**Location:** Virtual **Format:** Workshop

**Date:** Tuesday, 23 March 2021 **Time:** 09:00 - 13:00 (SAST)

**Convenors:** DPSA, FIC, UNODC, BHC and OO

**Implementing Beneficial Ownership[[1]](#footnote-0) Transparency for
anti-corruption and good governance in South Africa**

**Overview:**

Anonymous shell companies have been used in over 70% of all grand corruption cases globally. In response, a growing number of governments have committed to collecting beneficial ownership data. Beneficial Ownership data describes the natural person who owns or controls a legal entity - such as a company or a trust, whether they own it directly or indirectly. The collection and analysis of beneficial ownership information is one way of preventing the risks associated with opaque company structures and to improve due diligence processes. Beneficial Ownership data may be used within government by law enforcement, procurement authorities and externally by the private sector and civil society if accurate, reliable and timeously accessible data is published.

The ownership and control of illicit assets and the use of legal structures to conceal them, has been the subject of increased global attention in recent years. The establishment of complex corporate structures has increased public awareness of the way in which legal structures can be used to conceal illicitly acquired wealth. Through hiding their identity behind opaque corporate veils, the true purpose of the account, the source, use of funds or property associated with the corporate vehicles is often not made known or visible. These vehicles can be misused to circumvent existing controls by disguising the true identity of who owns, controls and ultimately benefits from such arrangements. It is often very difficult for competent and law enforcement authorities to identify the natural, real person who truly has ownership and control of a company, trust or other corporate vehicle, particularly when the arrangement involves several countries.

The fraudulent use and purposeful establishment of corporate entities for illicit purposes by unscrupulous individuals has, as a result of the COVID-19 pandemic, yet again, been placed high on the government's agenda. The global pandemic and the opportunities it created for individuals with criminal intent to personally enrich themselves placed a renewed urgency on governments’ commitment to create centralised and publicly accessible registers of beneficial ownership as a mechanism to support the identification and verification of such information. Such registers will enable access to adequate, accurate and timely information on the beneficial owner of legal persons and arrangements.

Since 2015, South Africa endorsed the G20 countries’ High-Level Principles on Beneficial Ownership Transparency (BOT) and committed the country to take concrete action to implement these principles and improve the effectiveness of its legal, regulatory and institutional frameworks for Beneficial Ownership Transparency. Cabinet approved an Inter-Departmental Committee, convened by the Department of Public Service and Administration (DPSA), to work towards: the harmonization and integration of the required domestic legal framework – which entails the review and potential amendment of various pieces of legislation, as well as develop specific regulations for purposes of the harmonisation of domestic legislation and institutions impacting on beneficial ownership to avoid fragmentation and conflicting of such laws and regulations; the rationalization, harmonization and improvement of current data by means of the upgrading and coordination of existing registers in relevant departments and agencies; and the development of systems and processes, within the next four years, to achieve an integrated National Beneficial Ownership Framework, through a multi-pronged approach whereby beneficial ownership information can be accessed across all levels and layers of both the keepers and end users of such information. This process will be achieved through regular feedback to Cabinet and working in close association with Civil Society Organisations (CSOs) driven by the Open Government Partnership (OGP) process, implementing its Commitments through the 4th National Implementation Action and its Implementation Plan.

Beneficial Ownership information should be easily and timely accessible to competent authorities and Law Enforcement Agencies in order to speedily determine the beneficial ownership concerning any structure or asset. The establishment of such a National Beneficial Ownership Framework not only gives practical expression of South Africa’s normative commitment to the global requirements of beneficial ownership transparency, but also assures the public and the world of the country’s seriousness in combating illicit activities conducted through the exploitation of legal entities and arrangements.

Over 100 countries now have made public commitments to implement beneficial ownership transparency principles. Several countries have developed the requisite legislative and/or regulatory framework or have set-up central beneficial ownership registers. As a nascent policy and data governance area, implementing beneficial ownership transparency remains a complex undertaking involving a range of stakeholders.

South Africa has made significant commitments to beneficial ownership transparency. The reform agenda in government is led by the Inter-departmental Committee (IDC) on Beneficial Ownership Transparency (BOT) co-ordinated by the Department of Public Services and Administration (DPSA). Key milestones in South Africa’s trajectory towards systematic and centralised collection of beneficial ownership data include:

