



Beneficial ownership in law: Definitions and thresholds

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Overview

To maximise the impact of beneficial ownership (BO) registers, it is important to minimise loopholes and make data as useful as possible. A legal definition of BO and its associated thresholds form the foundation on which a disclosure regime is built. This is necessary for those that hold significant interests in legal entities to be classed as beneficial owners and to have a legal obligation to declare their interests. Research with implementers and BO transparency (BOT) experts has shown that a robust legislative framework for BOT, including a good legal definition of BO, is one of the key enablers to BOT achieving its policy impact.¹ BO should be clearly and robustly defined in law, with low thresholds used to determine when ownership and control is disclosed.

Leading policy definitions of beneficial ownership have converged in recent years, and it is possible to start to identify best practice elements of definitions. Developing a robust definition involves ensuring these components are included in the definition, and adapting these to a specific local context. Thresholds at which it becomes a legal requirement to disclose BO are often part of legal definitions and contentious areas of debate. Low thresholds are important to ensure that most or all people with relevant BO and control interests are identified in the disclosures.

Careful consideration of definitions and thresholds is essential, as seemingly minor decisions during the early stages of implementation can have significant consequences for systems development and data publication. As this briefing illustrates, a weak legal definition can leave large numbers of beneficial owners invisible, undermining the goals of BOT reform. Thresholds that are not commensurate with the level of risk an individual, company or sector form can similarly leave large blindspots in disclosure regimes.

This policy briefing aims to help policymakers and those implementing or supporting BOT to think through the decisions required to define BO in law and to set appropriate thresholds, and how to operationalise these. The briefing outlines key policy principles, explains why these are important, and highlights emerging good practice from different countries. The briefing relates only to the BO of companies, and not trusts or other legal arrangements.²

A clear and robust definition – with low thresholds used to determine when ownership and control is disclosed – is a core tenet of the [Open Ownership Principles](#). The Principles set the standard for effective beneficial ownership disclosure and establish approaches for publishing BO data. They make published data usable, accurate and interoperable.

¹ Extractive Industries Transparency Initiative and Open Ownership, “Catalysing transformative change in beneficial ownership transparency”. August 2020. Available at: <https://www.openownership.org/uploads/Opening%20Extractives%20Research%20Report.pdf> [Accessed 29 September 2020].

² There are specific issues for BO disclosures that relate to trusts and other legal vehicles that are not dealt with in this briefing. For trusts, there is general consensus in international policy spheres that the settlor(s), trustee(s), protector(s), beneficiaries, and any other person exercising ultimate control through direct or indirect ownership or any other means, would be deemed beneficial owners. See, for example, European Union, “Directive (EU) 2018/843”. 30 May 2018, Article 1, Paragraph (2) (b). Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0843&from=EN> [Accessed 28 August 2020]; FATF, “Guidance on Transparency and Beneficial Ownership”. October 2014, p30. Available at: <https://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf> [Accessed 28 August 2020]; OECD, “Standard for Automatic Exchange of Financial Information in Tax Matters”. 2018, p22. Available at: <https://www.oecd.org/tax/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf> [Accessed 28 August 2020].



Draft beneficial ownership definition

A beneficial owner is a **natural person** ^b who has the right to some share or enjoyment of a legal entity's income or assets (**ownership** ^c) or the right to direct or influence the entity's activities (**control** ^c). Ownership and control can be exerted either **directly or indirectly**. ^d

Beneficial ownership should be disclosed when an individual's aggregate control of, or economic benefit from, a company reaches or exceeds:

- **5%** ^f of the company's stock, votes, profits or assets; or
- The right to appoint board members or company officers.

The **5% threshold** ^g applies in particular to, but is not limited to, the following types of economic or control interest:

- **Ownership of shares**
- **Control over voting rights**
- The **right to profits or distribution of assets**
- The **right to enjoyment of the company's assets** ^h
- **Other influence or control** over the company
- **Other economic benefits** derived from the company.

The interests of a beneficial owner may be maintained directly or indirectly via mechanisms including, but not limited to:

- Influence or **control granted through the rules or articles of the company or via a special class of share**.
- A **legal instrument** (i.e. a contract or agreement) that grants an individual control or financial benefit, such as a profit-sharing agreement.
- An **informal agreement** that grants an individual control over the company or financial benefit from the company, such as exercising **control via a family member or associate without a legal contract**. ⁱ
- A **financial instrument** that grants ownership or control rights, such as conditions attached to a loan.
- A **legal arrangement or structure** that allows an individual to exercise control through a nominated intermediary, such as a nominee shareholding arrangement or a parent exercising control on behalf of a minor.

Where no beneficial owners of a company reach the thresholds for disclosure, all board members and senior managing officials should be disclosed as the parties responsible for the declaration. ^j

- ^a Legislation in a jurisdiction should include a single and unified definition of what constitutes BO (page 7) consisting of a broad catch-all definition, coupled with a non-exhaustive list of example ways in which BO can be held (page 8)
- ^b The definition should specify that a beneficial owner is a natural person (page 6)
- ^c The definition should cover both ownership and control interests (page 6)
- ^d The definition should encompass both indirect and direct interests (page 6)
- ^e Governments should require the disclosure of, and publish the way in which, an individual exercises BO over a company, including the exact percentage of ownership and control (page 18)
- ^f Thresholds should be set low to ensure that most or all people with relevant BO and control interests are identified in the disclosures (page 11)
- ^g Countries should apply a risk-based approach to thresholds, and should consider applying even lower thresholds to companies, sectors or individuals with higher associated risks – such as politically exposed persons (PEPs) – in secondary legislation (page 12)
- ^h Governments should provide companies with clear guidance on how to identify qualifying beneficial owners and how to calculate indirect ownership percentages; for instance, how to calculate the threshold on the enjoyment of assets (page 18)
- ⁱ Definitions should be adapted for local contexts; for instance, by assuming joint action by family members in countries where this is common (page 4)
- ^j The law should include reporting requirements for firms where no person falls within the threshold or definition of BO (page 18)

This definition captures the main ways in which a legal entity can be owned and controlled but will need to be altered for local circumstances, and is not intended to be used as a replacement for legislative expertise. The draft definition demonstrates the principles of best practice covered in this briefing.



Defining beneficial ownership

The Financial Action Task Force (FATF) defines a beneficial owner as “the natural person(s) who ultimately owns or controls [a legal entity,] and/or the natural person on whose behalf a transaction is being conducted.”³ In other words, the **beneficial owner** is the person or persons who benefit from or exercises control over a legal vehicle. The concept of a **legal owner** of a company is slightly different in that it refers to the owner whose name appears on the shares (see Figure 1). For many ordinary companies not set up for illicit purposes the beneficial and legal owners of a given entity are often the same person, but this is far from always being the case.

Whilst direct forms of ownership and control – for instance, through the holding of ordinary shares – are relatively straightforward, there are also more complex ways in which natural persons can have indirect ownership or exercise indirect control over legal entities. These can include through ties of kinship or other types of affiliation, shareholder agreements, nominee shareholders, and

convertible stock.⁴ Similarly, someone may derive substantial economic benefit from a legal entity – for instance, through the enjoyment of assets – without holding any formal ownership shares. The World Bank highlights the importance of including indirect ownership when defining BO, arguing that BO should be understood as a material, substantive concept – referring to de facto control over a corporate vehicle – and not a purely legal or quantitative definition.⁵

Defining what constitutes indirect ownership and control is the main challenge in legal definitions. Control of a corporate vehicle can be exercised in many different ways, including through ownership, contractual, or informal arrangements.⁶ Additionally, **the ways in which an individual can directly or indirectly control or own a business will depend on the specific legal context** in a country, including via its company, inheritance, and tax laws, which can all provide other ways for individuals to derive benefits from a company.

