Oggetto: UNODC – UNCAC. Richiesta informazioni in attuazione della Risoluzione 7/2 della Conferenza delle parti su “Preventing and combating corruption in all its forms more effectively”.

Si trasmettono in allegato le informazioni di cui alla richiesta in oggetto, fornite dall’Ufficio II di questa Direzione Generale e dall’UIF – Unità di informazione finanziaria della Banca d’Italia, per quanto di rispettiva competenza.
Italian responses to the request for information submitted by UNODC in connection with the implementation of the Resolution “Preventing and combating corruption in all its forms more effectively, including when it involves vast quantities of assets”.

1. Experiences and best practices on criminal and civil measures and remedies to enhance international cooperation and asset recovery related to corruption, when it involves vast quantities of assets.

Regarding the best practices, the numerous agreements signed by the Direzione Nazionale Antimafia e Antiterroreismo – DNAA [National Anti-Mafia and Anti-terrorism Directorate] may be referred to and mentioned, as reported by the DNAA:

- administrative cooperation agreement with the European Anti-Fraud Office (OLAF) in the common attempt of protecting the financial interests of the European Union by fighting and preventing frauds, corruption and any other illegal activity to the detriment of the European Union’s financial interests, strengthening a timely exchange of information and an effective cooperation in cases of alleged fraud, corruption and any other illegal activity, as well as serious facts concerning the exercise of professional activities by members and staff belonging to the Institutions, bodies and agencies of the European Union. On the basis of this information the Parties might identify further collaboration opportunities, including parallel investigations, in order to create effective synergies in fighting corruption and organized crime (23.01.2017);

- memorandum of understanding and cooperation with the Attorney-general’s office of the Russian Federation to fight crime, also in its organized forms (including corruption and economic and financial crimes) and to cooperate in matters of judicial assistance in criminal proceedings, providing the exchange of information, also concerning the judicial system and the laws of both States and international judicial cooperation experience (12.01.2017);

- together with the Italian Ministry of Justice, operational guidelines concerning mutual legal and extradition assistance with the Canadian Ministry of Justice, providing forms of direct communication with the Public prosecutor and the law enforcement agencies of the requesting Nation, exchange of information on the respective legal proceedings and substantial law systems;

- on the occasion of the “Managing complex data in organized crime and corruption cases” meeting held in Belgrade on 26 and 27 May 2016, a memorandum of understanding with the national Prosecutors’ Offices of Serbia, Montenegro, Slovenia, Croatia, Bosnia and Herzegovina, Srpska, Macedonia, Albania, Bulgaria, Hungary and with the national anti-corruption directorate of Romania,
providing ways of mutual assistance and exchange of information concerning the fight against organized crime and corruption (26/05/2016).

As regards the experiences, the following practical cases are reported, pointing out that the same cases have already been referred to when replying to the questionnaire on the state of implementation of UNCAC, with specific reference to Articles 51-59 thereof. As already explained in the above-mentioned questionnaire, it should be noted that the report on the analysis of cases is influenced by the current limitations of the computerized filing system used by the Ministry of Justice, which at present does not allow to launch queries based on the type of offence which is the subject of the proceedings, or on the cooperation instrument applied.

The checks carried out by examining individual procedures have made it possible, so far, to identify a case from 2011 concerning a request for legal assistance from the Federative Republic of Brazil within the framework of an investigation against two Brazilian nationals for tax evasion, criminal association, corruption and laundering of proceeds from crime (case file No. 33.4.5.9517 VD). For the purpose of executing this request, the Italian judicial authority froze and seized two bank accounts held in the name of the suspects with two Italian banks. After the request for mutual legal assistance has been declared enforceable, the Court of Appeal, upon recognizing the foreign seizure and confiscation order, in application of Articles 740-his and 740-ter of the Code of Criminal Procedure, also ordered that all the confiscated assets be transferred to the requesting State, entrusting the Italian Ministry of Justice with the task of arranging the related procedures with the competent Brazilian authority. The legal basis used by the Court is the Treaty between the Government of the Republic of Italy and the Government of the Federative Republic of Brazil on Mutual Legal Assistance in Criminal matters, signed in Rome on 17.10.1989 and implemented in Italy by Law No. 41 of 7.1.1992 (date of entry into force: 1.8.1993), Article 2 of which allows assistance for search and seizure in compliance with the double criminality principle.

