

# THE INCREASING USE OF THE BENEFICIAL OWNERSHIP CONCEPT FROM THE ANTI-MONEY-LAUNDERING FRAMEWORK IN FURTHERING THE TAX TRANSPARENCY AGENDA

*Maryte Somare*

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## Abstract

The misuse of legal vehicles by individuals is a common technique used for abusive or criminal tax non-compliance and money laundering. For a long time information on the natural persons, who are ultimate beneficiaries of corporate vehicles or legal arrangements, was not readily accessible to tax administrations. This was due to the fact that the Commentary on the Model OECD Convention until 2005 was not explicit as to whether the exchange of information clause may be relied upon by the tax authorities to obtain ownership information in the cross-border context. Furthermore, until 2014 there was no internationally agreed standard concerning the requirement for financial institutions to engage in customer due diligence procedures for tax purposes. After a series of political priorities arising in the aftermath of the global financial crisis, access for tax authorities to information on the ultimate owners or controlling persons of legal vehicles in the framework of cross-border administrative assistance in tax matters has become an internationally agreed standard. This contribution provides a short chronology of policy developments leading to the acceptance of the concept of anti-money-laundering beneficial ownership in the field of taxation, and presents the extent of the scope to which this concept has been included in the instruments for cross-border administrative assistance in tax matters.

## 1 Misuse of corporate vehicles as a prerequisite for successful money laundering and tax non-compliance

The use of legal vehicles is a technique commonly used for both tax non-compliance and money-laundering practices. Legal vehicles allow for the achievement of a high degree of anonymity, particularly in cases where more than one layer in different jurisdictions is interposed between the beneficial owner and a country where illicit financial flows originate. The authorities seeking to establish the trail of illicit financial flows generally would face legal and administrative obstacles in obtaining adequate

information from the other jurisdictions. Legal vehicles often are used not only for illegal, but also for abusive tax practices, such as treaty shopping or the diversion of taxable revenues to low-tax jurisdictions. Not knowing who the ultimate beneficial owners of legal vehicles are makes the efficient diagnosis of criminal or abusive tax practices literally impossible.

## 2 Beneficial ownership concept under the anti-money-laundering framework

The identification and verification of beneficial ownership is an inherent feature of the customer due diligence process under the anti-money-laundering framework. The obligation to identify beneficial owners under this framework is deferred to the obliged entities.<sup>1</sup> National frameworks prescribing know-your-customer and customer due diligence procedures closely follow the international standard developed by the Financial Action Task Force (FATF),<sup>2</sup> which is set out in the document called *International standards on combating money laundering* (FATF Recommendations).<sup>3</sup> Although the FATF Recommendations are a *soft law* instrument, their acceptance was ensured by means of a mutual evaluation process.<sup>4</sup>

- 1 The notion 'obliged entity' includes credit and financial institutions, as well as designated non-financial businesses and professions as defined in the 40 Recommendations (2012) (see 113-114).
- 2 The FATF was constituted on a decision of G7 due to the growing concerns over the threats posed by international money-laundering practices. Initially, the FATF had 11 members and was set up for one year. The original members of the FATF were Australia, Austria, Canada, China, Denmark, Finland, France, Germany, Italy, Japan, Sweden, Switzerland, the United Kingdom, the United States and the European Commission. The FATF mandate gradually was extended and the number of its members grew consistently to the current 36 members. Additionally, the FATF counts 22 observers and eight FATF-style regional bodies which allow for extensive geographical representation. All in all, the FATF AML regime is estimated to have been adopted by more than 180 jurisdictions. E Tsingou 'Money laundering' in D Mütge (ed) *Europe and the governance of global finance* (2014) 143.
- 3 The first version of the FATF Recommendations is available online at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf> (accessed 14 June 2016). For a comprehensive overview of the development of FATF activities, refer to the FATF Report '25 years and beyond' 2014, <http://www.fatf-gafi.org/media/fatf/documents/brochuresannualreports/FATF%2025%20years.pdf> (accessed 14 June 2016). The FATF Recommendations are from time to time reviewed to ensure that they provide adequate measures to catch up with changing facets of money laundering and include new global threats, eg terrorism, which can be countered through the anti-money-laundering framework.
- 4 The first mutual evaluation round was started in 1992 and ended in 1995. In 2016 the FATF launched the 4th round of mutual evaluations. The mutual evaluations are carried out by FATF expert groups or by the FATF-style regional bodies on the basis of methodology developed by the FATF. Countries of which the legal systems exhibit substantial non-compliance with the FATF Recommendations are put on the periodic supervision process, which generally has proved to be an efficient measure in achieving the change of national laws and bringing national anti-money-laundering systems to substantial compliance with the international standard. For a detailed consideration of the effects of mutual evaluations, see eg KL Gardner 'Fighting terrorism the FATF

