Open Ownership

Beneficial ownership transparency and data protection in South Africa

Policy Briefing

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Overview

Beneficial ownership transparency (BOT) is one of the measures used internationally to combat financial crimes and the misuse of corporate entities. Making more beneficial ownership (BO) information available to those who can use it effectively helps solve issues around corporate accountability and illicit financial flows. BOT is gaining momentum globally, with over 120 countries committed to implementing reforms. This also helps countries to meet anti-corruption requirements such as those set by the Financial Action Task Force (FATF), the global standard-setting body on combating money laundering.[1] South Africa is one of these countries working toward meeting the FATF Recommendations. Some of FATF's key Recommendations[2] require countries to define the term "beneficial owner" and address the misuse of legal persons and legal arrangements. These Recommendations allow for flexibility depending on national legal frameworks.

In an attempt to meet these requirements, South Africa is in the process of policy reform, including the introduction of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill on 29 August 2022,[3] with the hopes of strengthening the fight against money laundering. At the time of writing, the Bill was still being considered by Parliament's Finance Standing Committee. It was signed into law in December 2022. South Africa has also amended some of its laws to ensure financial transparency, including amending the Financial Intelligence Centre Act, 2001 (FICA).

One of the globally used approaches to BOT, which also meets the FATF Recommendations, is to establish a register that lists the beneficial owners of corporate entities as well as allowing interested parties access to BO information. Public access to central BO registers has, however, resulted in concerns being raised as to how these BOT measures interact with the right to privacy internationally, including in South Africa. While the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill includes provisions for the creation of a beneficial ownership register, many of the implementation details will be covered by secondary legislation, including rules governing access to the register.

The right to privacy in the current informational age is one of the cornerstones of a democratic society. It protects values such as autonomy, dignity, and security. In South Africa, the right to privacy is protected under Section 14 of the Constitution.[4] The right to privacy includes the right to "protection against the unlawful collection, retention, dissemination, and use of personal information",[5] and the Protection of Personal Information Act, 2013 (POPIA) was promulgated to "promote the protection of personal information processed[6] by public and private bodies".[7] POPIA provides for the conditions of lawful processing of personal information. Concerns have been raised globally about BO information being collected and made public or publicly accessible, and whether that may infringe on the beneficial owner's right to privacy and be in contravention of privacy regulations like POPIA in South Africa.

This policy briefing interrogates whether BOT accommodates protection of personal information in South Africa. Through desktop research and analysis of existing literature, this paper considers BOT in the South African context and the pertinent issues relevant to South Africa, such as:

- whether BOT is in the public interest and justifies the limitation to the right to privacy;
- application of POPIA provisions to the establishment of BO registers and access to BO data;
- the interaction of BOT practices with applicable legislation in South Africa;
- personal information on minors as part of BO disclosure;
- gender information in BO data.

In conducting desktop research on BOT, particularly in light of data protection considerations, it is evident that BOT is an emerging topic in South Africa; as such, the

available literature is limited in scope. This policy briefing considers BO as it relates to companies rather than trusts and other legal arrangements, partnerships, not-for-profit organisations, or similar foundations. The relationship between these and BOT is a very important policy area for further research.

Based on available evidence, this paper offers considerations for emerging policies and their application. These include:

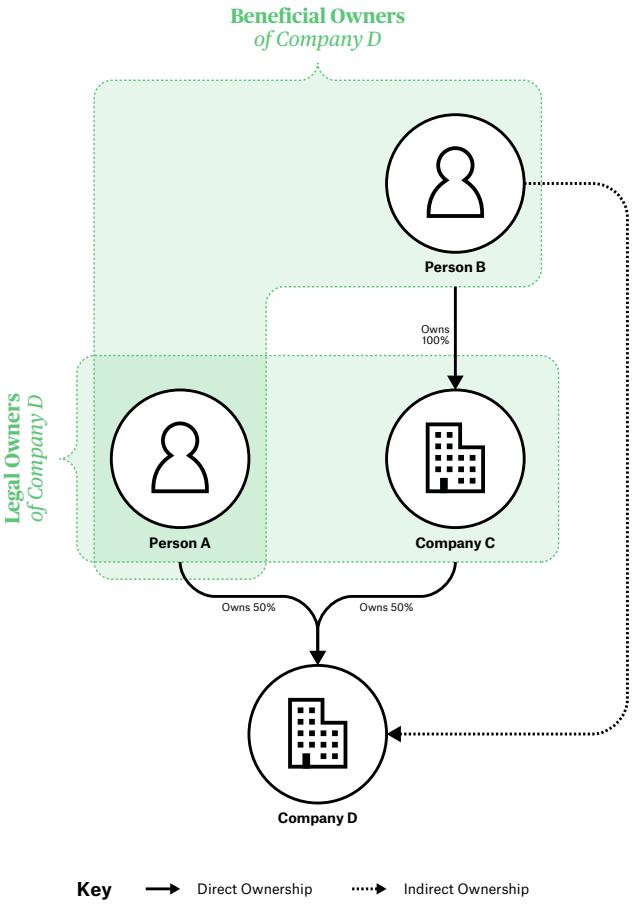
- policies that ensure adherence to the provisions of POPIA, including consideration to further processing that may occur when BO data is accessed by third parties;
- implementation of adequate safeguards in the publication of gender data and data on minors;
- adoption of company internal policies that ensure the protection of data subjects' personal information.

