



BENEFICIAL OWNERSHIP

OECD Africa Tax Crime Academy

Kenya Intermediate Course 27 Nov - 3 Dec 2021

MANAGING FINANCIAL INVESTIGATIONS VIRTUAL (Intermediate)

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Kenya Revenue Authority, Nairobi.

LEARNING OBJECTIVES

By the end of this presentation, participants should be able to :

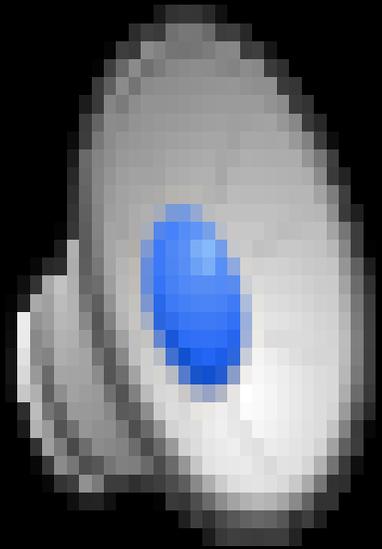
1. Explain the concept of beneficial ownership.
2. Differentiate between legal owners and beneficial owners, direct ownership and indirect ownership.
3. Identify beneficial owners in complex corporate ownership structures.
4. Identify sources of beneficial ownership information, information challenges, and the risks of uncertain beneficial ownership.

ABBREVIATIONS & ACRONYMS

- BO Beneficial Owner/(ship)
- DTA Double Taxation Agreements
- FATF Financial Action Task Force
- FSRB FATF Style regional bodies
- MAAA Mutual Administrative Assistance Agreements
- MLA Mutual Legal Assistance
- TIEA Tax Information Exchange Agreement
- UBO Ultimate Beneficial owner/(ship)

THE STRAW MAN DANCER

Concerns about the straw man dancer??



1. Who created them?
2. When, how and where were they created?
3. Which experts, if any, helped in their creation?
4. Who benefits from their performances?
5. Who controls their dance moves? How? Why?
6. Who decides when and where they dance?
7. Is their creation/control/ performance within the legal framework?

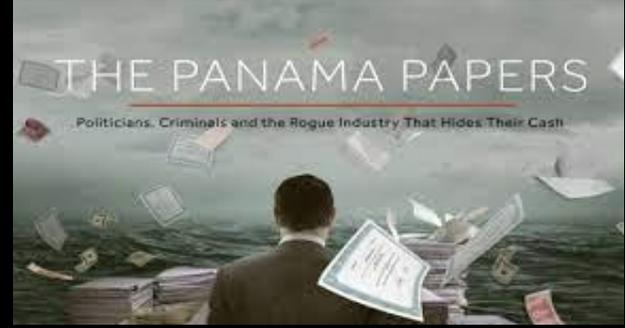
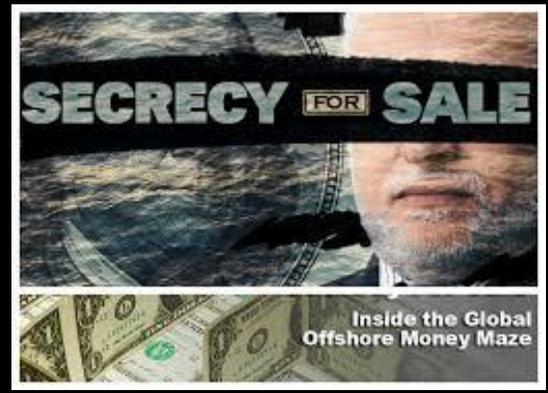
PANDORA PAPERS

- 3 October 2021!!!
- Published by the International Consortium of Investigative Journalists (ICIJ)
- Biggest leak ever of offshore data exposes (2.9 terabytes of data) with 11.9 million leaked documents.
- Dubbed the “Pandora Papers” because the findings shed light on the previously hidden dealings of the elite and the corrupt, and how they have used offshore accounts to shield assets collectively worth trillions of dollars.
- Pierced the corporate veil and revealed how **trusts** are prolifically used as a vehicle in conjunction with **offshore companies** set up for the sole purpose of holding investments and other assets by business families and ultra-rich individuals.
- Exposed the secret offshore accounts of 35 world leaders, including current and former presidents, prime ministers, and heads of state as well as more than 100 billionaires, celebrities, and business leaders.



TIP OF THE ICEBERG?





WHO IS CALLING THE SHOTS?







Who is the **Beneficial Owner?**

WHO IS A BENEFICIAL OWNER?

Beneficial Owner

- The **natural person**
 - who ultimately owns or controls a legal person or arrangements or,
 - on whose behalf a transaction is conducted, and
 - who exercises ultimate effective control over a legal person or arrangement.

Ultimately Owns or Controls

A situation which ownership is exercised through a chain of ownership or by means of control other than direct control.



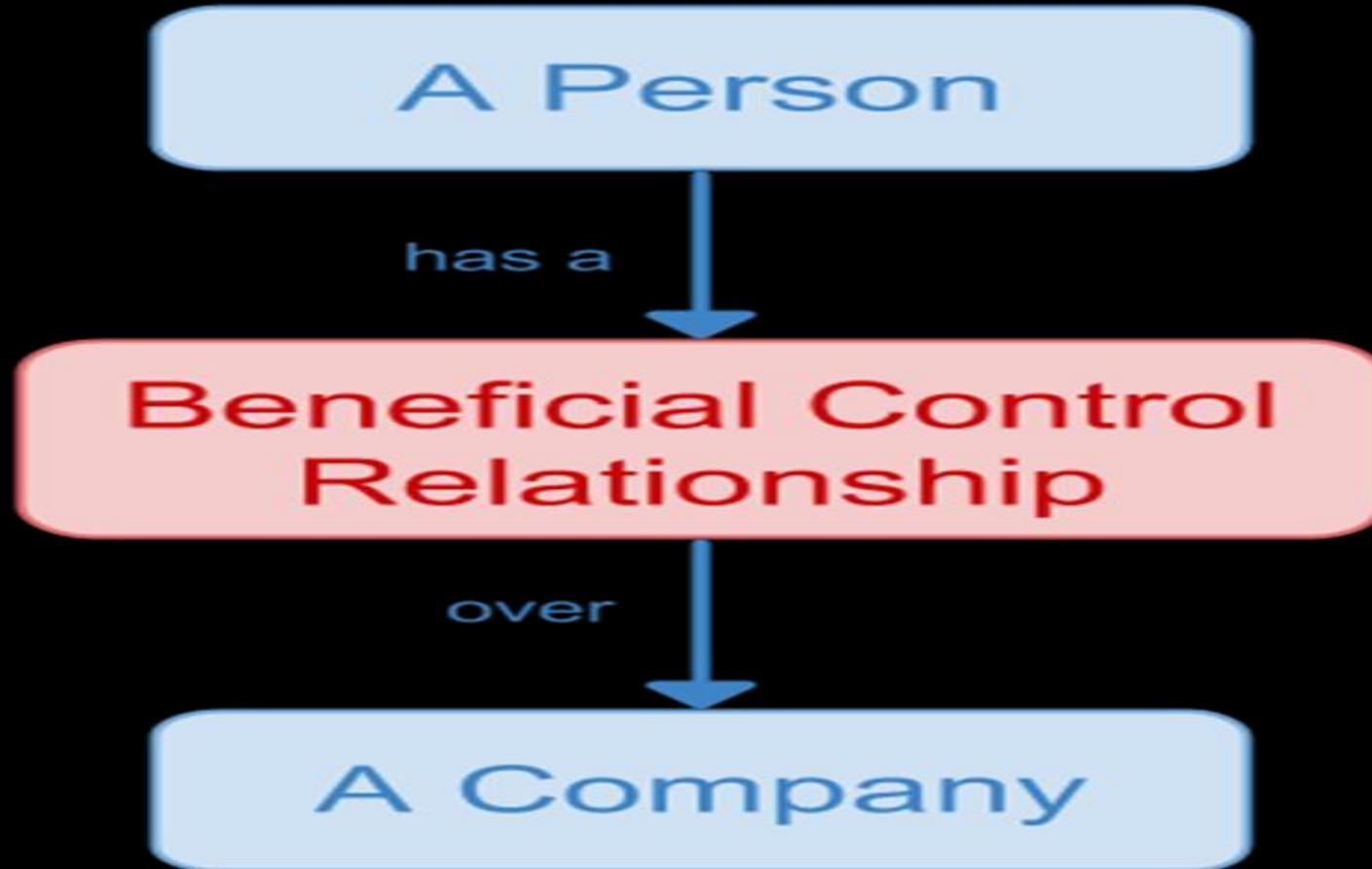
Arrangement

An artificial entity, without legal personality, associating one or more natural or legal persons together in an ownership or control relationship.

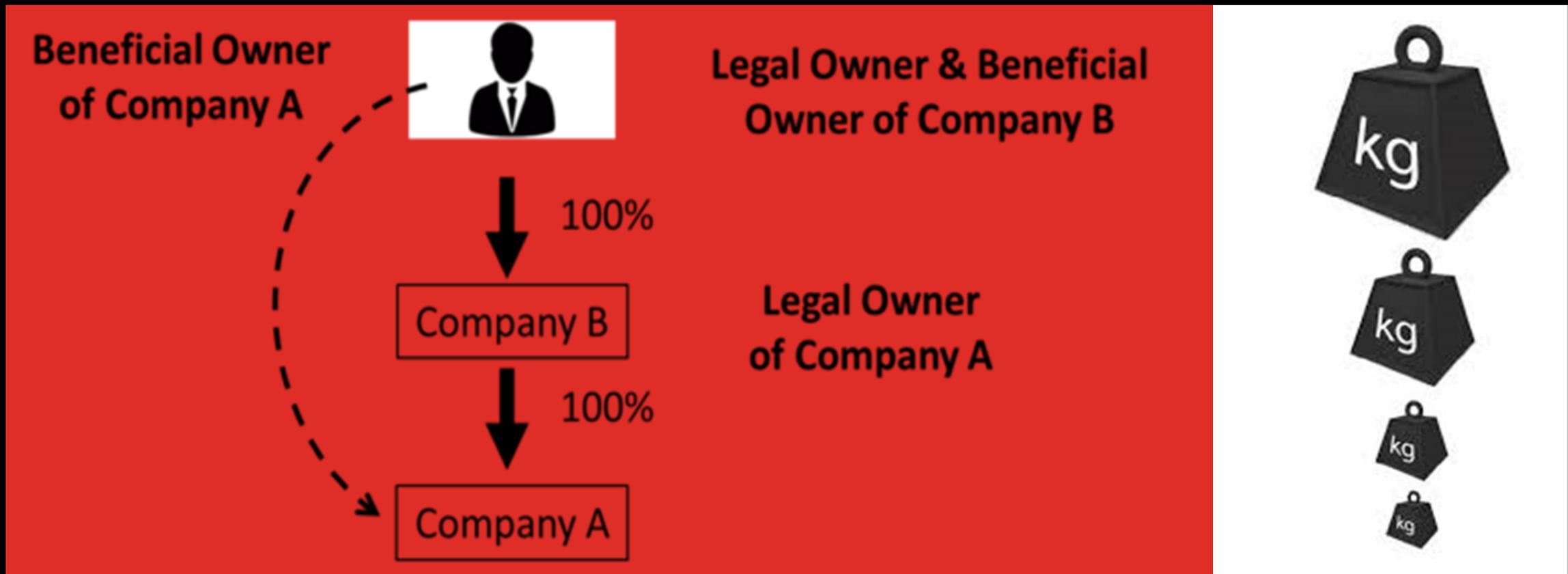
Significant Influence or Control

Participation in the finances and financial policies of a company without necessarily having full control over them