As regards the latter, it should be noted how the Italian case-law has always construed in an extensive manner the term assistance (as well as the term cooperation) in the field of international relations, maintaining that this term – subject to exceptions expressly indicated – must not be understood as limited to specific actions, but, on the contrary, in its general meaning. It is for this very reason, by way of example, in the past it was already held that the notion of widest measure of cooperation under Article 1 of the European Convention on Mutual Assistance in Criminal Matters makes it possible to include the execution of a conservative seizure in Italy (see Court of Cassation - I Division 09/03 – 10.05.2001 No. 15996 RV 234255 Biego and, already previously, Court of Cassation VI Division 19/03 – 2.5.1997 No. 1172 RV 207472 Huber).

Another case is that concerning PIZZOLATO Henrique, born on 9.9.1952 in Brazil. He was arrested in Maranello on 12 Feb. 2015 by Officers of the local Carabinieri Station upon an international arrest warrant issued by the Federal Supreme Court of Brazil for crimes of handling of stolen goods and corruption. He was extradited on 22.10.2015. The Court of appeal in Bologna ordered the return to Brazil of the total amounts seized to Pizzolato which were deposited on an Italian bank account.

Reference is also made to the case concerning the return to Tunisia of the yacht of Ben Ali’s family. On 23.01.2011 NCB in Tunis launched a search at international level for the provisional arrest with a view to extradition of Ben Ali Zine El-Abidine, former President of the Tunisian Republic and his closest entourage, for power abuse, financial crimes and handling of stolen goods. Subsequently, Interpol set up a dedicated task force to draw up a list of people holding assets stolen from the Republic of Tunisia in order to freeze them in compliance with the International Rogatory Letters issued by the authorities of that country. In May 2011, further to the tracing of a vessel having a value of about one million euros in Italy, the Tunisian Judicial Authority issued a Rogatory Letter asking the Court of appeal in Rome to seize the assets owned by the former head of the North African State, Zine El Abdine Ben Ali and his family. The Court of appeal of Rome (IV Penal Section) ordered its seizure, under a Convention signed in 1967 between Italy and the Maghrebi country. Subsequently, the Tunisian Magistrates forwarded an integration to the Rogatory Letter to the Italian Ministry of
Justice in order to obtain the return of the yacht, as an international courtesy, also in virtue of a ruling issued by the Court of First Instance in Monastir (Tunisia). After some repair works, the vessel was entrusted to a delegate from the Tunisian Government and in April 2013 it was returned to Tunisia. Within their own jurisdiction, the Judicial Authority, the Guardia di Finanza Service, the International Police Cooperation Service, and the Ministry of the Foreign Affairs acting as focal point for Italy of the coordination Group established for implementing G8 commitments were involved.

The three following cases, although they do not come within the scope of UNCAC, are mentioned here only in order to explain how the Italian legal system works and its full capability to comply with requests for cooperation in criminal matters from foreign States. In this connection, it should be pointed out, in so far as it is relevant, that Italy was able to implement UNCAC by simply inserting two Articles in the Code of Criminal Procedure, more specifically Articles 740-bis and 740-ter. In fact, from the entry into force of the new Code of Criminal Procedure in 1989, the Italian legal system allowed to recognise confiscation orders included in foreign judgements.

Meanwhile, some adjustments were made in 1993, always regarding the general provisions of the Code of Criminal Procedure, when the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, done at Strasbourg on 8 November 1990, was implemented (Law No. 328 of 9.8.1993). Therefore, when UNCAC was implemented, a broad “general” legal framework for the purpose of executing foreign confiscation orders already existed, and it has only been complemented by adding the two articles referred to above.

It is precisely owing to the “general” character of the legal framework (more recently developed and improved by “specific” rules applicable only in the relations with other UE Member States, and based on the principle of mutual recognition) that the reference to specific cases clearly shows the broadness and effectiveness of the cooperation provided by Italy regardless of the legal basis applied in the individual legal assistance proceedings and of the specific offences prosecuted by the same proceedings. As a matter of fact, the applicable rules are always the same, namely – as mentioned above – the “general” provisions laid down in the Code of Criminal Procedure, or the “special” provisions, even more developed and effective, which are provided by the legislation regarding legal assistance relations among UE Member States. Against this background, the three above-mentioned cases can now be reported. In all three cases Italy transferred to other States all the sums confiscated for the purpose of compensation of injured parties.