Beneficial ownership transparency

Abuse and misuse of corporate vehicles has led to an increasing number of countries implementing reforms to gain visibility on the individuals who ultimately own and control companies. BOT reveals the beneficial owners of corporate entities;[8] FATF defines a beneficial owner as a "natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement".[9] Most countries have implemented BOT measures by requiring corporate entities to disclose their beneficial owners to a central government register.[10] BOT is one of the measures being used to combat financial crimes such as the financing of terrorism, money laundering, and tax evasion.

From an anti-corruption, transparency, and accountability perspective, BOT reforms call for making BO data accessible. In other jurisdictions, this has been done through publicly accessible BO registers or providing access to the information upon request by authorised personnel. Notably, registers in some countries are not public and only accessible by specific government departments or upon request; to protect the privacy of the beneficial owners, it is only provided in instances where the request meets specified requirements to protect the privacy of the beneficial owners and when it is necessary for such the beneficial ownership information to be shared.

Figure 1. BOT reveals the beneficial owners of corporate entities



International standards

FATF has the mandate to be, "the global standard-setter for combatting money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction," and to hold their members to account in the implementation of these standards.[a] It published BOT Recommendations[11] calling on countries to, amongst other things, ensure that adequate, accurate, and timely information on the beneficial ownership of corporate vehicles is available and can be accessed by the competent authorities in a timely manner. Building on these recommendations, in 2013, the G8 countries endorsed core principles on beneficial ownership, consistent with the FATF standards, and published action plans setting out the steps they will take to enhance BO transparency. FATF's recommendations state that countries should ensure adequate, accurate, and timely access to information by authorities using a multi-pronged approach. It requires that countries create a register of the beneficial owners of legal persons as part of this approach, or provide an alternative mechanism, but allows flexibility for countries to design the reforms according to their context. As such, it states that countries "could consider facilitating public access."

