

OPTIONS FOR OBTAINING BENEFICIAL OWNERSHIP AND CONTROL INFORMATION

A Template prepared by the Steering Group on Corporate Governance

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INTRODUCTION

1. BACKGROUND

1. Corporate entities, including corporations, trusts, foundations and partnerships with limited liability characteristics, conduct a wide variety of commercial activities and are the basis for a broad range of entrepreneurial activities in market-based economies.¹ However, despite the important and legitimate roles these entities play in the global economy, they may, under certain conditions, be used for illicit purposes, including money laundering, bribery and corruption, improper insider dealings, illicit tax practices, financing of terrorist activities and other forms of illicit behaviour.

2. As a result of these concerns, in May 2000 the Financial Stability Forum (“FSF”) Working Group on Offshore Financial Centres asked the Organisation for Economic Co-operation and Development (“OECD”) to explore the issue of developing mechanisms to prevent the misuse of corporate entities by ensuring that supervisors and law enforcement authorities are able to obtain information on the beneficial ownership and control of corporate entities and to share that information with foreign authorities. The OECD Ministers also noted at their annual meeting in June 2000 that the OECD would conduct analytical work on the misuse of corporate entities. At their July 2000 meeting in Japan, the G-7 Finance Ministers welcomed this review. Following this request, the OECD Steering Group on Corporate Governance agreed to undertake the drafting of the report.

3. The OECD Steering Group on Corporate Governance assumed overall responsibility for the drafting of the report and established an *ad hoc* experts group to guide the OECD Secretariat in the drafting process. Upon its completion and adoption by the Steering Group, the report “Behind the Corporate Veil – Using Corporate Entities for Illicit Purposes” (the “Report”) was submitted to the OECD Ministers, G-7 Finance Ministers, and the FSF. At their annual meeting in May 2001, the OECD Ministers welcomed the Report, adding that it will contribute to efforts to combat corruption and money laundering. As part of their continuing efforts to fight against the abuses of the global financial system, the G-7 Finance Ministers in July 2001 also welcomed the Report and noted its potential to contribute to efforts to fight money laundering.

4. The Report addresses the means by which corporate entities are misused and identifies and analyses factors that limit the ability of supervisors and law enforcement authorities to obtain, on a timely basis, information about beneficial ownership and control. The Report concluded by presenting a menu of options for obtaining this information grouped into three broad categories: (i) an up-front disclosure system; (ii) imposing an obligation on corporate service providers to maintain beneficial ownership information; (iii) primary reliance on an investigative mechanism.

1 . While trusts and foundations are not corporations, they are included within such terminology only for the purpose of this template and the underlying report on which it builds.

5. Since the publication of the Report, there have been a number of developments related to obtaining and sharing information on the beneficial ownership and control of corporate entities. For example, the Financial Action Task Force (FATF) has for many years required financial institutions to obtain and record information on the identity of their clients, including any persons that may beneficially own or control the account or funds in question (see Recommendation 11 of the FATF Forty Recommendations). In 2001, the FATF commenced a review of the Forty Recommendations, including a consideration of the issues surrounding obtaining, accessing and sharing beneficial ownership and control information on “corporate vehicles”. The FATF has taken careful account of the OECD Report, including its fundamental objectives and options for obtaining the necessary information. The FATF has published a public consultation paper setting out options for minimum standards that should or could be adopted by all jurisdictions to ensure that law enforcement and financial regulatory authorities, and financial institutions, can obtain or have appropriate access to the necessary beneficial ownership and control information.

6. In addition, in connection with the OECD’s work on harmful tax practices, a large number of offshore financial centres have committed to the principles of transparency and effective exchange of information on tax matters. These commitments include a specific obligation to have access to, and to share upon request, information on the identity of legal and beneficial owners in companies and other entities. These matters will be developed further in implementation plans. With regard to the sharing of information, a model instrument on the exchange of information, covering both civil and criminal tax matters, has been developed jointly by representatives of OECD Member countries and offshore financial centres.