The first case concerns the recognition of a judgement of conviction delivered on 16.6.2014 by the Court of Assizes in criminal matters in Lugano against an Italian national. The Italian judicial authority ordered that the funds and sums previously seized by the Italian authority in the framework of the execution of a previous request for legal assistance be transferred to the Swiss Confederation, as partial compensation for the damage suffered by the injured parties.

In this case the provisions of paragraph I of Article VIII of the Bilateral Agreement between Switzerland and Italy of 10 September 1998, additional to the European Convention on Mutual Assistance on Criminal Matters, were applied, which explicitly provide for the possibility of transferring to the requesting State “also the assets deriving from an offence and the proceeds deriving from their disposal, which are liable to seizure under the law of the requested State”, and this “in particular, with a view to their return to the injured party or to their confiscation”.

In the second case, the Court of Appeal of Trieste allocated to the U.S. the entire amount of the sums confiscated in Italy, with commitment to transfer them to the injured parties, in accordance with the Mutual Legal Assistance Treaty between Italy and the United States of America, signed on 9.11.1982, as supplemented by the provisions of the Agreement between Italy and the EU signed on 3.5.2006. In particular, Article 18, paragraph 2, of the Treaty, after stipulating, in general, that “Proceeds of property forfeited to a Contracting Party pursuant to this Article shall be disposed of by that Party according to its domestic law and administrative procedures”, states more specifically that “Each Party may transfer all or part of such proceeds or property (...) to the other Party, to the extent permitted by their respective laws, upon such terms as they may agree”.

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The third case relates to a judgement rendered by the Court of Appeal of Genoa on 28.2.2013, which recognized a final judgement delivered on 12.2.2008 by the Court of Assizes in criminal matters in Lugano against an Italian national, who had been sentenced to 3 years and 6 months’ imprisonment “with confiscation and transfer to the injured party” of a property situated in Italy. The Court, when recognising the Swiss judgement, also ordered that the land registrar register the transfer of ownership of the property in favour of the injured party. It should be highlighted that the proceedings were initiated following two requests for legal assistance submitted by the Public Prosecutor in Lugano; by the former request, made in 2007, the “conservative” seizure of the property was sought, while the latter, made in 2011, requested the transfer of the property to the civil party, as ordered by the final judgement of conviction subsequently delivered against the defendant.

The aspects of interest of the third case are basically two. The former is that the Italian legal system does not include rules governing “Allocations to the injured party, which, on the contrary, are provided for by the Swiss law (Article 73 of the Swiss Criminal Code). The latter aspect of interest is that the proceedings were initiated not by the civil party, but by the Prosecutor General’s Office attached to the Court of Appeal on the basis of the requests for legal assistance made by the Swiss Authority. With regard to the former aspect, it should be noted that the judgement rejecting the appeal lodged by the convicted person (Court of Cassation, Section VI, 1/10 – 18.11.2013 No. 46201 Mosconi) expressly ruled out that a mechanism based on the loss of the ownership of an asset belonging to the convicted person and its concurrent allocation to the injured party for the purposes of compensation is in conflict with the fundamental principles of our legal system. Indeed, the Court emphasized that such a mechanism is basically similar to our conservative seizure, which is aimed at ensuring the subsequent sale of the asset of the convicted person with a view to assigning the proceeds thereof to the injured party as compensation. With reference to the latter aspect, the Court has regarded as “decisive” the consideration that “the initial request for instituting these proceedings directly stemmed from the Swiss judicial authority, which autonomously took action in order to enforce effectively its own decision”. In fact, in the light of this, it has been held that the Prosecutor General duly submitted a request for recognition of the judgment to the Court of Appeal, even if the enforcement of the sentence also implied the recognition of the decisions regarding the civil actions.

In conclusion, the case appears to be indicative of the high level of completeness and flexibility of the instruments provided for by Italian law for the purpose of the implementation of international obligations, including with reference, as it has just been noted, to the application of legal instruments not covered by our legislation.

