

Anti-money laundering and counter-terrorist financing measures

Botswana

Mutual Evaluation Report

May 2017





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MUTUAL EVALUATION REPORT OF THE REPUBLIC OF BOTSWANA

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TABLE OF ACRONYMS

| | |
|---------|---|
| AG | Attorney General |
| AFU | Asset Forfeiture Unit |
| AMLCO | Anti-Money Laundering Compliance Officer |
| AML/CFT | Anti-Money Laundering/Combating Financing of Terrorism |
| BICA | Botswana Institute of Chartered Accountants |
| BITC | Botswana Investment and Trade Centre |
| BoB | Bank of Botswana |
| BPS | Botswana Police Service |
| BURS | Botswana Unified Revenue Services |
| BNI | Bearer Negotiable Instrument |
| CDD | Customer Due Diligence |
| CEDA | Customs Excise and Duty Act |
| CECA | Corruption and Economic Crimes Act |
| CIPA | Companies and Intellectual Property Authority |
| CTA | Counter Terrorism Act |
| CTR | Cash Transaction Report |
| DCEC | Directorate on Corruption and Economic Crimes |
| DIS | Directorate of Intelligence and Security |
| DNFBPS | Designated Non-Financial Businesses and Professions |
| DPP | Directorate of Public Prosecutions |
| FATF | Financial Action Task Force |
| FI | Financial Institution |
| FIA | Financial Intelligence Agency |
| FI Act | Financial Intelligence Act |
| GDP | Gross Domestic Product |
| IFSC | International Financial Services Centre |
| KYC | Know Your Customer |
| ML | Money Laundering |
| ML/TF | Money Laundering/ Terrorist Financing |
| MoFAIC | Ministry of Foreign Affairs and International Cooperation |
| MoU | Memorandum of Understanding |
| MVTS | Money Value Transfer Services |
| NBFI | Non-Bank Financial Institutions |
| NBFIRA | Non-Bank Financial Institutions Regulatory Authority |
| NCCFI | National Coordinating Committee on Financial Intelligence |
| NIC | National Intelligence Community |
| NPO | Non-Profit Organisations |
| NRA | National Risk Assessment |
| NTA | National Threat Assessment |
| PEP | Politically Exposed Person |
| PICA | Proceeds and Instruments of Crime Act |
| RBA | Risk Based Approach |

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| REAC | Real Estate Advisory Council |
| SADC | Southern African Development Community |
| STR | Suspicious Transaction Reporting |
| TF | Terrorist Financing |
| UNSCR | United Nations Security Council Resolution |

EXECUTIVE SUMMARY

1. This report provides a summary of the AML/CFT measures in place in the Republic of Botswana (Botswana) as at the date of the on-site visit [13-24 June 2016]. It analyses the level of compliance with the FATF 40 Recommendations and the level of effectiveness of Botswana's AML/CFT system, and provides recommendations on how the system could be strengthened.

A. Key Findings

- Generally, Botswana's AML/CFT regime is not yet developed, with competent authorities still in the process of understanding their responsibilities and building capacity to deal with ML/TF.
- Botswana's level of domestic coordination and cooperation is generally good, although that can get better with the presence of shared understanding of ML/TF risks of the country among all stakeholders, and signed MoUs among competent authorities to facilitate information sharing.
- The money laundering legal framework in Botswana has major deficiencies arising from limited scope of predicate offences and absence of essential elements of the offence of ML. There is inconsistency between the minimum threshold of a serious offence as defined in the PICA and the penalty provisions provided for most of the offences, which do not fall under the threshold thereby disqualifying them from being categorised as predicate offences for ML purposes.
- Competent authorities in Botswana have varied capacity and understanding of their AML/CFT responsibilities. The DPP has insufficient resources and is not in control of the resources. The BPS and BURS do not have specialised units to conduct ML/TF investigations. Although the DCEC has commenced investigating ML cases, it still needs more capacitation in conducting specialised ML investigations. The FIA has sufficient resources to carry out its core functions. However, it requires capacity to carry out its supervisory role. The BoB demonstrated limited understanding and lack of implementation of its AML/CFT supervisory role. NBFIRA demonstrated an emerging understanding of its AML/CFT supervisory role but it has limited implementation due to inadequate specialised human resource.
- In general, Botswana has a sound legal framework on confiscation of proceeds of crime. However, there is very limited implementation of the provisions mostly because more attention is being given to investigation and prosecution of predicate offences.
- The TF legal framework in Botswana has major deficiencies arising mainly from non-criminalisation of individual terrorists, the penalty is not proportionate and does not cover legal persons. Competent authorities responsible for investigating and prosecuting TF have different levels of understanding of the TF offences and risks.
- The authorities have not determined which NPOs in Botswana could be vulnerable to TF risk and the kind of measures to take to mitigate such risks. Further, the authorities have not carried out any awareness to this sector on its possible exposure to TF risks.

- Botswana is currently conducting its first NRA which involve of different public and private sector entities with a view to developing a National Strategy to facilitate implementation of AML/CFT measures on a risk-sensitive basis. Therefore, currently there is no common understanding of ML/TF risks at national level by the authorities.
- The FIA's receipt of reports from financial institutions is limited. It only receives STRs and other reports mainly from banks, and does not receive cross-border cash and BNI declaration reports from the BURS.
- There is very low usage of financial intelligence by BPS, DCEC and BURS to initiate or support ML investigations, with the LEAs preferring to pursue predicate offences.
- The BoB and FIA have not demonstrated an understanding of ML/TF risks applying to their regulated entities. NBFIRA has demonstrated an emerging understanding of ML/TF risks applying to its regulated entities. The regulated entities demonstrated a varied understanding of ML/TF risks with the large foreign-owned banks and non-bank financial institutions demonstrating a better understanding of their ML/TF risks.
- The FI Act does not provide for a risk sensitive approach to implementation of AML/CFT obligations. In addition, the FI Act has major deficiencies as it does not cover most of the AML/CFT obligations. As a result, there is little or no application and implementation of mitigating controls.
- In general, Botswana's legal framework does not provide for a requirement to identify and verify the identity of legal persons and legal arrangements; a requirement to obtain and retain information on beneficial ownership. The authorities have not determined nor are they aware of the ML/TF risks which are associated with the legal persons and arrangements in Botswana.
- Supervisory bodies have powers to issue sanctions under the FI Act for non-compliance with AML/CFT obligations. However, the sanctions are not dissuasive and proportionate, and have not been applied.
- Botswana has a legal system in place to facilitate international cooperation in mutual legal assistance and extradition matters which they have applied on a few cases of ML. However, non-criminalisation of all predicate offences limits the scope of international cooperation provided.

