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Beneficial Ownership Interests in Nigeria: Are the Walls Crumbling?

Introduction

This piece discusses the issue of beneficial ownership (**BO**) interest which is increasingly becoming an important topic around the world. It considers Nigeria's response to the global trend including her recent approach to BO disclosures and associated transparency requirements, and its overall impact on Nigeria's attitude to the subject of investments in Nigeria.

The Concept of Beneficial Ownership

Beneficial owner has been used at various times to refer to the person or persons who ultimately own, exercise control, or derive benefits from, or over, an asset or property rights. The concept of BO is quite distinct from the concept of legal ownership, which refers to the natural or legal person whose name appears in the relevant register or asset documentation as the owner of asset or property rights but who, in fact, does not ultimately own or control those assets or rights. For example, a trustee or nominee shareholder.

In many jurisdictions, BO interests need to be fully disclosed and, in certain cases, registered. In some of those cases, BO (particularly from a disclosure perspective) will be defined or determined by reference to the percentage of interest or shares that a person or individual owns, such that if the numerical threshold is not met, the BO consequences will not attach.

For example, in Nigeria, companies are required to notify the Corporate Affairs Commission (“CAC”) of persons with significant control over, or substantial shareholding in, a company and the particulars of the control.¹

Countries generally use the concept of BO disclosure to achieve certain systemically important purposes such as fighting financial crimes, improving financial transparency, preventing money laundering, combating terrorism financing, protecting the integrity of their tax systems, and so on. In the past, non-disclosure of BO interest was seen as a tool for attracting foreign investment from family offices, high net worth individuals (“HNIs”) and other investors because of the anonymity it provides to investors who would prefer to keep their identity undisclosed in jurisdictions where they invest.²

Notwithstanding the above reasons for which countries insist on BO disclosures, investors with legitimate business concerns also use relaxed regimes on BO disclosure to legally overcome strict investment rules such as local content requirements in certain industries. One of the mechanisms for overcoming these strict investment rules is the nominee shareholding arrangement. A ready example is seen in the Nigerian Oil and Gas industry. Under the Nigerian Oil and Gas Industry Content Development Act 2010 (the “**Local Content Act**”), a *Nigerian Company* is defined as “**a company formed and registered in Nigeria in accordance with the provisions of the Companies and Allied Matters Act with not less than 51% equity shares by Nigerians**”. To comply with the 51% Nigerian equity threshold, some non-indigenous investors in the oil and gas sector tend to adopt a nominee arrangement under which a Nigerian is nominated to hold shares equal to, or more than, the threshold on their behalf so as to bypass the 51% Nigerian shareholding barrier that is required to qualify for certain special considerations in the industry. Another mechanism used in anonymising BO interest include trust arrangements where upon executing a trust over an interest, right or asset such interest, right or asset is transferred to a named trustee to hold in trust for the beneficial owner who need not be publicly disclosed. These and similar arrangements appear to be coming under regulatory scrutiny across various sectors in Nigeria.

Global Trends on Beneficial Ownership Transparency

Although there are legitimate uses of non-disclosure of BO as discussed above, trends have shown that non-disclosure of BO has been repeatedly used by investors to conceal illicit flow of funds, promote terrorism financing, engage in money laundering activities, and encourage tax evasion. Following mega-leaks such as the release of the Panama Papers, Paradise Papers and other such discoveries in recent times, governments globally have not only tightened their laws, but have also begun to dismantle such structures that take advantage of non-disclosure of BO, and have introduced sundry legal framework requiring the mandatory disclosure and reporting of beneficial ownership³. For example, after the release of the Panama Papers and documents that revealed aggressive tax planning and avoidance schemes and financial flows, the European Commission (EU) introduced the 5th EU Anti-Money Laundering Directive (AML 5) pursuant to which the EU suggested the establishment of public registries listing beneficial owners of companies⁴. Also, on 19 April 2018, the EU approved changes to the AML 5 which now require that BO registries for companies and legal persons be publicly accessible and that trusts’ BO information be

¹ See more details under the heading “*Nigeria’s Response to BO Disclosure Initiatives*”.

² Countries such as, Bahamas and Barbados in the Caribbeans, Belize and Panama in Central America, Austria, Channel Islands, Gibraltar and Isle of Man in Europe, Hong Kong, Samoa, Singapore in Asia, amongst others are known to be popular BO non-disclosure jurisdictions.

