

Tax Transparency and Corruption Project

WU Global Tax Policy Centre (GTPC)

In association with

World Bank Group, United Nations Office on Drugs and Crime (UNODC) and African Tax Institute (ATI)

ONLINE CONFERENCE ON TAX TRANSPARENCY AND CORRUPTION:

Summary – Discussion Highlights

Day 1 – Wednesday, 23 September 2020

Mapping the expected outcomes:

When the Tax and Good Governance Project began in 2015, the agenda for the Sustainable Development Goals had just been approved and [the Anti-Corruption summit](#) was set to take place in London the following year. It had been identified that US\$ 400 billion was required to finance the sustainable development agenda. The [High Level Panel Report on Illicit Financial Flows from Africa \(the Mbeki Report\)](#), also published in 2015, determined that significant revenue was being lost by African countries. In the following year, the Panama Papers revealed that the challenges relating to the misuse of corporate vehicles, secrecy and overall illicit flows of wealth continued to persist. In order to effectively counter corruption, bribery, money laundering and tax crimes, countries would need to engage in the process of capacity building, passing robust legislation, and engaging the right people with the necessary skills who could be empowered to implement change.

Today, the COVID-19 pandemic offers an opportunity to accelerate discussions on financial integrity as there is increased attention on the role of countering illicit financial flows (IFFs) to raise the revenues we desperately need to sustain economies and deal with inequality. IFFs have moved up the agenda on financing for sustainable development. Given the impact of the current crisis, African governments are facing a major squeeze in their revenue raising capabilities and, therefore, their budgets. It is now of great importance that we transport the international momentum to the national level and ensure practical relevance.

In this regard, the Tax Transparency and Corruption project aims to provide policy relevant research and a neutral forum for discussion between countries, governments, business, tax authorities, financial intelligence units (FIUs) and other law enforcement agencies. The platform for discussion has been the first major benefit arising from the first stage of the project and the outcomes will be used to feed into international and national debates.

We have established five focus groups made up of representatives, from over 15 African countries, of FIUs, tax authorities, customs, judges, business, academia and international organizations on the following topics:

- Beneficial Ownership
- Unexplained Wealth Orders (UWO)
- Inter-Agency Cooperation

- Client/Attorney Privilege
- Cooperative Compliance

Our emphasis continues to be on the practical implementation challenges, and this has influenced our main objectives of developing best practice manuals, guidelines, draft MOUs, draft legislation and building the network. We have focused on practical case studies, contextual failures and successes and this has so far provided key recommendations in the areas of beneficial ownership and UWOs.

Challenges and opportunities for implementing beneficial ownership regulations

The first presentation highlighted the progress made by the Focus Group on Beneficial Ownership so far. Through three virtual sessions held over the course of the last three months with officials from tax authorities, financial intelligence units (FIUs) and other institutions from over 20 countries the group have been able to identify the key objectives to be realized through this project. Overwhelmingly, officials identified the need to focus on the practical challenges for implementation and verification.

Discussions have so far provided key reportable relationships that may give rise to effective control that authorities may consider for purposes of declaration through a know your network process:

- Power of attorney
- Directors and senior management declare relationships of interest
- Ownership of key assets used to generate income
- Structure of the debt of the entity (significant creditors)
- Significant suppliers and purchasers
- Managers of key accounts
- Any links to PEPs

Further, through country case studies presented by officials, the focus group identified a wide range of sources of information being used to connect the dots or ‘follow the money’, validating that multiple source approaches for gathering information are much more useful than single source approaches. It also became clear that specific weaknesses in legislation were giving rise to challenges for implementation, for instance, not enough entities or financial products are required to report (including foundations and NGOs) and this is leading to opportunities for misuse.

We continue to document further case studies and intend to build up an inventory. In addition, using the experiences of countries, the GTPC team are developing a tool that will assist authorities to identify weaknesses in the value or supply chain of Beneficial Ownership Information.

Key discussion highlights:

- Crucial features of implementation include capacity and resources which are essential for implementing authorities.