* In October 2015 South Africa endorsed the G20 High-Level Principles on Beneficial Ownership Transparency.
* In 2016 the G20 Beneficial Ownership Transparency commitment was affirmed and given more detail in the Open Government Partnership (OGP) 3rd National Action Plan (NAP) Commitment to creating a central public register of beneficial ownership in open data machine-readable format.
* In 2017 the adoption of the amended Financial Intelligence Centre Act of 2017 introduced legislation to strengthen customer due diligence measures, including with respect to beneficial ownership and domestic prominent influential persons and foreign prominent pubic officials their family members and known associates[[2]](#footnote-1).
* In 2019 the Department of Trade and Industry (DTI) published a second draft of amendments to the Companies Act of 2011 (the first draft was published for public consultation in 2018). The amended draft, under consideration by the National Economic Development and Labour Council (Nedlac), includes provisions for a central public register of beneficial ownership.
* In 2020 the Director-General of the DPSA and Director of the FIC jointly initiated a discussion among the following four institutions that control existing registries impacting on BOT: CIPC (register of corporates and legal persons); DSD (register of NPOs); Department of Justice and Constitutional Development (the Master of the High Court – register of trusts); and Department of Rural Development and Land Reform (DRDLR) Deeds Office (registration of immovable properties).
* In 2020, South Africa’s International Monetary Fund (IMF) COVID-19 Rapid Financing Instrument (RFI) loan of $4.3 billion approved in July 2020 contains a commitment for beneficial ownership data to be disclosed in procurement data.
* In 2021, the OGP 4th NAP includes further commitments to beneficial ownership transparency.

The reform process and the political commitments present a timely opportunity to consider in detail the steps, choices and resources required in the next 12 -24 months to effectively implement beneficial ownership reform in South Africa.

**Purpose:**

The workshop will bring together a multi-stakeholder group of government, law enforcement, procurement, oversight institutions, as well as representatives from the private sector. The workshop will provide practical steps and tools on how to effectively implement impactful beneficial ownership reforms in South Africa. The workshop will aim to build a common understanding among a diverse group of stakeholders regarding the current BO reform process, what is required to maintain the momentum, and how BO data can be used. As this workshop is convened under the Transforming Procurement System (TPS) project in South Africa, the use of beneficial ownership data in procurement will be a BO data use case given particular priority.

**Objectives and Outcomes:**

* Developing a clear concept of what we mean by ultimate beneficial ownership.
* Raise awareness of the work of the Interdepartmental Committee on Beneficial Ownership Transparency.
* Drive the demand for open, accurate and accessible beneficial ownership data and drawing links to other data-sets such as procurement.
* Practical steps identified to progress with implementation of the beneficial ownership reform journey and build momentum for reforms currently underway in South Africa.
* Contribution towards shaping the National Beneficial Ownership Framework of the Inter-Departmental Committee (IDC) on Beneficial Ownership Transparency
* Identify further opportunities for collaboration, workshops and strategic high-level events.

**Background Reading:**

Corporate vehicles (including companies, trusts, foundations, partnerships and other types of legal persons and arrangements) play an essential role in the global economy and conduct a wide variety of legitimate commercial and entrepreneurial activities. However, they have also been misused by criminals for Illicit purposes, including money laundering (ML), bribery and corruption, insider dealings, tax fraud, terrorist financing (TF), and other illegal activities. This is because, for criminals trying to circumvent anti-money laundering (AML) and counter-terrorist financing (CFT) measures, corporate vehicles are an attractive way to disguise and convert the proceeds of crime before introducing them into the financial system.

The rules governing the registration of corporate vehicles and maintenance of such registers often make it difficult for competent authorities to identify the natural, real person who truly has ownership and control of a company, trust, or other corporate vehicle, particularly when the arrangement involves several countries. Criminals make use of this lack of access to beneficial ownership information to abuse the system. The misuse of corporate vehicles could be significantly reduced if accurate information regarding both the legal owner and the ultimate beneficial owner, the source of the corporate vehicle’s assets, and its activities were readily available to the authorities.

The South African government has committed to the following international standards or processes:

* Undertake a comprehensive national risk assessment on beneficial ownership transparency to implement the requirements of the 2014 G20 High Level Principles on Beneficial Ownership Transparency.
* Implement the FATF global standards on BO of Legal Persons and Legal Arrangements, as assessed in South Africa’s 2019 Mutual Evaluation.
* Implement Commitment No. 8 of South Africa’s Open Government Partnership (OGP) Country Action Plan for 2016-18 which refers to the G20’s High Level Principles on BOT by implementing a register of legal persons (the Deputy Minister of the Department of Public Service and Administration (DPSA) is the South African Open Government Envoy).

In a statement issued on 21 October 2015, **Cabinet endorsed the G20 countries’ High-Level Principles on Beneficial Ownership Transparency**. Cabinet further approved the setting up of the IDC, convened by the DPSA, to oversee the implementation and reporting of the Country’s Action Plan regarding BOT. Due to the cross-cutting nature and inter-agency cooperation and coordination required to effectively address the global requirements of beneficial ownership transparency, Cabinet further approved the establishment of an **Interdepartmental Committee (IDC)** on BOT in 2016, under the chairmanship of the Department of Public Service and Administration (DPSA), to develop and implement a **National Implementation and Action Plan** to realise the G20 High-Level Principles on BOT and to regularly provide progress reports in this regard.