³ Countries such as Australia, the United States, the United Kingdom and several others have introduced such changes to their beneficial ownership laws.

⁴ World Bank: “[Beneficial ownership: increasing transparency in a simple way for entrepreneurs](#)”.

accessible by competent authorities, financial institutions and anyone who can demonstrate a legitimate interest⁵. Additionally, on 1 May 2018, the U.K. Parliament agreed to amend the Sanctions and Anti-money Laundering Bill to require all British Overseas Territories to introduce publicly available registries of companies' beneficial ownership in the coming years.⁶

Back on the African continent, certain governments and policy makers have also had to amend their laws and rules to address the use of anonymously owned companies and other anonymous financial vehicles. For instance, in November 2018, Tunisia introduced a new legal framework on beneficial ownership including creating a beneficial ownership registry. Similarly, Ghana and Kenya launched online central beneficial ownership registries in October 2020 to comply with international transparency standards such that companies registered in Kenya are now required to maintain a registry of their beneficial owners and to submit a copy of this list to the State Registrar of Companies⁷. In Seychelles, a Beneficial Ownership Act was enacted in 2020 with **section 5 of the Act** providing for the maintenance of a register of beneficial owners by legal persons and legal arrangements.⁸

Most of these efforts are aimed at promoting transparency, combating money laundering and terrorism financing as well as assisting with national and cross-border investigations. Other reasons include the prevention of tax evasion and treaty shopping for tax purposes, as a result, some double taxation treaties now contain mandatory disclosure of BO as a requirement for enjoying treaty benefits⁹.

Nigeria's Response to BO Disclosure Initiatives

Nigeria has historically been one of those jurisdictions in which there were obscure, or no strict rules around transparency or disclosure of beneficial ownership except in limited sectors like the cabotage industry where the enabling law places several restrictions on the use or operation of vessels, tugs, etc. that are not beneficially owned by Nigerian citizens, or by a company registered in Nigeria with hundred percent of its share capital beneficially owned by Nigerian citizens.

However, in recent years, Nigeria has made commitments and initiated requirements relating to BO transparency and reporting as well as introduced legislative reforms aimed at dismantling the mechanisms that have been used in the past to support the non-disclosure of beneficial ownership. For instance, in 2016 at an Anti-Corruption Summit in London, Nigeria committed to implementing a fully public central beneficial ownership register to not only help the government serve businesses better but for businesses to also know those whom they are doing business with or competing against.¹⁰

Certain of these reporting and disclosure requirements apply generally while some others relate to beneficiaries/investors in specific economic sectors. For example, financial institutions, extractive industries, or activities conducted by representatives of self-regulated professions.

⁵ Joint Statement on the adoption by the European Parliament of the 5th Anti-Money Laundering Directive (europa.eu)

⁶ House of Commons Public Bill Committee Amendments: Sanctions and Anti-Money Laundering Bill [Lords], As Amended pages 1-7 (parliament.uk)

⁷ Beneficial ownership: increasing transparency in a simple way for entrepreneurs.

⁸ Beneficial Ownership Act, 2020 (Act 4 of 2020) | Seychelles Legal Information Institute (seylit.org)

⁹ OECD Model Tax Treaty contains requirement for mandatory disclosure of beneficial ownership as a condition for enjoying treaty benefits in respect of payments such as dividends, interest and royalties.

¹⁰ EITI (2017). Nigerian Vice President Yemi Osinbajo's address in Jakarta. <https://eiti.org/blog/nigerian-vice-president-yemi-osinbajos-address-in-jakarta>

General BO disclosure requirements

As noted earlier, under the Companies and Allied Matters Act 2020 (“**CAMA**”), persons with **significant control** over a Nigerian company or limited liability partnership are required to notify the company or partnership in writing of the particulars of such control, and the company or partnership is in turn required to maintain a record in its register as well as notify the CAC of the particulars of such persons.¹¹ A person with significant control includes any person who directly or indirectly holds **5% of the shares or interest** in a company or limited liability partnership (including voting rights, rights to appoint or remove a majority of the directors of the company or limited liability partnership, rights to exercise significant influence or control over the company or limited liability partnership¹². Given the expansive definition of persons with significant control, it would appear that the disclosure obligation lies on both the legal and the beneficial owners.