As regards the cases in which a foreign State enters an appearance to seek direct compensation for damage, please note that under Italian legislation there is no obligation for judicial authorities to inform the Ministry of Justice. Therefore, the Central Authority can be informed of the claims for compensation made by foreign States in civil or criminal proceedings only where the information has been made public, or occasionally in connection with other international cooperation activities. Hence, there is no information available with regard to actions brought by foreign States before Italian civil courts. On the contrary, we have been informed of two trials for international corruption pending before the Court of Milan. In one of them, the Algerian body for the management of oil resources joined proceedings as a civil party. In the other case, the State concerned (Nigeria) was duly informed of the beginning of the proceedings, but so far it has not filed any civil action in the criminal proceedings. In this connection, on the contrary, we are not in possession of any precise information on the proceedings for international corruption initiated by the Public Prosecutor’s Office in Busto Arsizio in relation to the supply of helicopters to Indian armed forces by Agusta Westland, of the Finmeccanica Group. As a matter of fact, the consultation of the computerized filing system of the Office only showed that the proceedings in question gave rise to a number of both outgoing and incoming requests for legal assistance. In this respect, it should be noted that, in accordance with the general rules of the Code of Criminal Procedure, the injured party is informed of the beginning of the trial so that he/she can decide whether or not to take part therein, bringing civil actions, where
appropriate. Failure to inform the injured party may render the proceedings null and void. These rules, of course, also apply to corruption and to the other offences covered by UNCAC, in relation to which the foreign State could appear as injured party and, therefore, shall be informed of the beginning of the trial (normally through the notification of the notice setting the hearing effected at its embassy in Italy).

So far, reference has been made, on the one hand, to cases of confiscation in favour of a foreign person on the basis of the recognition of a foreign confiscation order by the Italian State and, on the other hand, to cases of confiscation in favour of a foreign person which has joined as civil party criminal proceedings for the purpose of establishing whether a defendant is guilty of an offence. However, it could be also possible that a criminal court orders that assets be returned to a foreign State or person as injured party, even where no civil action has been filed in criminal proceedings. In this connection, the DNAA reported a case of restitution to the Netherlands of two paintings by the famous painter Vincent Van Gogh, stolen in 2002 during an exhibition at the Van Gogh Museum in Amsterdam, and seized within criminal proceedings for criminal association for the purposes of drug trafficking, on the grounds that they had been bought by using the proceeds of the criminal association.

As regards cases of no conviction based confiscation, it should be pointed out that this kind of confiscation also applies to persons engaged in corruption or other offences against public administration, since Decree-Law No. 92 of 23.5.2008, converted into Law No. 125 of 23.7.2008, broadened the range of persons targeted by this preventive measure affecting assets (originally intended for the so-called “especially dangerous persons”, i.e. persons suspected of being members of mafia groups, or of terrorist offences and money laundering) to persons falling within some categories of “common dangerousness”, as in the case of “persons engaged in illicit trafficking or persons who usually make a living from the proceeds of criminal activities”. The extension – as confirmed by the so-called anti-mafia code (see Article 4 c) of Legislative Decree No. 159 of 6.9.2011) and by the interpretation provided by the case-law (e.g. Court of Cassation, First Division No. 32032/13 and Court of Cassation, First Division) – has led to the application of preventive measures to habitual bribe-givers and bribe-takers. In this regard the DNAA reported the following cases:

1. MP [Preventive Measures] Decree No. 397/13 Court of Rome
Case concerning two public officers (including the President of the Superior Council of Public Works), in respect of whom the confiscation of all their assets was applied due to their dangerousness derived from the systematic commission of tax offences and of offences against the public administration starting from 1999, which resulted in the development of a system tainting the award of big and significant contracts, based on corruption, subversion of the rules governing the award of public contracts, subjugation of public offices to personal interest and enrichment.

2. MP [Preventive Measures] Decree No. 206/2014 Court of Rome
Case concerning an officer of a local health unit, who had accumulated considerable assets over the years, which appeared to be absolutely unjustified as compared with his revenue, thanks to the systematic “trading” of his public functions, which was carried out by taking advantage of his position and by the systematic collection of bribes. This conduct caused serious damage to the public body for which he worked.