7. Following the issuance of the Report and an increased interest among Member countries in corporate anonymity issues, the OECD Council approved a plan of action to follow up on the work contained in the Report. In January 2002, the Chair of the OECD Steering Group on Corporate Governance acted on this mandate by recommending that the Steering Group develop a template that would assist countries considering the options presented in the report in relation to their current systems for obtaining beneficial ownership and control information. The result of this work is the template set forth below. In accordance with the Report itself, the template is not intended to cover companies whose shares are publicly traded or listed on a stock exchange. The Template is not intended to preempt work on international standards in other fora.

2. GENERAL CONSIDERATIONS AND USE OF THE TEMPLATE

8. This template is based on the Report, closely following the elements, considerations and options contained therein. It is intended to provide countries with a resource to make their own assessment of their current systems for obtaining information on beneficial ownership and control. This template is intended to assist in the process of identifying how jurisdictions relate to three possible options for obtaining information on beneficial ownership and control.

a) Adherence to Fundamental Objectives

9. To successfully combat and prevent the misuse of corporate vehicles for illicit purposes, it is essential that all jurisdictions establish effective mechanisms that enable their authorities to obtain and be able to share with other authorities, in justified cases and on a timely basis, information on the beneficial ownership and control of corporate vehicles established in their own jurisdictions. This requires adherence to three fundamental objectives that also provide a means for measuring the operational effectiveness of the option(s) to be used in a jurisdiction:

1. Beneficial ownership and control information must be maintained or be obtainable by the authorities;
2. There must be proper oversight and high integrity of any system for maintaining or obtaining beneficial ownership and control information; and
3. Non-public information on beneficial information ownership and control must be able to be shared with other regulators/supervisors and law enforcement authorities, both domestically and internationally, for the purpose of investigating illicit activities and fulfilling their regulatory/supervisory functions respecting each jurisdiction's own fundamental legal principles.²

b) *Common Characteristics*

10. Regardless of the option(s) adopted, there must be proper oversight and high integrity of any system for maintaining or obtaining beneficial ownership and control information. In effect, each jurisdiction must ensure that there are credible sanctions that are sufficiently robust to deter misuses and to punish non-compliance and that these sanctions are vigorously enforced.

11. It is also desirable that policymakers in each jurisdiction consider ways to make it possible to grant access to beneficial ownership and control information to persons authorised by the government, the judiciary and financial institutions seeking beneficial and control information in order to comply with their customer identification obligations.

c) *Template Options*

12. With a view to the fundamental objectives outlined above, this template presents a menu of possible options based on the mechanisms available for obtaining information on the beneficial ownership and control of corporate vehicles. These options, which are derived from the mechanisms existing in various jurisdictions, are grouped into three broad categories:

1. Up front disclosure to the authorities;
2. An obligation by corporate service providers to maintain beneficial ownership and control information; and
3. Primary reliance on an investigative system.

13. In the template, each of these three options is described in two parts. The first part describes issues that will indicate whether a particular option may be suitable or appropriate for the jurisdiction. For example, some countries may not have the necessary resources to employ a full-scale investigative mechanism. The second part addresses characteristics of the system, and recognises that appropriate systems may nonetheless prove unworkable unless they adhere to the three fundamental objectives mentioned above. These fundamental objectives, identified in the Report, are intended to provide a means for measuring the operational effectiveness of the option to be used in a jurisdiction.

² For further details on sharing beneficial ownership and control information, see Annex 1.

14. A self-diagnostic includes a sequence of questions covering the present situation as well as an evaluation of viable avenues for achieving the objectives set out. The options presented in this template are, to a large extent, complementary. Accordingly, each jurisdiction may tailor and/or combine these options to fit local conditions, legal systems and practices. Depending on their particular circumstances, jurisdictions that rely primarily on one particular option may find it highly desirable and beneficial to supplement this mechanism with other options. The template does not express a preference for any particular option. It should also be understood that the options presented in this template are not to be construed as exhaustive or exclusive, and that they need to be viewed in the context of complementary available measures for combating and preventing the use of corporate entities for illicit purposes. In many jurisdictions, other adequate measures are also employed to prevent the misuse of corporate vehicles. Following the use of the template and the possible identification of desirable improvement in practice, the user may wish to seek guidance from existing best practices or experiences in comparable jurisdictions when devising an action plan for improvement.