Similarly, substantial shareholders of public companies are required to disclose to their companies when they become or cease to be substantial shareholders¹³ by giving a notice in writing to the company stating their name, address and full particulars of the shares held by them **or their nominee (naming the nominee)** by virtue of which they hold substantial shares.¹⁴ The company in turn is required to notify the CAC of such shareholding. In addition, public companies are required to maintain a Register of Interests in Shares, as a statutory record of all persons who are, or who were, substantial shareholders of the company¹⁵.

Beyond these general BO disclosure requirements, certain sectors in Nigeria have also introduced some level of sector-specific disclosure rules including:

Financial Services

In June 2022, the Central Bank of Nigeria (CBN) issued the CBN (Anti-Money Laundering, Combating the Financing of Terrorism, and Countering Proliferation Financing (AML/CFT/CPF) Regulations 2022, the (the “**CBN AML/CFT/CPF Regulations**”). Under the CBN AML/CFT/CPF Regulations, Financial institutions are required to understand the nature of the customer's business, its ownership and control structure including board and senior management and identify and take reasonable steps to verify the identity of a beneficial owner, using relevant information or data obtained from reliable sources to satisfy itself that it knows who the beneficial owner is through measures highlighted in the CBN AML/CFT/CPF Regulations.¹⁶ With respect to trust arrangements, financial institutions are now required to identify and verify the identity of the settlor, the trustee, the protector where they exist, the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate or effective control over the trust including through a chain of control of ownership.

Pursuant to the **CBN AML/CFT/CPF Regulations**, on 12th January 2023, the CBN issued its “**Guidance on Ultimate Beneficial Owners of Legal Persons and Legal Arrangements**” (the “**Guidance**”). The Guidance applies to all financial institutions and its objective is to assist financial institutions in identifying and verifying the beneficial owners of legal persons and legal arrangements in line with extant AML/CFT/CPF laws and regulations. According to the CBN, the Guidance was occasioned by the growing use of corporate vehicles, such as companies, trusts, foundations and other types of legal persons and legal arrangements by criminals to cover up and convert the proceeds of crime.

¹¹ Sections 119 and 791 of CAMA.

¹² Section 868 of CAMA.

¹³ Similar to “significant control”, the threshold is also 5% of the shares of the relevant company. Section 120 of CAMA.

¹⁴ Section 120 of CAMA.

¹⁵ Section 122(4) of CAMA.

¹⁶ Regulation 21 of the **CBN AML/CFT/CPF Regulations**.

Oil, Gas and Extractive Industries

The oil and gas sector is not left out of the developments responding to BO transparency requirements. Pursuant to the **Regulation for the Further Growth of Indigenous Capacity 2021**, every operator, alliance partner and contractor in the Nigerian Oil and Gas industry shall give first consideration to goods and services provided by Nigerian Indigenous Companies. The Regulation defines "Indigenous Company" as a Nigerian company formed and registered under CAMA with no less than **51 %** of its shares **beneficially owned** by **Nigerians**. This definition is an expansion of, and a departure from, the definition of "Nigerian company" under the Local Content Act which does not require that 51% of the shares of such companies should be beneficially owned by Nigerians. This development questions the efficacy of the nominee shareholding arrangement that has been used in the Nigerian oil and gas industry to qualify companies as "Nigerian companies" for the purpose of the Local Content Act.¹⁷

The Regulation also empowers the Nigerian Content Monitoring and Development Board (the "**Local Content Board**") to request any operator, alliance partner or contractor in the Nigerian Oil and Gas industry to depose to an affidavit confirming the structure of beneficial ownership of such companies, listing the beneficial shareholders of at least 51% of the actual shareholding of their companies.

Similarly, the Nigeria Extractive Industries Transparency Initiative reports that it has initiated a plan to deliver beneficial ownership transparency for the oil, gas, and mining sectors, and has worked with regulators in Nigeria's Mining Cadastral Office and the now defunct Department of Petroleum Resources to include a beneficial ownership disclosure requirement in relevant regulations.¹⁸

Perhaps in the actualization of the above initiative, the Mining Cadastral Office in Nigeria launched the beneficial (open) ownership database for the mining industry, while the Nigerian Upstream Petroleum Regulatory Commission ("**NUPRC**") on 26th December 2022 issued the Notification No. 1 to all Licence and Lease Holders in Nigeria on the Requirement for Submission of Beneficial Ownership Information (the "**Notice**"). Pursuant to the Notice, all entities that apply for, or hold a participating interest in, an exploration or production oil and gas licence, lease or contract are now required to provide information about their owners, including the identity(ies) of their beneficial owner(s), the level of ownership and details about how that ownership or control is exerted alongside information about persons with significant control over them. The information required was to be provided not later than seven (7) days from the date of the Notice.