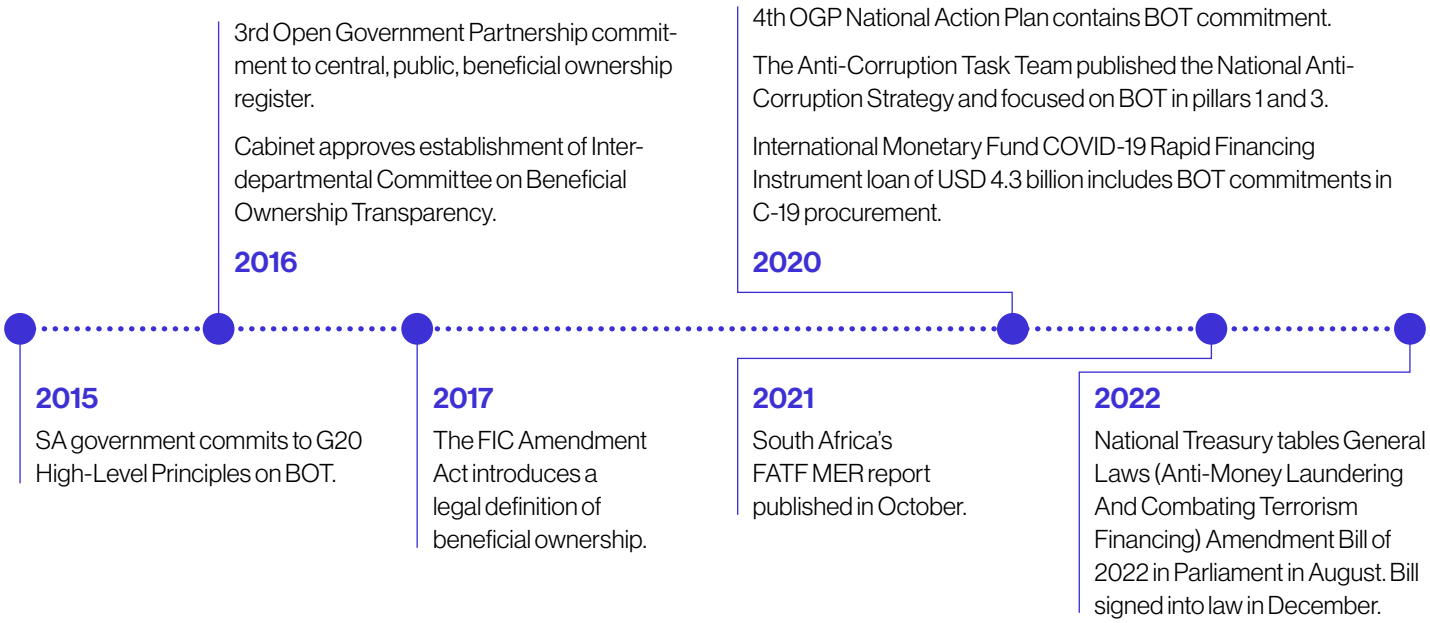
Experience from countries implementing BO registers shows that in order to be effective, registers must cover all types of legal entities and arrangements.[12] They should also include entities registered in foreign jurisdictions that operate within the jurisdiction of the register. To provide usable and actionable data, registers should be fully searchable, regularly updated, and contain all historical changes in ownership. Establishing a public register ensures that all bodies, including law enforcement agencies, tax authorities, and civic organisations from domestic and foreign jurisdictions, have free, immediate access to information.[13] When BO data is published as structured and interoperable data, this allows data to be linked and compared across jurisdictions, which enables transnational investigations.[14] It is also recommended that countries ensure that regulations clearly and robustly define beneficial owners; provide for the collection and verification of appropriate information; and effectively sanction those who do not comply. These standards and recommendations have been supported by FATF, the G7, the G20, the International Monetary Fund, the United Nations (UN), and the World Bank.

Further, the Global Forum Secretariat and the Inter-American Development Bank jointly published a Beneficial Ownership Implementation Toolkit[15] aimed at creating an understanding of BO as contained in international transparency standards. The Toolkit presents different approaches to ensuring the availability of BO information that is in line with the exchange of information standards. It aims to provide jurisdictions with relevant inputs to carry out their own internal assessment of the best-suited methods for implementation, taking into account their unique legal, policy, and operational frameworks.

a "Mandate," Financial Action Task Force, 12 April 2019, p1,3, https://www.fatf-gafi.org/media/fatf/content/images/FATF-Ministerial-Declaration-Mandate.pdf.

Beneficial ownership transparency in South Africa

Figure 2. Timeline of BOT in South Africa



South Africa has requirements to implement BOT under FATF Recommendations, and also has commitments through the G20, the Open Government Partnership, the UN Convention Against Corruption, and the National Anti-Corruption Strategy.[16] South Africa has made some strides to meet these recommendations and international standards. For instance, it has several laws that provide for access to databases like trust registers and company registers. In particular, the Promotion of Access to Information Act, 2000 (PAIA) provides for the constitutional right to access to information[17] in the form of records held by both public and private bodies.[18]

In 2016, the Cabinet of South Africa approved the setting up of the Inter-departmental Committee on Beneficial Ownership Transparency, made up of about 18 members[19] to, amongst other things, develop and carry out a National Implementation and Action Plan to ensure the realisation of the G20 High-Level Principles; provide progress reports; and develop a definition of "beneficial owner". The latter has since been achieved.