15. The following general questions can provide valuable guidance to frame the issues for the template:

- What possible problems exist in the jurisdiction?
- What are the main indicators that would demonstrate the origin and extent of the problems?
- Has it been ascertained that the problems actually exist?
- What are the consequences of the problems for the jurisdiction, for other jurisdictions and for multilateral co-operation?
- How can existing problems be corrected?
- Considering the specific characteristics of the jurisdiction, what is the likelihood of success for different possible remedies?

TEMPLATE FOR ASSESSING OPTIONS FOR OBTAINING BENEFICIAL OWNERSHIP AND CONTROL INFORMATION

I. OPTION 1: UP-FRONT DISCLOSURE SYSTEM

An up-front disclosure system requires the disclosure of the beneficial ownership and control of corporate entities to the authorities charged with responsibility at the establishment or incorporation stage and imposes an obligation to update such information on a timely basis when changes occur. The obligation to report beneficial ownership and control information to the authorities may be placed on the corporate entity, the ultimate beneficial owner, or the corporate service provider involved in the establishment or management of the corporate entity.

A. SUITABILITY

1. High Proportion of Non-Resident Ownership and Control of Corporate Entities

An up-front disclosure system may be more suitable for jurisdictions in which a high proportion of the corporate entities are beneficially owned and controlled by non-residents because the authorities in these jurisdictions face greater difficulties in ascertaining the beneficial ownership and control of the corporate entity. Key indicators of a jurisdiction with a high proportion of non-resident ownership of corporate entities may include:

- Restriction on domestic ownership of certain entities where such entities benefit from a favourable tax or regulatory regime.
- Separate information gathering and statistical regimes for non-residents.
- Minimal capitalisation requirements.
- Expedited processes for the formation of the corporate entity.
- The ability to use bearer shares and shareholder nominees where otherwise not permissible.
- The absence of residency requirements for directors.

2. High Proportion of Shell Companies or Asset Holding Companies

An up-front disclosure system may be more appropriate where a high percentage of corporate entities within a jurisdiction are shell companies or are established to hold assets rather than to operate businesses requiring physical premises. Jurisdictions may wish to consider the following indicators in their self-diagnostics:

- The number of shell or asset holding companies as opposed to operational companies.

- The percentage of companies registered in the jurisdiction in relation to its population and the size of its economy.
- Whether the jurisdiction requires a corporate entity to maintain a physical presence, such as a registered office or other physical property, in the jurisdiction.
- Whether entities that wish to register in the jurisdiction must state with specificity the activities they intend to carry out.

3. Weak Investigative System

An up-front disclosure system may be a viable option for obtaining beneficial ownership and control information in jurisdictions with weak investigative systems.

4. Availability of Anonymity Enhancing Instruments

In general, the greater the ability of an individual to conceal his or her identity the greater the need for an up-front disclosure system.³

B. EFFECTIVENESS OF SYSTEMS

1. Ability to Obtain and Maintain Information

a. Important transparency elements to be collected and maintained - An effective up-front disclosure system should include information for authorities to determine beneficial ownership. This information may vary depending on the type of entity. For example:

- *Corporations:*
 - Where a non publicly-traded corporation holds shares in a corporate entity, the identity of the ultimate beneficial owner of the company.
 - Where shares in the corporation are held by a trust, the identity of the beneficiaries, the trustees and any protectors.
 - Where shares of the corporation are held by a partnership, the details of the limited and general partner, including their beneficial owners.
 - Where “corporate directors” are permitted, the identity of the beneficial owner of the “corporate director.”

3. Reviewers should consult the discussion on anonymity enhancing instruments and effective countermeasures set forth in Annex 2.

