

Beneficial Ownership Information in South Africa

South Africa's protracted fight against corruption and financial crime necessitates the deployment of new and effective countermeasures to combat criminality. Open access to timely and accurate identifying information on the Ultimate Beneficial Ownership ("UBO") of corporate entities would be a force multiplier in this fight and would go a long way to building trust in the country's financial system.

Introduction

Exploiting anonymous shell companies and hiding behind sophisticated, opaque corporate structures has been the modus operandi for criminal enterprises globally. The first step towards combatting these syndicates is through increased transparency around the identity of these companies' beneficial owners, i.e., the individuals who ultimately benefit through effective ownership or control of the company.

Transparency is a powerful deterrent, and identifying the beneficial owners of South Africa-incorporated companies and trusts in a publicly-accessible "UBO Register" would not only secure everyday commercial transactions but would provide an extra layer of scrutiny over those doing business with the state through lucrative public contracts.

Importance

In the South African context, a UBO Register would be an especially effective tool for combatting corruption and bribery, undeclared conflict of interests, Broad-based Black Economic Empowerment fronting practices, tenderpreneurship and even improper favouritism. It would improve tax administration at SARS, and streamline investigative processes at SARS, the Hawks, the SIU and other anti-corruption agencies. Residual benefits extend to increased oversight and more accurate due diligence and risk evaluation by financial institutions, industry regulators and professional services firms (including auditors), as well as the empowerment of civil society structures and independent investigative organisations

such as AmaBhungane and media outlets such as City Press and Daily Maverick, who have already demonstrated their tremendous value in uncovering criminality during the State Capture years. It is also worth mentioning that South Africa is a member of the Financial Action Task Force ("FATF"), an intergovernmental organisation geared towards combating money laundering, which requires members to ensure that there is adequate, accurate and timely information available on the beneficial ownership of all legal persons, and that authorities can access this information in a timely manner.

The European Union ("EU") made UBO Registers obligatory under the 4th and 5th EU Anti-Money Laundering Directives, and most member states have established or are in the process of establishing registers. While the EU's initiative has not been without its share of completeness and public accessibility issues, significant progress has been made.

Challenges

While simple in principle, there are several legislative and administrative challenges to implementing and establishing a UBO Register in South Africa. However, these are not insurmountable if there is political will and sufficient pressure from the country's robust private sector and energetic civil society.

South Africa's current corporate legal framework requires private companies to keep an up-to-date register of their issued securities (including shares) and to provide members of the public with access to this register under

Section 26(2) of the Companies Act 71 of 2008 (“Act”), irrespective of the motive behind the request.¹ While some information is readily available through an online platform maintained by the Companies and Intellectual Property Commission (“CIPC”), this is limited to incorporation and administrative information as well as the identity of registered directors, but not shareholding information.

Crucially, private companies are not required to collect beneficial ownership information at all, and wholesale amendments to the Act and regulations would be required to bring our framework in line with international best practice. Similar amendments to the Trust Property Control Act 57 of 1988 would be required to ensure trust instruments are included in the UBO Register.

It is important to note the ongoing efforts to amend the Act, most prominently through the publishing of a draft amendment bill (“Bill”) in late-2018, which will, inter alia, introduce more onerous corporate disclosure requirements and require private companies to submit an updated copy of its securities register to CIPC annually.

While the Bill is a positive step that should be applauded, it falls short of requiring companies to collect beneficial ownership information, and it remains to be seen whether the CIPC would in any event digitise the shareholding information from companies’ securities registers and avail this on its online platform, in line with practices adopted by South Africa’s economic partners such as the UK (Companies House), China (NECIPS), Australia (ASIC) and even Botswana (CIPA).

Recent amendments to the Financial Intelligence Centre Act 38 of 2001 do include a definition of “beneficial ownership”, although this is aimed at addressing money laundering and terrorist funding by the relevant authorities and accountable institutions, and not the establishment of a publicly-accessible UBO Register.

It would be remiss to ignore the significant costs involved in maintaining a reliable and up-to-date centralised register, in addition to establishing a well-resourced agency – or capacitating CIPC or the Financial Intelligence Centre (“FIC”)– to take responsibility for it. This would also require stringent verification measures and a secure and accurate storage system to execute effectively.

Conclusion

Considering the substantial fiscal constraints and a significantly reduced 2021 budget that was adopted by National Treasury, it could be argued that diverting scarce resources towards a UBO Register or similar platform should not be a priority. However, this should

be counterbalanced with the benefits of combatting illicit activities, which have cost the fiscus trillions of Rands over the past decade and damaged investor confidence in the economy.

If South Africa is to regain its place as Africa’s economic powerhouse, it needs to leverage every countermeasure available to eradicate corruption and supercharge economic growth – establishing a UBO Register should be seen as a vital and necessary manoeuvre in this context.

¹ Nova Property Group Holdings Ltd and others v Cobbett and another 2016 (3) All SA 32 (SCA). If the request for access to the register is denied or ignored, the parties may approach the courts to compel access.

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