- There is now a need to engage policymakers to take on a stricter position where regulation is concerned. In addition, judges and other peripheral actors should be included in this forum as reinforcers of the entire system designed to tackle IFFs.
- Suspects are able to take advantage of weaknesses in the legal framework which circumvent effective implementation of Beneficial Ownership information collection. Operating in an environment full of loopholes can lead to non-compliant behavior.

The second presentation on testing the standards, highlighted the key definitions of Beneficial Ownership and the number of key organizations making progress in the area of standards setting. In particular, the Financial Action Task Force Recommendations have been endorsed by several organizations including the G20, Extractive Industries Transparency Initiative and Open Government Partnership. It emerged that the definition of a beneficial owner is dependent on recognition under domestic law and it may differ within a country. Cooperation was identified as an essential element to collection and use of beneficial ownership information, however significant challenges were identified that could limit cooperative efforts:

- Reporting institutions do not comply with their obligations.
- Accountable institutions are not regulated.
- Relevant registries (such as assets) are not required to verify the beneficial owners.
- Lack of synchronized sharing of information.
- Legal professionals and accountant fail to comply with their obligations.

Some specific challenges arising from the South African experience, that may be similarly identified by other countries, were provided:

- Company register that transmits data to SARS only hold legal and identity information.
- In case of trusts – beneficial owners are not accurately identified.
- There is no general register of partnerships in South Africa, information is not updated regularly, and it is entered manually.
- For Nonprofit organizations the register is only a voluntary registration facility, this structure is often misused and poses an even greater risk of misuse.
- Registers of cooperatives are available, but registration is manual by completing a form and the reporting person may decline to provide information if it may be to the disadvantage of the cooperative.

In order to develop a roadmap for improved implementation countries will need to place greater emphasis on political will, legislative harmonization, technical and human capacity building, inter-agency cooperation, the use of public registries, monitoring and evaluation of systems, the use of technology and a whole of source approach.

The slides for both presentations are now available on the [cloud](#) (PW:Vienna2020).

Key discussion highlights:

- FIUs should be responsible for hosting the beneficial ownership registers. This is because a company's registry is a commercial register and have no experience or expertise with financial intelligence. A FIU will already be familiar with the purposes

of financial intelligence legislation and can better coordinate, enforce compliance and cooperate with other authorities.

Panel discussion:

- Determining who holds the information is an important consideration, we do not want fragmented information, but a coherent register.
- Business legislation may often be fragmented and cover differing concerns and objectives.
- Taking on appropriate sanctions for non-compliance by either reporting institutions or the reporting persons/arrangements or accounts is important. Some of these sanctions may include de-registration, significant fines, refusal of services and further criminal sanctions.
- Public, centralized registries make a difference, they could be helpful for reporting institutions, particularly financial institutions. The recent FINCEN leaks demonstrate the usefulness that beneficial ownership could provide for AML officers within banks including in connecting information and tracking the changes in ownership or control.
- Where the information repository is anchored matters – FIUs are not always given this responsibility, and it may depend on capacity, resources and politics.
- Supervision and enforcement remain the biggest weaknesses at the national level.
- There is no clarity in legislation who the supervisory body is and what powers they might have (this is in reference to supervising the obligations of supervisory institutions).
- A whole of source approach to building the repository of beneficial ownership information is important. Since no one competent authority collects or holds all the information this means that the whole-of-source approach should be linked whole-of-government approach. Authorities must begin to break the silos and prioritize enforcement and compliance.
- The lack of legal coherence in the types of entities that need to provide information and we need to understand the role of inter-agency cooperation in verification efforts.
- Tools to identify the weaknesses in the value chain of how we collect and hold this information will be highly useful for authorities – the value chain tool being developed by the GTPC will be extremely important.
- The use of technology to host and manage centralized beneficial ownership registers and the compatibility of the systems used by different asset/information registries should be considered by implementing authorities as a priority for ensuring ease of access to information.
- Ongoing dialogue with reporting institutions, particularly financial institutions, is highly important in ensuring they are aware of the objectives of collecting due diligence reports and the major risks being identified by authorities. This has been particularly successful for authorities in South Africa who have established an inter-agency team that includes financial institutions.