BENEFICIAL CONTROL



LEGAL OWNER VS BENEFICIAL OWNER

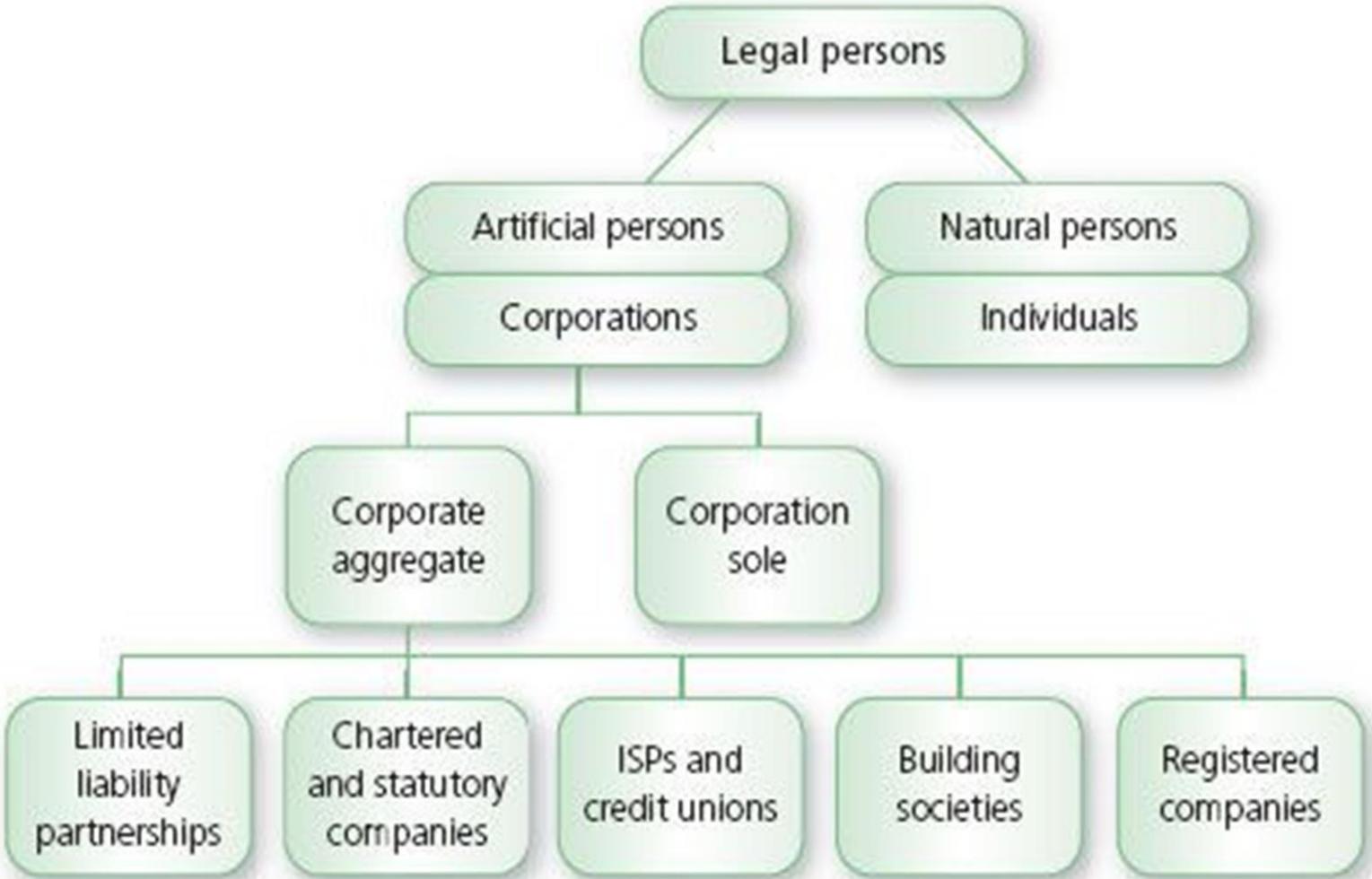


WHO IS A LEGAL PERSON?

what are other words for juridical person?



legal entity, legal person, corporate entity, corporate body, juridical entity



OWNERSHIP AND CONTROL TESTS

Ownership

Identify
“Natural Persons”
with 25% or more
Ownership of the
“Legal Entity”



Control

Identify
at least One Individual
with Responsibility to
Control, Manage or
Direct the
“Legal Entity”

CASCADING THE TESTS

Test (1)

- Identify the natural persons who ultimately have controlling ownership interest in a legal person by shares, voting, property, or any other right.

Test (2)

- If there is doubt under (1), identify the natural person exercising control of the legal person through other means

Test (3)

- Where no natural person is identified under (1) or (2) above, identify the natural person who holds the position of senior managing officer.

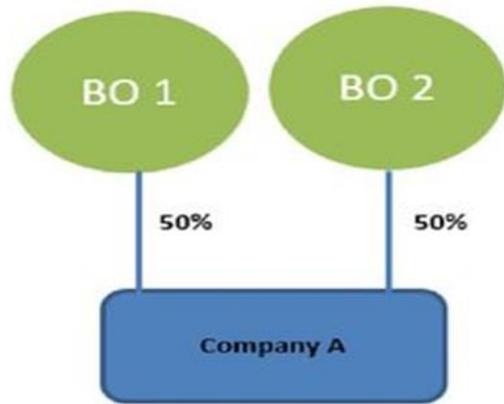
CONTROLLING OWNERSHIP THRESHOLD

- The FATF assessment has found a 25% threshold to be acceptable. As a result, “25 per cent” or “more than 25 per cent” is used in many BO definitions.
- Kenya Companies (Beneficial Ownership Information) Regulations:
 - 1) holds at least ten per-cent (10%) of the issued shares in the company either directly or indirectly;
 - 2) exercises at least ten per-cent (10%) of the voting rights in the company either directly or indirectly;
 - 3) holds a right, directly or indirectly, to appoint or remove a director of the company; or
 - 4) exercises significant influence or control, directly or indirectly over the company.
- NB: Kenya Tax Procedures Act is more strict.

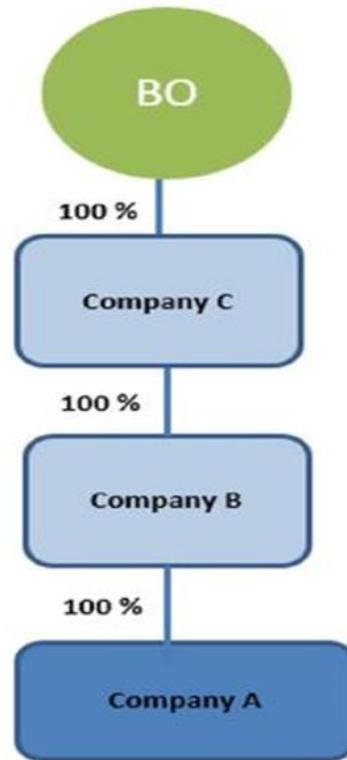
Defines "controlling member", in relation to a company, to mean a member who beneficially holds, directly or indirectly, either alone or together with a related person or persons:

- a) fifty per cent or more of the voting rights attaching to membership interests in the company;
- b) fifty per cent or more of the rights to dividends attaching to membership interests in the company; or
- c) fifty per cent or more of the rights to capital attaching to membership interests in the company.

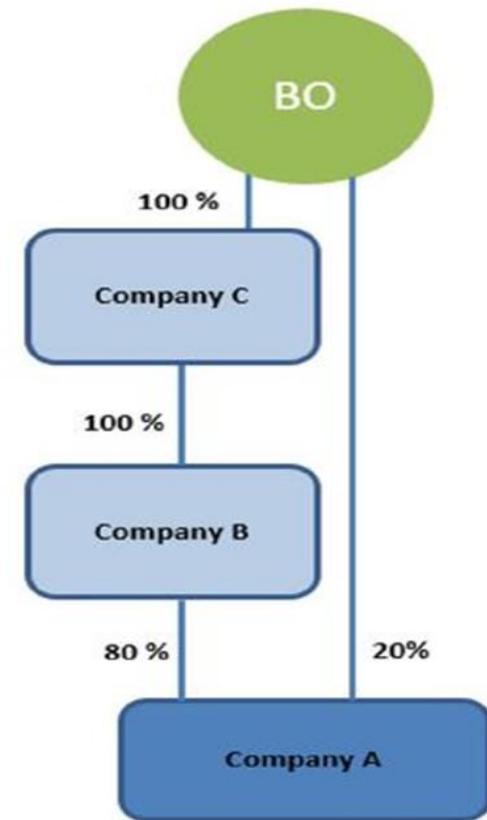
Ownership can be *direct* or *indirect*:



