



BENEFICIAL OWNERSHIP

AFRICA ACADEMY FOR TAX AND FINANCIAL CRIME INVESTIGATION

Conducting and Managing Financial Investigations (Foundation) Virtual
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RISKS OF OPAQUE BENEFICIAL OWNERSHIP



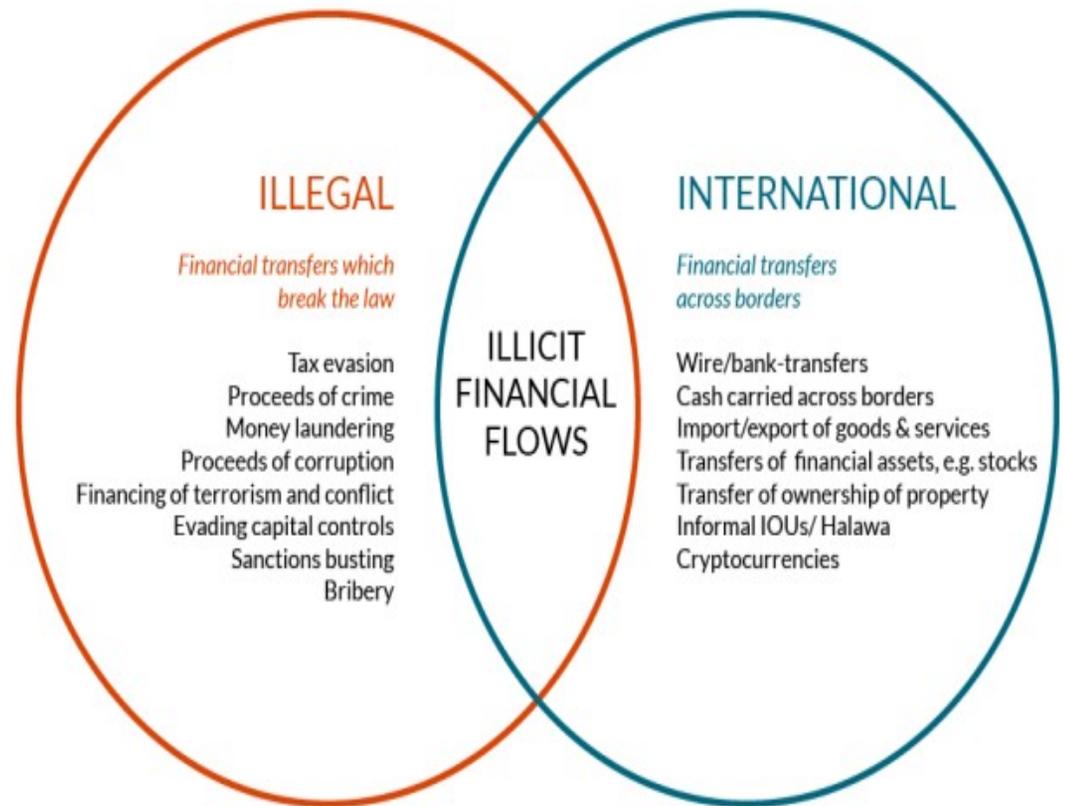
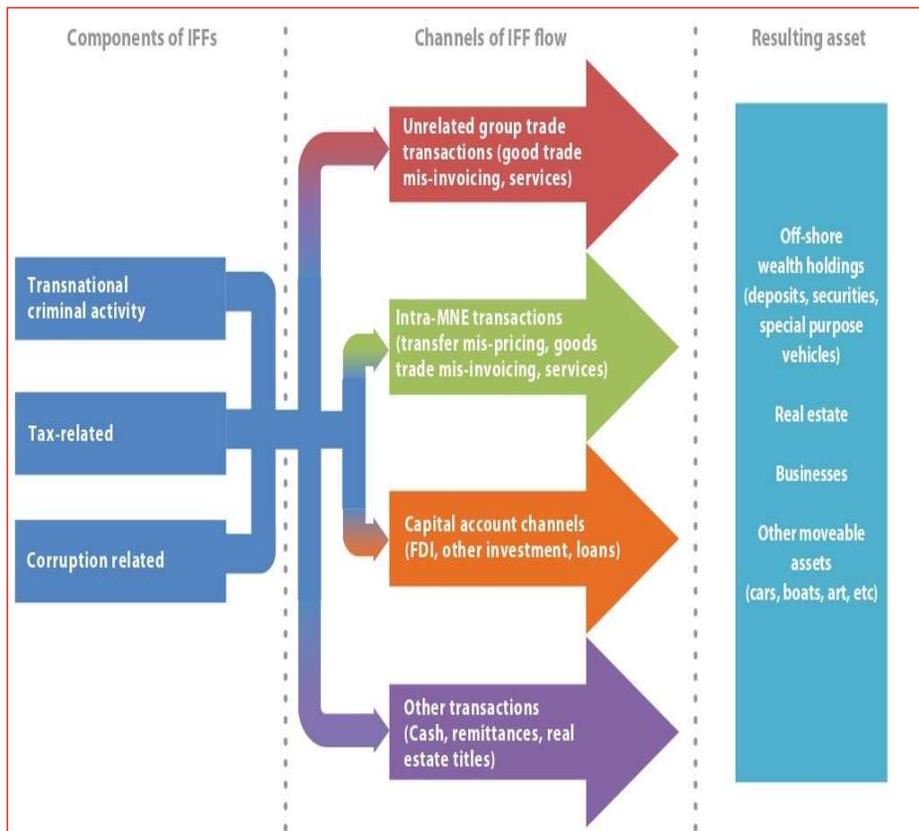
Money Laundering