Day 2 – Thursday, 24 September 2020

Challenges and opportunities of Unexplained Wealth (UW) laws

There were five presentations, followed by questions and answers, including:

- A brief introduction of the topic of unexplained wealth (UW) laws, and a summary of the outcomes and participants' interests identified in the UWO Focus Group (FG) meetings held so far (*see below*).
- The UWO under the Good Governance and Integrity Reporting Act 2015 in **Mauritius**; the institutional set-up to implement it (the two-tier Agency and Board system); how the law works in practice seen through practical case studies of MUR millions recovered so far.
- The role of FIC **South Africa** in counteracting IFFs and recovering the proceeds of crime, especially via enhanced inter-agency cooperation and public-private cooperation (e.g. with banks) under the South African Anti-Money Laundering Integrated Taskforce (SAMLIT); the UWO-type presumptions built into the asset recovery regime in South Africa (i.e. in the criminal/conviction-based asset recovery under Chapter 5 of the Prevention of Organised Crime Act); what challenges are faced under its asset recovery regime (both under the criminal and civil/*non*-conviction-based asset recovery); what changes are being considered to address challenges; practical cases where authorities have succeeded, leading to billions that have been recovered; and how the recovered funds are used.
- The UWO enacted with the **UK** Criminal Finances Act 2017 into the Proceeds of Crime Act 2002: discussing and comparing the various powers for the recovery of the proceeds of crime, such as account freezing orders (AFOs), listed assets, cash seizure and civil (non-conviction-based recovery) recovery, commonly referred to as Part V; Part V includes civil recovery coupled with property freezing orders (PFOs) and UWOs coupled with interim freezing orders (IFOs); the role of tax authorities in the successful implementation of UWOs and recovery of proceeds of crime; practical experiences through case studies and the lessons learned from those cases.
- The recent amendments to the Money Laundering and Proceeds of Crime Act to insert the UWO chapter in **Zimbabwe**, from the **Revenue Authority** (ZIMRA) perspective; the interplay between UWOs and tax authorities/collection (*see below*); ongoing efforts to strengthen cooperation between ZIMRA and other enforcement authorities in successfully implementing UWOs, including enhanced databases.
- The role of **Revenue Authorities** in **Mauritius** (MRA) in detecting and reporting UW to the Integrity Reporting Services Agency (IRSA) and, in general, in supporting the investigation and recovery of proceeds of crime, including non-tax crimes (e.g. money laundering), especially through enhanced inter-agency sharing of information.

Outcomes of Focus Group (FG) on UWOs

The FG on UWOs has come together during **two online calls**, on 23 June 2020 and on 30 July 2020, for fruitful discussions, culminating in the **Conference** on 24 September 2020.

Aims: The aim is for participants in the project to engage in dialogue together and with GTPC, to learn from sharing country experiences, to build a lasting network for the exchange of ideas

and best practices, and to voice their needs and interests under this sub-topic of the project. This way, the research and outcomes of the project result from a country-led process, are immediately relevant for policymakers, and are practically useful for day-to-day work of agencies aiming to counteract IFFs.

During the **first call**, WU GTPC gave a brief presentation on UWOs (focusing on the UWOs in Australia, Mauritius and the newer version enacted in the UK and more recently Zimbabwe) with the aim to broadly discuss ‘*what are we talking about under this sub-topic? And why?*’ and, then, to open the floor to participants to

- (1) understand participants’ experiences with asset recovery in their jurisdictions: *what are the challenges and successes, and what factors (legal, operational, financial) play a role?*
- (2) hear their general reactions to the UWO laws briefly presented: *what opportunities does it present? What risks?*
- (3) learn of similar tools, if any, with “unexplained wealth” features in their jurisdictions, of what works well with those tools, and of what tools are being considered to strengthen the detection, investigation and recovery of assets and unexplained wealth.