B. Risks and General Situation

2. At the time of the on-site visit, Botswana was in the process of carrying out a National Risk Assessment (NRA) and the preliminary findings of the exercise were not shared with assessors. There are no sectoral risk assessments by the competent authorities which were shared with the assessors in the absence of a completed NRA. As a result, the assessors had to determine the ML/TF risks facing Botswana based on the information gathered during the Technical Compliance review process, information provided by the authorities in preparation for the on-site visit and the information gathered during the interviews with the authorities during the on-site. The assessors mostly based their assessment of the ML/TF risks of Botswana on the major crimes identified to be

generating most of the proceeds which were likely to be laundered and the vulnerabilities in both the public and private sectors through which the risks may manifest. The crimes identified included: obtaining by false pretences, stealing by persons in public service, corruption in the construction industry involving contractors of mega-projects (with the bulk of the offences committed by public officials), theft of motor vehicles, and dealing in imported second hand vehicles and real estate. The BPS, BURS and DCEC reported cases of wildlife trafficking being of low risk at the time of the on-site visit due to measures which had been put in place by the authorities. They also accorded the decline in such cases due to the cooperation in enforcing requirements and control of movement of wildlife and wildlife products by LEAs in the SADC Region on exit and entry points. This view is also supported by the findings of the typologies study on *“Poaching, Illegal Trade in Wildlife & Wildlife Products & Associated Money Laundering in the ESAAMLG Region”* carried out by the ESAAMLG in 2015, which indicated that Botswana had only two rhinos killed in the period between 2006 -2013 compared to the statistics of other neighbouring countries during the same period¹.

3. Although, the offence of ML was criminalised under the repealed “Proceeds of Serious Crime Act”, from the interviews with the authorities and criminal cases cited, the repealed Act had not been extensively used to charge offenders with the offence of ML. The enactment of the Proceeds and Instruments of Crime Act (PICA) in 2014 brought in a new regime of the offence in terms of scope posing new challenges in terms of skills to identify, investigate and prosecute such cases as well as implementing an effective confiscation regime of proceeds of crime. The PICA complemented by the Financial Intelligence Act (FI Act), enacted in 2009 have strengthened the AML/CFT regime of Botswana and has also increased the list of specified parties (hereinafter referred to as “reporting entities”) which are obliged to implement AML/CFT preventive measures. Whilst the large foreign-owned financial institutions (FIs), in general, had a good understanding of their AML/CFT obligations including their inherent ML/TF risks, the same could not be said about the majority of the other FIs. Designated Non-Financial Businesses and Professions (DNFBPs) have no understanding of their AML/CFT obligations and ML/TF facing them.

4. The FI Act designates AML/CFT supervisors for FIs and DNFBPs. Most supervisors are in the process of developing capacity to ensure compliance with AML/CFT obligations by their regulated entities. The supervisors are yet to develop and implement a risk-based approach (RBA) to supervise and monitor compliance for AML/CFT purposes. Generally, the supervisory framework is still emerging as most of the supervisors are focusing on raising awareness on AML/CFT obligations and developing internal capacity to effectively implement compliance monitoring programmes.

5. In 2003, Botswana formed the International Financial Services Centre (IFSC) which was later merged with the Botswana Export Development and Investment Authority in 2012 to form the Botswana Investment and Trade Centre (BITC). Amongst the functions of the BITC is to promote investment and sustainable business opportunities in the country through special tax arrangements with the Government primarily for employment creation and economic growth. Investors (mainly from the region) may invest in any sector of the economy (mining, manufacturing and services industries) but must first be licensed as an IFSC-entity by the BITC, and thereafter obtain a business license from the responsible competent authority. In the financial

¹ Paragraph 39, page 19 of the Report

sector, there are seven IFSC-regulated entities providing non-bank financial products and have been licensed by NBFIRA under its legal and regulatory licensing framework. These entities are subject to the AML/CFT supervisory powers of the NBFIRA as prescribed under the FI Act. In practice however, there has not been any AML/CFT supervision which has been carried out by the supervisor, as it is in the process of setting up internal capacity to do so. To the extent that the IFSC-regulated entities are foreign-owned financial institutions and are not being supervised for AML/CFT purposes, the assessors view this sector as high risk for ML.

6. There is generally a low understanding of ML/TF risks in Botswana. The reporting entities and their supervisors are still familiarising themselves with requirements of the FI Act. There have been very few ML cases investigated and two cases prosecuted (using the repealed Proceeds of Serious Crime Act). Despite some of the officers having received training in ML investigations, they do not pursue ML cases but predicate offences. There is need for the investigators to apply skills gained so far, in addition provide more specialised training on ML investigations and prosecution. There is low understanding of ML/TF risks across the spectrum. Whilst the DIS has good understanding of the TF risks, the same cannot be said about the other LEAs.

C. Overall Level of Effectiveness and Technical Compliance

7. Botswana has since its last ME implemented some of the recommended actions to address the deficiencies identified through implementation programmes and passage of laws to improve both the technical compliance and effectiveness of its AML/CFT regime. Most notably, Botswana has set up an operational financial intelligence unit which appears well-structured and resourced to fulfil its core mandate of receipt of STRs, analysis and dissemination of financial intelligence. However, there are still outstanding material deficiencies and, in general, the AML/CFT regime is still young to have any meaningful impact on effectiveness. Although the coming into force of the PICA (2014), FI Act (2009), and the Counter Terrorism Act (CTA)(2014) have strengthened the AML/CFT regime of Botswana, in terms of technical compliance there are still deficiencies which are not addressed by the new laws and prevalence of weak institutional capacity to effectively implement the new laws.

8. The offence of ML has not been criminalised consistent with the Vienna and Palermo Conventions and not all predicate offences to the offence of ML are criminalised. Furthermore, the offence of TF has not been criminalised consistent with the TF Convention. The regulations to implement the UNSCRs relating to targeted financial sanctions and proliferation have not been issued.

9. The enactment of the PICA has strengthened the confiscation regime of Botswana. However, the authorities have not effectively used the provisions to identify and confiscate proceeds of crime relating to ML. This could be due to limited attention being paid to parallel financial investigations on predicate offences posing high ML risk owing to inadequate institutional capacity.

10. The FI Act provides for AML/CFT obligations to FIs and DNFBPs which were not part of the Botswana AML/CFT system before. FIs have taken some steps to implement them, while the DNFBP sector is yet to implement the measures due to lack of understanding of the measures and monitoring by their supervisors. However, the FI Act has major deficiencies arising from limited scope of the obligations and absence of risk-based requirements. The reporting entities have demonstrated a varied understanding and application of the obligations under the FI Act. As a result, there are major gaps relating to technical compliance and effectiveness.

11. The FI Act designates AML/CFT supervisory bodies for all FIs and DNFBPs (except for dealers in precious metals which are uncovered entities). The supervisors do not apply RBA when conducting their inspections. In addition, the supervisors demonstrated little or no understanding of ML/TF risks prevalent in their regulated entities. There is inadequate capacity across the board to supervise and monitor compliance by their regulated entities.