The members of the Inter-departmental Committee on BOT include:

* Companies and Intellectual Property Commission (CIPC)
* Department of Public Service and Administration (DPSA) (Convener)
* Department of Justice and Constitutional Development (Master’s Office)
* Department of Trade and Industry (DTI)
* Department of Small Business Development (DSBD)
* Department of Social Development (DSD)
* Directorate for Priority Crime Investigation (DPCI)
* Estate Agencies’ Affairs Board (EAAB)
* Financial Intelligence Centre (FIC)
* Financial Sector Conduct Authority (FSCA) – previously Financial Services Board (FSB)
* Independent Regulatory Board of Auditors (IRBA)
* Johannesburg Stock Exchange (JSE)
* Law Society of South Africa (LSSA)
* National Gambling Board (NGB)
* National Intelligence Coordinating Council (NICOC)
* National Prosecuting Authority (NPA)
* National Treasury (NT)
* South African Revenue Service (SARS)

The **Terms of Reference (ToR)** of the IDC included the **development of a definition of the beneficial owner** and **undertaking a national risk assessment (NRA)** of the existing and emerging risks associated with different types of legal persons and arrangements in South Africa. Progress in this regard is as follows:

The Financial Intelligence Centre (FIC) Act, 2001 (Act 38 of 2001), was amended in 2017 to include the definition of “beneficial owner” which states thus: ‘beneficial owner’, in respect of a legal person, means a natural person who, independently or together with another person, directly or indirectly owns the legal person or exercises effective control of the legal person.

The DPSA commissioned an independent research institution to conduct a **National Risk Assessment on Beneficial Ownership Transparency** (NRA BOT), in line with Principle 2 of the G20 High-Level Principles in 2016 through own funding and appointed a Steering Committee consisting of the DPSA (as convener), the FIC, CIPC, SARS and National Treasury to develop the scope and ToR for the NRA on BOT and oversee the process to completion.

With the support of the *Gesellschaft für Internationale Zusammenarbeit* (GIZ) GmbH a NRA and a BO risk assessment diagnostic tool was developed to analyse South Africa’s: legislative risk; operations, systems and resourcing capability risk; oversight risk; and coordination and access to information risk associated with different types of legal persons and arrangements in South Africa. The NRA BOT process commenced in 2016 and a final report with recommendations was handed over to the IDC in May 2019.[[3]](#footnote-2)

South Africa’s national Beneficial Ownership framework is informed by the existing and emerging risks associated with different types of legal persons and arrangements affecting Beneficial Ownership Transparency in South Africa, the work conducted on behalf of a Cabinet-endorsed Inter-Departmental Committee (IDC) on Beneficial Ownership Transparency (BOT) to implement an integrated and harmonised national Beneficial Ownership framework in South Africa, based on international standards, commitments and principles.

Key deliverables of the IDC include: the coordination of the conceptualisation, design and implementation of the National Beneficial Ownership Framework and the integrated and harmonised multi-pronged[[4]](#footnote-3), tiered approach; policy and legislative harmonisation; data harmonisation; and ensure accessibility of data contained in the registries to competent authorities and law enforcement agencies.

South Africa committed to take concrete action and to share in writing by means of developing, publishing and reporting regular progress on a Country Implementation Plan regarding the various steps to be taken to implement these principles and improve the effectiveness of its legal, regulatory and institutional frameworks with respect to BOT, implement the G20 High Level Principles on BOT and to meet the Financial Action Task Force (FATF)[[5]](#footnote-4) standards regarding the BO of companies and other legal arrangements such as trusts. While the transparency and BO requirements of the FATF Recommendations are aimed at fighting money laundering and the financing of terrorism, they also support efforts to prevent other serious crimes such as tax crimes and corruption. In 2014, the G20 Working Group on Anti-Corruption developed High-Level Principles on BOT. The principles are built on and support the existing international instruments and standards.

In line with the multi-pronged approach, various pieces of legislation are currently under review to include amendments, as well as specific regulations required for purposes of harmonisation of domestic legislation and institutions impacting on BO to avoid fragmentation and conflicting legislative frameworks. In this regard, the relevant legislation pertaining to the different entities and arrangements should have a specific provision that provides for ‘beneficial owner’ as defined in the Financial Intelligence Centre (FIC) Act, 2001 (Act 38 of 2001), as amended in 2017, in respect of “a legal person, i.e. a natural person who, independently or together with another person, directly or indirectly owns the legal person or exercises effective control of the legal person”. Current amendments under consideration include amendments to the Companies Act, the Trust Act and the Nonprofit Organisation (NPO) Act, to give legislative power to the keepers of BO registries including CIPC, the Master of the High Court and DSD to enable collection of basic and BO information.

