

**ENHANCING THE USE OF BENEFICIAL OWNERSHIP INFORMATION TO FACILITATE
THE IDENTIFICATION, RECOVERY AND RETURN OF PROCEEDS OF CRIME.**

1. Definition of beneficial ownership and mechanisms for obtaining beneficial ownership information.

1.1 To provide the definition for

a) Legal Persons

b) Legal arrangement, including the relevant legislations. Describe criteria and threshold that are applicable to determine Beneficial Ownership including any criteria for exercising control without legal ownership(e.g. voting rights)

A beneficial owner is an individual person other than a legal person/corporate body who has control over express trust or fiduciary relationships or on whose behalf an undertaking takes place.

The BRS (Business Registration Service); an online platform where Companies and entities are required to lodge the Beneficial Ownership (B.O) information, reiterates on the need for transparency and disclosure on B.O information so as to promote good governance and help mitigate cases of transgression and treachery. Pursuant to the BO Regulations 2020 and BOI amendment regulations, 2022, a person qualifies as a Beneficial Owner if the person falls under any of these categories:

1. Holds at least ten percent (10%) of the issued shares in a Company either directly or indirectly;
2. Exercises at least ten percent (10%) of the voting rights in a Company either directly or indirectly;
3. Holds a right, directly or indirectly, to appoint or remove a Director of the Company; and
4. Exercises significant influence or control directly or indirectly, over the company. This includes person(s) responsible for making strategic decisions that ultimately affect the business or determines the itinerary of the legal person.

2. Access to basic information on legal persons

2.1 Please describe the process of obtaining basic information on legal persons created or registered in your country, including the role of company registry

Under Regulation 3(3) of the BO Regulations 2020, a company is required to take reasonable measures to identify its beneficial owners and obtain the following information from them:

- a) Full name; (as indicated in the person's Identity card (ID), passport or birth certificate)
- b) birth certificate number, national identity card number, foreigner certificate number or passport number;
- c) KRA-personal identification number (PIN), where applicable;
- d) Nationality;
- e) Date of birth;

ENHANCING THE USE OF BENEFICIAL OWNERSHIP INFORMATION TO FACILITATE THE IDENTIFICATION, RECOVERY AND RETURN OF PROCEEDS OF CRIME.

- f) Postal address;
- g) Business address;
- h) Residential address;
- i) Telephone number;
- j) E-mail address;
- k) Occupation or profession;
- l) Nature of ownership or control
- m) The date on which any person became a beneficial owner of the company;
- n) The date on which any person ceased to be a beneficial owner; and
- o) Any other relevant detail the Registrar may from time to time require.

Under the BO Regulations, such information may be obtained from:

- 1) the beneficial owner or their authorized representative
- 2) An official register such as the IPRS or the KRA database; or
- 3) A third party not directly related to the beneficial owner.

Additional Information to be noted in BO Register.

Where a company has requested for the BO's information but has failed to obtain

These, the following details should be noted in the BO Register:

- 1) The date a warning notice under regulation 5 was issued
- 2) The date on which a restriction was issued; and the effect of the restriction (i.e restriction of the relevant interests)
- 3) The date on which the company became required to withdraw the restriction;
- 4) The date on which a withdrawal notice for the restriction was issued;
- 5) The person's relevant interest in the company.

A Company is further required to:

- a) Keep a register of its beneficial owners separate from the register of members:
The BO information can be kept either in a manual register or in an electronic register.
- b) Enter in the BO register information relating to its beneficial owners as prescribed under Regulation 3.
- c) Submit a copy of the BO register to the Registrar of Companies within 30 days of the preparation of the register, using the prescribed form BOF 1 under the BO Regulations. In this regard, the Company shall lodge the information electronically via the BRS Platform.
- d) Notify persons whom they know or have reasonable cause to believe are beneficial owners to submit their BO information to the company within 21 days.
- e) Ensure the beneficial information is accurate by verifying the same in accordance with Part VII herein and update any changes thereto in a timely

ENHANCING THE USE OF BENEFICIAL OWNERSHIP INFORMATION TO FACILITATE THE IDENTIFICATION, RECOVERY AND RETURN OF PROCEEDS OF CRIME.

manner, and notify the Registrar within 14 days of such change through the prescribed Form BOF2 (change of beneficial owner particulars). Public listed companies are however exempted from the requirement to notify the Registrar of a change in the particulars in the Register of BOs within 14 days.