12. The primary legislation setting out filing of suspicious transactions reports (STRs) relating to any criminal activity and financing of terrorism is the FI Act. There is however an obligation under the Banking Act which requires banks licensed by BoB to file STRs when they suspect the funds to be money laundering. The BoB has issued a letter instructing all banks to send STRs to the FIA only². In practice, all FIs file STRs with the FIA only and no copies of the same are sent to the BoB. Furthermore, not all reporting entities are reporting and filing STRs, with a major concern being the DNFBP sector, due to limited awareness of their reporting obligations monitoring.

13. In order to enhance the AML/CFT systems of Botswana, the authorities need to focus on improving national cooperation; filing of STRs (particularly by the non-bank financial institutions and DNFBPs sectors), receipt and analysis of a wide range of information; dissemination of financial intelligence and other information and its use to initiate investigations or in on-going investigations; prosecutions and confiscations of proceeds relating to ML and TF; implementation of preventive measures and supervision; and transparency of beneficial ownership of legal persons and overall understanding of the ML/TF risks at national level.

C.1 Assessment of Risks, coordination and policy setting (Chapter 2 - IO.1; R.1, R.2, R.33)

14. Botswana is currently carrying out a NRA to determine ML/TF risks. The assessors note that there has been no sectoral ML/TF risk assessments conducted by competent authorities to inform their application of AML/CFT measures.

15. National coordination in Botswana is spearheaded by the Ministry of Finance and Development Planning (MFDP) through a multi-agency committee known as National Coordinating Committee on Financial Intelligence (NCCFI). The NCCFI is chaired by the Permanent Secretary in the MFDP and its activities are coordinated by the Director of the FIA. Currently, the NCCFI is largely focused on developing the AML/CFT legal and institutional framework, and conducting the NRA which will be used to develop a National AML/CFT Strategy and Implementation Plans. The authorities have indicated that they will use the findings of the NRA to develop a common understanding of the ML/TF risks among the committee members that will inform allocation of resources on a risk-sensitive basis, and to mitigate the identified risks through policies and programmes at a national level.

16. Once the NRA is completed, the authorities should ensure that all stakeholders in the public and private sectors are aware of and improve their understanding of the ML/TF risks. The stakeholders should also implement appropriate measures including developing and applying specialised skills to mitigate the identified risks. The authorities should regularly update the NRA using reliable sources of information to ensure that emerging risks and threats are identified and managed. In particular, the updates should cover legal persons and arrangements, NPOs, IFSCs-entities, second-hand motor vehicle importation as conduit for other crimes and motor vehicle

² Assessors were informed during the on-site visit that efforts were on-going to introduce amendments to address this deficiency.

dealers and vulnerabilities created by lack of supervisory and investigative capacity as well as unsupervised and uncovered entities, to determine the degree of risk and better allocation of resources.

17. Competent authorities have not conducted sectoral risk assessments to identify and promote understanding of specific risks facing them, and inform allocation of resources to mitigate the identified risks. As a consequence, there is no common understanding of the prevailing ML/TF risks among the competent authorities which undermines effectiveness given the pronounced lack of institutional capacity across the board.

18. In respect of FIs, only large foreign-owned entities have conducted internal risk assessments to identify and understand their inherent ML/TF risks. The assessors noted that the DNFBP sector demonstrated no understanding of its ML/TF risks. Competent authorities, FIs and DNFBPs indicated that they will use the findings of the NRA as a basis to inform their understanding of ML/TF risks and develop programmes to mitigate the identified risks.

C.2 Financial Intelligence, Money Laundering and Confiscation (Chapter 3 - IOs 6-8; R.3, R.4, R.29-32)

19. Botswana has a relatively good legal and institutional framework in place to conduct investigation and prosecution of ML/TF cases as well as confiscation of assets linked to ML/TF. However, the AML/CFT system is not yet developed enough for ML cases to be adequately identified, investigated and prosecuted, and enable confiscation of illicit proceeds. The scope of predicate offences for ML is not wide enough to include all the designated categories of offences, since the offences of illicit arms trafficking, hostage-taking and kidnapping have not yet been criminalised.

20. Investigations are focused on obtaining evidence for predicate offences and are not expanded to identification of assets linked to ML that can be seized and confiscated. This is an indication that investigations and asset tracing measures are focused on gathering evidence to prosecute predicate offences and not confiscation of assets concerned with the cases. In some of the cases where such assets were identified and seized during the course of investigation, at the time of the accused person being convicted of the crime confiscation was not applied for³. The assessors have concluded that confiscation of proceeds of crime in general is not yet a policy objective which is applied in all investigation and prosecution of ML cases in Botswana.

21. The DPP established an Asset Forfeiture Unit (AFU) in September 2015, which is a positive sign indicating a shift in the approach to target proceeds and instrumentalities of crime. But the AFU is still at infancy stage and needs to be supported by all the other stakeholders at national level, which currently is not happening. It had instituted four confiscation proceedings involving domestic predicate offences at the time of the on-site visit. On three of the cases litigation was still on-going, whilst an order for recovery of illegal benefits has been granted in one of the cases.

22. Investigating Officers from BPS, DCEC and BURS have received basic financial investigation training covering investigation and identification of ML cases and confiscation of proceeds and instrumentalities of crime. However, the authorities indicated that capacity in the investigation of ML and identification of illicit assets for confiscation purposes needs to be improved on. This is also reflected by the lack of capacity to identify and investigate money laundering cases even in

³ See the case of DPP v Mothusi described in IO 7 and IO 8.

cases where there was clear evidence that the proceeds had been laundered. At the time of the on-site visit, apart from the DCEC indicating that it was considering 4 intelligence reports to determine if any offences of ML had been committed, there was no single case on ML/TF that had been successfully investigated and prosecuted using the PICA. Further, Botswana uses the declaration system to control cross-border transportation of cash but the legal framework providing for cash couriers does not include BNIs. Further, the deficiencies identified under the Banking Act which prohibit banks from sharing customer information limit the powers of other competent authorities, including the FIA to access information from banks on their customers during inquiries or investigations.

23. The DPP, which is responsible for guiding investigations and prosecutions of ML cases as well as confiscation cases, is not adequately resourced. It has limited skilled and experienced prosecutors in ML and asset recovery. This situation has been compounded by the high staff turnover of the few experienced and trained prosecutors' available, further exacerbating capacity issues at the DPP.

24. During the first mutual evaluation in 2007, Botswana had no proper legal framework for the establishment of an FIU. The DCEC was designated to operate as a *de facto* FIU with powers to receive STRs, together with the Bank of Botswana (BoB). This was addressed in 2009 with the enactment of the FI Act. However, it was only in February 2014 when the FIA commenced its core operations.

25. The FIA is well structured and resourced to enable it to carry out its core functions. It has filled 32 out of 38 established positions and has a dedicated analysis unit. The staff of the FIA have adequate and diverse skills to analyse transaction reports and produce quality financial intelligence for use by the LEAs and foreign counterparts. At the time of the on-site visit, the FIA was enhancing its data mining and analysis tools, and building strategic analysis capability.

