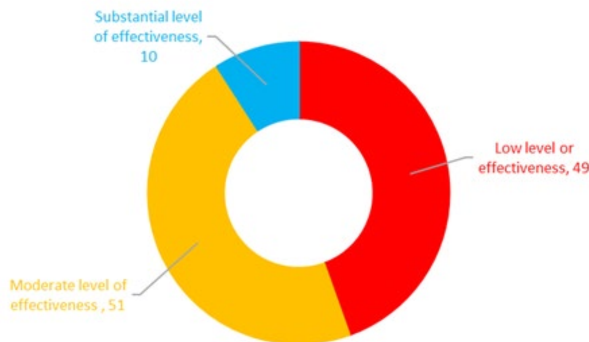
FATF – technical compliance Recommendation 24



Source: TI based on FATF Mutual Evaluation Reviews, July 2021

[22] https://www.abc.net.au/news/2020-02-28/homer-simpson-could-be-installed-as-australian-company-director/12010646

FATF Effectiveness rates (IO5)



Source: TI based on FATF Mutual Evaluation Reviews, July 2021

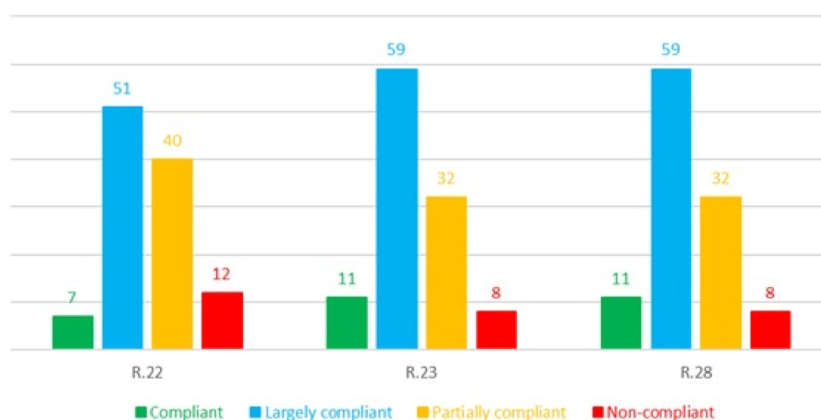
Note: No jurisdiction showed 'High level of effectiveness'.

Information collected by reporting entities is certainly an important part of the anti-money laundering framework and key in the identification of BO of legal entities, but not sufficient to ensure competent authorities have timely access to accurate and reliable BO information. It should be used as one of the sources of information available to authorities, but as part of a comprehensive system that requires that information is available to authorities, directly, through registers.

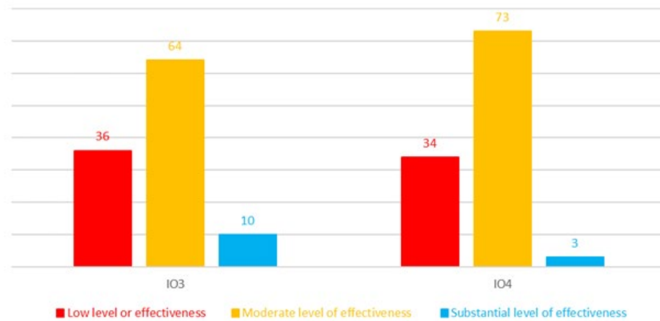
If competent authorities were to rely more on FIs and DNFBPs significant reforms would need to be implemented to address the challenges mentioned under question 2 above.

Firstly, jurisdictions would need to significantly improve the anti-money laundering obligations that apply to FI and DNFBPs and strengthen their supervision. This would be required to ensure that the BO information available from FIs and DNFBPs is reliable, accurate and up to date.

This is particularly the case for DNFBPs. As the graphs below demonstrate, jurisdictions' compliance with FATF recommendations related to DNFBPs (Recommendations 22 and 23) and their supervision (Recommendation 28) as well as their effective implementation (IO3 and IO4) is very poor across the FATF network. This means that there is no guarantee that these entities and professionals are always effectively regulated or consistently complying with their anti-money laundering obligations.



Source: TI based on FATF Mutual Evaluation Reviews, July 2021



Source: TI based on FATF Mutual Evaluation Reviews, July 2021

Note: No jurisdiction showed ‘High level of effectiveness’.

