



Beneficial Ownership Laws Under the Kigali International Financial Centre

By

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Introduction

In recent years, there have been increased efforts to set up International Financial Centres (IFCs) in Africa as a means of attracting foreign investment. In East Africa, particularly, two IFCs have been established, namely the Kigali International Financial Centre (KIFC) and the Nairobi International Financial Centre (NIFC). This policy brief focuses on the KIFC which has been hailed as one of the IFCs likely to become a significant African business facilitator in the next 2 to 3 years.²

As highlighted above, IFCs are considered a major vulnerability in ensuring successful transparency of legal persons such as companies. Due to the ease of setting up companies and the rather relaxed regulations in IFCs, criminals are attracted to them because they can easily legitimise their illicit transactions by setting up companies that seem like an ‘active and high functioning business’.³ For this reason, the Rwandan government should be vigilant in ensuring the effectiveness of its Beneficial Ownership (BO) laws as the ease of setting up companies will not only attract honest business but suspicious activities that advance illicit financial flows (IFFs) as well.

This policy brief shall further examine the recently

introduced BO provisions in the Laws Governing Companies (henceforth referred to as Company Laws)⁴ by placing the Rwanda framework in the larger context of international approaches on BO, providing a brief outlook of the BO laws in the country, highlighting its areas of weaknesses and how they can be improved. The establishment of IFCs and the need for transparency, in terms of BO, is particularly important given the likelihood of corruption and revenue losses through IFFs.

Beneficial Ownership Information

Before delving deeper into Rwanda’s approach to BO, it is important to have an understanding of the various key terms and concepts that underpin the discussion. This gives one an advantage in shaping arguments brought to fore in exposing weaknesses in Rwanda’s BO laws that have implications on domestic resource mobilisation (DRM).

Who are Beneficial Owners?

Beneficial owners are defined as the “*natural person(s) who ultimately own(s) or control(s) 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*”.⁵ Legal persons include entities such as companies, partnerships and

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2. CDI (China Development Institute), FCF (Financial Centre Futures) and Z/Yen Group, ‘The Global Financial Centres Index 20, September 2016, (n.4) <https://en.cdi.org.cn/images/research/gfci/GFCI20English-2016.pdf>
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4. Government of Rwanda, Laws Governing Companies 2021 Official Gazette No. 4 of 8/2/2021.
5. FATF (Financial Action Task Force), ‘The FATF Recommendations for International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation’ Updated October 2022 <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/EATF%20Recommendations%202012.pdf>

other corporate structures. It is essential to distinguish between the legal owner of a company and the beneficial owner of a company. A legal owner is a person who has a legal 'title,' which in the case of a company means persons who are registered either as shareholders or guarantors of a company limited by shares or a company limited by guarantee respectively or the directors of the company. A beneficial owner is a human being, often referred to as a 'natural person' in legal terms who enjoys the benefits of the ownership of a company.

A beneficial owner need not be a legal owner to derive benefits, for instance, in the case of nominee shareholders or directors who are nominated to hold the legal ownership in trust for an individual. The process of nomination may be a formal process or an informal one which often includes the use of family members to conceal the real person exercising ultimate control over the company. Another instance is through the use of bearer shares which are unregistered shares whose ownership is bestowed through physically possessing the share certificate. Bearer shares are a common feature in tax havens or secrecy jurisdictions through which beneficial owners can derive benefits such as the collection of dividends by having other people including professional intermediaries such as banks and lawyers collect these on their behalf without disclosing their identity.

The most common way that the concealment of beneficial owners occurs is through the use of complex ownership structures whereby an individual conceals their ownership by using intricate networks of legal ownership which are further complicated by establishing such chains across jurisdictions.

Why is Beneficial Ownership Information Important?