Example 1: Direct



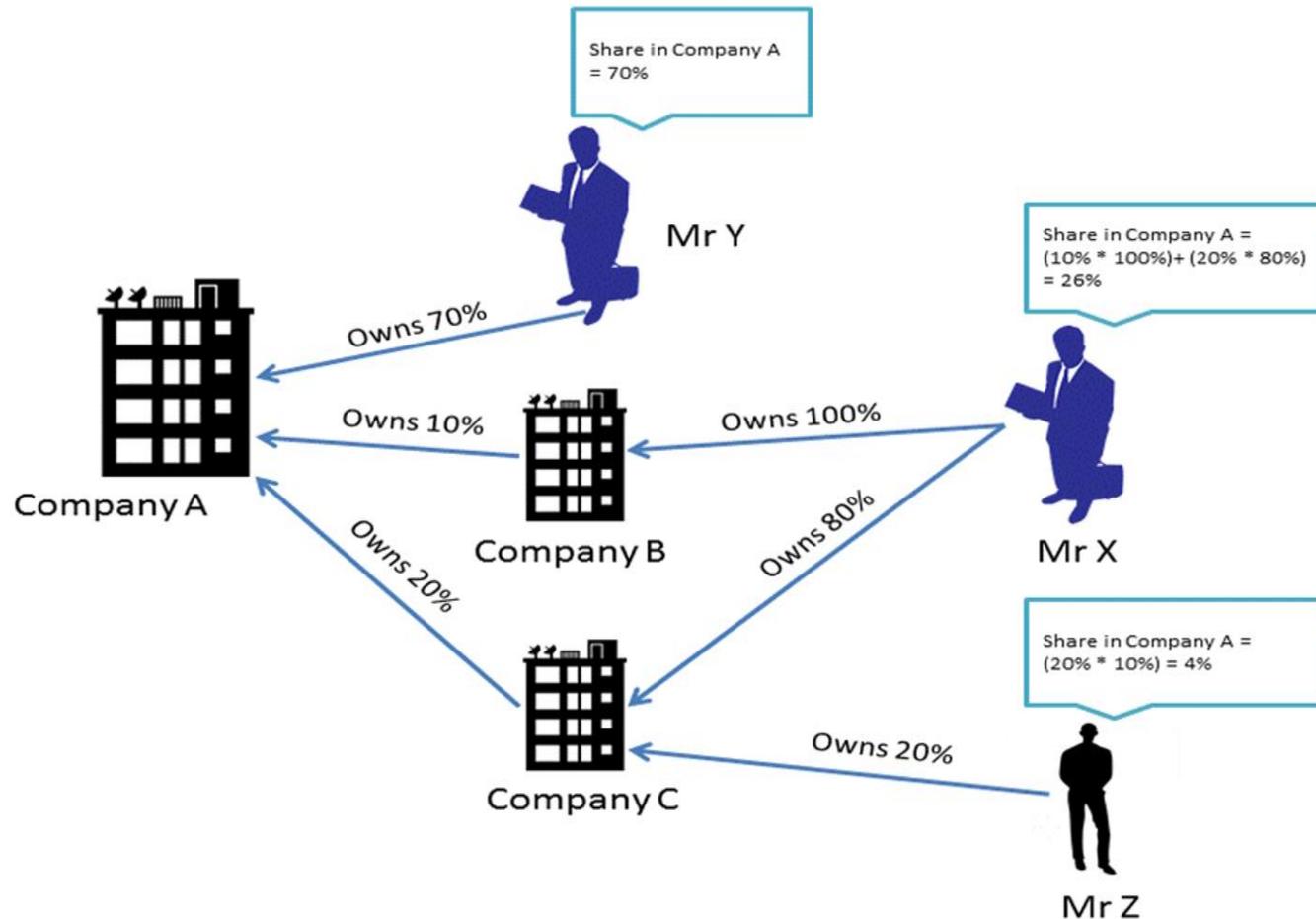
Example 2: Indirect



Example 3: Direct and indirect

OWNERSHIP STRUCTURES

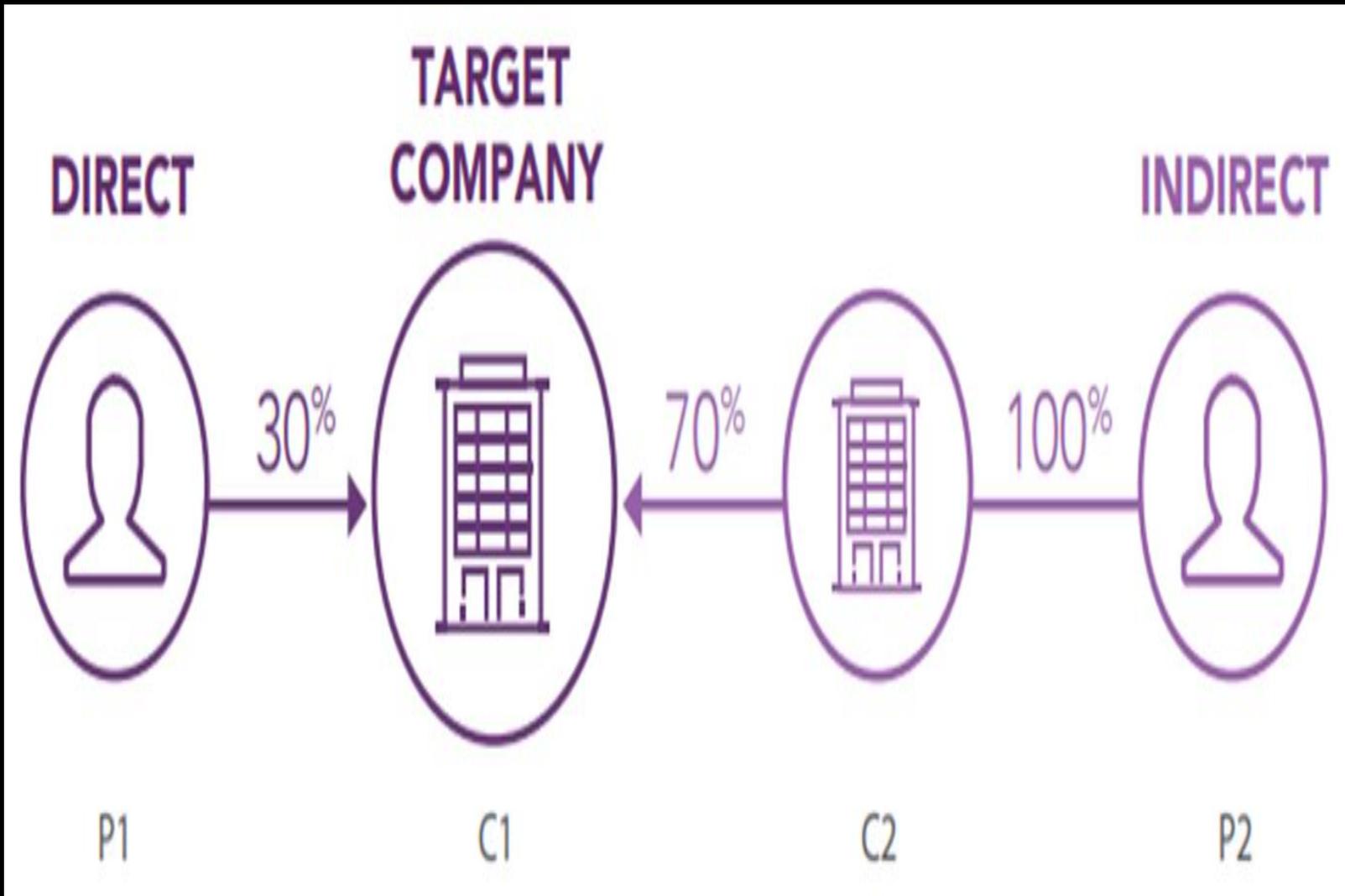
-CONNECTING THE DOTS: CASE 1



- Case of direct and indirect shareholding
- Mr. Y is a direct beneficial owner of Company A, owning 70% shareholding
- Mr. X is an indirect beneficial owner of Company A. He indirectly owns 26% shareholding
- Mr. Z is not a beneficial owner of Company A. He indirectly owns 4% shareholding

OWNERSHIP STRUCTURES

-CONNECTING THE DOTS: CASE 2



- Another case of direct and indirect ownership
- Person P1 is a direct beneficial owner of Company C1 and owns 30% shareholding.
- Person P2 is an indirect beneficial owner of Company C1 and owns 70% shareholding.

OWNERSHIP STRUCTURES

-CONNECTING THE DOTS: CASE 3

TARGET
COMPANY



A Company Ltd

100%



A Holdings Ltd

3.3%

81.33%

3.54%

3.54%

3.3%

2.5%

2.5%



P1



P2



P3



P4



P5



P6

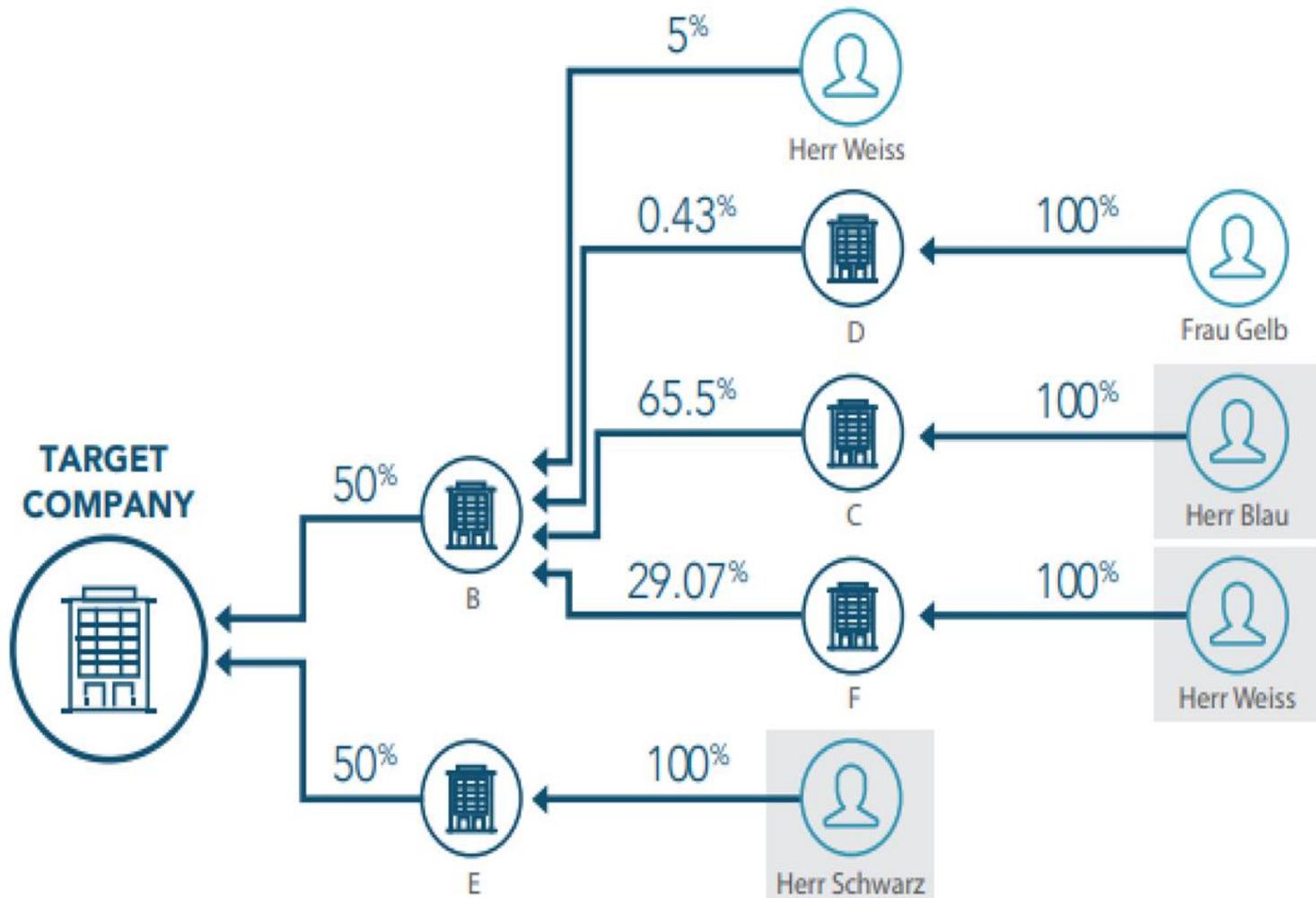


P7

- Case of simple indirect shareholding
- The shares are owned by multiple people.
- Person 2 has 81.33% ownership of A Holding Ltd, which fully owns Target Company A. Person 2 is therefore indirectly the beneficial owner of target Company A