In addition, FIs and DNFBPs’ compliance with anti-money laundering rules has also been under check due to the findings of recent studies and revelations by investigative journalists (e.g. Panama Papers, Laundromats). A study conducted by Sharman et al. assessed whether corporate service providers complied with customer due diligence rules, finding that in the majority of cases, corporate service providers failed to request from BO any form of photo identification, let alone certified photo identification, to form a company.[23] The extremely low number of suspicious transaction reports submitted by DNFBPs in the majority of countries also raises questions about their ability to identify wrongdoings.

Other concrete measures countries would need to take to mitigate the challenges that come with the reliance on FIs and DNFBPs would include ensuring that:

- all legal entities always have an established relationship with FIs and DNFBPs in their country of incorporation (e.g. companies would be required to open bank accounts in their country of incorporation)
- FIs and DNFBPs are licensed and registered for AML supervision in the country where incorporation takes places so that competent authorities can easily identify them.
- Jurisdictions dedicate sufficient resources to train and provide guidance to FIs and DNFBPs.
- FIs and DNFBPs are effectively supervised and subject to dissuasive sanctions.
- a state oversight agency to oversee self-regulatory bodies, when supervision of DNFBPs is carried by them, is in place.
- a clear timeframe for FIs and DNFBPs to comply with a request by a competent authorities and a range of sanctions in case of non-compliance.
- Barriers for competent authorities to access the BO data, such as the need of a court order, are removed.

Moreover, to ensure that the BO information would be available without delay to competent authorities and without risks that the client is tipped off, countries should set up bank account registers with BO information. These bank account registers would be accessible to competent authorities without the need to request access to the information to FIs. This is a requirement under the 5th EU Anti-money laundering directive, for example.

In countries where there is a reliance on notaries, information collected by them could also be included in a register that can then be accessed directly by competent authorities, as it is the case in Spain.

8. How can the compliance burden on low-risk companies be reduced, without creating loopholes that could be exploited by criminals?

There is no evidence suggesting that there is an additional compliance burden on low-risk companies if they are required to identify and report on their beneficial owners. On the contrary, available evidence shows that

[23] https://www.griffith.edu.au/business-government/centre-governance-public-policy/researchpublications?a=454625

implementing a BO register is not costly for low-risk companies. For instance, a review of the implementation of the PSC Register (the UK BO register) undertaken in 2019 shows that 95 per cent of surveyed businesses felt the process of complying with the PSC register had not had an impact at all on the way their business operates. In terms of financial costs, the review also reveals that the cost of compliance with the PSC register was relatively small, varying according to the business size and the complexity of ownership structure. As part of the survey, businesses were asked about the costs of identifying their BO and 26% reported zero costs. The mean overall cost was €70, while the median overall cost was €24. Nevertheless, nine in ten businesses (90%) reported there were no additional costs related to identifying their beneficial owners.

The same review also shows that businesses do not incur any additional significant cost if required to submit this information to a government register. Approximately nine in ten business reported no additional cost. The mean additional cost was €10.

Adequate, accurate, and up-to-date information

9. Who should play a role in the verification of BO information? How effective is the framework on discrepancy reporting? What are the possible verification approaches that can balance the need for accuracy and compliance cost?

The primary responsibility to verify BO information should lie with the registry authority (or public body responsible for collecting BO information). The registry authority should be mandated by law to independently verify the information provided by legal entities. Adequate powers and resources should be given to the authority to allow they check the information provided by legal entities, request documents, carry out inspections and sanction non-compliance.

The verification process involves ensuring that people in the register are who they say they are (authentication), that those persons have agreed to be involved in a legal entity (authorisation), and that all the registered data is valid (for example, the address exists, the date of birth is a valid date, and the purpose of the company is accurate).

For that, registry authorities, in addition to collecting documentation that confirm the identity of the beneficial owner and company legal representatives, should also rely on other mechanisms to verify the information, including:

- Create electronic forms that include as many preselected fields as possible, which can serve to validate and constrain responses to be entered; for example, nationality, address, postal code and date of birth.
- cross-checking the information against existing government databases and registers (such as tax registers, citizenship registers, land and vehicle registers). In Austria, Belgium and Denmark, for example, registers automatically cross-check the information on beneficial owners, shareholders and directors against other national databases, including the address registers and the national identification registers, using the individual’s name, address and date of birth.
- vetting the information against sanctions lists and adverse media.