The FATF Recommendations provide the following definition of a beneficial owner:<sup>5</sup>

Beneficial owner refers to the natural person(s) who ultimately owns or controls 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.

The scope of beneficial owner identification and verification procedures varies depending on whether the business relationship has been entered into with a legal person or a legal arrangement, for instance a trust, foundation or such like.

Where a business relationship is entered into with a *legal person*<sup>6</sup> the beneficial owner should include at least

- natural persons who ultimately have a controlling ownership interest in a legal person; and
- to the extent that there is doubt after identifying natural persons with a controlling ownership interest as to whether they are the beneficial owner(s) or where no natural person exerts control through ownership interests, the identity of the natural persons (if any) exercising control of the legal person or arrangement through other means;
- where no natural person is identified, then person holding the position of senior managing official.

As far as access to the beneficial ownership information of legal persons is concerned, the FATF Recommendations do not prescribe any mandatory mechanisms, but recommend several alternatives such as the availability of information at the level of legal entities, beneficial ownership register or a combination of different databases already available in a jurisdiction.<sup>7</sup>

For *legal arrangements*,<sup>8</sup> 'beneficial owner' must include at least the following persons: (i) the settlor; (ii) the trustee(s); (iii) the protector; (iv) the beneficiaries or classes of beneficiaries; and (v) any other natural person exercising ultimate control over the legal arrangement by reason of direct or indirect ownership or by any other means. The recommended mechanisms for the availability of beneficial ownership information for legal arrangements include registries; the keeping of information by any of the competent authorities; or subjecting service providers to keep such information.<sup>9</sup>

way' (2007) 13 *Global governance: A review of multilateralism and international organizations* 325-345; R Sansonetti 'The mutual evaluation process: A methodology of increasing importance at international level' (2000) 7 *Journal of Financial Crime* 218-226.

5 FATF *Forty Recommendations* (2012) 110.

6 Interpretative note to Recommendation 10.

7 Interpretative note to Recommendation 24.

8 Interpretative note to Recommendation 10.

9 Interpretative note to Recommendation 25.

### **3 Triggers for the adoption of the money-laundering beneficial ownership concept in the tax transparency framework**

The financial crisis of 1998 had already prompted the debate on the misuse of corporate vehicles for money-laundering and tax non-compliance purposes. Another financial crisis in 2008 was necessary to relaunch the debate which has successfully materialised into the nearly global consensus on a set of tax transparency measures also accepted by off-shore financial centres.

The origins of international efforts on beneficial ownership transparency in the tax field could be traced back to 2000, when the Organisation for Economic Co-operation and Development (OECD) was tasked by the Financial Stability Forum to make a detailed enquiry into the ways in which legal vehicles commonly are misused for illicit purposes. The OECD released its report in 2001 under the title 'Behind corporate veil. Using corporate entities for illicit purposes'. This study had a two-fold purpose: on the one hand, to contribute to the efforts of the OECD in its work on harmful tax practices and, on the other, to provide the FATF with insights for the planned review of its Forty Recommendations.