³ Financial Action Task Force Guidance, “Transparency and Beneficial Ownership”. October 2014. Available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf> [Accessed 29 September 2020].

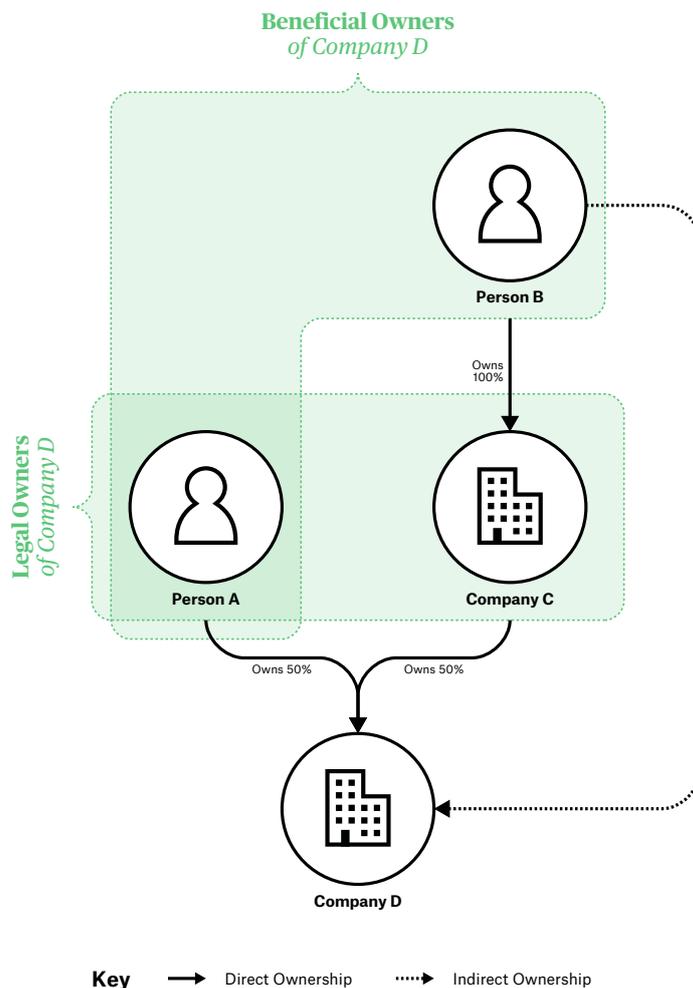
⁴ Transparency International G20 Position Paper, “Beneficial Ownership Principles”. May 2015. Available at: https://www.transparency.org/files/content/activity/2015_TI_G20PositionPaper_BeneficialOwnership.pdf [Accessed 29 September 2020].

⁵ World Bank, “The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It”. 2011. Available at: <https://star.worldbank.org/sites/star/files/puppetmastersv1.pdf> [Accessed 29 September 2020].

⁶ Ibid.



Figure 1. Types of Ownership



Person A and Company C are the legal owners of Company D. Person B is the legal owner of company C. Person A and Person B are the beneficial owners of Company D. Person A exercises his/her ownership directly, while Person B exercises his/her ownership indirectly through Company C. Company C cannot be a beneficial owner as it is not a natural person.

Therefore, the best way for BO to be defined in law is **to develop a definition that encompasses BO as a substantive concept, that is clear, comprehensive and enforceable**. Another challenge to identifying best practice is that comparatively few jurisdictions have fully implemented BOT, and there are even fewer where the legal definition of BO has been tested in court (the case of Slovakia, outlined in Box 2, is a notable exception).

For more conventional ways of exerting ownership and control, such as holding direct or indirect shares or voting rights, lawmakers often use percentage thresholds as a means to identify BO. Setting such thresholds too high can present a significant loophole, as will be discussed later in this briefing.



Recommendations for a robust definition

Despite the challenges mentioned above, some early evidence of good practice is emerging. As an overarching principle, **BO should be clearly and robustly defined in law**. Open Ownership (OO) has identified five key components that provide necessary minimum standards for such definitions of BO. The first three relate to the key constituent parts of BO definitions, whilst the last two address how best to enshrine these in law.

1. A definition should state that **the beneficial owner must be a natural person**. Even when companies own companies, individuals almost always appear at the end of the ownership chain. Whilst this may seem like an obvious point, a number of jurisdictions still do not meet this requirement. For instance, a 2019 review of legal approaches to BOT in the extractive industries found that 7 out of 16 countries surveyed did not explicitly state that beneficial owners should be natural persons.⁷
2. **BO should cover both ownership and control interests**. The concepts of ownership and control over a legal vehicle are distinct and should be defined separately. However, both should be key components of an overall legal definition of BO. The definition of control should include formal and measurable means, such as controlling 25% of votes, or having the right to appoint board members. Informal methods of control should also be included in the definition, such as cases where an individual is able to direct board decision-making despite not being a legal shareholder, through familial or other ties. It is these latter types of control that have sometimes received less attention when countries draft their BO definitions. For instance, a 2015 assessment of G20 BO principles implementation found that China's definition of BO had a limited conception of control that only extended to shareholders with voting rights and did not include other forms of de facto control.⁸
3. **BO should encompass both indirect and direct interests**. Both ownership and control can be held directly as well as indirectly through a chain of interest or nominee shareholders or directors (therefore BO is also often termed *ultimate* BO). A definition that does not cover indirectly exercised control or ownership will merely cover legal ownership and fail to capture BO adequately. Kazakh law provides an example of how countries might address this. Article 47 of its Subsoil and Subsoil Use Code explicitly states that: "Indirect control means the ability of a person or organization to control another organization through a third organization(s), between which there is the direct control."⁹

⁷ Afghanistan, Cameroon, Colombia, Republic of Congo, Kazakhstan, Liberia, and Malawi. See: Extractive Industries Transparency Initiative, "Legal approaches to beneficial ownership transparency in EITI countries". June 2019. Available at: https://eiti.org/files/documents/legal_approaches_to_beneficial_ownership_transparency_in_eiti_countries.pdf [Accessed 29 September 2020].

⁸ Transparency International, "China Beneficial Ownership Transparency". 2015. Available at: https://www.transparency.org/files/content/publication/2015_BOCountryReport_China.pdf [Accessed 29 September 2020].

⁹ Adilet, "On Subsoil and Subsoil Use". 27 December 2017. Available at: <http://adilet.zan.kz/eng/docs/K1700000125> [Accessed 29 September 2020].



Box 1: Definitions in international policy

Historically, there have been some differences between jurisdictions in their definitions of BO,¹⁰ creating substantial challenges for data users.¹¹ However, in recent years, definitions have converged somewhat and there are now a number of commonly accepted international definitions that incorporate the three components outlined above. For each of these guiding definitions, national definitions still need to be adopted or transposed in line with the guidance, taking into account the country's own legal context. As a result, we still see definitions diverge between countries, which, at times, causes negative consequences. For instance, EU member states are implementing different BO definitions, resulting in some countries having weaker definitions in terms of supporting the EU's desired policy impact on anti-money laundering (AML). A person may be considered a beneficial owner according to one country's definition but not according to the neighbouring country's definition (see, for instance, the example described in Box 2).