In 2019, the amendment to the definition of a beneficial owner came into effect as part of the amended FICA. The FICA was enacted to, amongst other things, combat money laundering activities, the financing of terrorism, and related activities, and to provide for customer due diligence measures to be undertaken by the relevant accountable institution, including with respect to beneficial ownership and persons in prominent positions. The FICA has been amended to define "beneficial owner in respect of a legal person, which means a natural person who, independently or together with another person, directly or indirectly: (a) owns the legal person;[20] or (b) exercises effective control of the legal person".[21] To identify a beneficial owner, Section 21A states that to "obtain information to reasonably enable the accountable institution to determine whether future transactions that will be performed in the course of the business relationship concerned are consistent with the institution's knowledge of that prospective client, including information describing — (a) the nature of the business relationship concerned; (b) the intended purpose of the business relationship concerned; and (c) the source of the funds which that prospective client expects to use in concluding transactions in the course of the business relationship concerned".

The FATF mutual evaluation report provided that South Africa needs to address certain areas of technical compliance, the beneficial ownership of legal persons, and reporting of and transparency around suspicious transactions.[22] Furthermore, the FATF standard, revised in March 2022, requires BO information that is collected to be verified for accuracy and placed in a centralised register or an alternative mechanism that allows for a similar degree of access to information by competent authorities. At the time of writing, South Africa does not yet have a BO register or an alternative mechanism.

BO information contains personal information and needs to be shared between different government departments to be verified and used effectively. This sharing,

in particular the localisation of data between different government agencies, such as the Department of Trade, Industry and Competition through the Companies and Intellectual Property Commission (CIPC) and the National Intellectual Property Management Office, is one of the reasons for the proposed Draft National Policy on Data and Cloud.[23] Furtherto, the Inter-departmental Committee is creating an integrated, national registry of beneficial ownership.[24] These initiatives may, amongst other things, aid in the governing and sharing of BO data between government departments and agencies.

However, this leaves questions of whether this information should be publicly accessible for free, as in Nigeria and the United Kingdom; accessible to the public for a fee, as has been the stance taken by Ghana, New Zealand, and Zambia; only accessible to authorised personnel but with a subset of data being accessible to the public, as has been legislated in Kenya for BO information only for companies from which the government procures; or whether a more conservative approach should be taken, such as making the information only accessible to authorised personnel, as has been the approach in Egypt.

Data protection and beneficial ownership transparency

The right to privacy in South Africa

South Africa's right to privacy is enshrined in the Constitution[25] and has, over the years, been developed and enunciated through case law. It has been made clear that a person's privacy is breached when, subjectively construed, there is an infringement which is contrary to the person's will and objectively unreasonable in the sense of being against the general sense of justice of the community, as perceived by the courts.[26] The scope of an individual's constitutional right to privacy extends to aspects of their life for which there is a "legitimate expectation of privacy".[27] The Constitution extends this right to juristic persons, although not to the same extent as natural persons; this is because juristic persons are not the bearers of human dignity and this right is based on human dignity.[28] For both juristic and natural persons, courts have considered several factors in determining whether the right to privacy had been infringed, including how the information was obtained; the nature of the information; the purpose for the initial collection of the information and the subsequent purpose for which it was used; the manner and nature in which the personal information is disseminated; and, finally, whether the data subject reasonably expected that the information would not be divulged to a third party without the data subject's consent.[29]

POPIA was promulgated to safeguard the right to privacy, especially with regard to the processing of personal information.[30] Personal information is defined as "information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person".[31] The scope of personal information in terms of POPIA includes information relating to the financial history of the person; an identifying number; email address; location information; and a person's name if it appears with other personal information relating to the person, or if disclosing the person's name would reveal information about the person.[32] POPIA also defines what constitutes "processing" as "any operation or activity or any set of operations, whether or not by automatic means, concerning personal information", including collection, storage, and disclosure of personal information.[33]

To achieve its purpose, POPIA prescribes eight conditions to be adhered to for processing of personal information to be lawful and, therefore, protect the right to privacy. These are: accountability;[34] processing limitation and further processing limitation;[35] purpose specific;[36] information quality;[37] openness;[38] security safeguards;[39] and data subject participation.[40] Further to regulating how personal information is processed, POPIA also regulates how special personal information, such as information relating to children, religion, and sexual preferences, should be processed.

Much of the personal information that is kept by responsible parties is kept in the form of databases, as records. Generally, POPIA dictates that records are captured, kept, and maintained:

- only for the purpose for which the data was originally collected;
- only for the length of time for which they are required kept up to date; and
- only used for the purpose for which they were gathered.