In 2003 the FATF was the first international body to develop the international beneficial owner standard and to achieve its nearly global implementation by means of periodic mutual evaluations. Nearly a decade later, the beneficial ownership concept, developed under the anti-money-laundering framework, was imported into several initiatives and legal instruments concerning international tax transparency and administrative assistance between competent tax authorities. In 2005 the Committee of Fiscal Affairs agreed to include an explicit clarification in the Commentary to article 26 of the OECD Model Convention (OECD MC) that the competent tax authorities may not refuse to exchange information where a request concerns ownership information. The Common Reporting Standard released by the OECD in 2014 adopted a 'look-through' approach for financial accounts held by passive non-financial entities, which requires the identification of natural persons standing at the end of the ownership chain and having control over such entities. In the first round of peer reviews, the Global Forum assessed whether jurisdictions under their laws required ownership information to be available and accessible to the competent tax authorities. In the second round of peer reviews planned for 2016-2020, particular attention, in fact, will be placed on the availability of beneficial ownership information. As a result, today the ownership transparency is profoundly enrooted in the international tax transparency agenda.

## 4 Exchange of ownership information under article 26 of the OECD MC

Article 26 of the OECD MC is recognised as constituting an international standard on administrative cooperation in the form of the exchange of information between the tax authorities of the treaty partners. The main provision determining the scope of information exchange, to be found in article 26(1), provides:<sup>10</sup>

The competent authorities of the Contracting States shall exchange such information as is *foreseeably relevant* for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind ...

This provision delimits the scope of obligation to exchange information by clarifying that the information requested must satisfy the standard of *foreseeable relevance* either for the purposes of domestic tax laws or for the purposes of the correct application of the Convention.

In the past it was not clear whether a request for ownership information submitted on the basis of article 26 of the treaty would be the standard of 'foreseeable relevance'. In 2005 the OECD included paragraph 5 to article 26 in its MC in order to clarify that the exchange of information may not be refused solely because of the fact that it concerns information on ownership interest in a person and that such information would constitute a variation to the laws and administrative practices of the requested state,<sup>11</sup> or would not be obtainable under the laws or in the normal course of the administration in the requested state.<sup>12</sup> However, it was not clarified whether the term 'ownership' was intended to include only the immediate shareholder of a legal person or whether it should be interpreted broadly to comprise also the ultimate beneficial owner.

In the view of the OECD's work on misuse of corporate vehicles, it is plausible to expect that a broad interpretation of this term was intended. A broad interpretation seems to also be supported by the example (g) provided in paragraph 8 in the Commentary to article 26(1) of the OECD MC (see Figure 7.1). This example describes a situation where the competent authority of state A wishes to determine whether the directors of company A also have a direct or indirect ownership interest in company B, which is a shareholder of company A. Should this be the case, state A intends to apply its CFC legislation and would tax dividends paid to company B by company A as income of the individuals X, Y and Z, all three of them being residents of state A.

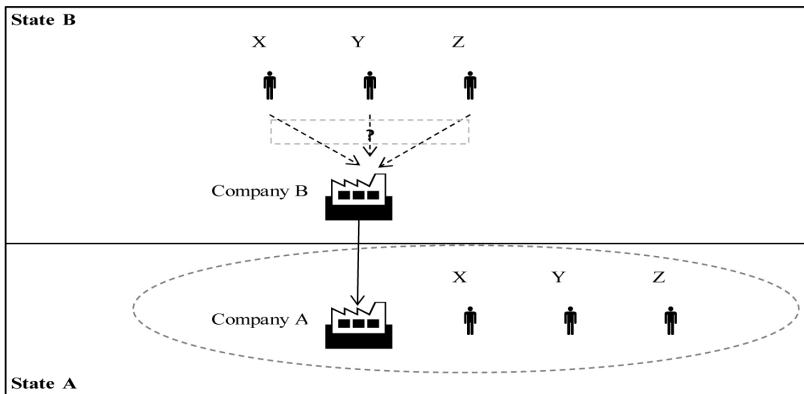
10 Art 26(1) OECD MC 2014 (my emphasis).