Moreover, registry authorities should conduct further checks based on risk factors (see below) and after the legal entity is set up to ensure information is up-to-date and to identify potential red flags, including the conduct of inspections at the premises of legal entities. Register authorities should also be required to report any suspicion to the country’s financial intelligence unit (FIU).

The quality and accuracy of the data can be further improved through the establishment of discrepancy reporting requirements and the publication of BO data to allow other users, such as journalists and civil society, to scrutinise the data.

Noteworthy is also the importance of ensuring data is online, collected and structured in a way that enables the information to be easily cross-checked against other databases.

With regards to the framework on discrepancy reporting, countries should require that FIs and DNFBPs as well as competent authorities report discrepancies to the register if the information recorded in the register differs from the information collected during due diligence or investigations. A "red-flag system" should be in place to alert users that there is a discrepancy report under analysis until the inconsistency is resolved. The requirement for FIs and DNFBPs to report discrepancies is relatively new and there is limited publicly available information on how it works in practice. Data from Germany, obtained through a parliament request, available only for the first six months of 2020, shows that 2.610 discrepancy reports were submitted to the country's BO register.[24]

Other verification approaches that could be used include the involvement of professionals with anti-money laundering obligations who may be engaged in the company formation process such as notaries, corporate service providers, lawyers, among others. In these cases, these professionals may be required to undertake due diligence, including the identification and verification of the beneficial owner. Given the several challenges mentioned under questions 1 and 3 regarding the effective compliance of these professionals with anti-money laundering rules and their supervision, we believe such an approach will only be effective if the BO information is still recorded in a register and that the registry authority maintains certain obligations to verify the information, particularly to ensure that the information remains up to date throughout the years.

Similar approaches are in place in countries like Spain, where notaries have to verify the BO provided by legal entities and include the information in a register that is accessible to competent authorities. In Slovakia, the register public sector partners, which includes BO information of legal vehicles that have a relationship with the state, relies on the so-called authorised partners, attorneys, public notary, auditor, tax advisor or a bank, to authenticate the data. Authentication of data by the authorized person is performed by comparing the data with the data available through public registers and originals of public documents. Once the authorised partner assures the veracity of the information, the data is recorded in a publicly accessible register, allowing other users to also scrutinise the information.

10. Should BO registries (where they exist) follow a risk-based approach to verifying of BO information?

All BO registries should establish verification mechanisms as described above to confirm the identity of the beneficial owner and verify the accuracy of the information provided. In addition to these checks, BO registers should follow a risk-based approach to determine if further checks are necessary, identifying potential red-flags that may trigger additional scrutiny.

Potential red-flags may include: BO that are politically exposed persons (PEPs), BO that are based or residing in foreign jurisdictions, legal entities registered in addresses where several other entities are registered, entities that have as directors individuals representing several other entities, frequent change of the BO, BO that have a history of human rights violations (noting the nexus between corruption and human rights abuse), have been or are subject to sanctions, among others. In Latvia, for example, doing the incorporation of the legal entity, the BO register verifies the address of registration and if the address matches addresses where a great number of companies are also registered, the register send it to the Revenue Authority for further checks.

11. How frequently should disclosed BO information be updated or re-confirmed (e.g. annually, within a set period after a change is made)?

BO information should be updated promptly, and in any case
no later than 14 calendar days following any change of the beneficial owner, and on an annual basis.

Access to information

[24] https://www.transparency.de/fileadmin/Redaktion/Publikationen/2021/Studie_Geldwa__sche-in-Deutschland_210706.pdf

12. Should access to a BO registry or another mechanism be extended beyond national (AML/CFT) competent authorities (e.g. to AML/CFT obliged entities such as financial institutions and/or DNFBPs)?

Yes. There is certain a great value in expanding access to a BO register beyond national competent authorities.

Money laundering very often includes a cross-border element and ensuring that relevant foreign competent authorities have easy, direct and timely access to information about legal entities and their BO is instrumental to effectively curb financial crime. If BO registers have their access limited to national competent authorities, foreign competent authorities will always have to resort to often lengthy international cooperation processes. This also means registers can only be used in a reactive manner and end up not supporting proactive cross-border investigations.