26. At the time of the on-site visit, DCEC was considering four intelligence reports it had received from the FIA to determine if there was potential for ML offences to have been committed.

C.3 Terrorist Financing and Financing Proliferation (Chapter 4 - IOs 9-11; R.5-8)

27. Botswana has not demonstrated a clear understanding of TF risks which the country might be facing. Though TF risk is rated low by the authorities, there has not been a comprehensive TF risk assessment. As a result, the country lacks a clear TF strategy and institutional arrangements that are able to detect, investigate and prosecute TF related offences. The absence of a legal framework to implement United Nations Security Council Resolutions (UNSCRs) significantly undermines efforts to combat TF. Efforts should be made to understand TF risks so as to develop strategies to combat TF. Further, the authorities should as a matter of priority develop proper legal mechanisms to implement UNSCRs. Equally, there is no framework or mechanisms to enable implementation of PF.

C.4 Preventive Measures (Chapter 5 - IO4; R.9-23)

28. The legal and regulatory framework setting out the AML/CFT preventive measures in Botswana is provided in the FI Act as read with its Regulations of 2013. The assessors noted that the FI Act and its regulations has broadened the scope of the AML/CFT requirements and the list of FIs and DNFBPs compared to the first mutual evaluation. However, the assessors have also

identified that there are a number of AML/CFT requirements which are not covered as required by the FATF Standard. These include beneficial ownership information, cross-border wire transfers, Politically Exposed Persons (PEPs), correspondent banking and new technologies.

29. Although the FI Act was enacted in 2009, the level of implementation and thus effectiveness remains low. Generally, the FIs, particularly subsidiaries of foreign-owned entities, have a better understanding and application of the measures prescribed in the FI Act and those from their country of origin.

30. In respect of the small to medium sized reporting entities and the DNFBPs, there is limited or no awareness of their ML/TF risks and application of the AML/CFT obligations. The estate agents and legal practitioners have been identified by both the private and public sectors as being high risk for ML yet these sectors have a very limited awareness of the ML/TF risks and the AML/CFT requirements that apply to them. Whilst, this is mostly attributed to the lack of supervision and monitoring of these sectors by their supervisors due to lack of internal capacity, the Law Society of Botswana is also of the view that application of the AML/CFT requirements will be in conflict with the client lawyer privilege.

C.5 Supervision (Chapter 6 - IO3; R.26-28, R. 34-35)

31. The FI Act creates a coordinated supervisory framework, under which supervisory authorities are responsible for monitoring compliance with AML/CFT requirements of reporting entities under their purview.

32. In general, Botswana has a sound legal and institutional framework for licensing and registration of reporting entities subject to AML/CFT requirements, though it can be improved by ensuring that all regulators adequately verify beneficial owners and apply fit and proper procedures. The framework is however undermined by the absence of a risk-based approach to supervision of FIs and DNFBPs.

33. While there are some elements of supervision of FIs (except for MVTs) as part of prudential inspections by BoB and NBFIRA, the DNFBP sector is yet to be supervised for AML/CFT compliance. Both the FI and DNFBP supervisors do not have adequate supervisory capacity to effectively monitor compliance with AML/CFT requirements by their reporting entities. Botswana is yet to adequately license or register MVTs and also monitor the sector for compliance with AML/CT requirements. The most disturbing finding is that, BoB has not taken any steps to supervise Banks and bureau de changes for compliance with AML/CFT requirements under the FI Act, as it applies the Banking (AML) Regulations issued under the Banking Act which have no specific provision on AML/CFT measures. Due to lack of adequate supervision, supervisors in Botswana have not issued any sanction for non-compliance with AML/CFT requirements by the reporting entities they supervise.⁴ The assessors further identified that the sanctions provided under the FI Act are very low to bring about any change in compliance behaviour by the reporting entities.

⁴ Although the BoB informed the assessors during the on-site visit that it had applied a few administrative sanctions, these had been applied in terms of the Banking Act and not the FI Act which empowers the BoB to sanction reporting entities under its supervision for AML/CFT violations.

34. All supervisors should use the findings of the NRA to promote understanding of the risks facing their regulated entities and apply risk-based supervisory framework commensurate with the risks identified.

C.6 Transparency of Legal Persons and Arrangements (Chapter 7 - IO5; R. 24-25)

35. At the time of the on-site visit Botswana was still in the process of conducting a NRA. However during the interviews the assessors engaged the authorities and institutions on the ML/TF risk exposure of the legal persons and arrangements incorporated in Botswana. In general, the assessors observed that the risks posed by either legal persons or arrangements had not been adequately addressed during the NRA. Both the authorities and other institutions like FIs and DNFBPs, did not demonstrate that they identify, assess and understand the ML/TF risks which legal persons and arrangements formed in Botswana can be exposed to and likely misuse. Therefore, there are no measures which are being taken to mitigate the risks. The possibility of legal persons posing ML/TF risks in Botswana might be high since it has a reasonable number of foreign companies (131) incorporated. Information on legal persons convicted of any criminal offences, including tax related as well as sanctions which might have been applied, was not provided by the authorities.

36. Although, Botswana's systems of capturing information on formation of legal persons are still mostly manual, basic information on the legal persons is readily available both to the public and competent authorities. The information is however not updated on time which affects its reliability and accuracy. Basic information on legal arrangements is not as much available as there is no requirement for legal arrangements to be registered. However, for trusts registered with the Registrar of Deeds, basic information on such trusts is easily available to both the public and competent authorities. Information on beneficial ownership is generally not obtained in Botswana. Those involved in the formation of legal persons like legal practitioners, chartered accountants and secretaries are not required to get this information when forming and registering a company. Other reporting entities, like FIs and DNFBPs, are also not required to obtain information on beneficial ownership of legal persons and trusts. However, it was noted that large foreign FIs were obtaining beneficial information on legal persons to meet the requirements of their parent companies. Other competent authorities also do not obtain information on beneficial ownership. Therefore, such information is in general, not easily available to competent authorities, particularly LEAs. It is important that Botswana takes adequate measures to ensure obtaining of beneficial ownership information, including changing the laws to require those involved in the formation and registration of legal persons to obtain this information.

37. The minimum requirements under the law which would enable competent authorities to keep accurate and reliable basic information on legal persons are not being met and prescribed sanctions for such violations are not being imposed, creating vulnerabilities for legal persons to be misused. Botswana needs to ensure that the minimum requirements are met by legal persons by enforcing the current legal provisions. There is need to ensure that the legal framework of Botswana adequately provides for obtaining of information on ultimate beneficial ownership and that such provisions when enacted are enforced to ensure compliance.

C.7 International Cooperation (Chapter 8 - IO2; R. 36-40)

38. Botswana has a legal framework in place to facilitate international cooperation in mutual legal assistance, extradition matters and to some extent other forms of cooperation. However, non-

domestication of all offences set out in the Vienna, Palermo and Terrorist Financing Conventions limit the scope of international cooperation that can be requested and provided. The offences of illicit arms trafficking; hostage-taking; individual terrorist; proliferation of weapons of mass destruction; and kidnapping have not yet been criminalised as required by the Conventions, limiting international cooperation which can be provided where dual criminality is required.