- In 2014, the G20 endorsed the High Level Principles on Beneficial Ownership Transparency, which included “Principle 1: Countries should have a definition of ‘beneficial owner’ that captures the **natural person(s)** who **ultimately owns or controls** the legal person or arrangement”.
- The FATF recommendations – covering 37 jurisdictions and 2 regional bodies, as well as 9 FATF-style regional bodies (FRSBs) – defines BO as “the natural person(s) who ultimately [including indirectly] **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.”¹²
- The EU, in their Fourth Anti-Money Laundering Directives (AMLD4) – covering 27 member states – echoes this definition closely, defining the beneficial owner as “any **natural person(s)** who **ultimately owns or controls** the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted.”¹³
- The Extractive Industries Transparency Initiative (EITI) Standard – covering 53 implementing countries – defines BO as “the **natural person(s)** who **directly or indirectly** ultimately **owns or controls** the corporate entity.”¹⁴

When seeking to enshrine these three constituent parts of BO definitions in law, countries should adhere to the following two principles:

4. There should be a **single and unified definition of BO in a jurisdiction**, preferably in primary legislation. All other laws involving BO should refer to this law. This, as discussed below, could include varying thresholds for disclosure. It is not uncommon for a jurisdiction to

develop different definitions of BO in different areas of the law, such as one in AML laws and another in legislation relating to public procurement. Mexico, for instance, currently has multiple definitions across the Law for the Prevention and Identification of Illicit Transactions, the Securities Market Law, and the Credit Institutions Law, among others,¹⁵ and is working to harmonise these as part of its efforts to create a public register by 2023. Armenia, meanwhile, defines BO differently and

¹⁰ World Bank, “The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It”. 2011. Available at: <https://starworldbank.org/sites/star/files/puppetmastersv1.pdf>.

¹¹ Refinitiv, “Beneficial ownership: Are you ready for 5AMLD?”. 19 June 2019. Available at: <https://www.refinitiv.com/perspectives/financial-crime/beneficial-ownership-are-you-ready-for-5aml/> [Accessed 29 September 2020].

¹² Financial Action Task Force Guidance, “Transparency and Beneficial Ownership”. October 2014. Available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf> [Accessed 29 September 2020]. <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf>.

¹³ Official Journal of the European Union, “Directive (EU) 2015/849 of the European Parliament and of the Council”. 20 May 2015. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015L0849&from=EN> [Accessed 29 September 2020].

¹⁴ Extractive Industries Transparency Initiative, “Beneficial ownership: Revealing who stands behind the companies”. Available at: <https://eiti.org/beneficial-ownership> [Accessed 29 September 2020].

¹⁵ EITI México, “Apuntes para la divulgación de beneficiarios reales de las empresas extractivas en México”. 25 November 2019. Available at: <https://www.colaboratorio.org/wp-content/uploads/2019/11/BREITIMX-vf-25112019.pdf> [Accessed 29 September 2020].



uses different thresholds in its 2008 AML law and in the 2019 State Registration Law, which governs extractives disclosures. Whilst such an approach may be helpful in initiating new BO disclosure requirements, it may result in confusion during implementation and potentially increase the reporting burden on companies. Having a single definition – with potential variations in thresholds for disclosures – minimises loopholes and makes it easier to produce corresponding forms for data collection. If necessary, certain additions to a unified definition can be added to the law for specific sectors – for example, where further details are required to support policy impact.

5. Legislators should aim to create a **broad catch-all definition of what constitutes BO, and couple this with a non-exhaustive list of example ways in which BO can be held**. This is because those seeking to use legal entities for illicit gain are constantly devising new ways to derive economic benefits from and exercise control over companies, meaning that a definition based solely on a purportedly comprehensive list of typologies would need constant revision. Moreover, each legal context also retains its own set of vulnerabilities that may be exploited, making any effort to create an exhaustive international list also impractical. Therefore, the best approach is for countries to use a broad definition of BO, and complement this with examples that outline specific mechanisms of ownership or control that fall within the definition. The broad definition is important for investigators needing to understand whether specific individuals can be said to be beneficial owners of a company. The list of examples assists companies subject to disclosure requirements to fulfil their reporting obligations accurately. For the holding of shares and voting rights, either directly or indirectly, countries often set percentage thresholds, as will be discussed later in this briefing.

Disregarding any of the five components outlined above can leave loopholes in a BO disclosure regime that may undermine its effectiveness.



Box 2: Slovakia – A case study on BO definitions

Slovakia's Register of Public Sector Partners, established in 2017, is a BO register for private entities that provide goods and services to the public sector, or acquire assets or receive qualified financial contributions from the public sector. As of June 2020, it contained 78,608 beneficial owners and 28,358 companies.¹⁶

Slovak law used to contain multiple definitions of BO for different sectors. However, during its implementation of the EU's AMLD4, Slovakia replaced these with a unified definition with Act no. 315/2015 (Act on the Register of Public Sector Partners and on Amendments to Certain Laws). This defined the “final beneficiary” in Slovakia's primary legislation on anti-money laundering (Act no. 297/2008) as:

“(1) Every natural person actually managing or controlling a legal entity, a natural person (entrepreneur) or a non-investment pooled asset fund, and every natural person for whose benefit the parties mentioned here above carry out their activities or business is deemed a final beneficiary; final beneficiaries are in particular,

a) in the case of a legal entity that is neither a non-investment pooled asset fund nor an issuer of securities admitted to trading on a regulated market, that is subject to requirements for provision or disclosure of information under a specific regulation, 37) equivalent legal regulations of a Member State or equivalent international standards, deemed final beneficiary shall be a natural person who

1. has a direct or indirect share or their total sum of at least 25% in voting rights in a legal entity or its registered capital, including shares registered to bearer,

2. is entitled to appoint, otherwise nominate or dismiss a statutory body, management body, supervisory body or control body of the legal entity or any member of the bodies thereof,

3. exercises control of a legal entity otherwise than stated in items (1.) and (2.) above,

4. is entitled to at least 25% of economic interest in the business of the legal entity concerned or in other activity undertaken by the legal entity,

b) in the case of a natural person-entrepreneur,¹⁷ deemed final beneficiary shall be a natural person entitled to

at least 25% of economic interest in the business of the natural person-entrepreneur concerned, or in other activity undertaken by the natural person-entrepreneur,

c) in the case of a non-investment pooled asset fund, deemed final beneficiary shall be a natural person who

1. is the founder or incorporator of the non-investment pooled asset fund; where the founder or incorporator is a legal entity, deemed final beneficiary shall be a natural person under subparagraph (a),

2. is entitled to appoint, otherwise nominate or dismiss a statutory body, management body, supervisory body or control body of the non-investment pooled asset fund or the members of the bodies thereof, or is a member of a body which is entitled to appoint, otherwise nominate or dismiss those bodies or any member thereof,

3. is a statutory body, management body, supervisory body or control body or a member of the bodies thereof,

4. receives at least 25% of funds provided by the non-investment pooled asset fund where future beneficiaries of the funds have been specified; where future beneficiaries of the funds have not been specified, a group of people having a significant benefit from the foundation or operation of the non-investment pooled asset fund shall be deemed a final beneficiary.