- Where nominee directors or nominee shareholders are permitted, the identity of the beneficial owner and whether there are any mechanisms available to determine the beneficial owner.
- Where the company is a shell company or asset holding company, the identity of any representatives physically present in the jurisdiction from whom information may be obtained.
- *Trusts:*
 - The identity of the individuals who furnish funds into the trust.
 - The identities of the trust beneficiaries and the trustee.
 - Whether the trustee is acting in accordance with a letter of wishes, and, if so, who is the author of that letter.
 - The identity of the persons who control the trust and make the investment decisions.
 - The identity of the “protector” if there is one and the types of powers he or she holds.
- *Partnerships:*
 - The identity of the general and limited partners.
 - Where the general or limited partner is a corporate entity, the identity of the ultimate beneficial owner of the entity.
- *Foundations:*
 - The identity of the persons who are in control of the foundation and are responsible for the allocation of its resources.
 - The identity of the designated beneficiaries of the foundation.
 - Whether the jurisdiction permits the use of a nominee to form the foundation and, if so, who are the persons with final authority.

b. Means of obtaining information – The following are types of documents that could be provided to authorities in an effective up-front disclosure system:

- Copies of share registries.
- Periodic reports such as tax filings and annual reports.
- Certificate of incorporation and other corporate formation documents.
- Any document that provides persons with authority to act on behalf of the corporation.
- A copy of the trust deed.

- A copy of the letter of wishes, if any.
- The availability of any documents granting other persons authority to act on behalf of the trust.
- A copy of the partnership agreement.
- A copy of any arrangements that permit limited partners to influence management. For example, arrangements permitting a limited partner to serve as an officer or director of a corporate general partner or to otherwise provide advice to the general partner.
- The basic document which sets forth the structure, power and details of the foundation.
- The availability of any documents that provide other persons with authority to act on behalf of the foundation.

c. Maintenance of information – Effective up-front disclosure systems should also ensure that information is securely maintained in a manner where it can be readily accessed by authorities, including the following:

- Whether the beneficial ownership information is contained in automated databases or other sources that enable linkages to information from other sources.
- Whether there are procedures to ensure that the information is received in a timely manner.
- Whether there are procedures to ensure that there are periodic updates. Whether these updates are triggered by specific occurrences and, if so, what these occurrences are.
- Who the regulatory bodies are that obtain, collect and store the information. For example, is the information under the control of the regulatory body responsible for supervision and oversight or is the information outsourced.
- The persons or entities that have access to the information.
- The procedures for ensuring the confidentiality of the information.
- The length of time that information is retained.

2. Proper Oversight and Integrity

An effective up-front disclosure system should have regulatory authorities that have sufficient personnel and other resources to effectively administer such a system. Key issues relating to the effectiveness of regulatory oversight in an up-front disclosure system may include:

a. Sanctions for non-compliance - The following factors may help in assessing whether sanctions are sufficient to promote the integrity of the system:

- Whether there are penalties and/or fines when individuals or companies do not comply with rules or requests for information.

- Whether there are other license related sanctions such as revoking the right to conduct business or imposing conditions on the conduct of that business.
- Whether instances of misconduct are a matter of public record.
- Specific examples of past cases where the jurisdiction has imposed sanctions.
- Procedures to avoid conflicts of interest between individuals imposing sanctions and material interests they may have in the affected entity.
- Whether timeframes are sufficient between the identification of the non-compliant conduct and the imposition of sanctions.

b. Personnel and other resources - Effective oversight systems consist of sufficient personnel and other resources to administer an up-front disclosure system. Jurisdictions may wish to consider:

- How funding and staffing corresponds to the amount of processing and administrative work.
- The extent to which the regulator relies on the work of third parties.
- Whether there are any processes for reviewing and verifying the work of third parties.
- Whether the programmes and offices are sufficiently well funded to enable investigations to proceed efficiently and effectively.
- Whether training is provided on a routine basis to address legal and technological developments and to the extent such training is done in conjunction with other members of the international community.
- Whether training is conducted in-house or through outside sources.

c. Supervisory authorities

- Whether there are procedures to ensure that the agency is allowed to carry out its mandate with full integrity and is free from undue political and commercial interference.