OWNERSHIP STRUCTURES

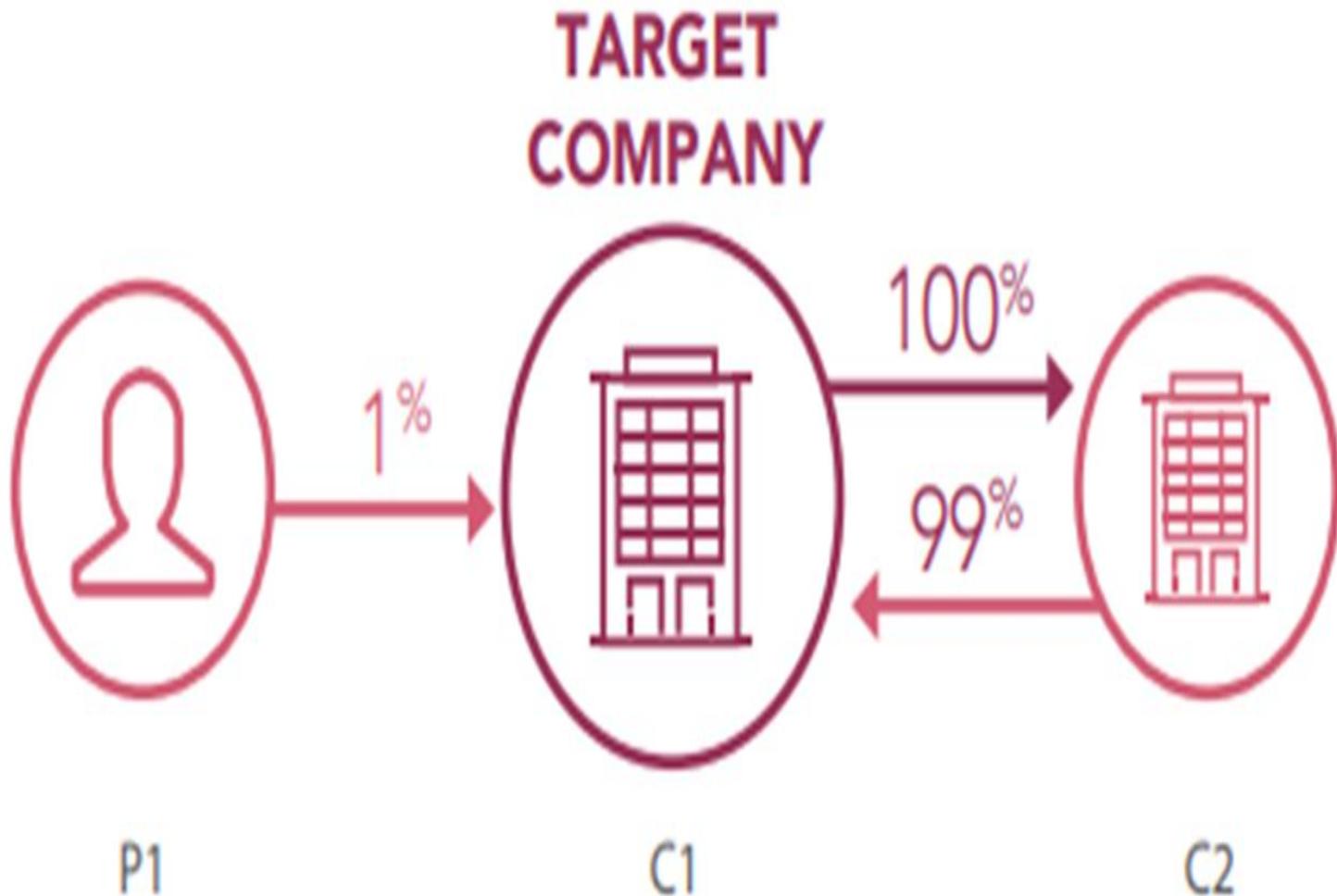
-CONNECTING THE DOTS: CASE 4



- Here, there are multiple levels of indirect ownership.
- Herr Schwarz has 50% interest in Target Company
- Herr Blau has a 32.75% interest
- Herr Weiss has 17.035% interest (Note Herr Weiss has both a direct and indirect interest in Company B).
- Frau Gelb interest is insignificant at 0.215%

OWNERSHIP STRUCTURES

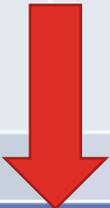
-CONNECTING THE DOTS: CASE 5



- Case of looping relationships (multi-level indirect shareholding)
- In this example, we have a seemingly unimportant 1% owner.
- In reality, this individual is the only UBO, with all the profits being delivered to the UBO in 1% shares.
- For example, if the company makes a \$10 profit, the UBO will receive full profit, but in 1% increments.

BREAK OUT SESSION 1- IDENTIFY THE BENEFICIAL OWNERS

CORPORATE STRUCTURE

A	B	C	D
Shareholder A owns 85% of the shares in the BVI HoldCo.	Shareholder B owns 2% of the shares and has weighed voting rights giving him at least 10% of the voting rights.	Shareholder C owns 4% of the shares and has the right to appoint and remove a single director.	Shareholder D owns 9% of the shares, has the right to approve the annual budget and has reserved rights over the additional borrowings and creation of security.
			
BVI Holding Company (BVI HoldCo)			
			
Mauritius Holding Company (Mau Co)			
			
Kenyan Company			

BREAK OUT SESSION 1

- REQUIRED

Using the beneficial ownership thresholds here below, identify the beneficial owners in the Corporate structure in the previous slide:

- a) Hold at least ten percent of the issued shares in the company either directly or indirectly;
- b) Exercise at least ten percent of the voting rights in the company either directly or indirectly;
- c) Hold a right, directly or indirectly, to appoint or remove a director of the company; or
- d) Exercise significant influence or control, directly or indirectly, over the company.

NOTE:

- Group 1 to consider issued shares.
- Group 2 to consider voting rights
- Group 3 to consider right to appoint or remove a director
- Group 4 to consider the exercise of “significant influence or control” over a company

BREAK OUT SESSION 1- THE IDENTIFIED BENEFICIAL OWNERS

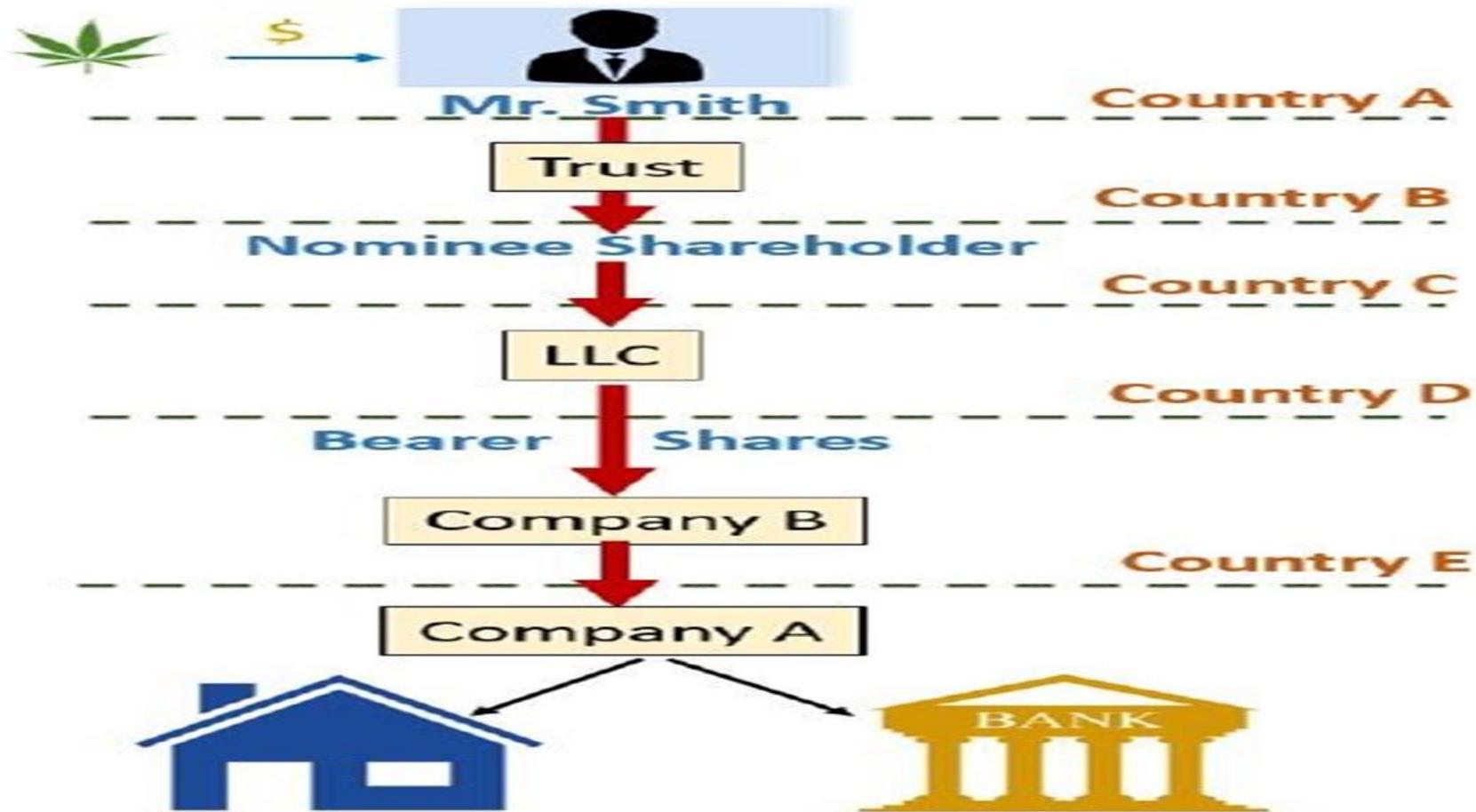
BENEFICIAL OWNERSHIP THRESHOLD	IDENTIFIED BENEFICIAL OWNER	REASON
The holding directly or indirectly of at least 10 percent of the issued shares	Shareholder A	Owns 85 percent of the shares capital in the BVI HoldCo.
The holding directly or indirectly of at least 10 percent of the voting rights	Shareholder B	Due to the fact of the weighted voting rights in his favour even though he beneficially owns only 2 percent of the shares in the BVI HoldC
The right to appoint or remove a director	Shareholder C	Has the right to appoint and remove a director even though he beneficially owns only 4 percent of the shares in the BVI HoldCo
The exercise of “significant influence or control” over a company	Shareholder D	Has the right to approve the annual budget and has reserved rights over the additional borrowings and creation of security, even though he beneficially owns only 9 percent of the shares in the BVI HoldCo.