It also specifies the disposal of the records. A disposal programme needs to be implemented and then rigidly followed. It is highly risky under POPIA to keep records and not destroy them when their purpose has finished. To help mitigate risk, a structured classification scheme may be developed so that records can be easily identified, stored, retrieved, and managed. This should be designed

to cater to records in all formats and in all locations. This is essential if records are to be managed according to POPIA's terms.

Access to company records

As mentioned above, BOT measures include, amongst other things, collecting and providing access to BO data upon authorised request as well as the FATF's revised Recommendation 24 requiring that information be collected in a centralised register or an alternative mechanism.[41] In South Africa, there are laws[42] that provide access to company records and public disclosure of company information, such as director and shareholder information, which would be classified as personal information in terms of POPIA. Section 26 of the Companies Act grants access to a company's share register by the public because, according to the Constitutional Court, "the establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter".[43] There are currently no laws providing for the establishment of a centralised BO register, however, at the time of writing, such policies and legislation are in the process of being drafted and discussed.

South Africa already has jurisprudence supporting access to company records in the spirit of transparency and accountability. During 2016, the Supreme Court of Appeal (SCA) ruled that the shareholding of private companies is not private information.[44] The SCA considered this case without regard to the application of POPIA because it had not yet fully come into effect. Instead, the court took into account the fact that, in Section 7, the Companies Act gives specific recognition to a culture of openness and transparency, as well as the interaction between Section 26(2) of the Companies Act and the provisions of the PAIA.[45] Section 26(2) provides that a company's Memorandum of Incorporation may stipulate additional information rights of any person with respect to information pertaining to the company, however, these rights may not diminish protections of any record, as provided in Part 3 of PAIA. That is, the right conferred by Section 26(2) is additional to the rights conferred by PAIA and does not need to be exercised in accordance with PAIA. Part 3 of PAIA provides for access to records held by private bodies and stipulates the manner in which the information may be provided or when it can be refused[46].

Considering POPIA's inclusion of juristic entities as data subjects, where applicable, public disclosure of a company's shareholder's information may be an infringement of the provisions of POPIA. On the other hand, publishing a shareholder's personal information may in itself be an infringement of the provisions of POPIA. However, it can be argued that Section 11(1)(c) of POPIA permits the processing of personal information where it is necessary to comply with a legal obligation of a responsible party. Because Section 26 of the Companies Act confers on any person other than a shareholder a right to inspect the securities register of a company, it by implication imposes a duty on the juristic person to afford such a person access to allow them to exercise the right. Simply put, the responsible party in POPIA is legally obligated to make this personal information available, and the granting of access to the personal information would have been made in terms of a lawful basis — that is, in terms of the Companies Act. Accordingly, if all other processing conditions stipulated in POPIA are met, then the right to privacy of that person is not infringed upon.

On the other hand, it can be argued that becoming a director of a company does not automatically relinquish a reasonable expectation of privacy regarding one's identity number and home address. Section 3(2)(a) of POPIA contemplates such a conflict and provides that where other legislation applies to the processing of personal information but is inconsistent with the objectives of POPIA, then the provisions of POPIA would apply. Section 3(3)(b) further provides that the provisions of POPIA should not "…prevent any public or private body from exercising or performing its powers…". The practical application of this is that Strate,[47] the CIPC, the deeds office, and other government departments would need to take into account their enabling legislation to determine whether — notwithstanding their enabling legislation — more privacy should be accorded to data subjects than is currently provided.

Further, Chapter 4 of POPIA provides for exemptions from certain processing conditions for the processing of personal information, these being where the Information Regulator grants an exemption in terms of Section 37 when the processing is in the public interest; for national security reasons; and for prevention and detection of criminal offences, or when the processing is in accordance with certain functions as envisaged in Section 38. Important to note is Section 38(2), which defines "relevant function" as the relevant function of a public body or, when conferred on a person, to perform the relevant function with the view of protecting the public from, amongst other things, financial loss, malpractice, or other seriously improper conduct in the provision of banking, insurance, or other financial services or management of bodies corporate. In essence, it is in the public's interest to be protected from from financial misconduct as envisaged by Section 26 of the Companies Act; ergo, it could be argued that BO

disclosure in public registers is, in fact, in the public interest, as has been the legal basis for (public) registers in other countries. However, the question remains as to whether a beneficial owner of a company ought to automatically relinquish a reasonable expectation of privacy regarding all the data typically collected in a BO declaration.