(2) Where there is no natural person that would meet the criteria listed in paragraph (1)(a), top management members shall be deemed final beneficiaries; the statutory body, a member of the statutory body, procura holder and senior manager reporting directly to the statutory body are deemed members of top management.

A natural person not meeting the criteria under paragraph (1), subparagraphs (a), (b), or (c), items (2.) through (4.) on his/her own, but meets at least one of those criteria jointly with another person acting in concordance or sharing the same procedure shall also be deemed a final beneficiary.”¹⁸

Slovak lawmakers tried to stay as close as possible to the intention of the EU definition that they were transposing, whilst simultaneously adapting it to the national context. As such, it has maintained all components of the EU definition, but with the addition of some provisions on joint control and coordinated action that were based on practical Slovak experiences

¹⁶ Ministerstvo Spravodlivosti Slovenskej Republiky, “Rozšírené vyhľadavanie”, Available at: <https://rpvs.gov.sk/rpvs/Partner/Partner/VyhľadavaniePartnera> [Accessed 23 June 2020].

¹⁷ A natural person-entrepreneur is a simple organisational and legal form found in Slovakia, and a way to conduct business without founding a legal entity, similar to a private entrepreneur or self-employment.

¹⁸ SlovLek, “297/2008 Coll.” 25 October 2016. Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2008/297/vyhlasene_znenie.html [Accessed 29 September 2020].



of wrongdoing. This means that whilst somebody may not meet the definition or threshold for BO individually, they may still do so in conjunction with one or more others. Joint control and coordinated action is assumed, for instance, if people are family members, or if different shareholders show a similar voting history.

The Slovak definition mentions a number of specific criteria (“in particular”) for BO, whilst also remaining broad in other areas, thereby preserving the definition’s substantive nature. For instance, an expensive car owned by a company, but driven by somebody not employed by that company (enjoyment of assets) would be covered by the phrasing in (1) c) 4: “significant benefit”, which covers any type of economic benefit that someone is not entitled to by law. It is not uncommon in Slovakia for companies to allow politicians to drive their luxury cars. The definition also covers those who may not have any control in the moment, but can instantly acquire control when they wish to do so.

Differing BO definitions across countries can mean that an individual may be identified as a beneficial owner of a company in one country, but not in another. This has already been seen in cases where multinationals have local subsidiaries in both Slovakia and the neighbouring Czech Republic, and thus are subject to different

reporting requirements in the two countries.¹⁹ At the time of writing, the proposed wording in a new Czech law on BO, due to be passed in November 2020, did not include examples (missing the words “in particular”), but was phrased as an exhaustive list of criteria under which someone could be considered a beneficial owner. This risks reducing BO from a substantive concept to something legal and formal. In Slovakia, if somebody holds 24.9% of the shares – thereby falling beneath the disclosure threshold – and other shareholders do not hold more than 1% each, this person would still have to disclose their beneficial ownership if, for instance, the company bylaws allow that person to make substantial decisions.

The robustness of the Slovakian definition has been tried and tested in the courts. A court cannot identify beneficial owners, but can rule on whether a specified individual is or isn’t a beneficial owner – for instance, if a company is challenged on their disclosure in which under Slovak law the burden of proof is placed on the company. The court has already had more than a dozen rulings regarding beneficial ownership. This has also included removing companies from the register, and thereby making them ineligible to bid for state contracts.²⁰

¹⁹ See Open Ownership, “Early impacts of public registers of beneficial ownership: Slovakia”. September 2020. Available at <https://www.openownership.org/uploads/slovakia-impact-story.pdf> [Accessed 14 October 2020].

²⁰ See, for instance, Ministerstvo Spravodlivosti Slovenskej Republiky, “Zverejňovanie súdnych rozhodnutí a ďalších informácií (InfoSúd)”. November 2018. Available at: <https://obcan.justice.sk/infosud/-/infosud/i-detail/rozhodnutie/3b90ffbc-a519-4e53-9627-329d6708b85d%3A4744e659-e5a2-42b3-a069-06abc5302a19> [Accessed 29 September 2020].



Thresholds

For the most common forms of ownership and control – namely, direct or indirect possession of ownership shares, voting rights, and right to income – most jurisdictions establish a threshold for disclosure requirements, expressed as a percentage of total ownership or control. Determining the level at which to set these thresholds is often a central area of debate when countries draw up legal definitions of BO. As a general principle, **low thresholds are important to ensure that most or all people with relevant BO and control interests are identified in the disclosures.** However, there is no one-size-fits-all level for thresholds since different percentages will be appropriate in line with the different policy aims that governments pursue via BOT. Similarly, certain economies or industry sectors that are associated with higher risks of financial crime should apply more stringent thresholds. Whilst thresholds can always be exploited by individuals seeking to avoid disclosure requirements by limiting their ownership stakes to just below the level stipulated in law, having low thresholds makes this more difficult. Moreover, where a robust definition of BO exists, which incorporates the substantive (and less common) criteria of ownership and control detailed above, certain individuals may still have to disclose their BO of a company, even if their ownership falls below the threshold level.²¹ Based on OO's experience supporting BO implementations, several countries find that a threshold falling somewhere between 5% and 15% – but sometimes as low as 0% for some people or sectors – is a good balance between the various issues discussed in this section.

²¹ For example, an individual could still qualify as a beneficial owner if they have a right to enjoyment of substantial company assets, even if they control few or no shares in that entity.



Box 3: Thresholds in international policy

No clear international consensus has emerged over the level at which thresholds should be set, although there is evidence of a trend over recent years towards lower thresholds.

In its 2014 guidance on BOT, FATF does not recommend a specific threshold level, but mentions a 25% figure in the context of examples to illustrate how thresholds would work.²²

Several of the early implementers of public BO registers, including the UK²³ and Ukraine,²⁴ adopted a 25%

threshold in 2015, which was also incorporated into other leading international policy instruments such as the EU's AMLD4 in the same year.²⁵

However, there appears to be increasing recognition internationally that this threshold level leaves many relevant beneficial owners outside of the disclosures. A number of countries have applied lower thresholds in their more recent legislation. This includes, in 2020, the national BO laws for Argentina (1 share or above),²⁶ Senegal (2%),²⁷ Nigeria (5%),²⁸ Paraguay (10%),²⁹ Kenya (10%),³⁰ and the Cayman Islands (10%).³¹

Policy goals and a risk-based approach to thresholds

When setting threshold levels, governments should start by examining the policy goals behind their drive to create BO registers. These can include tackling corruption, money laundering, terrorism financing, and tax evasion, or supporting economic activity by lowering the chance of fraud and the cost of due diligence. These policy goals are not mutually exclusive and many countries implement BO registers to pursue several of these aims in tandem. A low threshold is necessary to capture data on the relevant beneficial owners that enable governments to meet the majority of these policy goals.

When setting thresholds, OO recommends that implementers adopt a risk-based approach (RBA) to most

effectively meet their specific policy goals. High thresholds leave a disclosure regime vulnerable to loopholes, whilst low thresholds enable authorities to capture more data on those with relationships of ownership or control over corporate vehicles.