Terrorism financing



ILLICIT FINANCIAL FLOWS CONCERNS



NON-TRANSPARENT BO THREATENS NATIONAL INTERESTS

As reported in Kenyan “The Star Newspaper” of 11th May 2022:

- Speaking at a panel discussion in the NCAJ conference, the Interior Cabinet Secretary said intelligence shows up to 40 per cent of aspirants for elective office were commanding rackets of ‘wash wash’, drug trafficking, money laundering and corruption, among other criminal acts.
- He went on to say “We might have criminals as over 40 per cent of elected office holders, if we allow all the ‘wash wash’ gangs and other criminals to bribe their way into the coming elections.”



BENEFICIAL OWNERSHIP AND TAX

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.

Tax investigations should be impactful aiming to disrupting harmful tax practices such as:

- Base erosion and profit shifting (BEPS)
- International trade (Import / export) invoice frauds
- Suspect offshore Head Office, related party or third party financing and loans (Thinly capitalized entities, fake loans)
- Management and distribution invoices not commensurate with services received
- Dubious intellectual property ownership and related payments for right to use



HOW TO IMPROVE BENEFICIAL OWNERSHIP TRANSPARENCY

- Political will: From commitment to action
 - Enacting laws that guarantee transparency
 - Facilitating inter-agency cooperation
 - Fostering international coordination: peer learning exchanges and capacity building for establishment of centralized corporate registries, tax authorities, parliaments and anti money laundering agencies.
 - Providing financial resources for the establishment of Registers, technical assistance to support implementation and enabling usability and use of data
- Collective action: Like the African proverb suggests, “ a single broomstick is easy to break but not a bunch”. It is vital to engage a wide range of stakeholders and to have robust consultations
- Being impact driven:
 - Focus on collecting high quality data to maximize impact
 - Develop different methods of submitting BO data- both paper-based and online
 - Use easy-to-use forms



TAX RELATED MEASURES TO IMPROVE BENEFICIAL OWNERSHIP

- Confidentiality is a critical element in BO, money laundering and tax evasion. This problem can be avoided by creating more transparency obligations. Many information needs to be disclosed, including public registries of beneficiaries, public country reports, public reporting on tax rules, and registries of assets.
- Empowering institutions for law enforcement and prosecution:
 - Ensure that the records in which the information is stored are linked together,
 - Encourage more cross-border work opportunities.
 - Abolish laws that prevent further cooperation.
- Taxes must be paid where profits are created. Make it difficult for corporations to send profits earned in one country to their subsidiary in another country with lower taxes.
- Public administrations should be prohibited from purchasing services from companies that have offices registered in tax havens. Ethical businesses should be rewarded to ensure transparency in public procurement.