2.2 Please list the categories of basic information on legal persons that is, obtained and recorded by the company registry (or relevant registries) e.g. name of entity, date of incorporation, tax, ID number, etc.

Categories of basic information on legal persons that is obtained and recorded by the company registry;

- a) Full name ;
- b) Copy of his/her National Identification Cards, Passports or Birth Certificate;
- c) Postal Address;
- d) Residential Address;
- e) Copy of his/her PIN Certificate;
- f) His/her telephone number and occupation;
- g) The nature of ownership or control the beneficial owner has in the company;
- h) The name of shareholder (if any) holding shares on behalf of the beneficial owner;
- i) The date on which any person became a Beneficial Owner; and
- j) The date which any person ceased to be a Beneficial Owner.

2.3 Is the company registry available publicly and online in your country- YES,

the e-register of Beneficial Ownership is operational as of October, 2020 and is housed by the Business Registration Services(BRS)

If YES, provide links to the company registry- <https://brs.go.ke/>

3. Access to beneficial ownership information of legal persons

3.1 Through which mechanism(s) can competent authorities (such as law enforcement, police, and financial intelligence unit and tax agencies) access beneficial ownership information on companies and other legal persons created on registered in your country. **Please select all that apply.**

Through a registry/registries with beneficial ownership information

If REGISTRY, please provide further details on such registry (ies) including:

- **Authority(ies)/agency(ies) responsible for obtaining and maintaining beneficial ownership information**

Disclosure of BO Information is restricted to the following circumstances:

**ENHANCING THE USE OF BENEFICIAL OWNERSHIP INFORMATION TO FACILITATE
THE IDENTIFICATION, RECOVERY AND RETURN OF PROCEEDS OF CRIME.**

a) Disclosure by the company

A company shall disclose its BO information-

- a) The Registrar of Companies;
- b) To a procuring entity where the company participates in public procurement;
- c) To a contracting authority where the company participates in public private partnerships arrangement; or
- d) To the Court.

NB. In addition to the above circumstances, BO information may be disclosed to a third party following a written consent of the BO.

b) Disclosure by the Registrar

The Registrar may disclose BO Information to –

- a) competent authority;
- b) Public Procurement Regulatory Authority;
- c) Public Private Partnership Committee;
- d) To the Court

The Registrar in striking a balance between the right to access information and right to privacy shall ensure that personal data is processed in accordance with the right to privacy of the data subject in line with the Data Protection Act, 2021.

c) Disclosure by Public Procurement Regulatory Authority PPRA

shall publish in its public portal the BO information of the entities that have been awarded tender by a procuring entity or a contracting authority.

d) Disclosure by the Government

The government may disclose to the public BO information of any entity if such information affects the country

• **Categories of Beneficial Ownership Information (data fields)**

- a) Full name ;
- b) Copy of his/her National Identification Cards, Passports or Birth Certificate;
- c) Postal Address;
- d) Residential Address;
- e) Copy of his/her PIN Certificate;
- f) His/her telephone number and occupation;
- g) The nature of ownership or control the beneficial owner has in the company;
- h) The name of shareholder (if any) holding shares on behalf of the beneficial owner;
- i) The date on which any person became a Beneficial Owner; and
- j) The date which any person ceased to be a Beneficial Owner.

ENHANCING THE USE OF BENEFICIAL OWNERSHIP INFORMATION TO FACILITATE THE IDENTIFICATION, RECOVERY AND RETURN OF PROCEEDS OF CRIME.

- **Types of legal entities covered within the scope of the beneficial ownership registry (ies), including any exempt entities**

The BO Disclosure framework under the BO Regulations shall apply to incorporated or registered entities under the CA 2015:

- a) Companies limited by shares. (Private or public)
- b) Companies limited by guarantee.
- c) Unlimited Companies

The disclosure requirement shall also apply to the following entities *to the extent that they are shareholders in the companies* outlined under the above listed entities, and qualify as beneficial owners;

- a) Foreign Companies
- b) Limited Partnerships
- c) Limited Liability Partnerships
- d) Trusts
- e) Co-operative Societies
- f) Any other corporate bodies

- **Details of the registry (ies) access policy:**

- Is the information on the registry (ies) available to the public? **NO**
The Beneficial Owner information is NOT available to the public, but a Competent Authority may request access in writing to the registrar of companies.

If NO, please list the authorities/agencies that have access to this information, or that can request access.