Anti-Money Laundering

Similar to the above BO disclosure requirements, the Money Laundering (Prohibition and Prevention) Act ("**MLPPA**") 2022 requires financial institutions as well as designated non-financial businesses and professions to identify beneficial owners using relevant information or data obtained from reliable sources, such that the financial institution or the designated non-financial business and profession is satisfied that it knows who the beneficial owner is. Beneficial owner is defined under the act as (a) the natural person who ultimately owns or controls a customer; (b) the natural person on whose behalf a transaction is being

¹⁷ As a separate matter that is outside the scope of this piece, we should mention that there is the constitutional law question as to the legal power of the Local Content Board to, by its regulation, expand or override the definition of Nigerian Company as defined under a principal statute.

¹⁸ NEITI (2018). Annual Progress Report. <https://eiti.org/sites/default/files/documents/neiti-apr-2018-280619.pdf>.

conducted; and (c) a person who exercises ultimate effective control over a legal person or arrangement.

While Nigeria has not yet enacted a catch-all, or a holistic BO disclosure rule, from the above examples, it would appear that there is a gradual splintering of the BO shield with the intent to completely crumble the walls of non-disclosure of BO in the mid to long-term by eliminating or limiting to a great extent, the mechanisms that used to be available for overcoming strict investment rules. The benefits of such regime for an economy that ranks poorly on the global corruption perception index, and where transparency is expected to instil investor confidence and accelerate economic growth cannot be overemphasized. However, some would argue that a strict introduction and enforcement of such BO disclosure regime might be inimical to Nigeria – at least in the short to mid-term.

Pros, cons and potential impact of BO disclosures on investments in Nigeria

Non-disclosure of BO might be advantageous for some non-disclosure jurisdictions in different ways including increased investment in those countries, job opportunities through such investments, transfer of technology and expertise, enhanced revenue, etc. accruing from investments by the beneficial owners who value identity anonymization, confidentiality, data privacy and tax planning options.

Notwithstanding the above benefits, non-disclosure has been used severally to enable illegal activities to take place without trace thereby making it difficult for law enforcement agencies to uncover the persons behind those activities.

While BO disclosure requirements certainly provide an avenue to curb financial crimes and other malfeasance perpetuated as a result of the non-existence of mandatory disclosure of beneficial owners, there are concerns that BO transparency laws, where not properly considered and implemented, have the potential of discouraging investments or negatively impacting already existing investments in developing economies like Nigeria.

For example, a low threshold of substantial shareholding (such as in Nigeria) which warrants BO disclosure, expands the universe of businesses and investors who fall into the BO disclosure net. This has the potential of increasing the compliance burden for businesses, especially small and medium sized businesses. Additionally, it could create administrative difficulties for companies, the CAC or sector-specific regulators who would have to keep custody of a ton of information relating to BOs. This could also increase the regulator's exposure to data privacy breaches where effective data privacy measures have not been put in place. Some jurisdictions use a higher threshold of 25%.¹⁹ A higher or not-too low threshold reduces compliance burden for companies and administrative difficulties for regulators. In addition, it helps to ensure that data gotten is accurate as vetting the data will be faster and easier.

Further, mechanisms which were used to legally overcome strict investment rules such as high local content requirement may no longer be available to investors with legitimate business purposes. This has the potential of affecting existing investments in the relevant sectors and triggering investment exits in extreme cases.

¹⁹ The United Kingdom and the United States of America both set a reporting threshold of 25%.

Conclusion

In all, institutionalising an obligation to disclose, and establishing a mandatory register for beneficial owners are steps in the right direction as they promote investment transparency, and with time may prove worthwhile. But in addition to the growing reforms on BO transparency in Nigeria, it is also important to put in place effective mechanisms for implementation and monitoring.

That said, in making these disclosure rules, it is necessary to consider the immediate economic impact of BO disclosures on investments in Nigeria, especially in sectors that require huge foreign exchange inflows and where some classes of investors may, for legitimate reasons, want to keep their investments or holdings confidential.

Lastly, increasing the threshold warranting disclosure of beneficial ownership might help lighten the compliance burden for both regulators and investors, and reduce any negative impact on potential and existing investments.