Under some circumstances, applying an RBA may lead countries to apply different thresholds across different sectors of the economy. For example, an economy highly dependent on revenues from resource extraction – a sector known to be prone to corruption³² – may apply a lower threshold for their extractive sector disclosures than for the rest of the economy. In such cases, care should be taken to avoid creating a loophole where companies can choose which disclosure regime they fall under. To mitigate this, there should be a clear definition of each economic sector to which a particular threshold applies.

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- ²² Financial Action Task Force, "Transparency and Beneficial Ownership". October 2014. Available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf> [Accessed 29 September 2020].
- ²³ UK Legislation, "Small Business, Enterprise and Employment Act 2015". Available at: https://www.legislation.gov.uk/ukpga/2015/26/pdfs/ukpga_20150026_en.pdf [Accessed 29 September 2020].
- ²⁴ Extractive Industries Transparency Initiative, "Beneficial ownership in Ukraine: Description and road map". Available at: https://eiti.org/files/documents/ukraine_bo_roadmap_in_english.pdf [Accessed 29 September 2020].
- ²⁵ Official Journal of the European Union, "Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015". 5 June 2015. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0849&from=EN> [Accessed 29 September 2020].
- ²⁶ The Official Gazette of the Argentine Republic, "Federal Administration of Public Revenue". 15 April 2020. Available at: <https://www.boletinoficial.gob.ar/detalleAviso/primera/227833/20200415> [Accessed 29 September 2020].
- ²⁷ Interview with EITI Francophone Director, 2 September 2020.
- ²⁸ Section 868 of the Companies and Allied Matters Act, 2020 which defines a Person of Significant Control. See: https://www.proshareng.com/admin/upload/report/13880-Companies%20and%20Allied%20Matters%20Act,%202020_-proshare.pdf.
- ²⁹ Biblioteca y Archivo del Congreso Nacional, "Law No. 6446 / Creates the Administrative Registry of People and Legal Structures and the Administrative Registry of Final Beneficiaries of Paraguay". 20 January 2020. Available at: <https://www.bacn.gov.py/leyes-paraguayas/9116/ley-n-6446-crea-el-registro-administrativo-de-personas-y-estructuras-juridicas-y-el-registro-administrativo-de-beneficiarios-finales-del-paraguay> [Accessed 29 September 2020].
- ³⁰ Kenya Subsidiary Legislation, "The Companies Beneficial Ownership Regulations". 2020 Available at: [https://brs.go.ke/assets/downloads/The%20Companies%20\(Beneficial%20Ownership%20Information\)%20Regulation%202020.pdf](https://brs.go.ke/assets/downloads/The%20Companies%20(Beneficial%20Ownership%20Information)%20Regulation%202020.pdf) [Accessed 29 September 2020].
- ³¹ Cayman Islands Proceeds of Law (2020 Revision), "Anti-Money Laundering Regulations". 9 January 2020. Available at: https://www.cima.ky/upimages/commonfiles/1580219233Anti-MoneyLaunderingRegulations2020Revision_1580219233.pdf [Accessed 29 September 2020].
- ³² The Economist, "Bribery pays – if you don't get caught". 27 August 2020. Available at: <https://www.economist.com/business/2020/08/27/bribery-pays-if-you-dont-get-caught> [Accessed 29 September 2020].



However, implementing low thresholds does involve some challenges. It may increase the reporting burden on companies and is likely to require more state investment to communicate and explain how to comply with the disclosure requirements. Additionally, the lower the threshold is set, the more challenging it is for companies to be up to date with accurate identification of beneficial owners. In complex corporate structures, by the time the information of changes in BO gets to the declaring entity at the bottom of a holding structure, it is possible that there is already a new change going on at the top of the structure. The policy benefits and transparency of very low thresholds – e.g. under 5% – should be considered against the costs of implementation for government and the ability to comply from a business administration perspective for the private sector. Governments will need to judge the trade-off between these costs and outcomes.³³

The following section outlines how to take a risk-based approach to thresholds to meet two policy objectives: tackling corruption and money laundering, and improving the business environment.

Tackling corruption and money laundering

In order for BOT to reduce corruption and money laundering, thresholds should be determined in light of the corruption risks present in the jurisdiction, and specific risks associated with the sector(s) or types of legal entities that will be subject to disclosure requirements. Contrary to a legal definition of BO, where a single definition leads to more effective disclosure, it is possible to set different thresholds within a single economy, as certain sectors may be deemed to be higher risk and countries can respond to this by implementing a lower threshold. Employing an RBA to BOT can help target limited government resources towards tackling higher risk areas by applying lower thresholds to certain higher risk sectors – such as extractive companies – or classes of individuals – for example, politically exposed persons (PEPs).

Sector-specific thresholds

This is most frequently seen in the case of the extractive industries, which has been identified as posing a significant corruption risk.³⁴ Armenia, for instance, moved from a 20% threshold for BO in its 2008 AML law³⁵ to a 10% level for its 2019 mining sector disclosures.³⁶ Similarly, Liberia adopted a 5% threshold for mining, oil, gas, and agriculture, versus a higher 10% threshold for the forestry sector.³⁷ Ghana has adopted a 0% threshold for all locally registered extractive sector companies declaring to the Registrar under the amended Companies Act of 2019, No 992. Foreign extractive companies operating in Ghana will be subject to a 5% disclosure threshold.³⁸ Sector-specific thresholds are easier to implement in regulated industries or other situations where authorities know which companies are operating in a given sector, and therefore also which companies are expected to declare at a given threshold. Without this guarantee, there is a risk that ownership or control interests will be hidden in the most permissive disclosure regime, by misdeclaring the sector in which a company is operating.

Setting low thresholds ensures that a greater number of beneficial owners are disclosed to authorities. Examination of the data from Nigeria's extractive industry disclosures in Figure 2 demonstrates the extent to which different thresholds can alter the number of interests disclosed by beneficial owners. If Nigeria had applied a 20% threshold for its extractive industries disclosure requirements, rather than effectively having no threshold level, then the number of reported interests would have halved. This would very likely have had detrimental effects on the policy aims of helping to prevent or investigate corruption cases linked to the sector. By comparison, Myanmar has set a threshold of 5% for its extractives disclosures. Had the threshold been set at 20%, around 40% of the beneficial owners' interests included in the data would not have been disclosed to authorities (see Figure 3).

³³ This is not to say this is never feasible. Some countries, such as Curaçao, have set the threshold at a single share. See: Tax Justice Network, "Argentina finally has a beneficial ownership register". 20 April 2020. Available at: <https://www.taxjustice.net/2020/04/20/argentina-finally-has-a-beneficial-ownership-register-now-it-should-make-it-public/> [Accessed 29 August 2020].

³⁴ The Economist, "Bribery pays – if you don't get caught". 27 August 2020. Available at: <https://www.economist.com/business/2020/08/27/bribery-pays-if-you-dont-get-caught> [Accessed 29 September 2020].

³⁵ Republic of Armenia Law, "On Combating Money Laundering and Terrorism Financing". 21 June 2008. Available at: https://www.cba.am/Storage/EN/FDK/Regulation_old/law_on_combating_money_laundering_and_terrorism_financing_eng.pdf [Accessed 29 September 2020].

³⁶ As of July 2020, this applies only to the extractive industries, though an expansion of the disclosure regime to cover all sectors is planned for late 2020. See: <https://www.arlis.am/DocumentView.aspx?DocID=131518>.