The Registrar may disclose BO Information to –

- a) Competent authority; this include:-
 1. the AG;
 2. Any criminal Investigation Agency established by law;
 3. Law enforcement agencies and authorities that supervise and monitor financial sector including the Financial Reporting Centre and the Kenya Revenue Authority;
 4. Public Procurement Regulatory Authority;
 5. Public Private Partnership Committee;
 6. To the Court.
- **Does accessing beneficial ownership information in the registry (ies) entail any cost?**
No. Competent authorities are not charged to access BO information
- **Does the registry (ies) provide features to search information by different types of information by different types of**

ENHANCING THE USE OF BENEFICIAL OWNERSHIP INFORMATION TO FACILITATE THE IDENTIFICATION, RECOVERY AND RETURN OF PROCEEDS OF CRIME.

information e.g. legal entity name, by first name? Is it possible to search for a combination of information (Boolean searches)?

Yes. The search features include Business name, Registration Number, National ID number and Passport Number.

- **Frequency of updates of information and triggers for updates;**
Companies are required to update their beneficial ownership e-register by 31st July, 2021. Subsequently a company has to notify the Registrar within **Fourteen (14) days** of any change in Beneficial Ownership registration.

- **Any mechanisms to verify beneficial ownership information submitted to the registry (ies) by the legal persons or their representatives (if they exist).**

Currently the country is still collecting BO information with approx. 33% having already complied with the law.

- 3.2 Please describe any other sources (mechanisms) through which competent authorities/agencies can access beneficial ownership information in your country. In each case, please describe how beneficial ownership information on companies and other legal entities is made available to authorities and/ or public (if applicable)**

No. The database of BO information is held by BRS.

- 3.3 Are foreign legal persons, foreign (express) trusts, or foreign legal arrangements, allowed to operate in/own assets/and/or register in your country? YES/NO**

Yes, a foreigner can own land in Kenya in their name. The provisions of law regulating landholding by non-citizens are found in the Constitution of Kenya, the Lands Act (Act No. 6 of 2012), and the Land Registration Act (Act No. 3 of 2012).

If YES,

- **How is basic information on these arrangements recorded(if at all)**

They are recorded as a foreign resident or a foreigner

- **How is beneficial ownership information on these arrangements recorded (if at all)? Please provide details of the relevant legislation and practices**

LLPS, trusts and foreign companies are currently **NOT** required to disclose their Beneficial Ownership.

**ENHANCING THE USE OF BENEFICIAL OWNERSHIP INFORMATION TO FACILITATE
THE IDENTIFICATION, RECOVERY AND RETURN OF PROCEEDS OF CRIME.**

4. Access to basic information and beneficial ownership information of (express) trusts and other similar legal arrangement

4.1 Does your country recognize (express) trusts or other similar legal arrangements? YES/NO

YES.

Trusts in Kenya are created under the Trustees Act or the Trustees (Perpetual Succession) Act (Cap.164 of the Laws of Kenya) (Act).

Trusts are subject to other statutes that affect the operation of Trusts in Kenya such as the Income Tax Act and the Tax Procedures Act.

A Trust established, by way of a Trust deed ought to be stamped and then registered at the Lands Registry under the Registration of Documents Act (Chapter 285 of the Laws of Kenya). The process of registration of the Trust deed pursuant to CAP 285 establishes it as an unincorporated Trust, which does not have any distinct legal personality of its own.

- **If YES, please provide a broad overview of your country's system and mechanisms for obtaining beneficial ownership information on (express) trusts and other similar legal arrangements created in your country.**

The transparency requirement for legal arrangements goes beyond focusing on one BO and requires the trustee (or similar agent) to obtain information on any settlor, other trustees, the protector, beneficiaries (or class of beneficiaries), and any other natural person exercising ultimate effective control over the Trust, subject to the criteria set under the BO Regulations.

The following parties to a trust or other legal arrangement are therefore identified as beneficial owners, to the extent that they meet the criteria set under the BO regulations, as follows:

- a) The settlor (the person donating the assets);
- b) The trustee(s) (the custodian of the assets);
- c) The protector or enforcer (an intermediary between the settlor and trustee), if any;
- d) The beneficiaries to the trust or classes of beneficiaries; and/or
- e) Any other person exercising effective control or influence over the Trust.