INSTRUMENTS USED TO OBSCURE BENEFICIAL OWNERSHIP

- a) **Shell companies** (which can be established with various forms of ownership structure), especially in cases where there is foreign ownership which is spread across jurisdictions
- b) **Complex ownership and control structures** involving many layers of shares registered in the name of other legal persons
- c) **Bearer shares** and bearer share warrants
- d) unrestricted **use of legal persons as directors**
- e) **Formal nominee shareholders and directors** where the identity of the nominator is undisclosed
- f) **Informal nominee shareholders and directors**, such as close associates and family, and
- g) **Trusts and other legal arrangements** which enable a separation of legal ownership and beneficial ownership of assets.
- h) **Use of intermediaries** in forming legal persons, including professional intermediaries.



USE OF MULTIPLE LEGAL VEHICLES



THE OFFSHORE COMPANY MENACE



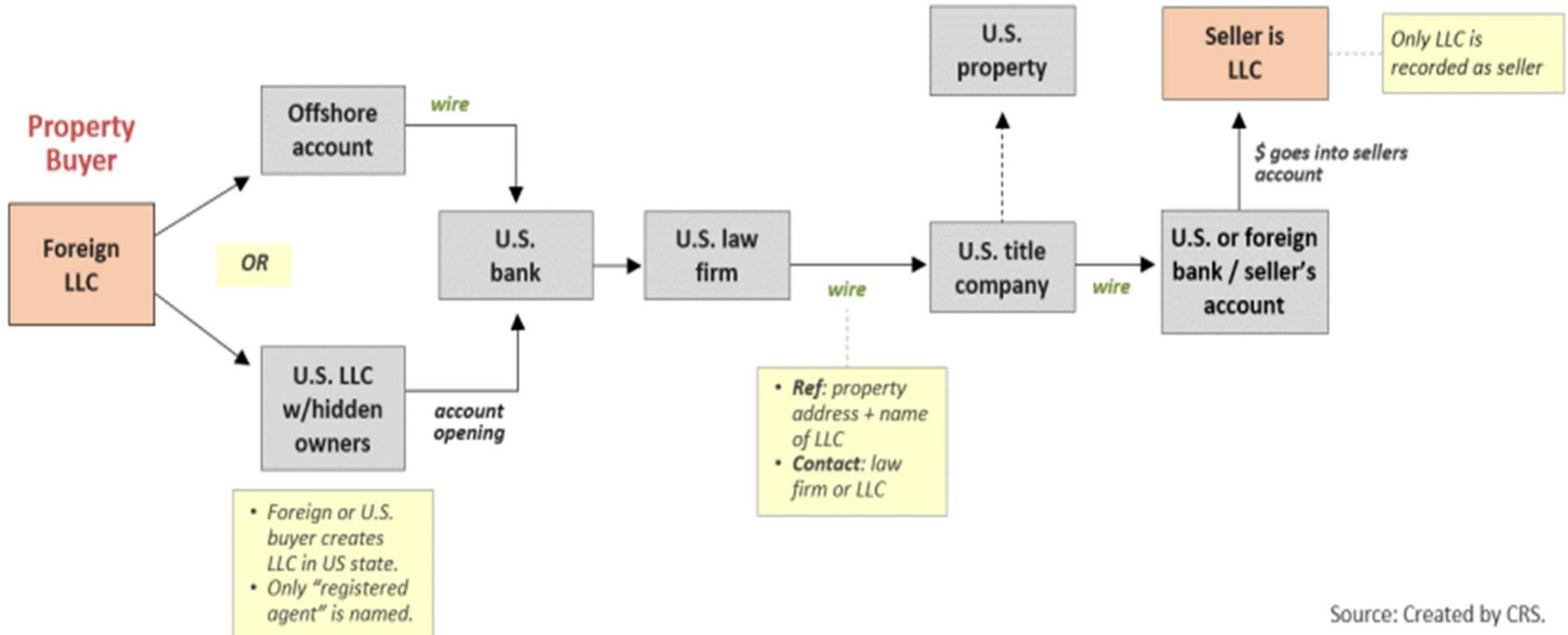
OFFSHORE WEALTH

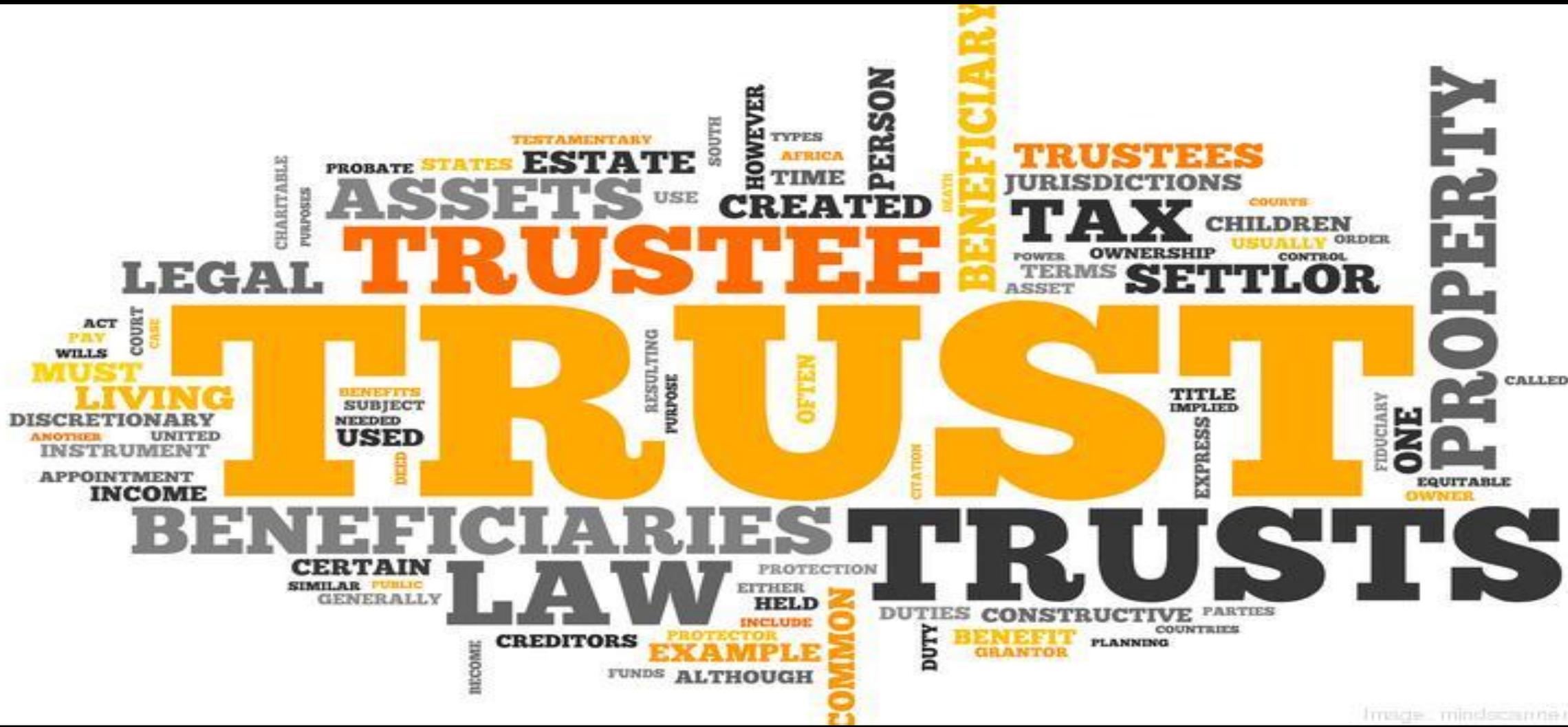
- Estimates vary widely about how much money is out there, but loosely speaking, it's a lot: from \$1 trillion to more than \$25 trillion.
- The most common type of estimate is based on national economic figures on investment, and such estimates generally come in the range of \$5 trillion to \$8 trillion.
- Roughly, that corresponds to about 10 percent of global gross domestic product.
- It is estimated 30% of Africa's wealth is held offshore

WHERE IS THE EVIDENCE?