Access to BO registers should also be extended to obliged entities, such as FIs and DNFBPs. While obliged entities are expected to undertake their own analysis and collect relevant documents to identify the beneficial owner of customers when undertaking customer due diligence checks, BO registers can serve as an important source of information. Moreover, obliged entities can then also help detecting potential inaccuracies in the registered data.

Other private sector entities may also benefit from access to BO registers. Businesses have reported using BO and company data to vet business partners and suppliers and make decisions on investments, among others.

Ensuring the data is publicly available also allows civil society organisations, academia and journalists to scrutinise the data. As users of BO data they can identify and expose conflicts of interest, potential corruption, tax evasion or other wrongdoing, but also undertake higher-level assessments that provide relevant information to improve frameworks and registers so that BO data serves competent authorities, obliged entities as a useful tool against financial crime. For example, bulk analysis undertaken by civil society in the UK supported reforms by Companies House, improving how data was collected. The analysis also led to the identification of approximately 4,500 companies listing other companies on the Persons of Significant Control (PSC) register in situations where this was not permitted, which in turn prompted Companies House to take action against these companies.

For more examples of how public BO registers have helped to identify potential crimes, please refer to Annex 1.

13. What measures should be taken to address concerns relating to privacy, security and potential misuse of BO information, arising from access to BO information?

Legal persons are needed to operate complex businesses, collect capital and limit risks and the liability of individuals, they were never created as a tool to hide ownership in business or other enterprises. As such, company incorporation does not provide the right to privacy. Individuals who create legal structures are actively choosing to benefit from them and take advantage of things like limited liability. Individuals could – if they wanted – trade in their own name and therefore avoid the public reporting obligations that come with legal structures.

To ensure that the right to privacy of individuals is respected, requirements to disclose the beneficial owner of companies should seek to strike a balance between privacy and public interest. All relevant information concerning the legal entity should be disclosed and personal information, such as the home address or identification number of the beneficial owner, should not be made available to the public. The law should make clear what personal data is collected, how it is used, shared, and secured.

Privacy concerns and security concerns should also be treated differently. BO transparency laws should ensure that exceptions are in place for cases that poses a significant risk of harm. Requests for exceptions should be verified by an independent body and the beneficial owner should be able to appeal from a denied request.

For example, in the UK, the law provides that under exceptional circumstances, where individuals, due to the activities of the company, are at serious risk of violence or intimidation if their details were made publicly available, an application can be made for their details to be protected. From the time period between April 2016 and December 2018, Companies House received only 903 applications from BO (Persons of Significant Control) to have their details protected from disclosure on the public register, and 474 were successful for the

different types of protection.[25] If we consider the number of companies incorporated in the UK, the number of requests is extremely low.

Bearer Shares and Nominee arrangements

14. Should issuance of new physical bearer shares without any traceability be prohibited?

Yes. Bearer shares are some of the methods used by the corrupt and other criminals to move, hide and launder illicit-acquired assets. As they are company shares that exist in a certificate form, whoever is in physical possession of the bearer shares is deemed to be the owner. As the transfer of shares requires only the delivery of the certificate from one person to another, they allow for anonymous transfers of control and pose serious challenges for money laundering investigations.

To prevent the misuse of bearer shares, countries should prohibit the issuance of new bearer shares without traceability.

15. Should existing physical bearer shares be immobilised or converted?

Yes. measures that allow for the identification of the beneficiary of the shares, such as requiring bearer shares to be converted into registered shares (dematerialisation), or requiring bearer shares to be held with a regulated financial institution or professional intermediary (immobilisation) should be implemented.

16. With regards to nominee arrangements, what are the benefits and disadvantages of requesting nominee directors and stakeholders to declare their status? Are there alternative equivalent measures that would offer the same level of transparency?

In countries where nominee shareholders and/or directors are permitted, only licensed professionals should be allowed to provide such services. They should be subject to anti-money laundering requirements, including the identification of the beneficial owners, and required to keep records of their clients for a certain period. Moreover, nominee shareholders and directors should be obliged to disclose the identity of the beneficial owner who nominated them to both the company and to the company register as well as to obliged entities they enter in a relationship with.