INCREASING BO 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 IMPLICATIONS IN KENYA

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 gazettment 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>

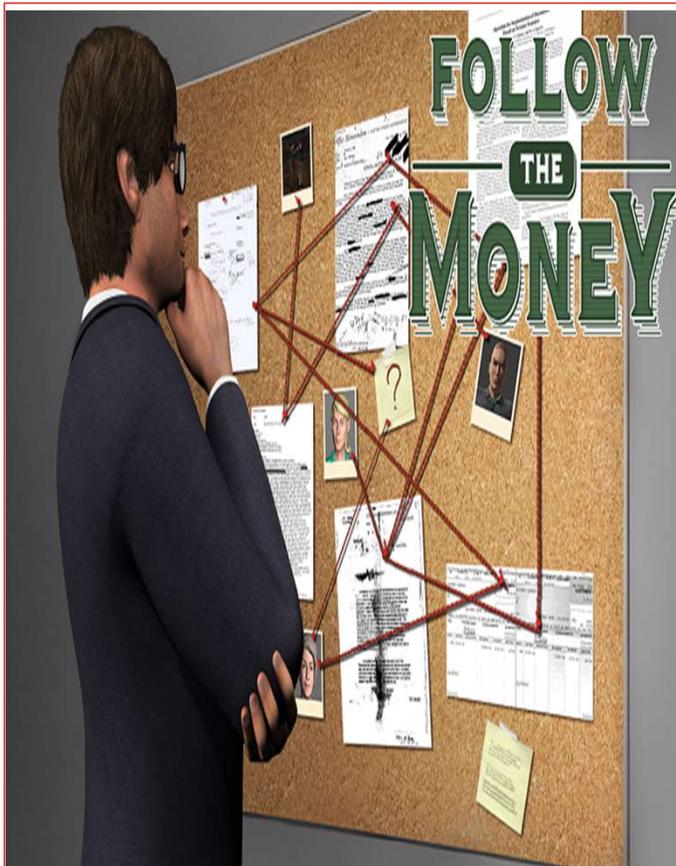
ESTABLISHING BENEFICIAL OWNERSHIP TRANPARENCY



1. FOLLOW THE MONEY

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).