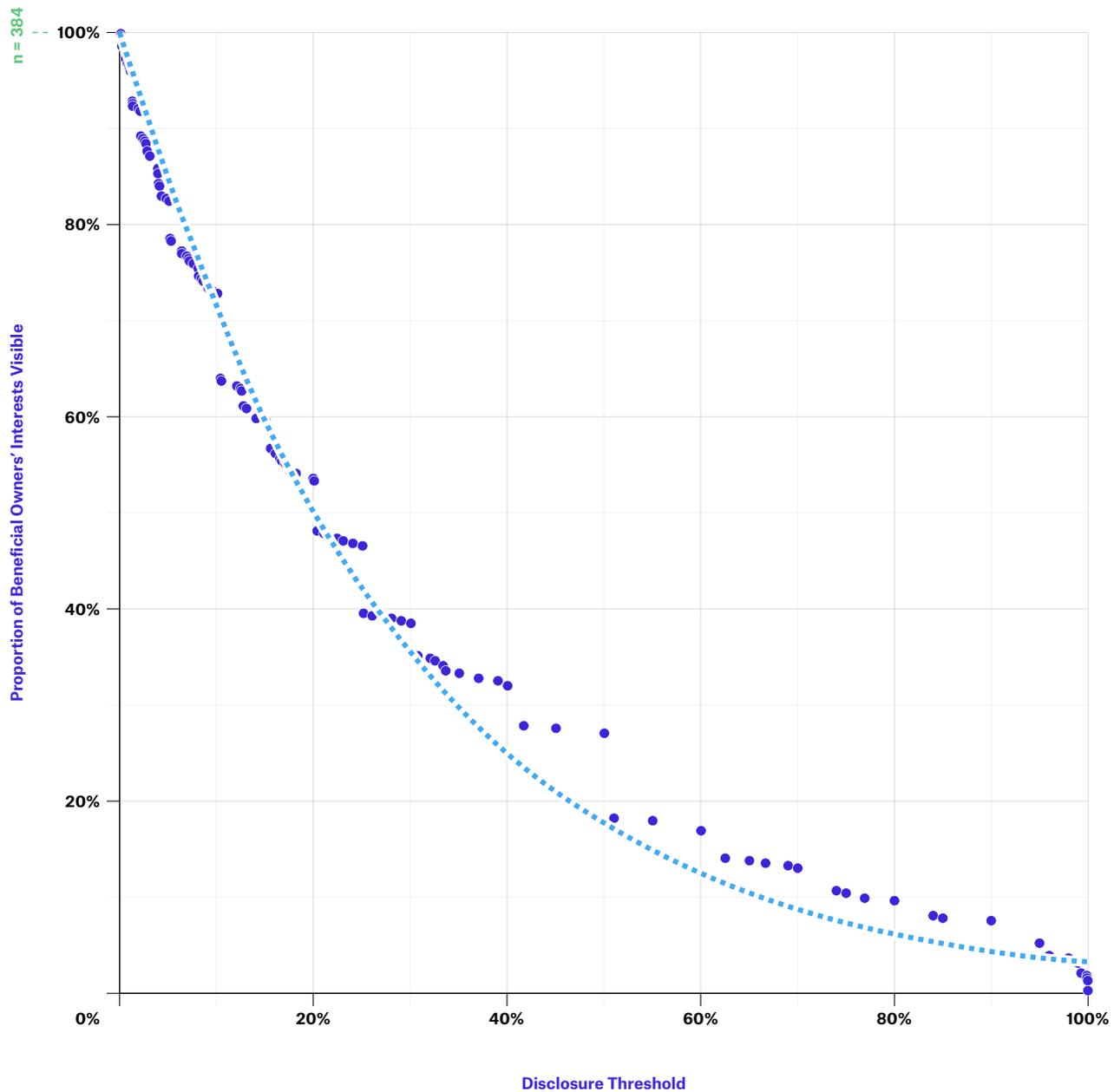
³⁷ Liberia Extractive Industries Transparency Initiative, "Beneficial Ownership Roadmap". December 2016. Available at: https://eiti.org/files/documents/leit_bo_roadmap.pdf [Accessed 29 September 2020].

³⁸ Ghana Business News, "Ghana to deploy Beneficial Ownership Register in October". 9 September 2020. Available at: <https://www.ghanabusinessnews.com/2020/09/09/ghana-to-deploy-beneficial-ownership-register-in-october/> [Accessed 29 September 2020].



Figure 2. Visibility of beneficial ownership in extractive companies in Nigeria

at different thresholds (based on disclosures on the NEITI portal)



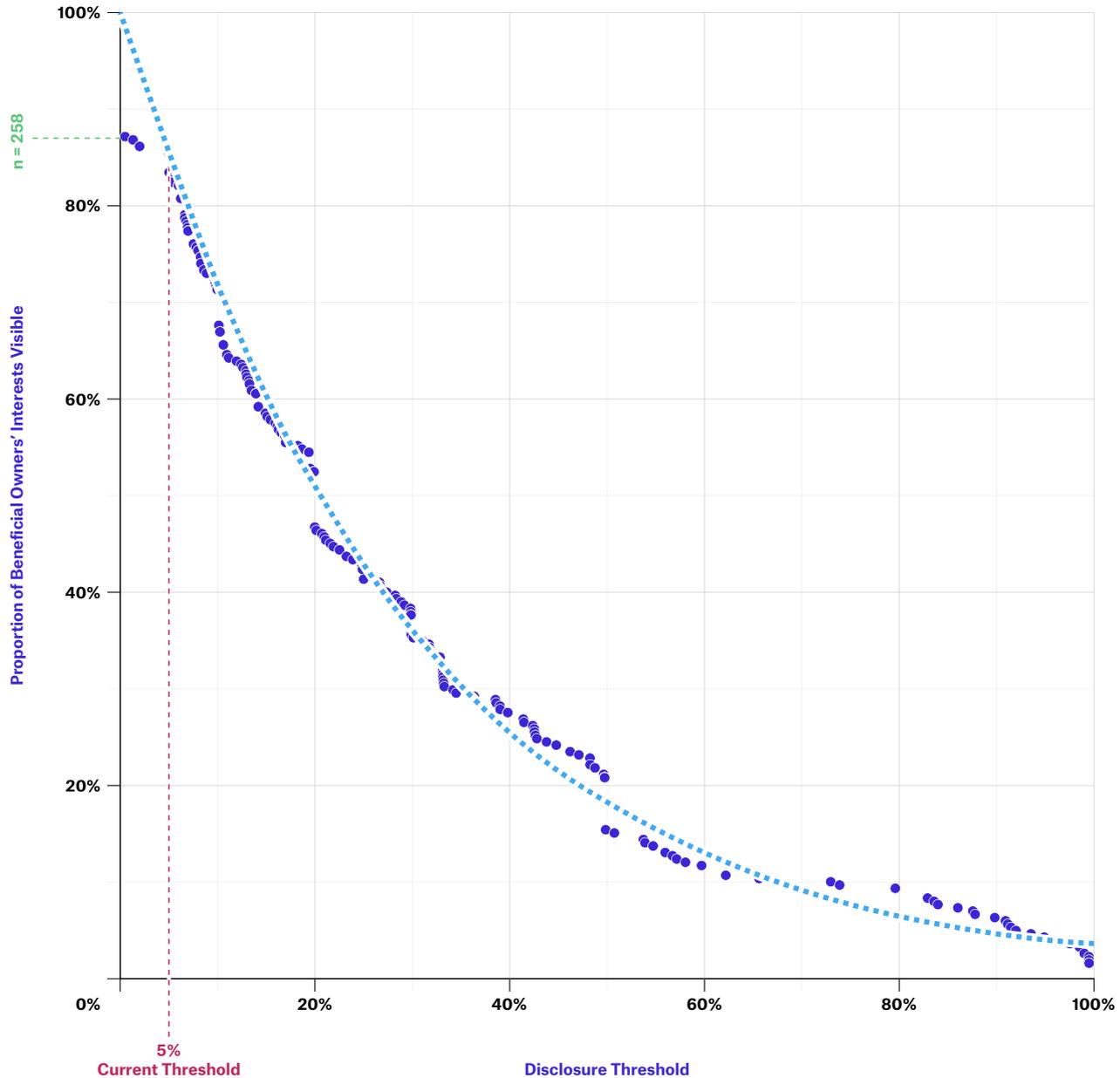
Graph showing the proportion of beneficial owners visible at different hypothetical threshold levels in Nigeria's extractives sector. It is based on an experimental treatment of NEITI bulk data, analysing declared percentages ownership and control from the beneficial ownership disclosures of Nigeria's extractives companies to determine the effect of adjusting the threshold on visibility of BOs. The sample size (n=384) is the total number of beneficial owners' interests disclosed.