South Africa is in the process of developing a national integrated and harmonised BO framework. Relevant keepers of BO registries agreed on a multi-pronged approach for competent authorities to gain access to information on BO through different sources. This multi-pronged approach consists of an integrated and harmonised two-tiered National BO Framework comprising of various public BO registries, including:

* **Tier 1:** Consisting of a corporates and legal persons BO register held by CIPC and a BO trust register under the various Masters of the High Count offices, and;
* **Tier 2:** Consisting of several BO registries of other structures and/or assets that have an important link to BO data. (e.g. the property deeds register (held in various Deeds Offices) and BO register of NPOs held by the DSD) and other public benefit structures liable for tax benefits (held by SARS).

The IDC on BOT under the leadership of DPSA, supported by the FIC, as technical lead agency, consulted with a broad range of stakeholders within and outside government in the implementation of the National BO Framework, including institutions that control existing registries impacting on BOT: CIPC (register of corporates and legal persons); DSD (register of NPOs); Department of Justice and Constitutional Development (the Master of the High Court – register of trusts); and DRDLR Deeds Office (registration of immovable properties).

South Africa’s National BO Framework data models are informed by a harmonised policy approach, allowing for the rationalisation and improvement of current data; the upgrading and coordination of registers in relevant departments and agencies to capture accurate and timeous BO information; and accessibility and sharing of data across the different registries in a way that could improve the quality of data held by each register. The requirement is that BO data should also be easily and timely accessible to competent authorities and LEAs to speedily determine the BO concerning any structure or asset under investigation.

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1. ‘Beneficial ownership’ or ‘beneficial owner’ refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement. [↑](#footnote-ref-0)
2. South Africa has an existing definition of beneficial ownership through the Financial Intelligence Centre Act of 2017. The definition as per the FIC Act of 2017 reads as follows: *"beneficial owner” in respect of a legal person, means a natural person who, independently or together with another person, directly or indirectly, — (a) owns the legal person; or (b) exercises effective control of the legal person*; An amendment process is underway to include a comprehensive definition and disclosure requirements in the Companies Act of 2011. [↑](#footnote-ref-1)
3. The GIZ NRA BOT is not yet published or publicly available as the Report and the recommendations contained therein first need to be endorsed and approved for publication as stipulated by the ToR of the IDC on BOT Implementation Plan. [↑](#footnote-ref-2)
4. A multi-prongend approach encompasses a registry, companies and existing information approach and is considered the most effective approach based on international best practice. The concept “multi-pronged approach” is derived from the FATF Best Practice Paper for Beneficial Ownership for Legal Persons (October 2019), stating: “Based on Countries’ experience shown in the FATF mutual evaluations echoes that jurisdictions using a single approach is less effective in making sure that competent authority can obtain accurate and up-to-date BO information to in a timely manner. Instead, a multi-pronged approach using several sources of information is often more effective in preventing the misuse of legal persons for criminal purposes and implementing measures that make the beneficial ownership of legal persons sufficiently transparent. The variety and availability of sources increases transparency and access to information, and helps mitigate accuracy problems with particular sources.” <http://www.fatf-gafi.org/media/fatf/documents/Best-Practices-Beneficial-Ownership-Legal-Persons.pdf>. [↑](#footnote-ref-3)
5. The Financial Action Task Force (FATF) is the global standard-setter for measures to fight money laundering and terrorist financing. In 2003, the FATF became the first international body to set global standards on beneficial ownership. It required countries to ensure that their authorities could obtain up-to-date and accurate information about the person(s) behind companies and foundations and other legal persons. The FATF further strengthened and clarified its beneficial ownership requirements in 2012. The FATF developed standards on transparency and beneficial ownership of legal persons (Recommendation 24) and legal arrangements (Recommendation 25), to deter and prevent the misuse of corporate vehicles and legal arrangements. The FATF Recommendations require countries to ensure that adequate, accurate, and timely information on the beneficial ownership of corporate vehicles is available and can be accessed by the competent authorities in a timely fashion. To the extent that such information is made available, it may help financial institutions (FIs) and designated non-financial businesses and professions (DNFBPs) to implement the customer due diligence (CDD) requirements on corporate vehicles including to identify the beneficial owner, identify and manage ML/TF risks and implement AML/CFT controls based on those risks (including suspicious activity reporting and sanctions requirements) thus preventing the misuse of legal persons and arrangements for criminal purposes. [↑](#footnote-ref-4)