Beneficial ownership transparency and public interest

As mentioned above, BOT is used to combat financial crimes and aid in the improvement of financial transparency. Its overall purpose is for the public good, and it aims to ensure better public oversight and scrutiny, and to give companies, civil society actors, and foreign authorities more efficient, reliable access to information about the individuals who ultimately own and control companies.[48] However, when considering the protection of the right to privacy in terms of POPIA, the question remains as to whether and in what circumstances BO data — and which specific data fields – should be made publicly available.

It is trite law that when rights or interests are in conflict with each other — in this instance, the right to privacy and the measures used to combat financial crimes — the proportionality test, as established in international law,[49] is applied. In South Africa, Section 36 of the Constitution[50] provides for the limitation of the right in the Bill of Rights when the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom". In terms of the Constitution, consideration should be given to, amongst other things, the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and whether there are less restrictive means to achieving the envisaged purpose.[51] Whilst there are not yet any indications with which a correctly drafted provision on BOT would be in conflict, or even any that would stand as a justifiable infringement of the right to privacy, if a court challenge was to be brought, and should BOT provisions be deemed to infringe upon the right to privacy, a court would balance the two interests. This would be done by taking into consideration the purpose of BOT within the South African and international context. It would also consider the harm of restricting the right to privacy over BOT and vice versa, asking which would cause greater harm. This may also be assessed on a case-by-case basis depending on the circumstances of each case. Considerations from other jurisdictions suggest that a court could rule that publicly accessible BO data does not violate the right to privacy if it meets objectives of public interest, and this is proportionate to the infringement on those rights. Proportionality could be achieved in part through mitigating the risks of public access, such as through a protection regime that would allow people to make applications to have their information withheld from publication if they face increased risks of personal harm as a result of certain information being made public, as other jurisdictions have done.[52]

Box 1. Public access to beneficial ownership information and privacy in the European Union[b]

On 22 November 2022 the Court of Justice of the European Union ruled that the provision of the 5th European Union (EU) Anti-Money Laundering Directive (AMLD5) whereby the information on the beneficial ownership of companies incorporated within the territory of the Member States is accessible in all cases to any member of the general public is invalid. AMLD5 amended the access provisions in AMLD4, under which the general public could only access BO information if they could demonstrate a legitimate interest, which many deemed too

b To read the ruling, see: "Judgment of the Court (Grand Chamber) In Joined Cases C-37/20 and C-601/20", CURIA, 22 November 2022, https://curia.europa.eu/juris/document/document.jsf?text=&docid=268059&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1. For more information on the court's ruling and its implications for BO register access in the EU, see: "Statement on Court of Justice of the European Union (CJEU) judgement on public beneficial ownership registers in the EU", Open Ownership, 28 November 2022, https://www.openownership.org/en/news/statement-on-court-of-justice-of-the-european-union-cjeu-judgement-on-public-beneficial-ownership-registers-in-the-eu/.

restrictive for many actors outside government to use the information to help prevent money laundering and terrorist financing.

The judgement is specific to the EU context and points to the fact the legal approach taken in AMLD5 does not appropriately balance privacy and public access. It states that the Directive does not demonstrate sufficiently that public access is strictly necessary to prevent money laundering and terrorist financing. The judgement does not say that public access is never justified, but the ruling underscores the importance of appropriately balancing privacy concerns with the public interest benefits arising from public access to beneficial ownership information.

Following the ruling, some member states have suspended public access to their registers (e.g. the Netherlands). Other member states have maintained public access to their registers, in particular those where the rationale for this access is broader than the objective of preventing money laundering and terrorist financing, such as improving the business environment or providing oversight and accountability of companies receiving public contracts (e.g. Slovakia).

Section 3(2) of POPIA provides for the application of the provisions of POPIA; Section 11(2)(c) permits the processing of personal information, which is in line with legal obligations; and Sections 37 and 38 contain exemptions for certain functions, such as those related to combating financial misconduct. Therefore, in balancing BOT and the right to privacy, in many countries, it is accepted that BOT is in the public interest and justifiable. There are, however, legitimate concerns regarding the personal safety of individuals, particularly when personal information such as identity document (ID) numbers or residential addresses are shared between government departments or made publicly available. It is also concerning when special personal information, such as that of children and gender data, is made publicly available or published.