11 Art 26(3)(a) OECD MC 2014.

12 Art 26(3)(b) OECD MC 2014.

The Commentary clarifies that information on direct or indirect ownership may be requested and, accordingly, the exchange of information may not be refused. Where information on ultimate owners is not available, at least information on shareholders should be provided so that the requesting state may continue its investigation. Additionally, it is also clarified that before refusing the exchange of information due to a lack of 'foreseeable relevance', the requested authority should consult the requesting authority and seek more information.

**Figure 7.1: Example (g) of the OECD MC 2014 Commentary to article 26**



The OECD has consistently aligned its Tax Information Exchange Agreement<sup>13</sup> and the Multilateral Convention on Mutual Administrative

13 The Model Tax Information Exchange Agreement (2005) is much more explicit and detailed if compared to art 26(5) as far as the exchange of ownership information is concerned. Art 5(4) provides that '[e]ach Contracting Party shall ensure that its competent authorities for the purposes specified in Article 1 of the Agreement, have the authority to obtain and provide upon request: (a) information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees; (b) information regarding the ownership of companies, partnerships, trusts, foundations, *Anstalten* and other persons, including, within the constraints of Article 2, ownership information on all such persons in an ownership chain; in the case of trusts, information on settlors, trustees and beneficiaries; and in the case of foundations, information on founders, members of the foundation council and beneficiaries. Further, this Agreement does not create an obligation on the Contracting Parties to obtain or provide ownership information with respect to publicly traded companies or public collective investment funds or schemes unless such information can be obtained without giving rise to disproportionate difficulties.'

Assistance in Tax Matters (Multilateral Convention)<sup>14</sup> with article 26 of the OECD MC. Accordingly, any of these instruments may be used by the tax authorities that have an interest in discovering the beneficial owners of the foreign entities. Similarly, as in the case of article 26 of the OECD MC, the standard of ‘foreseeable relevance’ must be satisfied also when an information exchange request is made on the basis of these two instruments.

## 5 Common reporting standard

In 2014 at the G20 Leaders’ Summit in Brisbane, the OECD presented its Global Standard for Automatic Exchange of Financial Account Information (Global Standard). The Global Standard consists of two essential elements: the Common Reporting Standard (CRS) and the Competent Authority Agreement (CAA). The CRS sets the scope of, amongst others, customer due diligence and reportable accounts, and the CAA is an agreement between tax authorities which sets out the terms under which the automatic exchange of financial account information should take place.<sup>15</sup>

The due diligence procedures provided by the CRS are designed to identify natural persons having effective control over financial accounts opened at the financial institutions in jurisdictions where the controlling persons are not resident for tax purposes. Therefore, not only accounts held directly by natural persons but also accounts held indirectly through passive entities generally will be subject to reporting under the CRS. The CRS defines the term ‘entity’ in a broad sense to encompass not only companies but also partnerships, limited liability partnerships and legal arrangements such as trusts or foundations.<sup>16</sup>

In the process of identifying reportable accounts, financial institutions must differentiate between accounts held by active non-financial entities (active NFEs)<sup>17</sup> and accounts held by passive non-financial entities (passive NFEs).<sup>18</sup> For a series of NFEs that are unlikely to be misused for tax non-compliance purposes by individuals, exclusion rules have been

14 Art 21(4) Multilateral Convention. OECD and Council of Europe *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol* (2011) <http://dx.doi.org/10.1787/9789264115606-en> (accessed 14 June 2016).

15 There must be a legal basis between the two jurisdictions for the automatic exchange of information in tax matters.

16 For a definition of the term ‘entity’, see CRS, sec VIII, E(3).

17 For a definition of the term ‘active NFE’, see CRS, sec VIII, D(9).

18 For a definition of the term ‘passive NFE’, see CRS, sec VIII, D(8).

provided. This particularly concerns entities that derive more than 50 per cent of their gross income from active income sources;<sup>19</sup> entities listed on recognised stock exchanges; financing or holding entities of the groups transacting only with group members; and entities established for charitable and non-profit purposes without clauses in their charters allowing for distributions to natural persons.<sup>20</sup>

Where a financial account is held by a passive NFE, a 'look-through' approach<sup>21</sup> must be applied to identify whether there are any controlling persons who are also reportable persons for the purposes of the CRS.<sup>22</sup> Where controlling persons are resident in jurisdictions that have committed to adhere to the Global Standard, the financial account must be classified as reportable and financial information on reportable accounts will be exchanged<sup>23</sup> with the tax authorities where the controlling persons are resident for tax purposes.