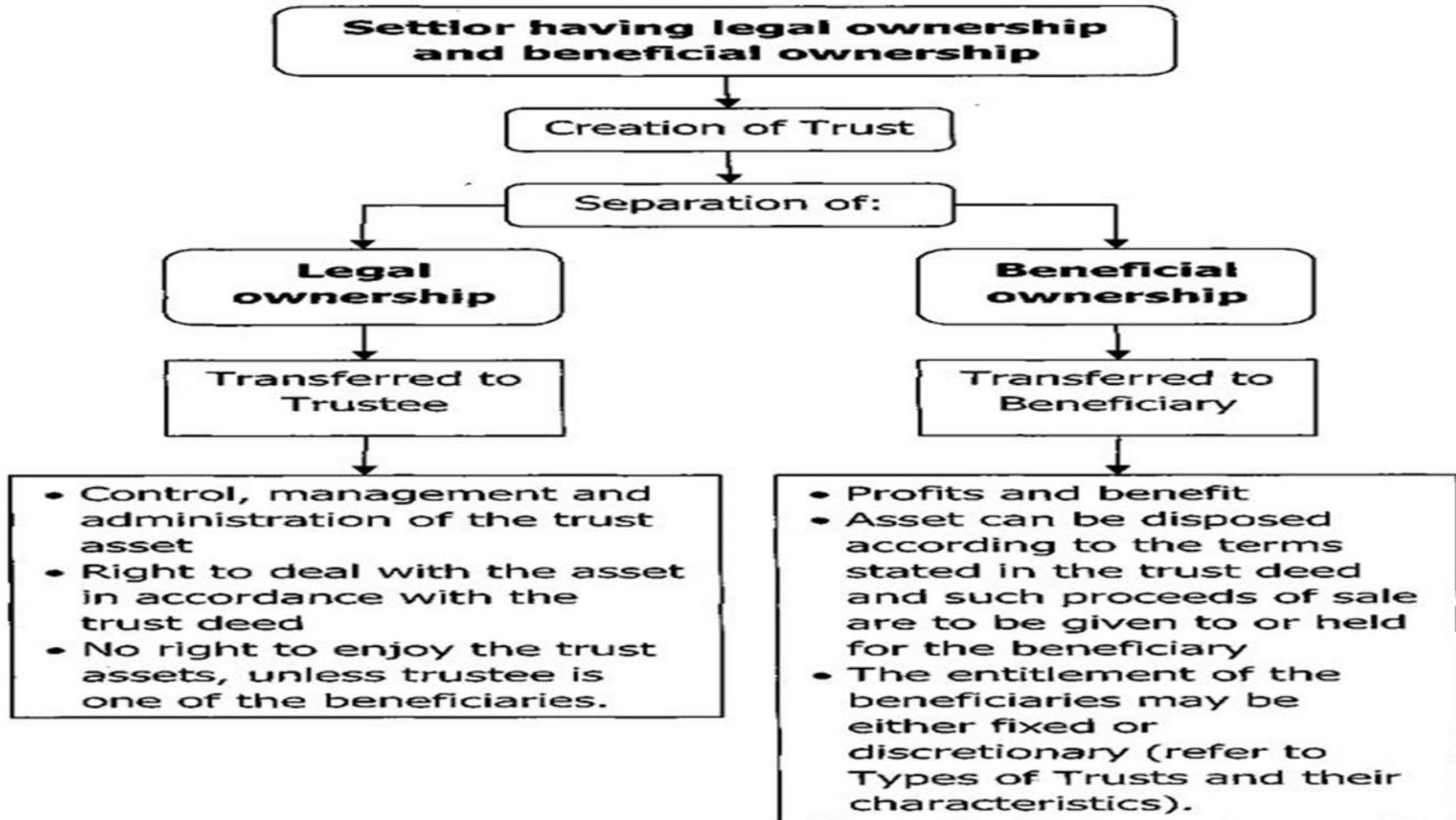
- Panama Papers uncovered 19 foreign nationals who have bought real estate in Miami with offshore companies.
 - <https://www.washingtonpost.com/news/wonk/wp/2016/04/12/how-secretive-shell-companies-shape-the-u-s-real-estate-market/>
- 9 % rise in London properties owned by offshore firms
 - <https://www.theguardian.com/money/2016/may/26/revealed-9-rise-in-london-properties-owned-by-offshore-firms>.
- 3,452 Sao Paulo properties valued at over US\$2.7 billion registered in the name of 236 companies controlled by or linked to others registered in tax havens and secrecy jurisdictions.
 - https://images.transparencycdn.org/images/2017_SaoPauloRealEstate_EN.pdf
- Africa's richest woman exploited shell companies and inside deals to build an empire
 - <https://www.icij.org/investigations/luanda-leaks/how-africas-richest-woman-exploited-family-ties-shell-companies-and-inside-deals-to-build-an-empire/>
- Paradise papers?????

FACELESS PROPERTY SALES

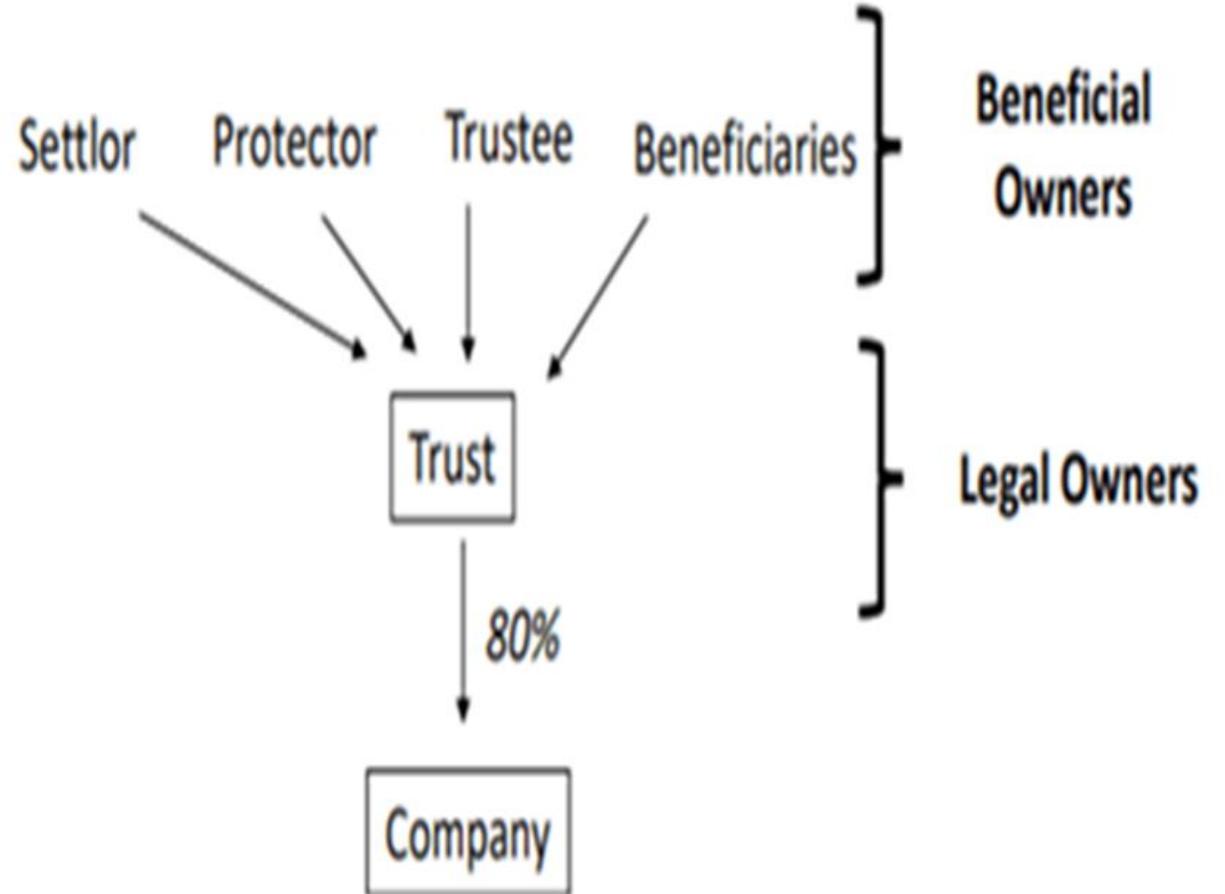
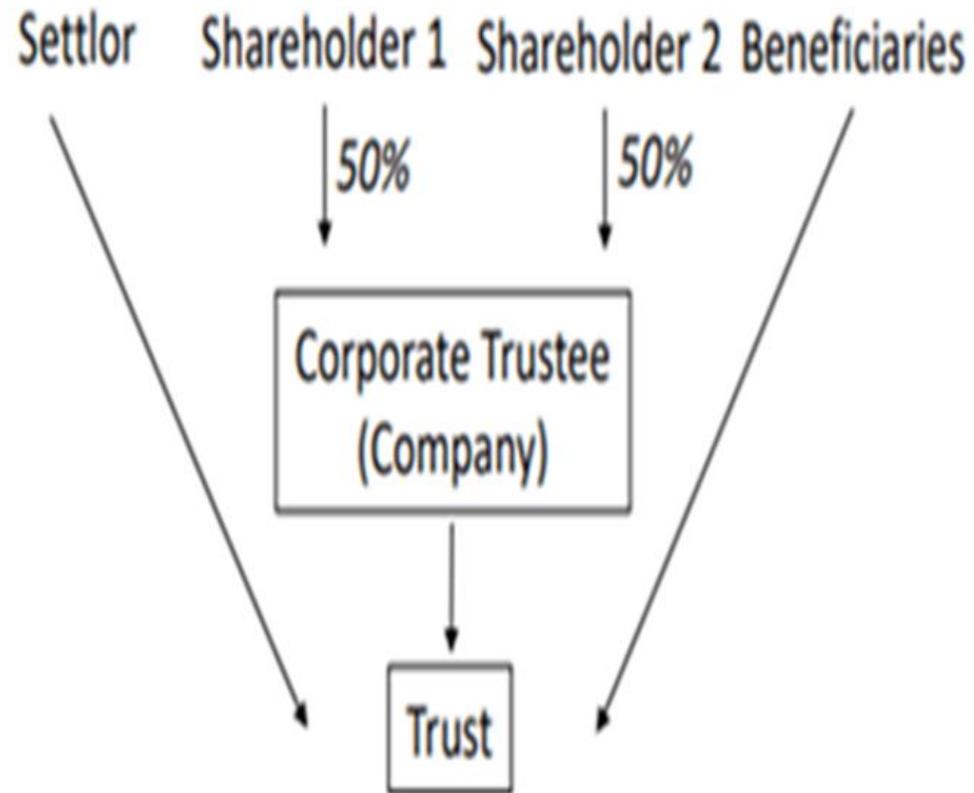