Based on the discussion and input of the first call, the **second call** focused on case studies and practical experiences to explore how UWO laws can operate in practice. To this end, WU GTPC presented a case study, decided definitively in 2020 by the Supreme Court of Kenya (one of the project’s “Focus Countries”), on a successful recovery of millions in KES under Kenya’s “unexplained assets” law. Also, speakers from South Africa’s FIC, SARS and National Prosecuting Authority Asset Recovery Unit presented their experiences, allowing participants on the call to benefit from their expertise and from a true inter-agency perspective on this topic.

From the two **FG calls**, participants are interested in further developing three aspects:

(1) **Practical case studies:**

- To understand the **opportunities**, it helps to see how the laws actually work *in practice*
- To understand the **challenges** and foresee how to **overcome** them
- To understand **successful strategies**, such as the types of intelligence/red flags to detect UW and, once detected, how to investigate it further and build a proper case of UW

→Therefore, WU GTPC is documenting these practical case studies.

(2) **Best practices** in UW laws:

- Given a wide range of laws with UW features (e.g. UWOs, e.g. illicit enrichment, e.g. lifestyle audits, e.g. similarities with tax investigations of undeclared income), it is useful to **compare**, contrast, bring further clarity, and, in this way, discover **building blocks** of well-functioning, well-designed UW laws
- e.g. What safeguards to protect rights constitute best practices? This is crucial because it also addresses: How do you ensure against constitutional legal challenges to these laws? (e.g. in the FG, we discussed ‘how can the information obtained under UWOs be used?’, which touches upon a fundamental right of presumption of innocence in trials)

- e.g. How do you ensure certain aspects of scope / procedures of the law do not *inadvertently* render the law ineffective or too restrictive in practice? (e.g. FG discussed whether certain time limits/deadlines could be too short, e.g. the 60-day limit in the UK could make it too difficult for authorities to verify respondents' explanations)
- →Therefore, WU GTPC is compiling best practices on well-designed and well-functioning regimes (in the draft research paper, [on the cloud](#), and eventually in guides/manuals).

(3) Effective and transparent **use of funds recovered**:

- How should the funds be used? What procedures should be put in place to govern their use?
- e.g. If multiple agencies are involved in recovering proceeds of crime, how might use of funds be coordinated or prioritized? What coordinating mechanisms can be used if the assets that are targeted for recovery under a proceeds-of-crime Act are the same as those needed to collect/satisfy a tax debt?
- It is crucial to consider, once agencies recover funds, how can the government make effective use of those resources: to build capacity in agencies, to return funds to victims or repatriate to origin countries, to build a better society through social programs, etc.
- →Therefore, WU GTPC is also compiling country practices and keeping up-to-date with recent promising developments (e.g. FRACCK,¹ TI & UNCAC Coalition proposal).

Some Key Highlights and Take-aways

- Under criminal (conviction-based) asset recovery regimes, some features that have been helpful in successful asset recovery: e.g. in South Africa, (1) UW-type presumptions built-into the proceedings (which allow authorities to presume that various unexplained assets, i.e. assets that defendant is unable to show were legitimately acquired, form part of the proceeds of crime to be confiscated²) and (2) the possibility to enquire into not only benefits from the offence in question but also benefits from “sufficiently related” criminal activities, either using the presumptions or bringing in other dockets that are outstanding against the defendant into the enquiry, thereby expanding the amount that can be confiscated
- Under civil (non-conviction-based) asset recovery regimes, factors that may improve success: e.g. in South Africa, use of CARIN greatly assisted international cooperation to recover assets in a case with Denmark; e.g. one possibility under consideration in South Africa is designing law to include in scope not only tainted assets but also substitute assets.

¹ Framework for the Return of Assets from Corruption and Crime in Kenya; Transparency International and UNCAC Coalition Submission to the UNGASS against Corruption: Proposal for a Multilateral Agreement on Asset Recovery.