II. OPTION II: IMPOSING AN OBLIGATION ON SERVICE PROVIDERS TO MAINTAIN BENEFICIAL OWNERSHIP AND CONTROL INFORMATION

This option requires intermediaries involved in the establishment and management of corporate entities, such as company formation agents, trust companies, registered agents, lawyers, notaries, trustees, and companies supplying nominee shareholders, directors, and officers (“corporate service providers”), to obtain, verify, and retain records on the beneficial ownership and control of the corporate entities that they establish, administer, or for which they provide fiduciary services.

A. SUITABILITY

1. Adequate Investigative Mechanism

The authorities in jurisdictions adopting this option should have adequate oversight, compulsory powers and institutional capacity to effectively monitor compliance by corporate service providers with their obligation to obtain beneficial ownership and control information.⁴

2. Pool of Corporate Service Providers with Experience

Given that beneficial ownership and control information will be maintained by third parties, it is important that the jurisdiction has a sufficient pool of corporate service providers possessing suitable experience/qualifications and sufficient resources to be entrusted with this function. The following should be considered in determining whether corporate service providers are able to provide the necessary services:

- The number of qualified and experienced corporate service providers in the jurisdiction compared to the number of entities that use such services on a yearly basis.
- Whether the staff at the corporate service providers is properly qualified, for example in terms of suitable experience, exams, licenses and training from well regarded outside sources.
- Examples where the lack of experienced staff resulted in errors or delays that may have impeded the ability to obtain necessary information.
- Whether licensing of corporate service providers requires that the owners, directors and managers of such entities should comply with qualifying (e.g., the “fit and proper”) criteria, including an examination of integrity, competence, training, experience and solvency (going concern).
- Whether the corporate service providers are using qualified business methods. These include:

4. For a description of factors that may indicate a strong investigative system, see section III.A. as a guide for whether, by relative terms, the jurisdiction has an adequate investigative system.

- The appointment of a compliance officer.
- An effective complaints handling system.
- Procedures to ensure that transactions are duly authorised.
- Adequate and orderly records of business transactions.
- Acting with due care and diligence in performing its obligations.
- Whether there have been an unusually large number of legal actions alleging negligence or breach of fiduciary duties in the performance of their functions.
- Whether there are provisions and procedures for avoiding conflicts of interest.
- Whether there are mechanisms in place to ensure that regular review of corporate service providers are carried out.

B. EFFECTIVENESS OF SYSTEMS

1. Ability to Obtain and Maintain Beneficial Ownership Information

An effective system that relies on corporate service providers to obtain, maintain and verify beneficial ownership and control information should have procedures and laws in place to enable and verify the information.

a. Important transparency elements to be collected and maintained by corporate service providers - In an effective system using corporate service provider obligations, authorities are able to obtain information similar to the types of information provided in an up-front disclosure system described under section I.B.1.a. above.

b. Means of obtaining information - Authorities may consider the following in assessing the effectiveness of corporate service providers:

- Whether there are effective procedures to retrieve the beneficial ownership and control information from intermediaries.
- Whether there are specific timeframes for the release of the information.
- The relative seniority of the person who makes the decisions to release the information. Whether that person must seek approval from any other sources.
- Whether there are any examples where the inability to provide the information in timely manner has prejudiced an investigation by law enforcement into the conduct of illicit activities.
- Whether the jurisdiction protects confidential communications between service providers such as lawyers and others. For example:
 - What is the scope of this duty?

- Whether there are any exceptions to the duty to protect confidential communications.
- Whether legal proceedings are required to obtain the information when it involves communications with corporate service providers.
- Whether there are other laws, such as bank or corporate secrecy laws that may affect the ability to obtain beneficial ownership and control information. For example:
 - Whether these types of laws could prohibit inspection of corporate records in certain circumstances.
 - Whether the consent of the affected party is required before releasing the information.
 - Whether there are circumstances under which protection may be lifted.
 - The procedures for releasing information under these laws and whether they are likely to cause delay in securing the information from the corporate service providers.