39. Competent Authorities are providing a wide range of mutual legal assistance and informal cooperation. They are also seeking mutual legal assistance from foreign jurisdictions, but the assistance sought as at the date of the on-site visit was mainly for purposes of pursuing prosecution of predicate offences with only limited assistance having been made or requested on the offence of ML.

40. As Botswana has not yet encountered any TF case where international cooperation has been required, effectiveness could not be determined.

41. The DPP has a case management system which captures details relating to MLA requests but this system has not been effectively utilized to manage and monitor execution of MLA requests. The system does not capture full information during the execution of a MLA request which results in inadequate monitoring of the progress of requests and inaccurate statistics of requests received. The authorities having set up such a case management system should aim at improving it to ensure that it captures all aspects of important information relating to cases dealt with.

D. Priority Actions

42. Botswana should take the following actions to strengthen its AML/CFT regime:

- Ensure that all the competent authorities under its AML/CFT regime, understand their responsibilities and are building adequate capacity to deal ML/TF challenges.
- The authorities should provide adequate resources across the board for all AML/CFT stakeholders. The DPP should be provided with sufficient resources and have a framework which will enable it to be in control of the resources. The BPS and BURS are encouraged to have specialised units to conduct ML/TF investigations. The DCEC should have more capacitation in conducting specialised ML investigations. The FIA should build capacity to carry out its supervisory role. The BoB should build more understanding of its AML/CFT obligations which will assist it in implementing its AML/CFT supervisory role more effectively. NBFIRA should have adequate specialised human resource to enable it to implement its AML/CFT supervisory role more effectively.
- In order to improve on its domestic coordination and cooperation, Botswana should ensure shared understanding of the ML/TF risks of the country among all stakeholders and encourage competent authorities to sign MoUs to facilitate more information sharing.
- The authorities should criminalise at a minimum the remaining predicate offences listed under the FATF Glossary. Align the penalty provisions of most of the criminal offences so that they can be consistent with the definition of the serious offence currently provided in the PICA.
- In order to gain experience in handling ML cases, the LEAs and prosecutors should make more initiative to identify, investigate and prosecute ML cases. Where necessary there should

be prosecution led investigations and conducting of parallel financial investigations. There should be more engagement between the FIA and other LEAs who receive the intelligence reports from FIA on how the reports can enrich and inform their investigations, including commencing of ML investigations and not limit such investigations and prosecutions only to predicate offences.

- Botswana should use the sound legal framework it has on confiscation to enhance confiscation of all types of proceeds of crime consistent with the country's ML/TF risks.
- Botswana should address the legal deficiencies with the criminalisation of TF, which include non-criminalisation of individual terrorist and a disproportionate penalty provision which also does not cover legal persons. It should also aim at ensuring that competent authorities responsible for investigating TF offences have the same understanding of the risks and the offences pertaining to TF.
- The authorities should determine which NPOs in Botswana could be vulnerable to TF risk and the kind of measures to take to mitigate such risks. Awareness should be carried out to the sector on its possible exposure to TF risks.
- Botswana needs to finalize its NRA so that it promotes a common understanding of the ML/TF risks which face Botswana at a national level and develop a National Strategy once the NRA has been finalised in order to facilitate implementation of the AML/CFT measures on a risk-sensitive basis
- The BURS should submit cross-border cash declaration reports to the FIA and FIA should make arrangements with BURS to ensure that such reports are submitted to it. FIA should engage the reporting entities that are not filing STRs to ensure that they do so, failure of which sanctions should be imposed on these reporting entities.
- The authorities, in particular FIA should carry out more awareness on how the financial intelligence it disseminates to BPS, DCEC and BURS can be effectively used to initiate or support ML investigations.
- The FIA and BoB should understand the ML/TF risks applying to their regulated entities. NBFIRA should consolidate on the emerging understanding it has of the ML/TF risks applying to its regulated entities. The supervisors should ensure that their regulated entities are at the same level of understanding their ML/TF risks as currently it is only the large foreign-owned FIs which have a better understanding of their ML/TF risks.
- The FI Act should be amended to cover the deficiencies it has on AML/CFT obligations and provide for a risk based approach to implementation of the obligations.
- The legal framework in Botswana should provide for requirements to obtain and retain information on beneficial ownership relating to legal persons. The authorities should also determine the ML/TF risks associated with the legal persons incorporated in Botswana as well as the trusts.
- The FI Act should be amended to provide more dissuasive and proportionate sanctions. The supervisory bodies should ensure that the sanctions are implemented for non-compliance with the AML/CFT obligations by their regulated entities.

- Botswana should ensure that the legal system it has to facilitate international cooperation in mutual legal assistance and extradition is effectively used in ML/TF cases and that non-criminalisation of some of the predicate offences which might impede on such processes is addressed.

E. Effectiveness & Technical Compliance Ratings

Effectiveness Ratings

| | | | | | |
|---|--|---|--|---|---------------------------------------|
| IO.1 Risk, policy and coordination | IO.2 International cooperation | IO.3 Supervision | IO.4 Preventive measures | IO.5 Legal persons and arrangements | IO.6 Financial intelligence |
| Low | Moderate | Low | Low | Low | Moderate |
| IO.7 ML investigation & prosecution | IO.8 Confiscation | IO.9 TF investigation & prosecution | IO.10 TF preventive measures & financial sanctions | IO.11 PF financial sanctions | |
| Low | Low | Low | Low | Low | |

Technical Compliance Ratings

AML/CFT Policies and coordination

| | |
|------------|------------|
| R.1 | R.2 |
| NC | PC |

Money laundering and confiscation

| | |
|------------|------------|
| R.3 | R.4 |
| PC | PC |

Terrorist financing and financing of proliferation

| | | | |
|------------|------------|------------|------------|
| R.5 | R.6 | R.7 | R.8 |
| NC | NC | NC | NC |

Preventive measures

| | | | | | |
|-------------|-------------|-------------|-------------|-------------|-------------|
| R.9 | R.10 | R.11 | R.12 | R.13 | R.14 |
| NC | NC | NC | NC | NC | NC |
| R.15 | R.16 | R.17 | R.18 | R.19 | R.20 |
| NC | NC | N/A | PC | NC | PC |
| R.21 | R.22 | R.23 | | | |
| NC | NC | PC | | | |

Transparency and beneficial ownership of legal persons and arrangements

| | |
|-------------|-------------|
| R.24 | R.25 |
| NC | NC |

Powers and responsibilities of competent authorities and other institutional measures

| | | | | | |
|-------------|-------------|-------------|-------------|-------------|-------------|
| R.26 | R.27 | R.28 | R.29 | R.30 | R.31 |
| NC | LC | NC | NC | PC | PC |
| R.32 | R.33 | R.34 | R.35 | | |
| PC | NC | PC | NC | | |

International cooperation

| | | | | |
|-------------|-------------|-------------|-------------|-------------|
| R.36 | R.37 | R.38 | R.39 | R.40 |
| PC | LC | PC | PC | PC |

MUTUAL EVALUATION REPORT

Preface

43. This report summarises the AML/CFT measures in Botswana at the date of the on-site visit. It analyses the level of compliance with the FATF 40 Recommendations and the level of effectiveness of the AML/CFT system, and recommends how the system could be strengthened.