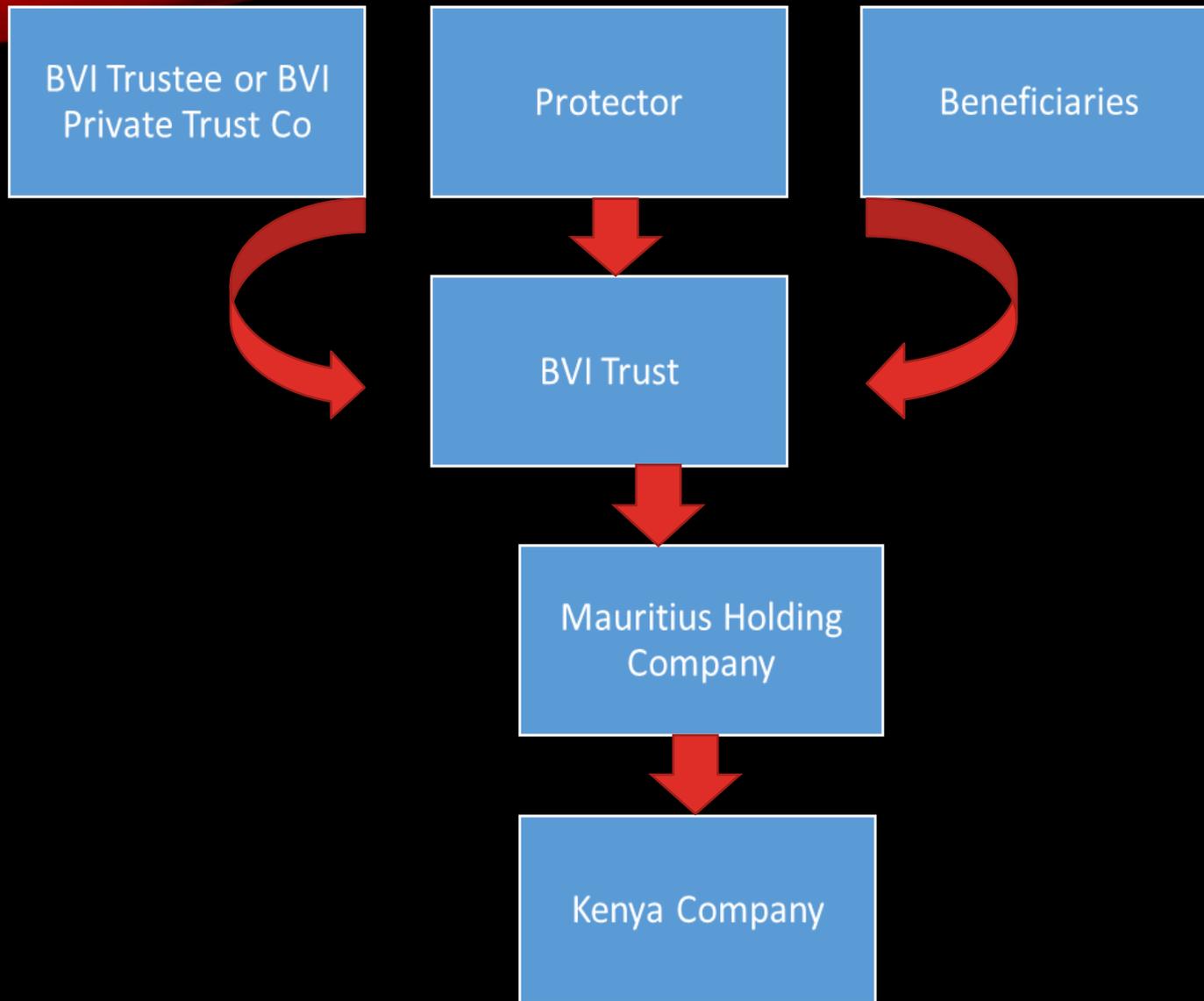
ABUSE OF TRUSTS



BENEFICIAL OWNERS IN TRUSTS



OFFSHORE TRUST STRUCTURE



The BVI Trustee and the protector may be reportable under the Kenyan Regulations in the following circumstances:

- The BVI Trustee would be reportable by virtue of the fact that he holds as legal and beneficial owner all the shares in Mauritius Holding Company.
- The protector might be reportable depending on the terms and conditions of the trust deed. For example, if the protector has rights to appoint or remove a director of the Kenyan company or if he enjoys "significant influence" by virtue of having the right to make key financial decisions.

RISKS OF OPAQUE BENEFICIAL OWNERSHIP



Money Laundering



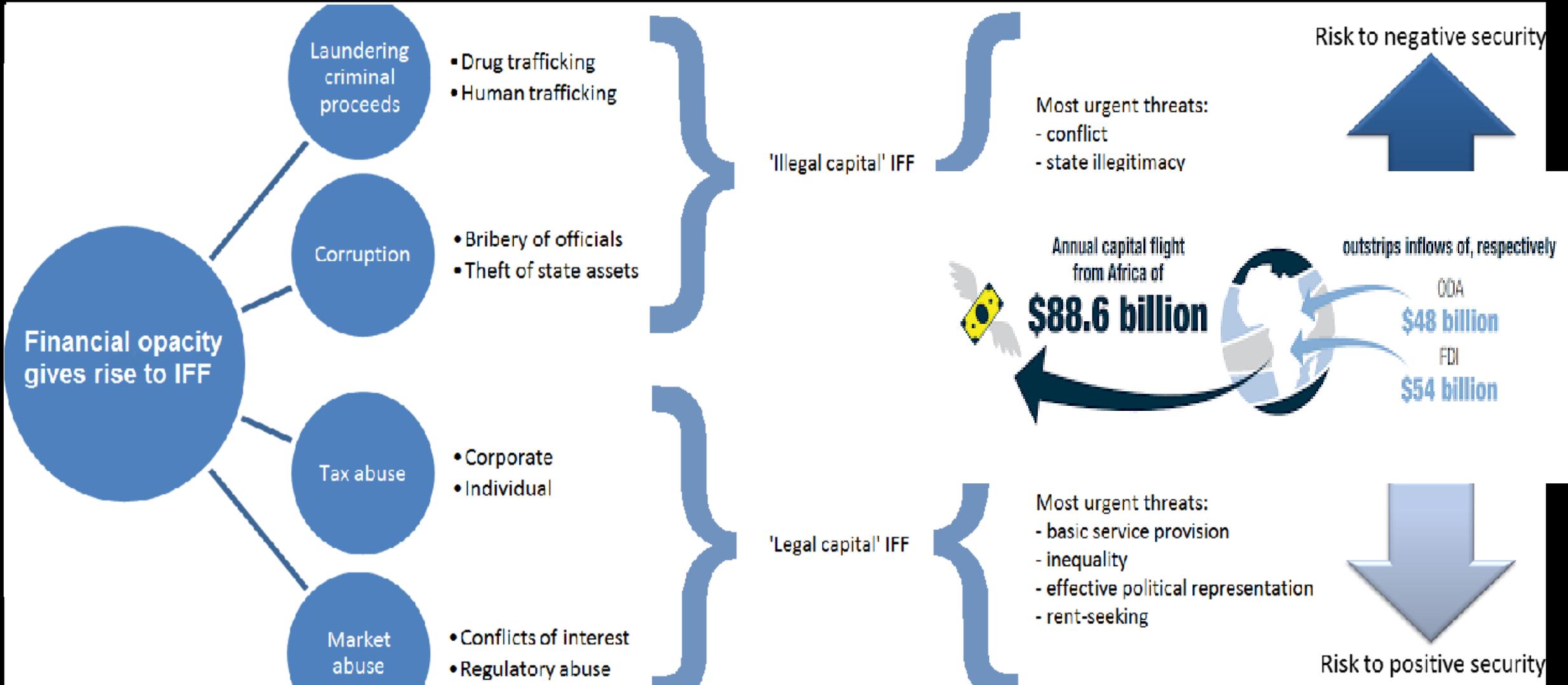
Bribery and corruption



Terrorism financing



ILLICIT FINANCIAL FLOWS



BENEFICIAL OWNERSHIP AND TAX FRAUD

The phrase 'beneficial owner' appears in both the OECD Model Tax Convention and the UN Model Tax Convention in the provisions dealing with the following incomes:

- Dividend;
- Interest;
- Royalties; and
- Fee for technical services (FTS) - this income does not appear in the OECD Model Tax Convention.

Considerations:

- Base erosion, tax shifting
- Import / export invoice frauds
- Tax Residency frauds
- Suspect offshore Head Office, financing and profit distribution costs
- Thin capitalization deeming rules

CALL FOR TRANSPARENCY



WHAT TO DO?

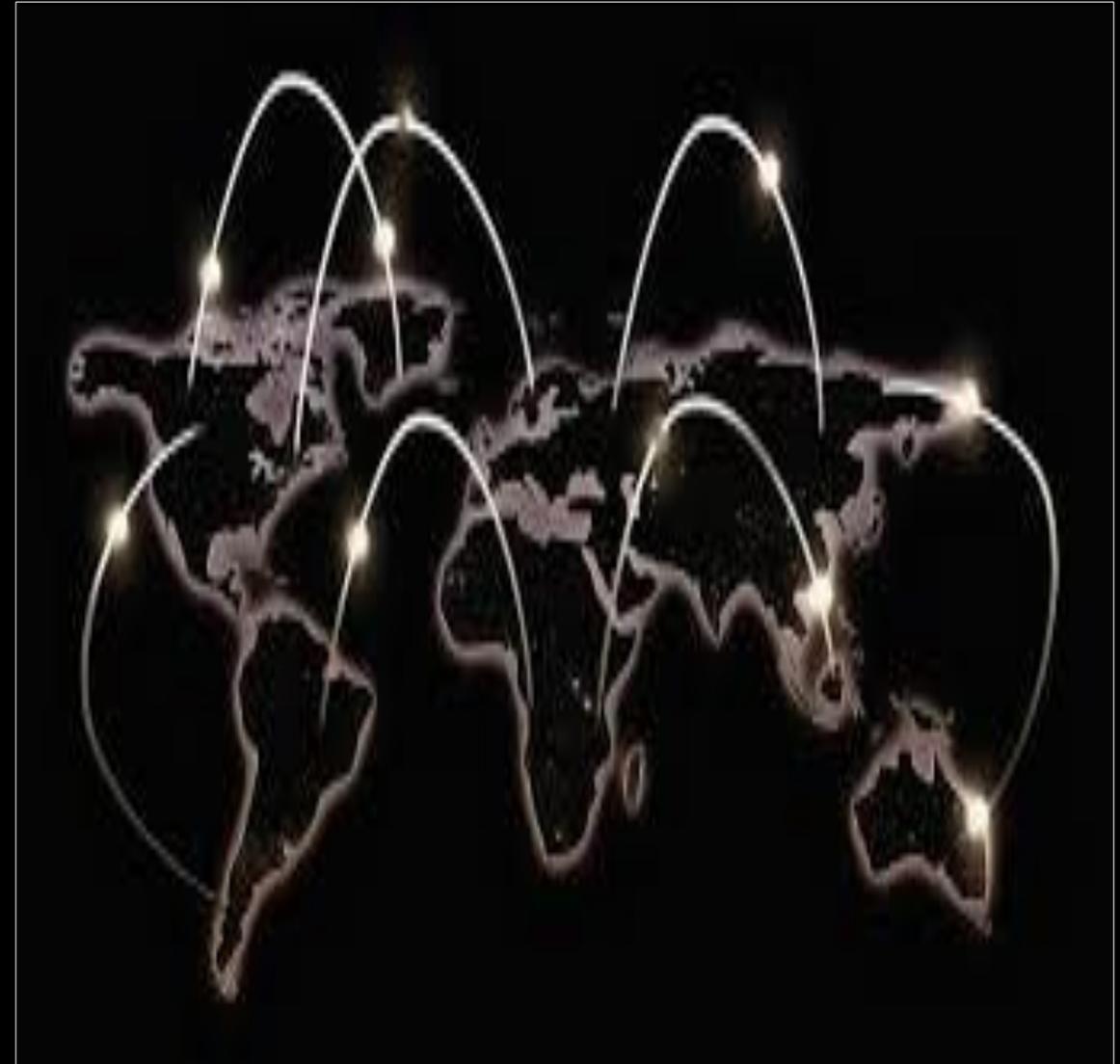


You follow drugs, you get drug addicts and drug dealers. But you start to follow the money, and you don't know where it's gonna take you."