2. LIFT THE CORPORATE VEIL

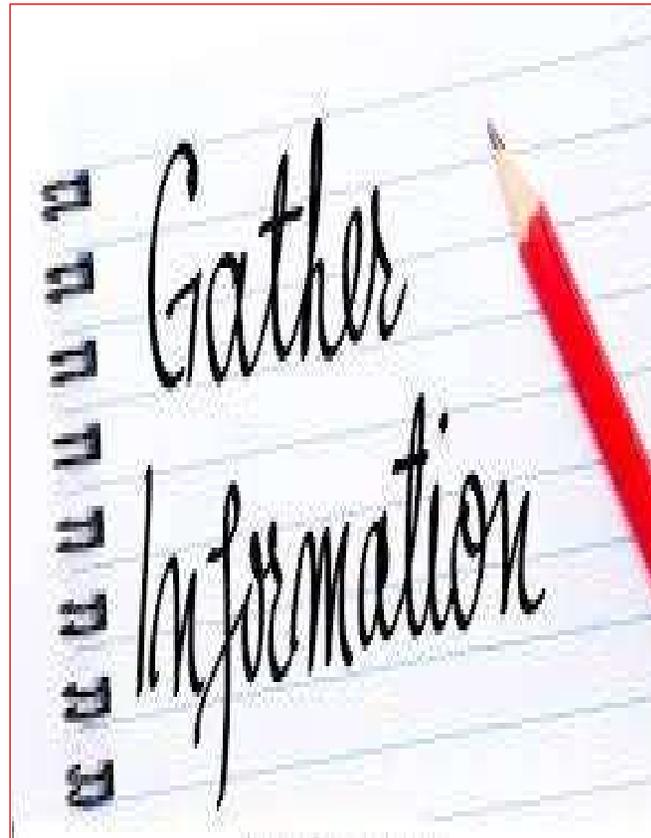
Lifting the corporate veil



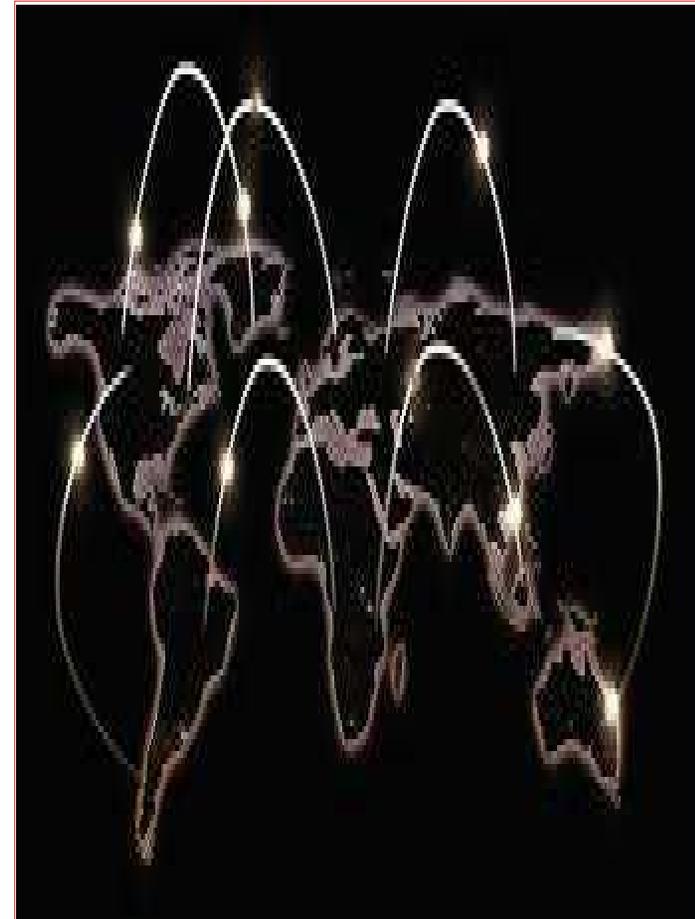
3. ASK THE QUESTIONS



4. GATHER INFORMATION



5. USE EXISTING LINKAGES





BENEFICIAL OWNERSHIP INFORMATION SOURCES

1. Open Sources

a) National Business Registration Offices

Examples: <https://brs.go.ke/companies-registry.php>, <https://ursb.go.ug>, <https://ors.brela.go.tz>