The CRS defines the term 'controlling persons' as 'the natural persons who exercise control over an entity',<sup>24</sup> and clarifies that the term 'controlling persons' should be interpreted in a way consistent with interpretation of the 'beneficial owner',<sup>25</sup> as provided for in the FATF Recommendations.<sup>26</sup> The interpretative guidance to the term is provided in the Commentary to the CRS, whereas the term 'controlling person' always should be interpreted in a way consistent with Recommendation 10 'Customer Due Diligence' and its Interpretative Note.<sup>27</sup>

19 The OECD CRS Commentary on sec VIII at para 126 provides that the term 'passive income' should be interpreted in accordance with the rules of the reporting jurisdiction and provides the following non-exhaustive list of possible types of passive income: dividends; interest; income equivalent to interest; rents and royalties other than rents and royalties derived in the active conduct of a business conducted, at least in part, by employees of the NFE; annuities; the excess of gains over losses from the sale or exchange of financial assets giving rise to the passive income described previously; the excess of gains over losses from transactions (including futures, forwards, options, and similar transactions) in any financial assets; the excess of foreign currency gains over foreign currency losses; net income from swaps; or amounts received under cash value insurance contracts. However, the term 'passive income' should not include, in the case of a NFE that regularly acts as a dealer in financial assets, any income from any transaction entered into in the ordinary course of such dealer's business as such a dealer. However, the OECD CRS does not clarify what types of income should be considered active for entity classification purposes.

20 For a complete list, see CRS, sec VIII, D(9).

21 Each of the interposed passive NFEs have to be 'looked through' until it is possible to determine who is a natural person controlling the passive NFE or that there are no controlling persons at the end of the control chain.

22 CRS, sec VI, A(2).

23 The reporting financial institutions have to transmit information to their domestic tax authorities which will then exchange information with tax authorities of jurisdictions participating in the CRS.

24 CRS, sec VIII, D(6).

25 CRS, sec VIII, D(6), last sentence.

26 CRS Commentary on sec VIII, para 132.

27 CRS, sec VIII, D(6).

In the case where a financial account is held by a legal person, the notion of ‘control’ should correspond to controlling ownership with an ownership interest equal to or exceeding 25 per cent. When no natural persons hold the controlling ownership interest in an entity due to diluted shareholding, it subsequently becomes necessary to determine whether there are any natural persons who exercise control through any other means.<sup>28</sup> Where no such natural person is identified, then, for the purposes of the CRS, a controlling person should be a natural person who holds the position of senior management official.<sup>29</sup>

If a passive NFE concerned is a trust or an entity functionally similar to a trust (for instance, a foundation), the reporting financial institution is explicitly required to treat the settlor(s); the trustee(s); the protector(s) (if any); the beneficiary(ies); and class(es) of beneficiaries as ‘controlling persons’.<sup>30</sup> As this is a specific requirement, the determination of effective control over a trust or any other functionally similar arrangement is not necessary. In addition, any other natural person exercising ultimate control over the trust (or any other functionally similar arrangement) should be considered as a ‘controlling person’.

In the process of due diligence for CRS purposes, the reporting financial institutions may be permitted to rely on information collected and maintained pursuant to anti-money-laundering know-your-customer procedures provided that such procedures are consistent with Recommendations 10, 24 and 25 of the FATF Recommendations (2012).<sup>31</sup> Such requirement provides for a motivation for jurisdictions to closely follow the FATF customer due diligence standard.