44. This evaluation was based on the 2012 FATF Recommendations, and was prepared using the 2013 Methodology. The evaluation was based on information provided by Botswana, and information obtained by the evaluation team during its on-site visit to Botswana from 13 – 24 June 2016.

45. The evaluation was conducted by an assessment team consisting of: Joseph Jagada and Phineas Moloto (team leaders), John Muvavarirwa (financial sector expert), all ESAAMLG Secretariat; Nonhlanhla Mkhwanazi, South African Reserve Bank (financial sector expert); Chanda Lubasi Punabantu, Bank of Zambia (financial sector expert); Masautso Ebere, Financial Intelligence Unit, Malawi (financial intelligence unit and financial sector expert); Oswald Tibabyekomya, DPP's Office, Tanzania (legal and law enforcement expert); and Richard Ogetii, President's Office, Kenya (legal expert); and Tau Phasumane (law enforcement expert).

46. The report was reviewed by FATF; Pieter Smit, Executive Manager, Financial Intelligence Centre, South Africa; and Marilyn Goncalves, World Bank.

47. Botswana previously underwent a World Bank Mutual Evaluation in 2007, conducted according to the 2004 FATF Methodology. The Mutual Evaluation concluded that Botswana was compliant with 3 Recommendations; largely compliant with 6 Recommendations; partially compliant with 13 Recommendations; non-compliant with 27 Recommendations; and 1 Recommendation was rated non-applicable. The 2007 evaluation has been published and is available at www.esaamlg.or.tz.

48. Botswana entered into the follow-up process in 2009 and exited the process in March 2016 still with outstanding deficiencies on R. 1, 4, 6, 8, 10, 14, 15, 17, 21, 23, 32, 33, 34, 39, 40 and SR. 1, VI, VII, VIII, IX. The reason for exiting the follow-up process was that Botswana was going to be assessed for the second time in June 2016. However, Botswana will continue reporting progress in addressing deficiencies which were identified by the High Level Mission to Botswana in August 2013, until its MER under the 2nd Round of MEs is adopted.

CHAPTER 1. ML/TF RISKS AND CONTEXT

49. Botswana is a landlocked country with an area of 581,730 sq. kms located in the southern part of Africa. About 70% of the land consist of the Kalahari Desert, and one of the world's largest natural inland deltas, the Okavango Delta. Botswana became a Republic after becoming independent from being a British Protectorate in 1966. The main borders of Botswana are shared with South Africa, Namibia and Zimbabwe, and a small portion of a few hundred metres with Zambia. Its population is estimated to be over 2 million. Botswana has developed from being one of the poorest economies in the 1960s to one of the fastest growing economies in the world today. With a GDP per capita of US\$18,825 as of 2015, it is one of the countries with the highest gross national income in Africa and the highest human development index in Sub-Saharan Africa. It is a member to the African Union (AU), Southern African Development Community (SADC), Commonwealth of Nations and the UN, among others.

50. The official languages used in Botswana are English and Setswana. There are many ethnic groups collectively referred to as Batswana.

51. The President of Botswana is the head of both the State and Government. Botswana is a multi-party state. Executive powers are vested in the President, whilst legislative powers are vested in the Parliament of Botswana.

52. The Constitution of Botswana does not only ensure the rule of law but also an obligation to observe in practice the rights of the citizens of Botswana. Botswana's judiciary is independent of both the executive and the legislature. Over the years Botswana has earned a reputation of being one of the least corrupt countries aided by a transparent judicial system. Botswana has four main type of courts: Customary Courts, Magistrates Courts, High Court and a Court of Appeal. The High Court is headed by a Chief Justice and has unlimited original jurisdiction to hear and determine any criminal, civil or constitutional matters under any law in Botswana. Appeals from the High Court are heard by the Court of Appeal, which is the highest and final court in Botswana headed by a Judge President. The President of Botswana appoints judges on the recommendation of the Judicial Service Commission. The legal system and the independence of the judiciary guaranteed by the Constitution has led to a safe and secure environment for doing business in Botswana encouraging foreign participation in the economy. The Directorate of Public Prosecutions, which is a Division under the Attorney General's Chambers, is responsible for prosecuting all criminal cases in Botswana.

53. The Government of Botswana over the years has been moving away from relying on mining of diamonds as the major source of income by diversifying into mining of other minerals and development of human resources.

1.1 ML/TF Risks and Scoping of Higher-Risk Issues

a) Overview of ML/TF Risks

54. Botswana has not yet finalised its NRA, therefore identification of proceeds generating crimes and proceeds which can be laundered was not informed by the results of the NRA. The information provided by the authorities to support the effectiveness of the AML/CFT regime of Botswana indicated that a National Threat Assessment (NTA) had been done but the results of this assessment were not shared with the assessors to enable them to determine whether there were any ML/TF risks identified. Through information gathered from the authorities, the following

crimes appear to pose high ML risks: obtaining by false pretences, stealing by person employed in public service (stealing by servant), corruption in the construction industry involving contractors of mega-projects and theft of motor vehicles. The assessors identified most areas through which proceeds could be laundered to be dealers in second hand motor vehicles, and the other DNFBPs (e.g. lawyers) which are not being monitored for AML/CFT. However, not all predicate offences to the offence of ML have been criminalised in Botswana. In the absence of the results of a NRA, it is not clear how much of these non-criminalised offences pose a ML risk to Botswana.

55. The practical measures put in place in Botswana relating to TF and terrorism and explanations provided by the DIS of the measures and how the measures are implemented in practice, in the absence of the results of a NRA and the other shortcomings identified with Botswana's TF regime, might be adequate for the DIS to identify and deal with terrorism and TF risks. However, other than the DIS, the awareness of TF by other LEAs is still limited. The DIS as a LEA mostly dealing with the internal security issues of Botswana, is aware of the TF risks and explained the extensive measures they have put in place to ensure funds intended to fund terrorists do not originate or pass through Botswana, including categorising sectors of the economy they view to be vulnerable to TF, e.g. FIs, informal sector. These measures are extended to stringent visa requirements and screening of visitors to Botswana from countries considered to be of high TF or terrorism risk, profiling of sources of income of suspected individuals and their monitoring, taking of immediate action to address situations identified as TF or terrorism threatening to Botswana. The DIS and other agencies of the security cluster also attend regional meetings frequently held under SADC to discuss threats of terrorism and TF in the region to enable a uniform approach to such issues but the other agencies were not aware of the domestic TF risks. Added to this Botswana has a relatively strong economy and a very stable political and cultural set-up which to a large extent has not been affected by international cultural influences. The assessors, however, noted the vulnerabilities created by the lack of a legal framework to implement the UNSCRs. This was despite the UNSC lists being circulated in practice to reporting entities to informally check against their databases. The authorities have again not taken a risk assessment to determine which of the NPOs might be exposed to the TF risk or are likely to be abused for TF purposes, and where necessary take measures to mitigate the identified risks. Botswana does not have a TF Strategy and should develop one when the results of its NRA are out.