BO information is important because it helps remove the veil of secrecy and opaqueness that individuals utilise to cover their illicit or criminal financial activities. Well-developed BO laws that are backed by

government enforcement helps curb tax avoidance. This is done by stopping the use of complex webs of ownership that are used to artificially reduce tax liability through bypassing transfer pricing laws. For instance, through identifying the beneficial owners of companies, revenue authorities will be able to identify related parties and prevent the abuse of transfer pricing principles such as the arm's length principle. Other illicit activities that will be curbed include money laundering and terrorism financing as well as corruption; as a remedy to the flow of illicit finances, BO laws will also enhance the process of asset recovery.

The recent Pandora Papers exposé by the International Consortium of Investigative Journalists (ICIJ) is a real-life example that illustrates the importance of beneficial ownership information. The exposé revealed the role played by the global financial system in helping key power players including sitting Heads of State to hide their financial activities.⁶ The leak spotlighted the use of international financial architecture in facilitating IFFs; for instance, Some popular offshore financial centres mentioned in the leaks included jurisdictions such as the British Virgin Islands, the Cayman Islands, Mauritius amongst others.

Within offshore financial centres, trusts, foundations and other legal vehicles are used to move capital for tax avoidance amongst illicit purposes as revealed by the 11.9 million confidential files that were leaked from 14 offshore firms.⁷ Efforts to curb the opacity of secrecy jurisdictions have included the introduction of BO laws which would require that the natural person ultimately controlling any legal vehicle used be adequately identified and held accountable for the use of shell companies in offshore centres. The Financial Action Task Force (FATF), a global anti-money laundering and terrorism financing watchdog, has been calling for the establishment of BO laws for almost two decades.⁸ Unfortunately, only a third of all countries have taken steps toward BO laws, with

6. CIJ (International Consortium of Investigative Journalists), *Offshore havens and hidden riches of world leaders and billionaires exposed in unprecedented leak*, 3 October 2021, <https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore/>

7. *Ibid*

8. TJN (Tax Justice Network), *The state of play of beneficial ownership registration in 2020*, <https://taxjustice.net/reports/the-state-of-play-of-beneficial-ownership-registration-in-2020/>

few African countries taking concrete measures to have in BO laws place.

How are Beneficial Ownership Laws Structured?

Most states structure their BO laws as per the recommendations of FATF. It helps states frame their policy plus institutional frameworks and evaluates their compliance or effectiveness in implementing the standards they set. FATF has produced several recommendations on BO laws, but for the purposes of this paper, Recommendation 24 on BO of Legal Persons is relevant.⁹

The main objectives of Recommendation 24 to:

1. Ensure that there is an accurate and up to date collection of BO information on legal persons.
2. Ensure that competent authorities have timely access to this information, especially law enforcement authorities.
3. Curb practices that hinder the collection of BO information, including, the use of bearer shares and nominee shareholding, amongst other practices.

To achieve these objectives, FATF provides 3 approaches which can be applied by states in the collection of BO information. They include:¹⁰

1. **Companies Approach:** This is whereby the company is required to obtain BO information and keep a record of it at a particular office within the state.
2. **The Registry Approach:** This is whereby the company registries are to obtain and maintain records of BO information.
3. **The Existing Information Approach:** This is whereby BO information is sourced from other persons other than the company for example through financial institutions and other designated non-financial businesses and professions, including competent government authorities amongst others.

States are encouraged to adopt at least one approach. However, the best approach being a combination of all of the above.¹¹

Rwanda's Approach and Structure to BO Laws

Article 116 to 120 of the Company Law govern beneficial ownership for companies. A close reading of these articles shows that Rwanda has adopted a 'companies' approach. These are the main provisions of these Articles:

Beneficial Owner Information Required - Article 116 directs that BO information collected with regard to persons should include the names and identification documents of the individual. Concerning a company that is a beneficial owner, the names of the company, the registration personal identification number (PIN) or tax identification number (TIN), and the registered office of the company must be provided to the Registrar General.

Obligated Party to Collect BO information: Article 116 of the Company Laws requires that the Company Secretary collect BO information. In the absence of the Company Secretary, the Board of Directors are required to collect BO information. A register of beneficial owners must be kept at the company's registered office.