² See e.g. South Africa, Prevention of Organised Crime Act, Act No. 121 of 1998, Chapter 5, Section 22 (“Evidence relating to proceeds of unlawful activities”: “(1) For the purposes of determining whether a defendant has derived a benefit in an enquiry under section 18 (1), if it is found that the defendant did not at the fixed date, or since the beginning of a period of seven years before the fixed date, have legitimate sources of income sufficient to justify the interests in any property that the defendant holds, the court shall accept this fact as prima facie evidence that such interests form part of such a benefit.”).

- UWO regimes: when authorities establish that a person has wealth that exceeds known lawfully obtained income or wealth, these regimes, in essence, make it easier to take action on this basis: e.g. to issue an order to require explanations of how certain assets were obtained, e.g. the possibility to initiate proceedings to recover the assets that cannot be satisfactorily explained; precise conditions and consequences vary depending on the regime (see e.g. presentations of Mauritius, UK and Zimbabwe)
 - All regimes presented successful cases thus far, some challenges in the implementation, and lessons learned when implementing these laws

Country practices and design features of UW laws discussed:

- Two aspects of designing the scope of this law - worth further research and following future developments in FG:
- **(1) personal scope:** in the UK, UWO is directed at a person that holds (meaning e.g. effective control, trustee or beneficial owner) wealth that is not commensurate with known lawfully obtained income/wealth, often a **natural person**, but the “respondent” of the UWO can also be a **legal person**
 - Potentially promising feature: given the ongoing difficulties in implementing beneficial ownership registries (as discussed during day 1 of the conference), perhaps requesting information from these types of “respondents” helps identify ultimate beneficial owners in some cases
 - Potentially challenging to target as “respondents”, given complexity of legal arrangements, need to read and understand the agreements and paperwork of the legal entities e.g. of a Panamanian foundation as in the *Baker* case, etc.
- **(2) time limit issue:** When respondents send information in connection with a UWO, authorities can be inundated with volumes of material; thus, in the UK, authorities have realized that the 60-day limit placed on authorities to determine what action to take after a UWO may be insufficient.
 - In designing such regimes, important for other countries to consider the procedures and timelines
- One **lesson learned:** more of the investigation will be completed *prior to* applying for a UWO and more care given to requesting in the UWO information that authorities do not already hold – in sum, building even stronger cases of UW before applying
- **Common feature/consideration**, which came across in multiple case studies presented: importance of increased scrutiny in cases involving PEPs (see e.g. case studies in Mauritius, South Africa and UK all involved PEPs; moreover see e.g. Sec. 362B(4)(a) of UK UWO law)
- Importance of considering how to **coordinate** between **different agencies** with seizure powers, or between **different forfeiture/asset recovery regimes:**
 - Cases arose where different agencies (e.g. police, anti-corruption commission) have seized cash or assets that are also subject to UWO or asset recovery:

- One approach: in Mauritius, the Act provides that the Board “shall, in case of concurrent jurisdiction with an enforcement authority, prevail in relation to any action relating to the confiscation of property” (legal hierarchy approach)
- Other approach: subtract the value of other outstanding forfeiture orders from the UWO (mathematical approach)
- Topic for further research: *see above outcomes of FG calls*
- On inter-agency cooperation:
 - For detecting UW, importance of information sharing between agencies
 - e.g. in Mauritius, the Act creates statutory “duty” for certain authorities to report suspicions of UW, and allows general public to submit reports of UW too
 - After receiving reports and referrals from other authorities, feedback system is used, i.e. agency provides follow-up on what was done with information received
 - In some cases, clear distinctions between mandates must be made: e.g. in Mauritius, distinction between Agency’s work and that of police (UWO is not criminal, so Agency is careful not to interfere or get involved in those aspects; it is completely separate)
 - Other **practical examples of successful cooperation** included:
 - (1) as mentioned above, SAMLIT (2) role of revenue authorities in UWOs (*see below*) and (3) international cooperation: South Africa highlighted practical case study of benefit of CARIN (Camden Asset Recovery Inter-agency Network)
- The **importance of political will and public support** was emphasized by the country experiences
 - Concerns can arise that UW laws will be misused. Addressing these concerns involves:
 - (1) carefully considered (i) institutions and (ii) procedures for implementing UWOs, well-designed to ensure independence of the authorities responsible for applying UW laws, e.g. by applying via an independent judiciary, or by having more than one level of review, or both
 - e.g. an investigation of UW by designated law enforcement authorities, who must then apply to a High Court that will decide whether to issue a UWO (UK, Zimbabwe)
 - e.g. a report of UW, followed by a two-tier (1) Agency and (2) Board review process, before potentially applying to a judge for the UWO (Mauritius); to ensure independence, emphasized importance of transparent procedures for appointing persons to Agency and Board, carefully considering qualifications of those persons and avoiding conflicts of interest, etc.
 - (2) raising awareness / public campaigns – before and after enactment of law