56. Concerns were raised on the vulnerability of the second hand motor vehicle importation business to abuse for trafficking of drugs and other contraband forbidden in Botswana at the time when the cars are being brought into Botswana. Although, the LEAs and some of the FIs, particularly banks are aware of the risks associated with this sector, no action has yet been taken by the authorities to determine the ML/TF threats posed by the business. Added to this, most of the transactions are largely carried out in cash and that there is a degree of informal trading, create opportunities of illicit proceeds being directly or mingled with legitimate proceeds and channelled into the formal sector.

57. The enactment of the FI Act in 2009, CTA and the PICA in 2014 has strengthened the AML/CFT regime of Botswana. However, the institutional framework has not been sufficiently capacitated to complement the effective implementation of the new laws. There are still limited skills to ensure that ML cases are properly identified, investigated and prosecuted, and illicit proceeds are identified, traced and confiscated. In some cases where parallel financial investigations would have been warranted, such investigations were not undertaken leaving the possibility of the proceeds of crime involved not being traced, identified and confiscated. The

capacity of the judiciary to deal with ML cases based on PICA could not be determined as no ML cases had been brought before the courts for prosecution under the new Act by the time of the on-site visit. The courts based on decided predicate case judgments provided to the assessors, are however, expected to provide more guidance to both LEAs and prosecution in their judgments when lesser charges are preferred in more deserving cases where a charge of ML could have been preferred.⁵

58. The information provided by the authorities show that NBFIRA has been able to identify at varying levels, the risk areas existing in its respective sectors based on its AML/CFT supervision results. This has enabled NBFIRA to develop measures to mitigate the risks such as the adoption of thematic guidance to address the risks that was coordinated by a project team specifically set-up within NBFIRA for that purpose. In respect of the BoB and FIA, they both demonstrate a lack of awareness of the ML/TF risks of the entities they supervise or are supposed to supervise with the FIA still to commence AML/CFT supervision of the entities which fall under its mandate. Most of the entities, apart from the banks, lack the technical and financial resources to adequately identify their ML/TF risks and implement mitigating measures.

59. The CDD obligations do not include PEPs and given that the beneficial ownership regime in Botswana is still weak, the absence of CDD requirements pertaining to PEPs poses a high ML risk. The legal framework does not require obtaining of ultimate beneficial ownership information of legal persons other than for trusts.

60. AML/CFT supervision of the DNFBPs sector is still very weak as none of the supervisors have yet started implementing their supervisory roles. The ML/TF risks relating to this sector have not been identified and there is no risk based approach being implemented by any of the DNFBPs. In addition, precious metal dealers are not subject to AML/CFT requirements and are not being monitored or supervised for AML/CFT compliance.

b) Country's risk assessment & Scoping of Higher Risk Issues

61. Botswana commenced undertaking a NRA in April 2015 which has not yet been finalised. However, Botswana has done a National Threat Assessment (NTA). The results of the NTA were not shared with the assessors. Therefore, the assessors could not determine the scope of the exercise and if it related to ML/TF, the areas it identified to be of low and high ML/TF risks. The assessors, therefore, mainly based their understanding of the areas of higher ML/TF risks existing in Botswana, on information obtained from the authorities' responses to the TC and Effectiveness Questionnaires and other reliable open sources. The information enabled the assessors to identify the following areas as of higher ML/TF risks which required more attention during the on-site visit:

- **Structural issues which might negatively impact on the AML/CFT effectiveness of the regime** - a) efficient operational functioning of the FIU as a central point to receive, analyse STRs and other reports, and disseminate financial intelligence reports and other information; b) how non-bank financial institutions were being supervised for AML/CFT and the scope of the supervision; c) determine the extent of implementation

⁵ See analysis in IO 7 in the case of *A. G. Vs Bateng's Building Construction (PTY) Ltd & Others*, 1999(1) BLR 431

of CDD requirements and reporting in the DNFBPs sector, d) scope of the informal economy and the extent of financial inclusion;

- **Investigation, Prosecution and Confiscation of Proceeds of Crime** – The authorities in Botswana are still concentrating on investigating, prosecuting and to some extent confiscating proceeds of predicate offences. The assessors wanted to understand why investigation, prosecution and confiscation relating to ML was not being pursued as this creates a vulnerability for ML risks;
- **Non-criminalization of other predicate offences** - The Assessors wanted to determine whether the Authorities understood ML/TF risks related to non-criminalization of some of the predicate offences, in particular relating to illicit trafficking in narcotic drugs which could be an ML risk to Botswana;
- **Real Estate Sector** – The assessment team wanted to look at the extent to which the sector is exposed to ML/TF risks and whether the ML/TF risks in the sector have been determined. Due to most of the transactions in the sector taking place in cash, and AML supervision not having started in the sector, it makes the sector highly vulnerable to ML risks;
- **PEPs** –The authorities indicate corruption relating to large-scale government construction tenders and the construction industry in general as a high ML risk. There are no AML/CFT requirements relating to KYC/CDD for PEPs in Botswana. The assessors therefore wanted to examine whether PEPs were not exposing the FIs and DNFBPs sectors to proceeds generated from such related corruption and other crimes. The assessors also wanted to understand the extent to which the absence of KYC/CDD requirements on PEPs could be affecting the AML/CFT regime regulating FIs and DNFBPs.
- **Organised crime linked to second hand import car dealership** – Second hand car dealership, particularly imported cars from Asian countries, as it has become with most countries in the ESAAMLG Region, is big business in Botswana. Although, car dealership is designated as a reporting entity for AML/CFT purposes in Botswana, cash is used for most of the transactions making it vulnerable to ML risks as illegitimate funds may easily be mixed with legitimate funds. The assessors wanted to determine the extent to which the authorities understood this sector’s exposure to ML/TF risks and whether there was effective AML/CFT monitoring and supervision⁶.Also to determine whether importation of second hand vehicles for resale in Botswana was not associated with other crimes inherent with cross-border businesses, such as drug and wildlife trafficking.

⁶ Although this sector is out of the scope of FATF, for the ESAAMLG Region with the exception of South Africa where importing of second hand cars for re-sale is not permitted, the sector poses high ML risks as most of the countries are cash based including Botswana and this is still an area which is not effectively supervised.