3. MP [Preventive Measures] Decree No. 136/2014 Court of Rome
Case of two public officers, who committed repeatedly misappropriation of public funds through bank transactions to the detriment of the Italian National Health Service.

On the same subject, it should be noted that Law No. 161 of 17.10.2017, which reformed the so-called “anti-mafia code”, introduced a new category of “especially dangerous persons”, to whom
preventive confiscation may be applied regardless of the condition of being a habitual offender required for "common dangerousness". Reference is made, in particular, to persons who are suspected of fraud for the purpose of obtaining public funds, or of criminal association for the purpose of committing the most serious offences against public administration (embezzlement, misappropriation, abuse of power or position by an official [concessione], proper or improper corruption, corruption in judicial proceedings, undue inducement to give or promise favours, international corruption, etc.) (see Article 4 i-bis) of Legislative Decree No. 159 of 6.9.2011). Therefore, in connection with the offences covered by UNCAC, it can be affirmed, by way of conclusion, that the application of preventive confiscation is mandatory, provided that the other conditions established by law are met, in respect of both the persons suspected of being bribe-takers and bribe-givers (regarded as "persons of common dangerousness") and those who, regardless of the condition of being habitual offenders, are suspected of leading, or participating in a criminal association for the purpose of committing offences against public administration. Furthermore, in this regard it should be pointed out that the death or the absence or the escape of a dangerous person does not prevent proceedings from being initiated and concluded, nor confiscation from being enforced.

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2. Best practices in the identification of legal and natural persons, involved in the establishment of corporate entities, including shell companies, trusts and other similar arrangements which may be abused to commit or conceal crimes of corruption or to hide, disguise or transfer their proceeds of corruption to countries that provide safety to the corrupt and/or their proceeds.

As regards powers and functions of the Italian Financial Intelligence Unit, it's worth noting that, according to the national legislation (see Leg. Decree n. 231/2007, as amended by the Leg. Decree n. 90/2017, implementing in Italy the Fourth AML/CFT European Directive), the Unità di Informazione Finanziaria per l'Italia (UIF) is in charge of receiving information on suspected money-laundering, associated predicated offences or terrorist financing from all obliged entities, performing the financial analysis on the same information and transmitting it to the competent authorities.

The obligation to report suspicious transactions apply to all financial institutions and to the s.c. Designated Non Financial Business and Professions (DNFBPs), among which also trust and company service providers are included when, on behalf of or for a client, they prepare for or carry out transactions concerning the following activities:

- 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.

When filling Suspicious Transaction Reports (STRs), obliged entities have to provide the UIF with all the information available regarding ownership of legal entities and/or final beneficiaries of legal arrangements. Indeed, basic and beneficial ownership information are particularly useful in the financial analysis performed by the UIF on the STRs, since they allow to reconstruct a complete profile of the reported subjects and to identify cases in which companies or trusts are used as a screen to facilitate money laundering transactions.
The suspicion substantiated in the STRs may arise from the characteristics, size, or nature of the transaction or from any other circumstances that come to the reporting entity’s attention by reason of its functions, and taking account of the economic capacity or business activity of the persons carrying out the transaction. The suspicion must be grounded in a comprehensive assessment of all elements – objective and subjective – of the transactions that are known to the reporting entity, acquired in the course of the fulfilling of the customer due diligence (CDD) obligations or as the result of a careful screening of any possible anomaly in the conduct of the customer. This means that based on the CDD measures and on careful monitoring and screening activities, quality information on potential ML/TF cases is detected and reported - through STRs - to the UIF.

In order to help obliged entities in detecting and reporting suspicious transactions (STRs), the UIF periodically issues and updates anomaly indicators, and elaborates models and patterns of anomalous behavior with reference to specific lines of business or phenomena relating to possible money-laundering, associated predicate offences or terrorist financing.

Since many years, the “red flag” indicators issued by UIF to facilitate the detection and disclosure of money laundering and terrorist financing suspicions focus specifically on anomalies related to the misuse of beneficial ownership of companies and trusts and the lack of transparency in this context. Such misuse, and the relevant indicators, are particularly addressing cases of international tax fraud, invoicing fraud, fraudulent mechanisms such as “carousels” and “paper mills” and, in general, techniques designed to obtain undue fiscal advantages also with the aim to use the funds illicitly obtained to corrupt.