Source: Nigeria Extractives Industry Transparency Initiative (NEITI), "Beneficial Ownership Portal". Available for bulk download from: https://bo.neiti.gov.ng/company_excel_download/xls (Oil and Gas); and: https://bo.neiti.gov.ng/company_excel_download_sm/xls (Solid Minerals) [Accessed 11 May 2020]



Figure 3. Visibility of beneficial ownership in extractive companies in Myanmar

at different thresholds (based on disclosures on the MEITI portal)



Graph showing the proportion of beneficial owners visible at different hypothetical threshold levels in Myanmar's extractives sector. It is based on an experimental treatment of MEITI bulk data, analysing declared percentages ownership and control from the beneficial ownership disclosures of Myanmar's extractives companies at a 5% threshold to determine the effect on visibility of BOs of adjusting the threshold. Disclosures beneath 5% are voluntary. The line of best fit has been extrapolated to show what the hypothetical total number of disclosures could be if the threshold were set at 0%. The sample size (n=258) is the total number of beneficial owners' interests disclosed.

Source: Myanmar Extractives Industry Transparency Initiative (MEITI), "Beneficial Ownership Disclosures". Available for bulk download from: <https://bo.dica.gov.mm/pages/bo-disclosure> [Accessed 13 May 2020]



Politically exposed persons³⁹

In terms of individuals, for PEPs – those holding senior political office and their close family or associates – an extremely low or 0% BO threshold may be justified. It is widely recognised that the influence and power PEPs derive from their positions can be abused for the purpose of corruption, bribery, and money laundering.⁴⁰

In July 2020 in Kenya, the press reported that a cousin of President Uhuru Kenyatta would likely benefit from Kenyatta's decision to abolish a tax on gambling as he indirectly held stakes in the sector via shareholdings of between 0.5% and 3% in affiliated companies.⁴¹ A 0% threshold for PEPs can help bring such potential conflicts of interest to light at an early stage. Thresholds for PEPs in Armenia were set at 0% in its 2020 extractive industry disclosures. This is in line with the EITI's guidance on PEPs, and also followed allegations that stakes in mining firms had been illegally sold to firms controlled by politically-connected figures after the revolution in 2018.⁴²

Avoiding thresholds

Authorities and regulated entities should remain mindful that thresholds are only a minimum level for triggering BO disclosure requirements, and that further investigation may be required for entities and individuals deemed suspicious or high risk but which fall below this level.⁴³ Implementers should consider that high thresholds can serve as an impediment to investigations of individuals and entities that do not meet this threshold. This was illustrated in the Cayman Islands in August 2020 when the Ombudsman's Office ordered the Registrar of Companies not to collect information on individuals who possessed ownership stakes below the level legally mandated in the territory's Company Law. This meant that an investigation would have to use BO information held by the company

itself (thus tipping it off to the investigation), or make a special access request to the register, which adds time and bureaucracy to the investigation.⁴⁴

A threshold set at any level involves a risk that illicit actors will deliberately circumvent the legislation by limiting their ownership stake to just below the threshold percentage. This was clearly illustrated in the Russian Laundromat case, for example, in which USD 20.8 billion was reportedly transferred from 19 Russian banks into Moldova and then on to other international destinations. The perpetrators reportedly avoided the BO disclosure requirements at 5% by using multiple entities and limiting their shares to 4.9% per entity. When Moldovan authorities reduced the threshold to 1%, those involved altered their strategy to limit their shareholdings to 0.9%.⁴⁵ More sophisticated schemes of circumventing thresholds have also been identified, including via use of circular ownership structures.⁴⁶ Such schemes again emphasise the importance of only using thresholds as one component of a far broader and more substantive definition of what constitutes BO.

Improving the business environment

In order to manage operational and reputational risks, businesses require good visibility of company ownership and to comply with AML/Combating the Financing of Terrorism (CTF) and Know-Your-Customer (KYC) legislation. In the absence of public BO registers, companies often purchase BO data from third party suppliers who are keen users of the BO data that is publicly available. As one of the main providers, Dun & Bradstreet say, "to accurately calculate the aggregated beneficial ownership, a 10% or 25% threshold may not be enough. Determining ownership as low as 1% to calculate the total ownership percentages across various owners may be required for the compliance officers to be confident."⁴⁷

³⁹ International definitions of PEPs commonly include not just individuals that directly hold political office, but also those close to them, such as their spouse and immediate family. See, for example, United Nations, "Convention Against Corruption", Article 52(1). Available at: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf [Accessed 6 September 2020].

⁴⁰ Financial Action Task Force Guidance, "Politically Exposed Persons (Recommendations 12 and 22)". June 2013. Available at: <https://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf> [Accessed 29 September 2020].

⁴¹ The Elephant, "It's Our Turn to Eat: Cousin of Kenya's President Has Stake in Sportpesa Betting Firm". 2 July 2020. Available at: <https://www.theelephant.info/features/2020/07/02/its-our-turn-to-eat-cousin-of-kenyas-president-has-stake-in-sportpesa-betting-firm/> [Accessed 29 September 2020].

⁴² For more on these allegations, see, for example: https://arinfo.info/full_news.php?id=51522&lang=3.

⁴³ World Bank, "The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It". 2011. Available at: <https://starworldbank.org/sites/star/files/puppetmastersv1.pdf> [Accessed 29 September 2020].

⁴⁴ Cayman Compass, "Ombudsman orders registrar to stop collecting personal information". 14 August 2020. Available at: <https://www.caymancompass.com/2020/08/14/ombudsman-orders-registrar-to-stop-collecting-personal-information/> [Accessed 29 September 2020].

⁴⁵ Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion, "Public Hearing Financial Intelligence Units (FIUs): 'Ins and Outs' and the Russian 'Laundromat' Case". 21 June 2017. Available at: https://www.europarl.europa.eu/cmsdata/128621/PANA%2021%20June%20pm_Verbatim%20Report_EN.pdf [Accessed 29 September 2020].