b) International open sources

Example: <http://www.opencorporates.com/>

MUTUAL LEGAL ASSISTANCE REQUESTS

2. MLA requests

- Under UNCAC, CoE Convention, MLA Convention, Minsk Convention



MUTUAL ASSISTANCE challenges



TRANSNATIONAL NATURE



RAPIDNESS



VOLATILITY of DATA

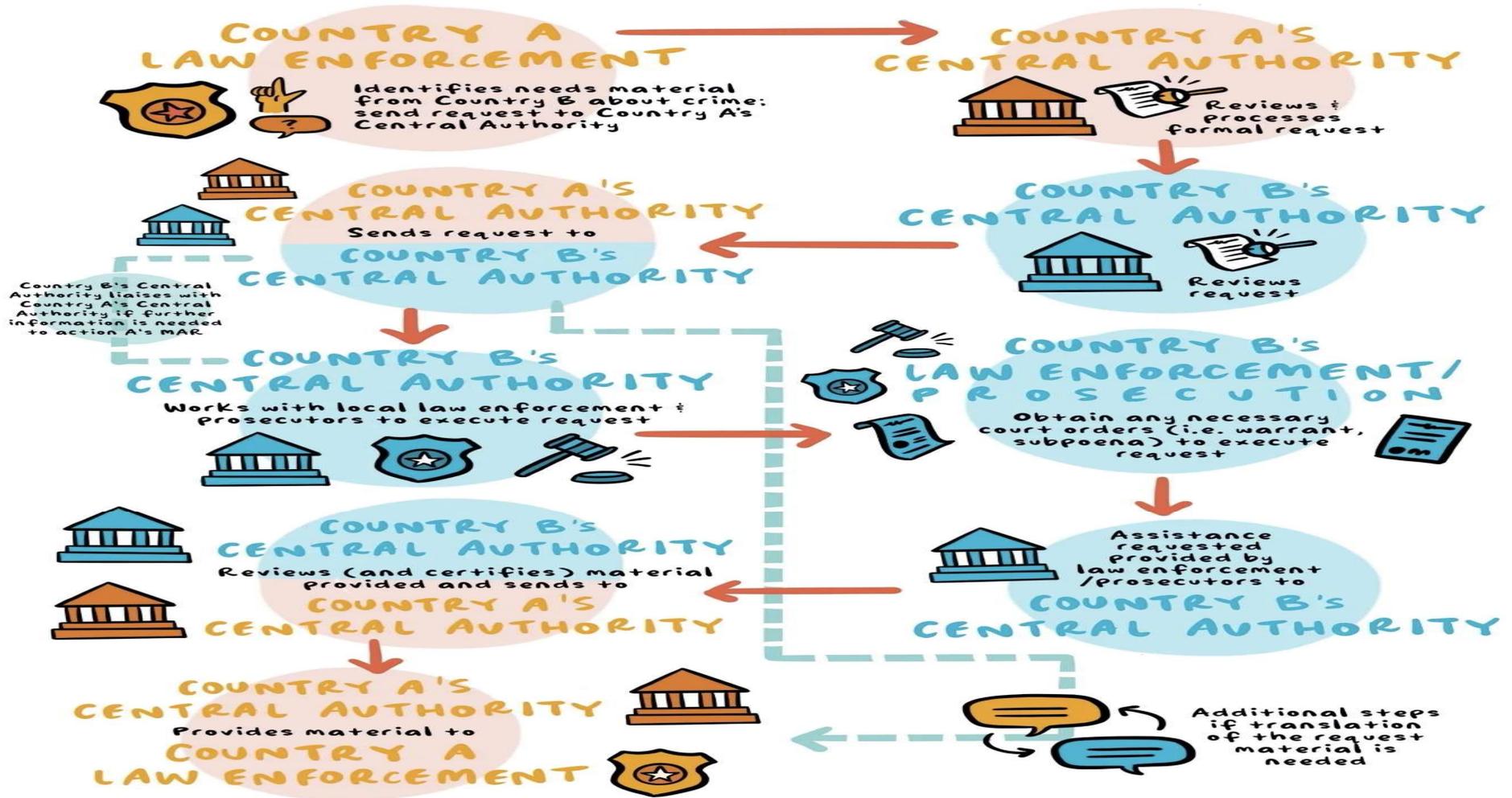


DUAL CRIMINALITY & SAFE HAVENS



TIME

THE MLA PROCESS



OTHER INFORMATION SOURCES

OTHERS	BENEFITS
3. DTAs (Article 26 on Exchange of Information)	<ul style="list-style-type: none">- Multilateral- Wider scope- More flexible- Uniformity
4. TIEAs	
5. MAAAs	
6. Informal co-operations and joint investigation teams (JITs)	



BO INFORMATION REQUIRED

- Full name;
- Birth certificate number, national identity card number or passport number;
- Tax identification number;
- Nationality;
- Date of birth;
- Postal address;
- Business address;
- Residential address;
- Telephone number;
- Email address;
- Occupation or profession;
- Nature of ownership or control;
- Date on which person became a beneficial owner of the company;
- Date on which person ceased to be a beneficial owner; and
- Any other relevant detail the Registrar may from time to time require.