Detective Lester Freamon in "The wire" season 1, episode 9 (Game day).



WHAT TO DO?



GLOBAL INTEREST

1989: FATF established

2003: FATF sets global standards on beneficial ownership

2009: UN Committee raises issue of financial crime in relation to UBO

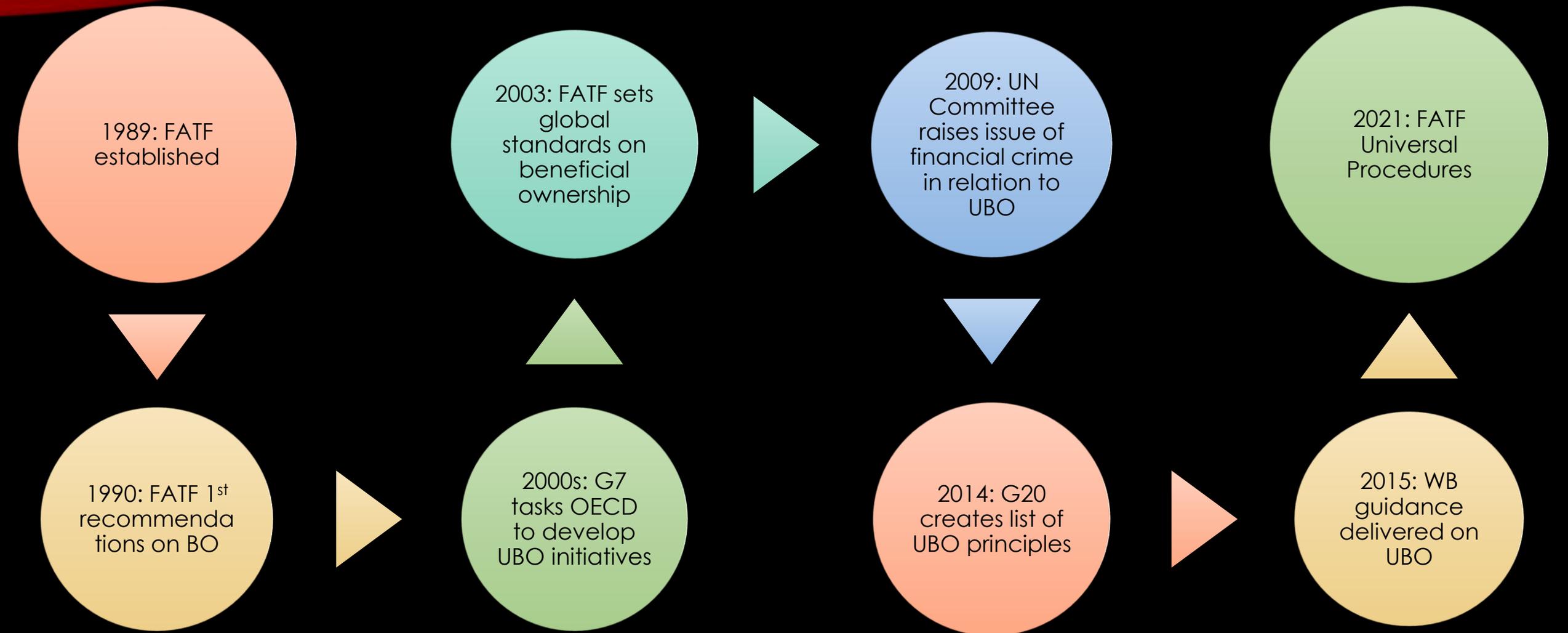
2021: FATF Universal Procedures

1990: FATF 1st recommendations on BO

2000s: G7 tasks OECD to develop UBO initiatives

2014: G20 creates list of UBO principles

2015: WB guidance delivered on UBO



KEY PLAYERS

When there is solidarity and unity among the oppressed, the oppressor becomes a prey! Think about this!



FATF- style regional bodies



Building a global network against money laundering & terror financing

KENYA'S STRIDES

2015:

- Abolished the issuance of bearer shares.
- Existing shares to be converted into registered shares.

2017

- Companies required by law to keep a register of beneficial owners

2019:

- Companies Act, 2015 amended to introduce a requirement for every company to maintain a register of its beneficial owners and to submit a copy of this register to the Registrar.

2020:

- In early 2020, regulations were published setting out the details required to be provided in the register, as well as other compliance obligations.
- 13 October 2020: E-Register operationalized

ENFORCEMENT

Public Notice

Take note that pursuant to section 93A of the Companies Act, 2015 (“the Act”) requiring all companies to keep and lodge with the Registrar of Companies a register of its beneficial owners and the gazette of the enabling regulations, Companies (Beneficial Ownership Information) Regulations, 2020, the Registrar of Companies hereby notifies all Officers of Companies and authorized persons that the Beneficial Ownership (BO) E-Register has been operationalized with effect from 13th October, 2020.

Every Company is thus required to comply with the aforementioned provision of the Act and submit a copy of the BO Register within 30 days of its preparation..

Registrar of Companies

Business Daily

TUESDAY NOVEMBER 23 2021

- 2,541 companies were closed down by the Attorney-General in the year ended June 2021 for failing to disclose their owners.
- The number of companies closed in the previous year were 1,255.
- Over 6,000 firms have been closed since July 2017.
- This latest influx was occasioned by enforcement of the beneficial ownership information disclosure requirements since the BOI e-register was operationalized on October 13, 2020

Ref:
<https://www.businessdailyafrica.com/bd/economy/ag-shuts-2-000-firms-for-failure-to-disclose-owners-3627624>

INFORMATION SOURCES

- Open Sources
 - a) National Business Registration Offices
<https://brs.go.ke/companies-registry.php>
 - b) International open sources
<http://www.opencorporates.com/>
- MLA requests
 - Under UNCAC, CoE Convention, MLA Convention, Minsk Convention
 - Very lengthy

OTHERS	BENEFITS
• DTAs (Article 26 on Exchange of Information)	1. Multilateral
• TIEAs	2. Wider scope
• MAAs	3. More flexible
• Informal co-operations and joint administrative teams (JITs)	4. Uniformity

CHALLENGES

- Huge collection burden on the business's operations
- Complexity and broadness of BO data for companies with a global footprint in all their markets.
- Non-standard documentation in offshore financial centers (OFCs)
- Flexible change of ownership in OFCs
- Navigating multiple layers of ownership

- Professional enablers: Lawyers, company service providers not obligated to identify the beneficial owners of their clients.
- Business of dealers in luxury goods / precious metals and stones not regulated / not obligated to identify beneficial owners of their clients.
- Nominee shareholders and directors not prohibited

- Lack of publicly available BO registry data.
- Limitation to access
- Unverified information
- Non-cooperation, or grudging disclosure
- Trusts:
 - No mandatory registration
 - No obligation to identify the beneficial owners of their clients.
 - No timely access of information on trusts by competent authorities.
- Client-agent privileges (C-AP)

QUALITY OF INFORMATION

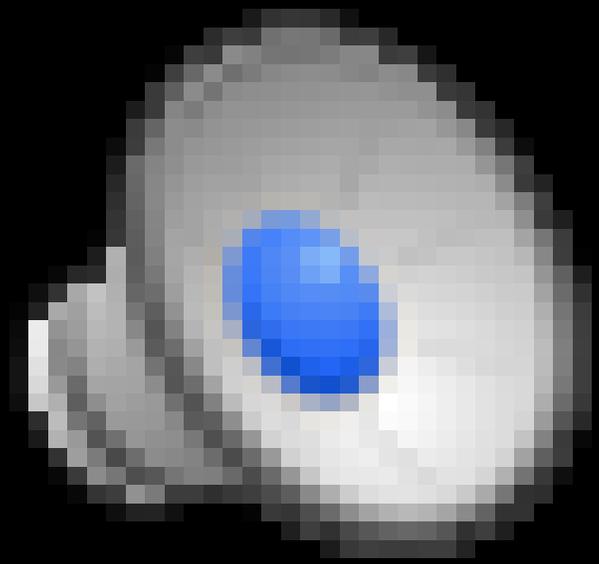


- Does your Registry verify information submitted???
- Garbage in, garbage out???
- How have capacity challenges been addressed???

ACCESS LIMITATIONS



- Access limited to law enforcement agencies, tax authority and FIU only
- No electronic access to register
- Private companies' information not open for inspection
- No database for information sharing by domestic authorities
- No direct access to information by foreign authorities



GRAND CORRUPTION CASE

Ref: https://www.youtube.com/watch?v=WpmpkyL_2Cvs

- Players: Finance Minister and Managing Director of National Power Company
- MD formed Offshore Company “Windward Trading Ltd (Jersey)” in May 1986 with the help of Deloitte & Touche. Nominee directors provided.
- Offshore Company received “commissions and consultancy fees” from foreign firms which won tenders from National Power Company
- An Offshore trust “Walbrook Trustees (Jersey) Ltd”, a Deloitte in-house trust company, were administrators and face of the offshore company and would wire kickbacks received to the Minister and the MD against vague invoices . An intermediary company called “Camargo” used to make the payments.
- MD tried to hide some of the money using “Argus Management Services, Gibraltar” after realizing the British were after him.

CASE SYNOPSIS

SUCCESSSES

- Messy divorce case in Kenya centered around share of Kshs. 20 billion empire lifted lid on secretive accounts, prompting Jersey to commence investigations.
- The British House of Commons was also investigating a loan for a Hydro-power plant that never took off but money was diverted to MDs offshore account.
- May 2002: Walbrook Trustees filed STR and refused to make more payments to Minister and MD.
- Kshs. 526 million out of stolen Kshs. 997m (3.9 BP and 4.2m USD) frozen by Jersey authorities.
- April 20, 2011, arrest warrant for Minister and MD issued in Jersey to face charges of corruption and money laundering.

CHALLENGES

- Over Kshs. 400 million already spent by culprits
- Even though the MD did acknowledge to the Jersey court that he was the **Beneficial owner** of the company, the two have continued to challenge extradition to Jersey through multiple suits in Kenyan courts.
- Kenyan authorities have never opened criminal proceedings against the two

OUTCOME

- ✓ February 24, 2016, Windward Trading Ltd (Jersey) pleaded guilty to possession of proceeds of crime and acquiring profits from criminal conduct.
- ✓ Jersey Government has agreed to wire first tranche of Kshs. 444m to Kenya to buy medical equipment and supplies against Covid 19.
- ✓ On 5th November 2021, the Supreme Court of Kenya gave the not for extradition proceedings for the duo to face charges in Jersey.
- ✓ Asset tracing and identification in Kenya to commence

- Ahsanteni sana

- Iko swali??