NB: Trust deeds may contain provisions that impact where ultimate control over the trust assets lies, including clauses under which the settlor reserves certain powers (such as the power to revoke the trust and have the trust assets returned). This may

ENHANCING THE USE OF BENEFICIAL OWNERSHIP INFORMATION TO FACILITATE THE IDENTIFICATION, RECOVERY AND RETURN OF PROCEEDS OF CRIME.

assist in determining the beneficial ownership of a trust and its related parties. In other jurisdictions, trusts are usually complex structures that can include additional parties. Some trusts may have no beneficiaries, and others may comprise confidential documents, such as a will with the settlor's instructions. The above circumstances may make it difficult to determine who has effective control over the Trust, hence the requirement to exercise caution where the legal shareholder in a reporting entity is a Trust.

4.2 How is basic information on (express) trusts and other legal arrangements obtained and recorded in your Country?

4.3 How is beneficial ownership information on (express) trusts and other legal requirements recorded in your country?

Through a registry/registries with beneficial ownership information

If REGISTRY, please provide further details on such registry (ies) including:

• **Authority(ies)/agency(ies) responsible for obtaining and maintaining beneficial ownership information**

Disclosure of BO Information is restricted to the following circumstances:

a) Disclosure by the company

A company shall disclose its BO information-

- a) The Registrar of Companies;
- b) To a procuring entity where the company participates in public procurement;
- c) To a contracting authority where the company participates in public private partnerships arrangement; or
- d) To the Court.

NB. In addition to the above circumstances, BO information may be disclosed to a third party following a written consent of the BO.

b) Disclosure by the Registrar

The Registrar may disclose BO Information to –

- a) competent authority;
- b) Public Procurement Regulatory Authority;
- c) Public Private Partnership Committee;
- d) To the Court

The Registrar in striking a balance between the right to access information and right to privacy shall ensure that personal data is processed in accordance with the right to privacy of the data subject in line with the Data Protection Act, 2021.

ENHANCING THE USE OF BENEFICIAL OWNERSHIP INFORMATION TO FACILITATE THE IDENTIFICATION, RECOVERY AND RETURN OF PROCEEDS OF CRIME.

c) Disclosure by Public Procurement Regulatory Authority PPRA

shall publish in its public portal the BO information of the entities that have been awarded tender by a procuring entity or a contracting authority.

d) Disclosure by the Government

The government may disclose to the public BO information of any entity if such information affects the country

5. Sanctions

5.1 Please describe the types of sanctions, sanctionable conduct, and targets of sanctions for non-compliance with beneficial ownership regulations (whether on registry(ies) or through an alternative mechanism)

Under Regulation 93 A (5) of the Companies (Beneficial Ownership Information) Regulations, where a company fails to keep a register of its beneficial owners, each officer of the company who is in default, commits an offence and on conviction shall be liable to a fine not exceeding Kenya Shillings five hundred thousand shillings (KES. 500,000.00).

Section 93 A (6) further states that, after a company or any of its officers is convicted of an offence, where the company continues to fail to comply with the relevant requirement, the company, and each officer of the company who is in default, commit a further offence on each day on which the failure continues and on conviction are each liable to a fine not exceeding fifty thousand shillings (KES. 50,000.00) for each such offence. The penalties continue to accrue until the requirements are complied with.

The Regulations, in line with the principles of data protection, further state that it is an offence to disclose beneficial ownership information in any manner other than for the purpose for which the information has been obtained. The penalty for this disclosure is a fine not exceeding twenty thousand shillings (KES. 20,000.00) or imprisonment for a period not exceeding six months, or to both.

The Regulations provide that the Registrar may use the information relating to a beneficial owner for communicating with the beneficial owner and that the BO information shall not be made available to the public. The only exception to this restriction is that the BO information may be made available to a competent authority upon a written request to the Registrar.

ENHANCING THE USE OF BENEFICIAL OWNERSHIP INFORMATION TO FACILITATE THE IDENTIFICATION, RECOVERY AND RETURN OF PROCEEDS OF CRIME.

5.2 Please describe the powers available to the designated authority(ies)/agency(ies) to enforce sanctions for non-compliance with the beneficial ownership disclosure requirements, including any statistics on enforcement of such sanctions

Competent Authority can only get BO information upon a written request to the Registrar.

A person who discloses beneficial ownership information in any manner other than for the purpose for which such information is obtained commits an offence and shall be liable upon conviction to a fine not exceeding twenty thousand shillings or to imprisonment for a period not exceeding six months, or to both.

Therefore, Competent Authorities may have powers to prefer criminal charges, impose fines, monitor compliance and other penalties may be imposed by Registrar for non-compliance.