INFORMATION 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

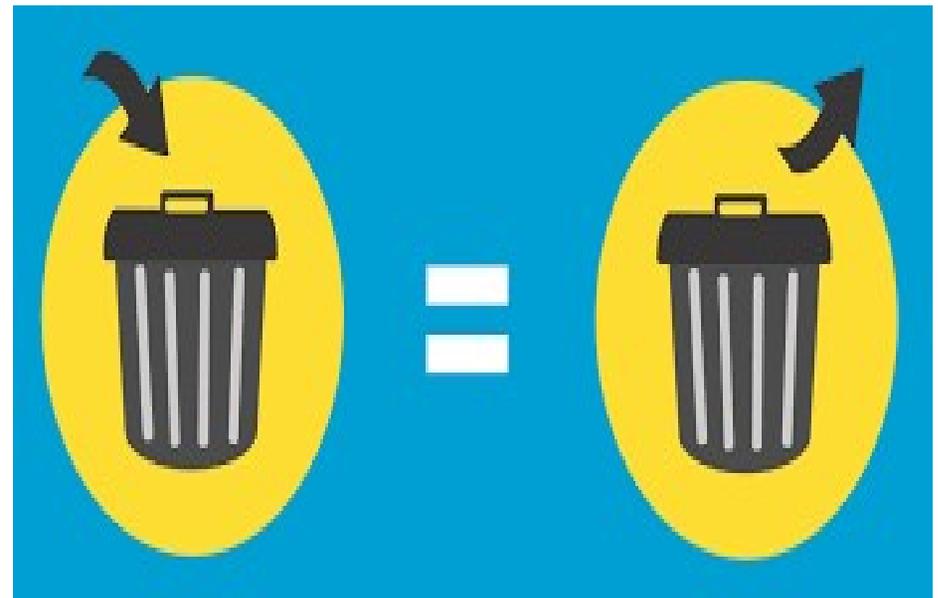
- ★ Professional enablers: Lawyers, company service providers not obligated to identify the beneficial owners of their clients.
- ★ Business of dealers in luxury goods / precious metals and stones not regulated / not obligated to identify beneficial owners of their clients.
- ★ Nominee shareholders and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

- ★ Lack of publicly available BO registry data.
- ★ Non-cooperation, or grudging disclosure
- ★ Trusts:
 - ★ mandatory registration?
 - ★ obligation to identify the beneficial owners of their clients?
 - ★ timely access of information on trusts by competent authorities?
- ★ Client-agent privileges (C-AP)

INFORMATION RELIABILITY



- Does your country maintain a BO register?
- Is the register digitized?
- Does your Registry verify information submitted?



LIMITATION TO ACCESS



- 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

Ref: https://www.youtube.com/watch?v=WpmkyL_2Cvs





GRAND CORRUPTION CASE

- Players: Finance Minister (FM) and Managing Director (MD) 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 FM and the MD against vague invoices . An intermediary company called “Camargo” used to make the payments.
- After the MD realized that the British were onto him, he attempted to hide some of the cash in a Gibraltar-based company “ Argus Management Services”

CASE SYNOPSIS

ORIGIN

- ❑ 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.
- ❑ In May 2002, Walbrook Trustees filed STR and refused to make more payments to Minister and MD.

SUCCESSSES

- ✧ In April 20,2011, arrest warrant for Minister and MD issued in Jersey to face charges of corruption and money laundering.
- ✧ In 2016, directors of Windward Trading Ltd (Jersey) were sued for money laundering and pleaded guilty to possession of proceeds of crime and acquiring profits from criminal conduct. The case took only two weeks!
- ✧ Kshs. 526 million out of stolen Kshs. 997m (3.9 BP and 4.2m USD) frozen by Jersey authorities.
- ✧ The MD did acknowledge through Jersey court filings that he was the Beneficial owner of the company
- ✧ On 5th November 2021, the Supreme Court of Kenya gave the node for extradition proceedings for the duo to face charges in Jersey.
- ✧ In March 2022, Jersey Government and Kenya signed Asset Recovery Agreement to wire back to Kenya Kshs. 450m (3m BP) to support response to Covid 19.

CHALLENGES

- * Snail speed of criminal justice system:
 - * For over ten years, the two have continued to challenge extradition to Jersey through multiple suits in Kenyan courts.
- ✓ **WHAT DO YOU THINK KENYAN AUTHORITIES WOULD HAVE DONE DIFFERENTLY???**

- **Ahsanteni sana!** (Thank You!)
 - **Iko swali??**
(Any Questions/comments)