2. Proper Oversight and Integrity

The proper oversight of the intermediaries who will be maintaining the beneficial ownership and control information is critical to the effectiveness of this system. Authorities may consider the following:

a. The ability to monitor compliance by corporate service providers - A system that relies on intermediaries to obtain and secure beneficial ownership information must ensure that the intermediaries are fulfilling their responsibilities. The following factors can be indicators of the ability to ensure compliance of corporate service providers:

- Requirements for corporate service providers to have procedures for obtaining the necessary beneficial ownership and control information.
- Timeframes ensuring that the information is received at the formation of the entity and updated on a regular basis or upon the occurrence of certain events.
- Requirements for corporate service providers to maintain beneficial and control information in certain formats (e.g. electronic databases).
- Whether there are regular reviews by the supervisory authorities of corporate service providers to ensure that they are obtaining and maintaining the appropriate information.
- Whether there are rules to ensure that corporate service providers maintain adequate databases to permit the quick and timely retrieval of information.
- Whether sanctions are routinely imposed on corporate service providers that do not fulfil their obligations. These sanctions may include, among other things, revoking a corporate service provider's license or imposing a fine.

b. Personnel and other resources - Effective oversight systems consist of sufficient personnel and other resources to ensure that appropriate information is received from the corporate service provider. Authorities may consider:

- The number of staff devoted to this oversight compared to the number of corporate service providers in the jurisdiction and the number of companies that the corporate service providers service.
- Whether training programmes are available and whether training updates are provided on a routine basis to address legal and technological developments.
- Whether there is funding and staffing devoted to oversight of corporate service providers.

III. OPTION III: PRIMARY RELIANCE ON AN INVESTIGATIVE MECHANISM

Under an investigative system, the authorities seek to obtain (through compulsory powers, court-issued subpoenas, and other measures) beneficial ownership and control information when illicit activity is suspected, when such information is required by authorities to fulfil their regulatory/supervisory functions, or when such information is requested by other authorities domestically and internationally for regulatory/supervisory or law enforcement purposes.

A. SUITABILITY

1. Strong Investigative System

A jurisdiction that relies on an investigative system should have the appropriate tools and resources to enable it to obtain the necessary beneficial ownership and control information. The following are factors that may indicate whether a jurisdiction has the strong institutional features that make an investigative system suitable for that jurisdiction:

a. The jurisdiction has strong compulsory powers - Primary reliance on an investigative system may be appropriate in jurisdictions where regulatory/supervisory and law enforcement authorities possess strong compulsory powers and have the capacity to obtain beneficial ownership and control information for regulatory/supervisory, law enforcement, or sharing purposes. Key indicators include:

- Whether the authority to obtain information includes both the ability to compel testimony and access records or documents.
- Whether the authority to compel testimony or access records extends to any person possessing relevant information.
- Whether this authority is contained in statutes, regulations or agency policies.
- Whether there are any material restrictions to obtaining this information when needed in connection with a criminal, civil or administrative investigation or proceeding.
- Whether the timeframes for obtaining information have proved adequate in practice.
- Whether authorities are required to use the judicial process to obtain the necessary information and whether that process is timely.
- Whether authorities have effective mechanisms to seek information outside their jurisdiction.

b. Adequate resources and funding to support a system that primarily relies on an investigative mechanism - The jurisdiction's resources for investigative purposes could include:

- Whether the jurisdiction has sufficient numbers of qualified experienced personnel.
- Whether the programmes and offices are sufficiently funded or are there examples where the lack of funding resulted in the inability to conduct an effective investigation.

- Whether training programmes are available and, if so, whether updates are provided on a routine basis to address legal and technological developments.

c. The support of a judicial systems that function effectively and efficiently - An effective investigative mechanism requires the support of a well-functioning judicial system of high competence and integrity that is able to process subpoena or other order applications and to respond to requests for information in a timely manner. Indicators of an effective judicial system to support an investigative mechanism could include:

- Whether the judicial system is able to process its cases, including requests from other jurisdictions expeditiously.
- Whether there are sufficient levels of staffing that have expertise and familiarity with financial crimes, including money laundering and related issues.
- Whether the judicial system operates independently from the executive and legislative branches.
- Whether judges routinely recuse themselves if there is a conflict of interest.
- Whether the system’s funding depends on reviews by third parties that have interests in the outcome of specific cases.