By transposing FATF’s beneficial owner concept in the Global Standard, the OECD has expanded the scope of its application. Whereas the anti-money-laundering framework covers only the criminal dimension of tax non-compliance, the OECD’s CRS has the aim also of improving tax compliance in general and counter the abuse of the tax system.

## **6 Peer reviews and availability of ownership information**

The origins of the OECD’s initiative to enhance international tax transparency may be traced back to its initiative against harmful tax competition launched at the end of the 1990s. A Forum on Harmful Tax Practices was established to identify tax havens and jurisdictions with preferential tax regimes on the basis of criteria identified in the 1998 Report

28 No clarification is provided for the term ‘any other means’.

29 CRS Commentary on sec VIII, para 133.

30 CRS Commentary on sec VIII, para 134.

31 CRS Commentary on sec VIII, para 137.

'Harmful Tax Competition: An Emerging Global Issue'.<sup>32</sup> Next to the criteria concerning specific substantive tax system elements, the lack of the effective exchange of information and lack of transparency were named among the four main criteria that would warrant a jurisdiction to be placed on a 'black list'. As a result of this campaign against harmful tax competition, the black-listed jurisdictions largely had adhered to the demands of the OECD and had adapted their legal systems by (partly or fully) eliminating the elements of harmful tax competition.

The financial crisis of 2008 acted as a necessary trigger to expand the tax transparency initiatives beyond financial centres and cause this standard to be a must for any jurisdiction. For this purpose, the OECD's Global Forum on Taxation was restructured in 2009 into the Global Forum for Tax Transparency and Exchange of Information for Tax Purposes (Global Forum) and opened to all jurisdictions.<sup>33</sup> The Global Forum had enhanced the tax transparency standard and launched the two-phase peer review process to ensure the adherence to and effective implementation of this standard by relevant jurisdictions.<sup>34</sup> Phase 1 sought to determine whether information that may be necessary for tax assessment or enforcement purposes were collected, could be made available to competent authorities, and whether there was a sufficiently broad network of information exchange instruments entered into by a jurisdiction under review (see Figure 7.2). The jurisdictions were also reviewed in respect of their ability to exchange ownership information in a cross-border context.<sup>35</sup>

32 In the 1998 Report 'Harmful tax competition: An emerging global issue' OECD identified that the main features of tax havens are (i) no or only nominal taxes; (ii) a lack of an effective exchange of information; (iii) a lack of transparency; and (iv) no substantial activities (see 23). Additionally, factors identifying harmful preferential tax regimes were provided. These are low or zero effective tax rates on the relevant income; the availability of 'ring-fencing' provisions banning from the preferential tax treatment income derived domestically; the operation of the regime in a non-transparent manner; and no effective exchange of information with other states by the jurisdiction operating regime (see 27).

33 Although the OECD peer review process was launched in 2009, the Global Forum, albeit under a different name and with different functions, has existed from the beginning of 2000. Initially having its membership limited to OECD member states, the Global Forum has become an open platform for the states sustaining the values prophesied by it. The mandate of the Global Forum has developed from the strict focus on the policing tax havens and harmful preferential tax regimes to spreading the culture of jurisdictional transparency through voluntary compliance with a global standard of tax transparency and exchange of information.

34 For the methodology of peer reviews, see Global Forum 'Revisited methodology for peer-reviews and non-member reviews' (2013) <http://www.eoi-tax.org/keydocs/3a4dca676433deb37b910032fa0848ba#default> (accessed 14 June 2016).

Figure 7.2: Phase 1 assessment indicators

|                                                                                                                |                                                                                                          |                                                                                                                                                                                                                                                    |
|----------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Group A: Availability of bank, ownership, identity and accounting information</b>                           | <b>Group B: Access to information</b>                                                                    | <b>Group C: Exchanging information</b>                                                                                                                                                                                                             |
| <ul style="list-style-type: none"><li>• A.1. Ownership</li><li>• A.2. Accounting</li><li>• A.3. Bank</li></ul> | <ul style="list-style-type: none"><li>• B.1. Access Power</li><li>• B.2. Rights and Safeguards</li></ul> | <ul style="list-style-type: none"><li>• C.1. Exchange of Information Instruments</li><li>• C.2. Networks of Agreements</li><li>• C.3. Confidentiality</li><li>• C.4. Rights and Safeguards</li><li>• C.5. Timely Exchange of Information</li></ul> |