- (3) when asked by public, have prepared clear explanations as to how the law is intended to be used (e.g. slides from Mauritius emphasizing not intended to target people who are merely poor record-keepers but rather situations with other signs indicating illicit sources of wealth) and recalling that the law targets the property, not the person, i.e. it is not criminal conviction³
- In sum, calls for robust and highly transparent governance frameworks that are designed to ensure accountability
- **Role of tax administrations** in recovering the proceeds of crimes, in general, and UW, in particular:
 - Tax crimes/offences: Evidently, within the mandate of revenue authorities, they support the recovery of the proceeds of *tax* crimes.
 - Non-tax crimes/offences (e.g. money laundering, corruption) and unexplained wealth: Revenue authorities also detect in practice instances of suspicions of *non-tax* crimes and unexplained wealth in general.
 - At least two aspects help facilitate the role of tax authorities:
 - (1) amending the laws to allow, or even oblige, referrals of relevant information in certain cases: for example, the Income Tax Act in Mauritius was amended to include a statutory obligation to make referrals where the director general has reasonable grounds to suspect that a person has acquired unexplained wealth. MRA sends a written report to the Agency to specify the name, addresses of all persons concerned, and the amounts.
 - (2) creating mechanisms for efficient effective (so as not to lose time or money) sharing of information among agencies: for example, in Mauritius, between MRA, ICAC, FIU and police where there are suspicions of money laundering or corruption. Similarly, Zimbabwe is considering drafting/updating MoUs and procedures to liaise with other LEAs (i.e. Zimbabwe Anti-Corruption Commission; National Prosecuting Authority) through sharing of information where its legally permissible to do so and improving databases.
 - Another approach is:
 - As seen in Zimbabwe and UK, the revenue authorities (ZIMRA and HMRC) are *themselves* listed as an “enforcement authority” under the UWO law with the power to directly apply to the Court for UWOs.
 - The experience in Zimbabwe illustrates the potential for mutually reinforcing relationship between UWOs and tax authorities/collection:
 - (1) how tax authorities support the successful implementation of UWOs (i) because they can help detect & investigate ill-gotten wealth and (ii) because ZIMRA has powers of seizure and attachment of property, and

³ Note: this point is relevant for the types of UW laws discussed at the conference; some countries have what are often referred to as illicit enrichment offences, e.g. modelled after Article 20 of the UNCAC, that do have criminal consequences.

- (2) vice versa, how UWOs support the recovery of taxes because, in some cases, undeclared unexplained wealth can be included in the gross income of the respondent and taxed accordingly.

How are recovered funds used?

- South Africa: either for victims or for Criminal Assets Recovery Account (CARA), e.g. in 2019\20 financial year, 159m was paid into CARA and R29.4 was paid to victims (see slides for more information); CARA: assists law enforcement agencies; must submit a motivational application; only used for projects (not for e.g. filling vacancies)
- Mauritius: National Recovery Fund dedicated to projects for alleviating poverty; includes measures to ensure transparency, e.g. submitting audited accounts to the National Assembly, e.g. voluntarily publishing annual reports on audited accounts and case statistics, among others