2. Reliable History of Enforcement

Primary reliance on an investigative mechanism may be more appropriate where the authorities in a jurisdiction have, on prior occasions, consistently displayed a commitment to employ their compulsion powers for regulatory/supervisory or law enforcement purposes or to assist other domestic and foreign authorities to fulfil their regulatory/supervisory or law enforcement responsibilities. The following are factors that may reflect an authority’s enforcement history:

- The elements the authority must consider in deciding whether to proceed with an enforcement action.
- The seniority level of the person deciding whether to proceed with an enforcement action. For example, must the agency head agree to proceed with an enforcement action or is authority to proceed delegated to an enforcement unit.
- Whether there are recent examples where an authority has used investigative tools to obtain beneficial ownership and control information in connection with the investigation of an illicit activity.

3. Beneficial Ownership and Control Information is likely to be available within the Jurisdiction

The effectiveness of an investigative system depends, to a significant extent, on the likelihood that beneficial ownership and control information relating to the establishment stage is available within the jurisdiction in which the corporate entities were established. Consequently, primary reliance on an investigative system would be more appropriate in jurisdictions:

- With a large proportion of corporate entities that are beneficially owned and controlled by residents or which conduct operating businesses requiring physical premises in the jurisdiction of establishment.
- The inability of persons to effectively conceal their identities from authorities through anonymity enhancing instruments

B. EFFECTIVENESS OF SYSTEMS

1. Ability to Obtain and Maintain Information

An effective system that relies on investigative means to obtain beneficial ownership and control information should have procedures and laws in place to enable the authorities to obtain the relevant information for civil, criminal or administrative actions.

a. Important transparency elements to be collected as necessary – In an effective investigative system, authorities are able to obtain information similar to the types of information provided in an up-front disclosure system described in section I.B.1.a. above.

b. Means of obtaining information - The ability to obtain information in an investigative system will depend primarily on the effectiveness of the investigative tools that are available.

- Whether there are strong compulsory powers and the ability to issue subpoenas are critical for obtaining information.
- Whether there are laws, such as bank or corporate secrecy laws or attorney-client privileges that may affect the ability to obtain beneficial ownership and control information.
 - Whether these laws could prohibit witness testimony or production of corporate records.
 - Whether the consent of the affected party is required before releasing the information.
 - Whether there are circumstances under which protection may be lifted.
- The procedures for releasing information under these laws and whether they are likely to cause delay in securing the information.

2. Proper Oversight and Integrity

a. Supervisory authorities

- Whether there are procedures to ensure that the process is free from political interference.
- Whether there is sufficient and stable funding for the investigative functions.

b. Personnel and other resources

- Well funded offices and programmes that enable investigations to proceed efficiently and effectively.
- Routine training programmes with updates as necessary to address legal and technological developments.
- Information technologies in place that enable authorities to manage and retrieve information quickly and efficiently.

ANNEX 1: SHARING BENEFICIAL OWNERSHIP AND CONTROL INFORMATION DOMESTICALLY AND INTERNATIONALLY⁵

1. To effectively combat and prevent the misuse of corporate vehicles for illicit purposes, it is essential that the authorities in each jurisdiction have the capacity to share information on the beneficial ownership and control of corporate vehicles with other authorities domestically and internationally, respecting each jurisdiction's own fundamental legal principles. The ability to share information among domestic authorities is important because certain authorities in a jurisdiction may possess, or have better access to, beneficial ownership and control information that are required by other domestic authorities for supervisory or law enforcement purposes. The availability of mechanisms to share information domestically also facilitates the efficient use of scarce resources by ensuring that duplicate efforts to obtain beneficial ownership and control information are not undertaken. In addition, because anonymity can be enhanced through the use of corporate vehicles incorporated in foreign jurisdictions, it is equally critical that the authorities in one jurisdiction also have the ability to share information on beneficial ownership and control with authorities in other jurisdictions.