Source: Peer Review Methodology, Global Forum

Ownership information in the context of peer reviews was to be understood broadly and, therefore, not limited to information on shareholders or legal owners, but also including effective owners of legal entities. The peer review methodology explicitly provided that for all companies and bodies corporate ‘[o]wners include legal owners and, in any case, where a legal owner acts on behalf of any other person as a nominee or under a similar arrangement, that other person, as well as persons in an ownership chain’.<sup>36</sup> This requirement is similar to what is required from financial institutions (and other persons) in the customer due diligence process under FATF standards.<sup>37</sup>

The Global Forum provided that the availability of ownership information in jurisdictions should be ensured for a broad range of legal arrangements and should not be limited to companies and, therefore, should also extend to

- foundations, *Anstalts* and any similar structures;
- partnerships or other bodies of persons;
- trusts or similar arrangements;
- collective investment funds or schemes;
- any persons holding assets in a fiduciary capacity; and

35 The Peer Review Methodology provides that ‘[e]ffective exchange of information requires the availability of reliable information. In particular, it requires information on the identity of owners and other stakeholders as well as information on the transactions carried out by entities and other organisational structures. Such information may be kept for tax, regulatory, commercial or other reasons. If such information is not kept or the information is not maintained for a reasonable period of time, a jurisdiction’s competent authority may not be able to obtain and provide it when requested.’ OECD *Implementing the tax transparency standards: A handbook for assessors and jurisdictions* (2011) 23 24-26, <http://dx.doi.org/10.1787/9789264110496-en> (accessed 14 June 2016).

36 OECD (n 35 above) 24.

37 OECD 27.

- any other entities or arrangements deemed relevant in the case of the specific jurisdiction.<sup>38</sup>

Additional clarifications concerning the scope of ownership information were made in respect of partnerships, trusts and foundations.<sup>39</sup> Jurisdictions that under their laws allow partnerships were also assessed in respect of their ability to access information on the identities of the partners in any partnership that (i) has income, deductions or credits for tax purposes in the jurisdiction; (ii) carries on business in the jurisdiction; or (iii) is a limited partnership formed under the laws of that jurisdiction.

Jurisdictions that provide for possibilities to set up trusts were checked against their ability to ensure that information is available to their competent authorities that identifies the settlor, trustee and beneficiaries of express trusts (i) created under the laws of that jurisdiction; (ii) administered in that jurisdiction; or (iii) in respect of which a trustee is resident in that jurisdiction. Finally, jurisdictions that allow for the establishment of foundations were checked against their ability to ensure that information is available to their competent authorities for foundations formed under those laws to identify the founders, members of the foundation council and beneficiaries (where applicable), as well as any other persons with the authority to represent the foundation.

The peer review methodology did not require jurisdictions to have any specific mechanisms, such as beneficial ownership registers, to ensure the availability of ownership information. The methodology required that beneficial ownership information is available at least at the level of financial institutions or other intermediaries. Should beneficial ownership information be relevant to respond to a request for information received under exchange of information instrument, the competent tax authorities should have access to such information.<sup>40</sup> The standard required that any national legal secrecy provisions are relinquished when ownership information is requested in the context of an exchange of cross-border tax information.<sup>41</sup> It is important to highlight that jurisdictions would also be expected to exchange information on any entities in the ownership chain, as long as information on such entities is in the possession or control of persons within the jurisdiction's territorial jurisdiction.<sup>42</sup>

The move to phase 2 was conditional on the successful completion of phase 1. Where the assessors determined that some of the essential elements were absent, the jurisdictions under review were asked to adapt their legal and regulatory frameworks to eliminate the highlighted deficiencies. In phase 2, jurisdictions that had practical experience in