Access to BO Information by Competent Authorities - According to Article 119, competent authorities can only access BO information once they produce a certificate to the Company Secretary authorising them access to the information. This certificate is authorised through a court order or any other written law. Upon receipt of this certificate, the Company Secretary has 2 days to produce the relevant information.

Powers to Compel Shareholders to Provide BO Information - Company Secretaries, as per Article 118, will give shareholders a notice to provide BO information within a specified period of time. If the shareholder fails to do this within the specified

9. *Op.Cit.* FATF, 2020, n.11

10. FATF (Financial Action Task Force), 'FATF Guidance on Transparency and Beneficial Ownership' (2014), <http://www.fatf-gafi.org/media/fatf/documents/reports/guidancetransparency-beneficial-ownership.pdf>

11. FATF (Financial Action Task Force), 'Best Practices on Beneficial Ownership for Legal Persons', (2019) www.fatf-gafi.org/publications/documents/beneficial-ownership-legal-persons.html%0A%3C.

time or provides false information, the company has powers to limit the interests of the shareholders in the company including amongst other measures, cancelling the interest of the shareholders in the company in accordance with Article 119.

Sanctions Against Failure to Provide BO Information or Give False Information - Article 333 provides that if the Company Secretary fails to provide BO information to a competent authority when it has been requested for, he or she becomes personally liable to pay a fine of between 500,000 (497.68 USD) to 1,000,000 (995.37 USD) million Rwandan Francs. Article 352 makes it an offence to provide false BO information as a shareholder which can lead to imprisonment of 1 to 2 years and a fine of 5,000,000 (4976.84 USD) to 10,000,000 (9,953.68 USD) million Rwandan Francs.

Lastly, Article 353 creates another offence whereby if a Company Secretary discloses information that may jeopardise an investigation into the company affairs, he or she shall have committed an offence leading to imprisonment of 6 months to 1 year and a fine of 500,000 (497.68 USD) to 2 million (1,990.73 USD) Rwandan Francs.¹²

Areas of Concern Within Rwanda's BO Framework

Lack of a Beneficial Owner Definition - The Companies Laws do not provide a definition of beneficial owner. In fact, within Rwandan laws, it is only in the Anti-Money Laundering (AML) laws that a comprehensive definition of a beneficial owner is found.

A beneficial owner is defined as: "*A natural person who ultimately owns or controls a customer or the natural persons on whose behalf a transaction is being conducted. It also includes*

those persons who exercise ultimate effective control over a legal person or legal arrangement."¹³

This definition purposefully refers to the identification of a natural person who exercises ultimate control over an entity. This is in line with FATF recommendations as well as practice across African nations such as Kenya, Nigeria and South Africa that persistently refer to a beneficial owner as a 'natural person'.¹⁴ Rwanda seems to deviate from this as can be seen in Article 116, whereby a beneficial owner seems to include a company such that the BO information requires inclusion of the company name, its registered office and its registration number.

This unclear framework will make it very difficult to implement BO laws as well as ironically contradict the very purpose of such legislation which is to cut through the veil protecting companies and individual identities actually controlling the company. Thus, the Company Law as it presently reads does not differentiate between the legal ownership and beneficial ownership of a company.

Timely Access to BO Information by Competent Authorities - Competent authorities, especially Law Enforcement Agencies, should be able to access BO information promptly to effectively carry out investigations on money laundering offences, tax issues as well as other IFF purposes.¹⁵ According to an analysis by Transparency International, the lack of access by competent authorities to BO information was highlighted as one of the biggest challenges in the implementation of legislation.¹⁶

FATF and the Egmont Group identified several methods used by entities to hide who actually exercises, ultimate control, including use of very complex structures, the use of nominee shareholders

12. An exchange rate of 1 USD =1,004.653693 Rwandan Franc was used as of 17th November, 2021 https://www.bnr.rw/currency/exchange-rate/?tx_bnrcurrencymanager_master%5B%40widget_0%5D%5BcurrentPage%5D=5&cHash=fe7530d52729a1c39486247efe543203 accessed 17 November 2021