Personal information on minors as part of beneficial ownership disclosure

In many jurisdictions, data that conveys sensitive personal information or information about minors is accorded additional protections under the law. Jurisdictions have taken different approaches to whether beneficial ownership can be held by minors. In South Africa, a person under the age of seven years does not have the capacity to enter into a legal contract, meaning, they would not, on the face of it, be able to be a beneficial owner. However, all minors should have parental or guardian approval in order to enter legal contracts,[53] meaning that in these circumstances, arguably, a child between the ages of 7-17 could be a beneficial owner, but the parents or legal guardian are ultimately exercising control until the minor reaches the age of majority.

Box 2. Treatment of minors in beneficial ownership disclosure

In the United States, proposed legislation "provides a special rule for reporting the information of a parent or guardian in lieu of information about a minor child", including a requirement to declare "that such information relates to the parent or legal guardian".[54] In AMLD4, cases "where the beneficial owner is a minor or otherwise incapable" are treated along with cases where the beneficial owner is exposed "to the risk of fraud, kidnapping, blackmail, violence or intimidation" as grounds for exemption under a protection regime, allowing member states to "provide for an exemption from [access by parties beyond specific authorities] to all or part of the information on the beneficial ownership on a case-by-case basis".[55] The risk with the EU approach could be that placing the ownership in the name of a child may become an attractive avenue to shield information from the public, although the authorities would still have access to this data.

The South African Information Regulator issued the Guidance Note on Processing of Personal Information of Children[56] (under the age of 18) to guide responsible parties who are required to obtain authorisation from the Information Regulator to process personal information of children, as provided for in Section 35(2) of POPIA. The guidance note makes clear that a responsible party may obtain authorisation to process the personal information of children in terms of Section 35(2) when such processing is in the public interest. POPIA does not define what constitutes public interest in relation to the processing of personal information of children, but it states that public interest is wide in its scope and application, and it generally refers to an action, process, or outcome that would benefit the public at large, in the spirit of equality and justice.[57]

Furthermore, appropriate safeguards need to be put in place to protect the personal information of the child in question. To secure the integrity and confidentiality of personal information, the responsible party would need to take appropriate, reasonable technical and organisational

measures to prevent loss of, damage to, or unauthorised destruction of personal information and unlawful access to or processing of personal information. The guidance note provides guidance on what would constitute appropriate safeguards, and that the responsible party should:

- identify all reasonably foreseeable internal and external risks to personal information in its possession or under its control;
- establish and maintain appropriate safeguards against the risks identified;
- regularly verify that the safeguards are effectively implemented; and
- ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards.

When considering the publication of BO information and BO registers, it is imperative that the guidance on the processing of personal information of children is considered and the appropriate authorisation is obtained from the Information Regulator. The Information Regulator may impose reasonable conditions in respect of any authorisation granted, which will be decided on a case-by-case basis.[58] This would ensure that the interests of children are protected and financial transparency is achieved in the public interest.

Gender information in beneficial ownership data

"Gender data" has been defined by the Information Regulator as data disaggregated by sex as well as data that affects women and girls exclusively or primarily.[59] Information about a person's sex is relevant to their right to privacy and constitutes personal information as defined in Section 1 of POPIA. Notwithstanding, gender data, particularly as it refers to women, the LGBTQI+ community, and other marginalised communities requires extra consideration and protection because of the intersectional inequalities and challenges that these groups face.

It would therefore be prudent to adopt a cautious approach in the development of BOT policies. There is usually no reason to collect or publish gender data explicitly, although it is implicitly collected through titles, gendered names, passport scans, etc.[60] However, in South Africa, as a result of the Broad-Based Black Economic Empowerment Act, 2003 (B-BBEE Act), businesses need to be certified as being beneficially women-owned in order to qualify for preferential procurement contracts. The B-BBEE Act is a legislative framework for the promotion of Black economic empowerment in an attempt to redress the economic disfranchisement that people of colour experienced during Apartheid as a result of their race. In consideration of intersectionality, the B-BBEE Act tries to empower women of colour and increase the extent to which they own and manage corporate entities.[61] According to the scoring criteria applied in the B-BBEE Act, information regarding a beneficial owner needs to be collected. The information is currently collected by private verification agencies,[62] but given the vulnerability to fraud and the lack of complete certification documentation, there may be grounds for collecting gender data as part of BOT as a reference dataset for B-BBEE verification. However, the impact and effects of publication or access to this information for BOT purposes would need to be considered.