2. In recent years, the G-7 Finance Ministers have undertaken substantial work to enhance international co-operation and information sharing. The *1998 G-7 Ten Key Principles on Information Sharing* and the *1999 G-7 Ten Key Principles for the Improvement of International Co-operation Regarding Financial Crime and Regulatory Abuse*, in particular, address the most significant issues relating to sharing information on beneficial ownership and control of corporate vehicles among regulators/supervisors and law enforcement authorities.

ANNEX 2: COUNTERMEASURES AGAINST INSTRUMENTS FOR ACHIEVING ANONYMITY⁶

1. Individuals and corporate vehicles have legitimate expectations of privacy and business confidentiality in their affairs and jurisdictions adopt different approaches to protect legitimate privacy interests. Certain arrangements and practices can contribute to the potential for misusing corporate vehicles by making it very difficult, and perhaps even impossible, for the authorities to identify the beneficial owners and controllers. Jurisdictions should carefully consider whether the benefits of such practices outweigh the costs or whether they should be permitted, if at all, only under special conditions and in

5. The information contained in this annex is provided for the benefit of the reader and is not to be considered integral to the template document. The reader is referred to section III D of the report.

6. The information contained in this annex is provided for the benefit of the reader and is not to be considered integral to the template document. The reader is referred to section III C of the report.

limited circumstances. The following instruments are examples of mechanisms that can be used to facilitate the misuse of corporate vehicles and they have also been identified as raising particular concern for money laundering purposes:

- ***Bearer shares*** – in certain jurisdictions, bearer shares are commonly and legitimately used. However, the high level of anonymity that they provide makes them attractive for nefarious purposes, especially in certain jurisdictions and in certain commercial contexts, such as shell companies and IBCs. In order to curb their misuse, jurisdictions may wish to review the use of bearer shares. Options might include their abolition or the introduction of measures to ensure 1) their immobilisation (e.g., by requiring deposit of bearer shares with the authorities/licensed corporate service providers or by dematerialising shares) or 2) that their owners are known to the company or the authorities (e.g., mandatory reporting of identity of bearer shareholder as a condition to exercise voting rights or to receive dividends or upon attaining certain levels of control).
- ***Nominees*** – nominees are commonly used for the clearance and settlement of trades in listed companies. However, their use in non-listed public limited companies and other corporate vehicles may lead to abuse. In jurisdictions where a high proportion of corporate vehicles are owned by non-residents or were formed to hold assets rather than to operate businesses requiring physical premises in the jurisdiction of establishment, policymakers may choose to permit only licensed corporate service providers to serve as nominees or fiduciaries. This would protect the legitimate privacy interest of the beneficial owner while providing increased assurance that the authorities will be able to discover the identity of the beneficial owners in appropriate circumstances.
- ***“Corporate” directors*** – directorships by legal persons lessen the accountability of directors by compromising the function of a board of directors as a means to impose responsibility on physical persons for the actions of a corporation. Jurisdictions should carefully review their legislation to ensure that individuals are not able to escape responsibility and accountability through the use of corporate directors.
- ***Flee clauses*** – any flee clauses that require a trust and information about a trust to be moved to a different jurisdiction upon receipt of service of process or inquiry by the authorities only serve to encourage and protect illicit behaviour. Jurisdictions should consider reviewing the use of flee clauses to evade service of process or inquiry by the authorities with a view to either abolish them or severely limit their availability.
- ***Strict secrecy laws*** – legal provisions that impose civil or criminal penalties on those who respond to legitimate requests for information by supervisory/regulatory and law enforcement authorities primarily serve as a shield to perpetrators of illicit behaviour. Jurisdictions should review the use of strict secrecy laws to ensure that effective gateways exist for obtaining beneficial ownership and control information and for sharing this information with other authorities in appropriate circumstances.
- ***Trust laws*** – trust law provisions and other arrangements that allow trusts to be established to delay, hinder, or defraud creditors only serve to encourage illicit activities. Similarly, trust law provisions and other arrangements that permit the trustee to change or name new beneficiaries in a non-transparent manner encourage the use of trusts for illicit purposes. Jurisdictions should review the relevant features of the regulatory framework for trusts with a view to limiting the scope for misusing trusts for illicit purposes.