13. Government of Rwanda, Law on Prevention and Punishment of Money Laundering, Financing of Terrorism and Financing of Proliferation of Weapons of Mass Destruction 2020 Gazette No. 7 of 24/2/2020. Article 3(8)

14. TJNA (Tax Justice Network Africa), The Case for Beneficial Ownership Disclosure: A Discussion Paper on the Policy Frameworks Promoting Beneficial Ownership Transparency in Africa, (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3754859

15. *Op.Cit.* FATF, 2019, n.15

16. TI (Transparency International), 'Who Is Behind the Wheel? Fixing the Global Standards on Company Ownership' (2019), https://images.transparencycdn.org/images/2019_Who_is_behind_the_wheel_EN.pdf

as well as bearer shares. The reason why use of such means to conceal BO information is so successful is because there is an absence of accurate up to date information and the lack of access to this information by competent authorities.¹⁷ The bottom line is that as long as competent authorities do not have access to this information, no matter how well structured the BO information laws are, they will be ineffective since it is simply impossible to enforce them.

There are two main ways competent authorities can access BO information. The first is through centralised databases, a common practice, especially with companies that implement the registry's approach and the other is through the use of investigative powers.¹⁸

The latter approach is what Rwanda is adopting. The Companies Laws show how jealously BO information is protected. Access can only be sanctioned through court orders or written law. The written law in this instance are the AML laws which will limit access to BO information only to the extent of investigating money laundering offences and not other IFF activities such as aggressive tax avoidance.¹⁹

FATF discusses the challenges of the investigative approach highlighting the key issue of risks in tipping off directors or shareholders using this approach.²⁰ This is especially so since as per the Company Laws, the certificate must specify the purpose of requesting BO information. Further, the Company Laws in Article 120, provides that any information that is subject to attorney-client privilege, including BO information, will not be subject to disclosure. The attorney is only required to provide names and addresses. This loophole is likely to be exploited to further avoid the obligations of BO disclosure especially since attorneys often take up the role of Company Secretaries who are custodians of BO information.

Bearer Sharers, Nominee Shareholding and Directorship - Bearer shares according to the

IMF are prohibited in Rwanda. However, nominee shareholding and directorship are not encumbered with regard to transparency requirements in Rwanda. For instance, the BO information required does not include the requirement to disclose any nominee shareholding or directorship.

Conclusion

While the enactment of BO laws is highly commendable, in order to make them truly effective it is absolutely necessary for Rwanda to ensure that in practice, competent authorities have timely access to BO information. This will be by increasing the scope of their powers of access, through written laws such as the Company Laws and AML laws or by creating a centralised database through streamlining with the Registrar General's office.

Further, consideration of risks such as the setting up of an IFC and the introduction of new corporate structures should be considered in further formulating and implementing BO laws. A risk assessment should be carried out in order to identify these vulnerabilities and amendments made accordingly.

Recommendations

1. The Rwandan Parliament must amend the Company Laws to include a definition of beneficial owners, ensuring that only natural persons/individuals shall constitute beneficial owners. This will help effectively encourage financial transparency in the ownership of companies.
2. The Rwandan Parliament must amend the Company Laws to include a wider array or required BO information such as, beneficial owners must disclose if they are using nominee shareholders or directors to control their interests in the company so that not only are the beneficial owners disclosed but also reveals how they exercise control.
3. To ensure timely access of BO information by competent authorities, Rwanda should adopt the approach of establishing and maintaining

17. *Op.Cit.* FATF - Egmont Group (n.8).

18. *Op.Cit.* FATF 2019 (n 15).

19. *Op.Cit.* FATF 2019 (n 14).

20. *Op.Cit.* FATF 2019 (n 15).

an up-to-date registry of BO information with the Company Registrar or other appropriate authorities. This registry should not only be made available to the competent authorities but be publicly accessible to further enhance financial transparency.

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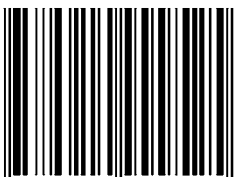
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