It’s worth noting that in 2013 the UIF issued a specific “Communication on the misuse of trust”, which stressed how this vehicle can lead to the lack of traceability of the beneficial owner of the funds. In particular, the UIF Communication reminds obliged entities that they have to collect complete information on trust, also concerning the beneficiaries, the trustee and the real purpose of the trust, in order to detect possible instances of misuse effectively.

As regards UIF’s powers to obtain information useful for its financial analysis on legal and natural persons involved in corporate entities and suspected to misuse the same entities to commit or conceal crimes, please consider that companies information can be obtained and shared by UIF through a variety of sources, which can be accessed in conjunction or as alternatives and which are all within the remit of UIF’s capacity to collect and share information with foreign counterparts. It’s important to highlight that in the recent Mutual Evaluation of its AML/CFT system by FATF, Italy has received positive ratings on the effectiveness of competent authorities’ (UIF among them) capacity to obtain complete and updated information on companies and their beneficial owners.

The Italian Business Register, which can be publicly accessed, keeps information on companies incorporated in Italy that range from the date of incorporation to the types of businesses and activities performed; comprehensive data on shareholders is also available, be they legal entities or natural persons; in the former case, it is possible to trace back the chain of participation and look through the capital structure of each interposed entity by retrieving information on the relevant shareholders. According to the Decree n. 90/2017, implementing in Italy the Fourth AML/CFT European Directive, information on beneficial ownership are now available in an ad hoc section of the same Business Register, that can be directly accessed by the UIF.

When information from the Business Register is not available or not sufficient (for example, in cases of chains of participation involving companies or entities incorporated in a foreign jurisdiction which does not file data to the participated company or to the Business Register), UIF applies its powers to acquire information on companies and beneficial ownership elsewhere, requesting CDD
information to other obliged entities, cooperating with other domestic authorities, or accessing to other external databases like, for example, the central database of bank accounts and the tax database.

In the context of the international cooperation with FIUs in other countries, the UIF sends or receives requests for information for the purpose of analyzing suspicious transactions, where subjective or objective connections with foreign countries come to light. Requests usually aim at tracing the origin or use of funds transferred from or to other jurisdictions, identifying movable or immovable assets abroad and clarifying the beneficial ownership of companies or entities established in other countries. Any information can be exchanged between FIUs, also including data and information concerning the subjective features of the individuals involved in suspicious transactions. Upon this legal basis, that relies on international standards, and European and national legislation, UIF is able to request or provide to foreign FIUs all information available at the time of the request (e.g., STR material including banking and financial information, further information collected or intelligence developed through the analysis). The range of the information UIF is able to collect or request from/to its foreign counterparts also includes peculiar characteristics of the individuals involved (the status of public official, for example), that are often considered as elements that enrich the informative flows and the subsequent financial analysis.

Also information on trusts and other legal arrangements can be obtained on behalf of foreign counterparts and shared with them. More particularly, UIF can:
- access information on trustees, beneficiaries and trust assets by making inquiries into any obliged entity where the trustee (or possibly the beneficiary or other subjects who have vested interests in the trust or in the trust property) has a business relationship or performs a transactions (thus making him/herself subject to CDD checks and beneficial ownership verification);
- access external databases where information on the structure and beneficial ownership of trusts and other legal arrangements can be obtained; this is the case, for example, of the central bank accounts databases and of the tax databases;
- information can also be obtained by UIF from domestic law enforcement counterparts, to the extent that relevant data is available to such counterparts as a result of investigations or prosecutions.

By cooperating with its counterparts in other countries, the UIF has identified anomalous practices of regulatory arbitrage with foreign countries to facilitate the obscuration of both financial flows and the identities of the parties to the transaction. Some of the most common practices consist in: the use of foreign funds and investment instruments to conceal the funds belonging to persons and entities under investigation in Italy; using companies, trust companies and other foreign trust structures to move cash; establishing companies and performing operations in various countries so as to exploit gaps in the safeguards and controls and to prevent the identification of beneficial owners.