In Australia, the current loopholes in the system allow non-licensed third-party providers to sell nominee director or shareholder services, ensuring that the real identities and ultimate beneficiaries are kept hidden, and allowing opaque business structures to flourish. For example, ARDCS, a Gold Coast (Queensland Australia), based company provides 'Resident Director Services' allowing international companies to purchase nominee directors. As quoted from their website, for a cheap price you can ensure "a cost-effective and seamless solution" to overcome the "major hurdle" that the "director residency rule" can be for overseas businesses wishing to establish in Australia.[26] This is one of many nominee service providers available in Australia, that promotes the confidentiality of their services.

In Australia, there are also examples of law firms that provide 'back door' ASX listing services. This offers a veil of legitimacy, particular for companies registered in Australia to then operate in the Pacific where assumptions are made that due diligence checks have been done. Here is an example of the service been advertised by an Australian Law Firm.

As an additional case study, Transparency International Australia investigated a company registered in Australia on the ASX which had a share in the Goldridge mine in the Solomon Islands. These blogs ('Australia's

[25] https://eur-lex.europa.eu/legal content/EN/TXT/?uri=CELEX%3A32018L0843https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822823/review-implementation-psc-register.pdf
[26] https://www.ardcs.com.au/

doors are wide open to money laundering and corrupt conduct' [27] and 'Inadequate due diligence and the infrastructure sector' [28]) explore the challenges this poses for communities in the Solomon Islands directly impacted by the mine, and the questions that remain as to who will really benefit from this project given the links to Australia. BO transparency would make it much more difficult for criminals to hide in this example, given that foreign companies do not need to hold or disclose BO information in the Solomon Islands.

ANNEX

1. **Examples of challenges faced by competent authorities in countries that relied on FIs and DNFBPs as a source of BO information at the time of the mutual evaluation review (MER) was conducted.**

Country	**Challenges FATF MER**
Australia	Law enforcement authorities recognised during the FATF MER that the best source of beneficial ownership information is reporting entities. For that to be accessible, however, they must first discover "which reporting entity has a business relationship with the legal person or arrangement at stake, and that the legal person or arrangement has established a business relationship with a reporting entity", which may delay the process and hamper investigations.
Austria	Until recent reforms of the country's beneficial ownership transparency framework, the main sources of information for law enforcement were financial institutions and DNFBPs, such as lawyers, notaries and tax advisors. For this reason, beneficial ownership information would only be available if a legal entity was a client of an entity or professional with anti-money laundering obligations.
Canada	"While the legal powers available to LEAs [law enforcement agencies] are comprehensive and sufficient, the instances in which LEAs were able to identify the BO of Canadian legal entities or legal arrangements appear to have been very limited" The process of linking a specific financial institution with a legal entity or partnership subject to an investigation is not always timely, particularly in cases involving small or provincial financial institutions or DNFBPs. The report also stresses that it is not possible for law enforcement agents to check with each financial institution and DNFBP individually whether it holds relevant information. In these instances, the identification of the relevant financial institution or DNFBP relies on other potentially lengthier methods, such as surveillance
Isle of Man	In the Isle of Man, trust and corporate service providers play an important role as one of the main sources of beneficial ownership information. Even with the adoption of a beneficial ownership register giving direct access to authorities, service providers will continue to play an essential role in obtaining and reporting beneficial ownership information of their clients. However, the report finds that the

[27] https://transparency.org.au/australia-open-to-money-laundering/
[28] https://transparency.org.au/inadequate-due-diligence-and-the-infrastructure-sector/

	requirements placed on these service providers are not sufficient to ensure adequate, accurate and current beneficial ownership information, particularly because of the conditions under which these professionals operate. For example, the non-face-to-face nature of many relationships, the extensive use of professional intermediaries, and the tendency of trust and corporate service providers to downplay risk – and therefore not apply customer due diligence measures that are commensurate with the real risk – have an impact on the quality and accuracy of the data available to authorities.
United States	"[L]ack of timely access to adequate, accurate and current beneficial ownership information remains one of the fundamental gaps in the US context. (…) While authorities did provide case examples of successful investigations in these areas, challenges in ensuring timely access to and availability of BO information more generally raise significant concerns, bearing in mind risk and context. However, as there are no legal requirements to record BO information (as defined by the FATF), LEAs must often resort to resource-intensive and time consuming investigative and surveillance techniques. As a result, concerns remain about the ability of competent authorities to access accurate BO information in a timely manner".

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