6 International Co-operation, asset recovery and challenges

6.1 Does your country make beneficial ownership information available to foreign competent authorities(directly or upon request)?Please provide details of the relevant

No,

Disclosure of BO Information is restricted to the following circumstances:

Disclosure by the company

A company shall disclose its BO information-

a) The Registrar of Companies;

To a procuring entity where the company participates in public procurement;

e) To a contracting authority where the company participates in public private partnerships arrangement; or

f) To the Court.

NB. In addition to the above circumstances, BO information may be disclosed to a third party following a written consent of the BO.

6.2 Please describe how foreign competent authorities may request or access beneficial ownership information on legal persons and legal arrangements formed in your country. Which agency (ies) are responsible for receiving and responding to foreign requests? Please provide contact information and instructions.

Through an MLA to any of competent authorities or Business Registration Services (BRS).

ENHANCING THE USE OF BENEFICIAL OWNERSHIP INFORMATION TO FACILITATE THE IDENTIFICATION, RECOVERY AND RETURN OF PROCEEDS OF CRIME.

6.3 In your own opinion, what are the challenges faced by *foreign competent authorities* to access beneficial ownership information in your country?

- a) Time taken to respond to requests;
- b) Dual criminality;
- c) lack of multilateral agreements, Language barrier and Translation issues and Complexity in MLAs

6.4 In your opinion, what are the challenges faced by *competent authorities of your country* to access/receive beneficial ownership information held in a foreign country?

- a) Identifying the competent Authority
- b) Time constraints
- c) Lack of good will from foreign jurisdictions
- d) Language barrier and Translation issues for non- English Speaking Countries
- e) Complexity in MLAs

6.5 Do you have any case studies or examples where the transparency of beneficial ownership has enabled the effective recovery and return of proceeds of crime in (or for) your country?

ACEC CASE NO. 15 OF 2019

Ethics and Anti-Corruption Commission v Patrick Ochieno Abachi & 6 others. This case study examines a 2021 unexplained wealth (illicit enrichment) case in Kenya involving a former Chief Accountant at the Treasury, Patrick Ochieno Abachi.

The case is related to Kenya's 'Anglo Leasing scandal', in which 18 high-value government security contracts were allegedly awarded to fictitious companies in the early 2000s. It illustrates one set of circumstances in which civil unexplained wealth (or civil illicit enrichment) legislation and Beneficial Ownership Transparency can be an extremely useful tool to target assets stolen through corruption.

7 Good practices for Beneficial Ownership Transparency

7.1 Has your country implemented any specific good practices relating to Beneficial Ownership Transparency that you wish to highlight? Examples could include good practices in verification, data format, search ability, use of technology, enforcement of sanctions, automatic red flagging, use of risk based approach.

The BO Regulations, 2022 seek to extend BOI disclosure requirements to entities doing business with the Government. Specifically, companies are now

ENHANCING THE USE OF BENEFICIAL OWNERSHIP INFORMATION TO FACILITATE THE IDENTIFICATION, RECOVERY AND RETURN OF PROCEEDS OF CRIME.

required to disclose their beneficial ownership information to procuring entities and contracting authorities when participating in public procurement, assets disposal and Public Private Partnership (PPP) arrangements.

8 Follow-up to the special session of the General Assembly against corruption

8.1 Please describe any other measures, if any, that your country may have taken to implement paragraph 16¹ of the political declaration adopted by the General Assembly at its special session against corruption held on June 2021.

Amendment of The Companies (Beneficial Ownership Information) (Amendment) Regulations, 2022 to include regulation 13 (6);

“Information relating to a beneficial owner shall only be made available to a competent authority, the Public Procurement Regulatory Authority or the Public Private Partnership Committee upon a written request by the competent authority, the Public Procurement Regulatory Authority or the Public Private Partnership Committee to the Registrar”

¹ 16. We commit to making effort in international cooperation and taking appropriate measures, to enhance beneficial ownership transparency by ensuring that adequate, accurate, reliable and timely beneficial ownership information is available and accessible to competent authorities. In addition, by promoting beneficial ownership disclosure and transparency, such as through appropriate registries, where consistent with the fundamental principles of domestic legal systems and using as guideline the relevant initiatives of regional, interregional and multilateral organizations against money laundering. To this end, we will develop and implement the measures necessary to collect and share such information on the beneficial ownership of companies, legal structures and other complex legal mechanisms, and we will enhance the ability of competent authorities in this regards