38 OECD 24.

39 As above.

40 OECD (n 35 above) 27.

41 As above.

42 As above.

exchanging information with the jurisdiction under review were asked to provide information and statistics on the efficiency of such cross-border administrative cooperation. As a result of phase 2, reviewed jurisdictions were rated as compliant, largely compliant, partially compliant or non-compliant.<sup>43</sup>

Jurisdictions reviewed in the first round of peer reviews most frequently were found not to be able to completely satisfy the standard on availability of ownership information. This element was a reason to provide jurisdictions not commonly referred to as offshore financial centres with a 'largely-compliant' rating. This, for example, occurred in the cases of Austria, the Czech Republic, Germany, Greece, Hungary, Israel, The Netherlands, Poland, Portugal, the Russian Federation, the Slovak Republic, the UK and the US, which received the same rating as jurisdictions widely known as financial centres, such as Aruba, the Bahamas, Belize, Bermuda, Cayman Islands, Cook Islands, Liechtenstein, Niue, St Kitts and Nevis, the Seychelles, and others.

In the second round of peer reviews, which are to be undertaken during 2016 to 2020, new and already-reviewed jurisdictions will be assessed as to the progress made in implementing the standard for exchange of information on request. In this round of reviews, the Global Forum will be focusing, among other matters, on the availability of ownership information. The new methodology explicitly provides that in order to

ensure a level playing field and to respond to the G20's call to draw on the work of the FATF on beneficial ownership, the Global Forum strengthened its EOIR<sup>44</sup> standard for its second round of review by introducing the FATF concept of beneficial ownership in its assessments ...<sup>45</sup>

In line with this statement, the Global Forum also changed the language in the methodology and no longer refers to 'ownership information', but rather to the term 'legal and beneficial owners' with direct reference to the definition of 'beneficial owner' as provided in the FATF Recommendations (2012).<sup>46</sup> It furthermore is extensively emphasised that the jurisdictions will be assessed also with respect to the availability of beneficial owner information concerning companies and other bodies corporate incorporated elsewhere, but having a substantial economic nexus with the jurisdiction under review. Such nexus would be constituted by, for example, tax residence or headquarters.<sup>47</sup>

43 Ratings of the jurisdictions reviewed by Global Forum are available at <http://www.oecd.org/tax/transparency/exchange-of-information-on-request/ratings/#d.en.342263> (accessed 14 June 2016).

44 Exchange of information on request.

45 Global Forum *Exchange of information on request. Handbook for peer reviews 2016-2020* (2016) 9-10.

46 Global Forum (n 45 above) 19.

47 As above.

The Global Forum also acknowledged that its

standard-setting and evaluation closely relates to areas covered by other international bodies, and in particular the FATF, the principles developed by the FATF may be taken into consideration to interpret and apply the standard where appropriate.<sup>48</sup>

Accordingly, it may be expected that in the future the synergies between the tax transparency and financial transparency frameworks will be strengthened.

## **7 Concluding remarks**

The lack of beneficial ownership transparency has been recognised as constituting one of the major factors contributing to the misuse of corporate vehicles for both tax non-compliance and money-laundering practices. The foregoing discussion clearly has demonstrated that the agendas of the OECD and the Global Forum in countering the misuse of the legal vehicles increasingly intertwine with the principles of the anti-money-laundering framework shaped by the FATF. This trend acquired momentum after the last financial crisis when the peer review process launched by the Global Forum included in the methodology requirement that beneficial ownership information is available and accessible for tax purposes in the reviewed jurisdictions. The availability of beneficial ownership information remains a priority focus of the second round of peer reviews which commenced in 2016 and will continue until 2020.

Whereas the peer review process assessed the availability of beneficial ownership information on an on-request basis, the OECD's CRS was designed to provide on automatic basis information on the controlling persons of the financial accounts to the jurisdictions where such persons are resident for tax purposes. Today more than 100 jurisdictions have committed to adhere to the Global Standard which may be said to be a manifestation of the first exchange of beneficial ownership information instigated for tax reasons.

48 Global Forum (n 45 above) 29.

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