⁴⁶ The Tax Justice Network has written in detail about how circular ownership structures can be used to avoid disclosure thresholds. See: Tax Justice Network, "More beneficial ownership loopholes to plug". 6 September 2019. Available at: <https://www.taxjustice.net/2019/09/06/more-beneficial-ownership-loopholes-to-plug-circular-ownership-control-with-little-ownership-and-companies-as-parties-to-the-trust/> [Accessed 2 August 2020].

⁴⁷ Dun & Bradstreet, "How Compliance Practices Should Adapt to Increased Beneficial Ownership Scrutiny". 2016. Available at: <https://www.dnb.co.uk/content/dam/english/dnb-solutions/supply-management/beneficial-ownership-white-paper.pdf> [Accessed 29 September 2020].



For businesses to operate with confidence, lower thresholds are preferable, as more data will increase visibility.

On the other hand, lower thresholds may increase the cost of due diligence for AML-regulated entities, although the existence of publicly available registers can help offset these costs. In addition, evidence from countries like the UK have already demonstrated that the cost of compliance with BO disclosure regulations is low for the vast majority of businesses.⁴⁸

⁴⁸ For instance, in a review of the UK register, the median cost of compliance in the UK was £287. See: Department for Business, Energy & Industrial Strategy, "Review of the implementation of the PSC Register". March 2019. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822823/review-implementation-psc-register.pdf [Accessed 1 August 2020].



Operationalising definitions and thresholds

When seeking to apply these principles to drafting BO definitions and thresholds in practice, it is important for implementers to **set concrete plans for periodic review and assessment of threshold levels**, and potentially also the BO definition, to see whether these serve policy goals. Illicit actors will continue to seek new ways to evade disclosure requirements, including by reducing their shareholdings in order to move below threshold levels. Once systems for gathering and publishing data are established, implementers should conduct a detailed assessment of initial disclosures, assessing data quality and coverage and evaluating whether the definition and threshold level has proved adequate to yield disclosures that support their policy goals. Authorities may consider using such an evaluation to determine what loopholes exist in the definition. As part of the iterative design process on which BO reforms are ideally based, authorities may also assess the potential benefits and trade-offs involved in lowering the threshold. Downward revisions of thresholds should also be considered in cases where significant money laundering activities have been detected, as highlighted in the Russian Laundromat case above. Frequent alterations to other aspects of the BO definition should not be required if the original law is formulated along the lines explained earlier in this briefing.

It is also critical that **governments provide companies with clear guidance on how to identify qualifying beneficial owners and how to calculate indirect ownership percentages**. It can be helpful to test the disclosure forms and process with a number of the target companies prior to fully rolling out disclosure requirements. This can alert implementers to any issues companies may have in understanding the disclosure requirements, and will help judge

whether the chosen threshold enables sufficient information to be collected. Producing detailed guidance and visual tools to help companies understand and comply with disclosure regulations will be a vital component of such efforts.⁴⁹

In order to maximise the utility of the data, it should be as clear and granular as possible. **Governments should require the disclosure of, and publish the way in which, an individual exercises BO over a company, including the exact percentage of ownership and control**, and a statement of whether the interest is held directly or indirectly, where applicable. Not doing so hinders interpretation and use of the data. For example, currently the UK's disclosure regime requires only the selection of bands – over 25% and up to 50%, more than 50% and less than 75%, and 75% or more⁵⁰ – which severely limits interpretation and linking of the data with other registers. Where governments have implemented different thresholds for different sections of the economy, it will also be important to ensure that users of the BO data understand the thresholds on which the BO disclosures have been determined so that they may interpret the data correctly.

Finally, governments should **apply reporting requirements for firms where no person falls within the threshold or definition of BO**. It is possible for no individual to meet the criteria for disclosure outlined within a legal definition of BO, even if the definition is robust and the thresholds are low. In such cases, it is recommended that countries require the disclosure of the name of a natural person in a senior role with managerial responsibility for the company in question. Many countries – including Argentina, the Republic of Korea, and EU member states under AMLD5⁵¹ – require the submission of names of

⁴⁹ OO has developed a number of tools to help develop such guidance, including visual language that can help illustrate BO structures in a clear and consistent way: <https://www.openownership.org/visualisation/>.

⁵⁰ Companies House and Department for Business, Energy & Industrial Strategy, "Summary guide for companies – register of people with significant control". February 2018. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/621568/170622_NON-STAT_Summary_Guidance_4MLD_Final.pdf [Accessed 29 September 2020].

⁵¹ The Official Gazette of the Argentine Republic, "Federal Administration of Public Revenue". 15 April 2020. Available at: <https://www.boletinoficial.gob.ar/detalleAviso/primera/227833/20200415> [Accessed 29 September 2020].



senior managing officials of the relevant entity instead (e.g. the directors, CEO or board members). The EITI, in its work on BO disclosures for mining, oil, and gas firms, has held up the example of Liberia as a case study in good practice. In that country, where no natural persons meet the definition of BO, the reporting entity must declare the identity of those individuals with the five largest stakes in the firm.⁵²

Whilst it is important to note that these people are not necessarily beneficial owners, for law enforcement purposes it is preferable to have the name of somebody who has real responsibility for the company rather than having no name at all (or the names of formation agents). Where this is the case, it should be recorded in the published data that these individuals have been disclosed because there are no others that qualify as beneficial owners under the country's legal definition.

⁵² Extractive Industries Transparency Initiative International Secretariat, "Guidance note 22 on how to plan for beneficial ownership disclosure (roadmap)". April 2016. Available at: <https://eiti.org/GN22> [Accessed 29 September 2020].



Conclusion

A legal definition of BO and its associated thresholds form the foundation on which a disclosure regime is built.

Although not many legal definitions currently in operation have been tried and tested in court, early evidence shows that good definitions have a number of characteristics. A BO definition should set itself clearly apart from legal ownership by clearly stating that a BO is a natural person, including both ownership and control, and specifying that this can be exercised both directly and indirectly. There should be a single, harmonised definition in a jurisdiction, contained in primary legislation. The definition should include a broad, catch-all description of BO, complemented by a non-exhaustive list of examples, tailored to local contexts.

Thresholds are an important feature of determining when and what types of disclosures are required. However, they only relate to a limited number of types of ownership and control, albeit very common ones. When deciding the appropriate threshold levels for a BO regime, discussions should be framed around the policy goals a government wants to achieve with BOT, and what thresholds are most likely to yield data that assists in meeting these goals. A risk-based approach, especially when it comes to corruption

and anti-money laundering, is likely to be the best way to effectively deploy limited government resources to do this.

It may be challenging to determine appropriate threshold levels to meet policy goals in advance, and whilst lessons can be drawn from other countries, the appropriate thresholds will be specific to local contexts. Governments should seek to make thresholds as low as possible using the RBA, whilst also balancing the potential costs and policy benefits involved with setting thresholds at different levels. Setting concrete plans at the outset of the implementation process for periodic review of threshold levels to assess their continued appropriateness is also good practice. It is also important that they provide the right guidance to companies to disclose the correct data, and that the clarity and granularity of this data is published. In order to support investigations, implementers should consider including reporting requirements in the case no natural person meets their legal definition of a beneficial owner.

As additional countries adopt legal definitions of BO, and these are tested in court, OO will continue to collect emerging evidence on best practice.

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