The processing conditions contained in POPIA should be applied. In addition, considerations should be made to risk mitigation measures, such as anonymising or pseudonymising data, and limiting access to sex data to clearly specified, legitimate purposes.

Further, specific attention can also be paid to the Information Regulator's Guidance Note on Processing Special Personal Information,[63] the purpose of which is to provide guidance to responsible parties that are required to obtain authorisation from the Regulator to process special personal information in terms of Section 27(2) of POPIA. The guidance note provides that public interest is a broad concept that should not be limited in scope and application, and should be determined on a case-by-case basis. It further provides that the responsible party should adopt appropriate security safeguards, including identifying and continually updating all reasonably foreseeable internal and external risks to personal information in its possession or under its control.

Considerations for policy and practice

In light of the analysis above, policymakers should consider the following.

Ensuring the provisions of POPIA are adhered to

This includes ensuring compliance with POPIA's processing conditions and risk-mitigation measures are incorporated into implementation, for instance:

For the collection of beneficial ownership information in a central register:

- clearly establishing a purpose and legal basis compliant with POPIA, in law, for the collection and processing of personal information as part of BOT;
- ensuring the minimisation of data collected as part of BO disclosures to meet the established purpose, in line with POPIA requirements; and
- clarifying how the legal definition of beneficial ownership applies to minors in guidance or regulations.

For a publicly accessible register:

- adopting a layered or tiered access approach in which personal data (e.g. home addresses, ID numbers, and full dates of birth) are only available to specific users, such as law enforcement, and a smaller subset of data is published to the broader public (e.g. full name, month and year of birth), provided this information is sufficient to unambiguously identify beneficial owners; and
- implementing a protection regime for individuals who are at a demonstrated increased risk of personal harm as a result of publishing certain information to apply to have some or all information withheld from publication.

Consideration should also be given to the further processing of BO data. For example, many jurisdictions prohibit the use of information from a BO register for commercial purposes. It may be prudent to have processing conditions in line with POPIA placed on BO data, in addition to the safeguards discussed below.

Implementation of safeguards in the publication of gender data and data on minors

For either a non-public or public register, there is a need for clarity on the purpose of the collection, processing, and publication of sex-disaggregated data on beneficial owners. Unless it is necessary and justifiable to collect and publish gendered data, anonymisation of the data or similar protective mechanisms could achieve the legitimate interest sought. Data can also be collected and used for internal purposes (e.g. B-BBEE verification) and withheld from publication, as part of a layered access approach.

Implementation of gender-responsive policies in BOT policies

BOT policies can be gender responsive in their approach, even if they do not seek to promote gender equality as a primary aim. A gender-responsive approach implies that risks of potential harm associated with the collection and processing of gender information should be assessed and mitigated where possible, even if not required under data protection legislation.

Adoption of internal policies that ensure the protection of data subjects' personal information

It may be relevant to put internal protection policies in place, such as implementing an internal access log or requiring competent authorities to specify their purpose for accessing data or specific, special personal information which is not made available to the public. This is similar to Regulation 18 of the National Credit Act, 2005, which sets out acceptable reasons for requesting a credit bureau record and credit bureaux[64]. These measures could also be applied to public access, but they may decrease data usability and the extent to which the stated purposes are achieved.

Conclusion

BOT serves a legitimate purpose and is not overtly in contravention of POPIA. This is because disclosure of BO information is a necessary measure in combating financial crimes and the misuse of corporate entities and is thus in the public interest. Existing literature supports the position that BOT does not overtly contravene data protection legislation. Moreover, POPIA provides for the application of the provisions of POPIA, permitting the processing of personal information which is in line with legal obligations and exemptions for certain functions, such as those related to combating financial misconduct, contained in POPIA.

However, as lawmakers and regulators in South Africa develop the necessary legal and regulatory frameworks to meet specific policy aims, including complying with FATF's Recommendations on BO disclosure, it is critical to ensure that the provisions and purposes of POPIA are not contravened. It is important that, in implementing BOT policies and creating BO registers, measures are made to mitigate the potential negative effects of: collecting personal information; processing, including storing and analysing, that information; and providing public access to that information. These measures can be implemented whether South Africa opts for a non-public BO register that is only accessible to competent authorities, or a publicly accessible register publishing certain data fields.

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(a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;

(b) dissemination by means of transmission, distribution or making available in any other form; or

(c) merging, linking, as well as restriction, degradation, erasure or destruction of information".

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