- **Scope of crimes related to illegal trade in wildlife and diamonds** – Determine whether there have been any ML risks identified relating to wildlife and illegal trade in diamonds given the role played by both wildlife and diamonds in Botswana’s economy.
- **Beneficial Ownership** – Given Botswana’s growing economy, the lack of a legal framework obliging the companies, registries, SRB, or reporting entities to obtain information on ultimate beneficial ownership when dealing with legal persons is likely to be exposing Botswana to high ML risks. The assessors wanted to explore to what extent the authorities are aware of the ML/TF risks associated with beneficial ownership, a situation which is further aggravated by the lack of KYC/CDD obligations on PEPs.
- **NPOs** –The assessors wanted to determine whether the authorities understood the TF risks associated with the sector and whether a TF risk assessment of the sector had been done and NPOs which are vulnerable to possible TF abuse had been identified and how the TF risks associated with such NPOs were being managed.
- **Other significant crimes** – **To determine whether the crimes** of fraud and stealing by a public servant, which had been identified by the authorities, were not generating proceeds which were likely to be laundered. The assessors wanted to determine the extent to which parallel financial investigations involving such cases were being pursued by the authorities, and the measures being taken to mitigate the ML risks arising from such crimes.

1.2 *Materiality*

62. Botswana is an upper middle income country with a GDP of about P91.2 billion mainly supported by an increasing mining production. The GDP has seen a steady growth from the 1960s when Botswana was ranked amongst the least developed countries to a middle income country in 1992. The country heavily depends on South Africa for its imports which are over 60%. Its annual exports, amounting to about 75% are mainly diamonds.⁷ Mining contributes on average about 40% of Botswana’s GDP⁸. However, in the 2015/16 financial year, minerals contributed an average of 24% to the country’s GDP⁹.

63. Although, the banking sector of Botswana continues to grow with banking assets having increased by about 4% to the GDP ratio to become 51.4% in 2015¹⁰, accessibility of banking services is still a challenge as there is lack of such services in rural areas¹¹. A total of 50% of Botswana

⁷African Development Bank. http://www.africaneconomicoutlook.org/sites/default/files/2016-05/Botswana_GB_2016_WEB_0.pdf.

⁸<http://www.gov.bw/en/Ministries--Authorities/Ministries/Ministry-of-Finance-and-Development-Planning/Parastatals1/Overview-of-the-Botswana-Economy/>

⁹ <http://allafrica.com/stories/201603090673.html>

¹⁰ Banking Supervision Annual Report 2015

¹¹ <http://www.finmark.org.za/enhancing-access-to-banking-and-financial-services-in-botswana/>

population is banked. In terms of implementing financial inclusion, Botswana is ranked number five in the SADC Region¹².

64. Ten commercial banks which are all foreign-owned or controlled, account for 91% (P76,6 billion) of total assets of the banking sector and play a dominating role in the sector. Of these, four commercial banks hold about 80 % of the assets. 9% (P7.5billion), which represents the remaining market share of the banking sector in terms of total assets, is attributed to three statutory banks.

65. The non-bank financial sector has also continued to experience reasonable growth in Botswana in terms of companies providing products and services. Total assets of the sector increased by 2% to P94 billion as of the 31st of December 2014, with life insurance institutions contributing P20.1 billion of this sector's total assets¹³. The banks and pension funds are important elements for Botswana's financial sector in terms of asset size. Pension funds form majority of transactions for some of the reporting entities. The Pension Funds' assets total about P70 billion, with 71% being public service funds. The Government is the most significant player in the pension funds market with fund assets of about P48.2 billion.

66. In 2003, Botswana positioned itself to become a major regional and continental economic hub by establishing the International Financial Services Centre (IFSC) aimed at reducing reliance on mineral revenues, especially from diamonds. Specifically, the IFSC was aimed at attracting foreign direct investment (FDI) to Botswana by offering special favourable tax arrangements across all economic sectors, creation of sustainable employment, enhancing the country's skills base, innovation of service delivery and facilitating economic diversification. The IFSC is part of the Botswana Investment and Trade Centre (BITC) which does the licensing and registration of the companies, in addition to the normal company registration legal requirements in the country. At the time of the on-site visit, the financial sector had 7 IFSC regulated entities operating in Botswana engaged in non-bank financial services. An IFSC may range from a foreign Government development agency for social upliftment to profit making private companies.

67. The assessors noted that there are weaknesses in respect of verification of beneficial ownership at the entry stage of licensing and registration as both the CIPA (company registry) and the BITC do not obtain adequate information on who ultimately benefits from the transactions. The authorities indicated that for an IFSC to operate in the financial sector, it is subjected to the same legal and regulatory licensing requirements applied by that regulator without exception, as a legal condition to obtain a business license. For instance, all IFSC providing non-bank financial services have been duly licensed by NBFIRA as per its statutes and procedures before conducting any lawful business. In respect of AML/CFT supervision, NBFIRA conducted a familiarisation exercise of IFSC accredited entities with a view to identify compliance challenges of the regulated sector. As a result NBFIRA was able to identify the vulnerabilities of the sector. However NBFIRA lacked the capacity to fully understand ML/TF risks of this sector.

68. Overall, supervision of banks by BoB is focused on prudential risks, while NBFIRA is having an emerging supervision approach covering a number of AML/CFT obligations. Competent authorities responsible for supervision of DNFBPs and MVTS for compliance with AML/CFT requirements have not started supervisory actions due to lack of capacity.

¹² <http://www.finmark.org.za/results-from-finscope-consumer-survey-botswana-2014/>

¹³ NBFIRA Annual Report 2015

1.3 Structural Elements

69. An assessment of Botswana's systems shows that it has the necessary structural make up to have an effective AML/CFT system. The country has been politically stable and there is political commitment to promote transparency in handling government affairs and have democratic functioning systems in the country. Botswana has an independent and capable judicial system, although, this has not yet been tested in as far as ML cases using the PICA are concerned. Also, there are a few old cases which are still pending in the courts and the reasons cited include high staff turnover, fully booked court diaries, non-availability of witnesses, transfer or resignation of judicial officers. Although, Botswana has stable institutions which are capable of strengthening its AML/CFT systems, most of them still need to be properly capacitated to deal with ML cases. Most of the institutions appear to work in a transparent and accountable way other than the main cases of theft by public servants from their employers and corruption involving lucrative tenders which were reported by the authorities to be high. The BoB as the Supervisor of the banking sector, has not yet started to fully apply the requirements of the FI Act on the banks. AML/CFT supervision of the DNFBPs is still very weak, reflecting on the limited capacity of the AML/CFT supervisors in the sector.

1.4 Background and other Contextual Factors

70. The AML/CFT regime of Botswana is in the process of being developed following the enactment of laws to widen the scope of the AML/CFT legal and institutional framework. In general, the level of implementation and thus effectiveness by competent authorities remains low primarily as a result of capacity and capability necessary to effectively implement the key laws, namely, the FI Act (FIU - preventative and supervision measures; PICA - ML offence and confiscation measures; and CTA -TF offence and confiscation measures). Botswana requires adequate understanding of its ML/TF risk exposure and implementation of commensurate mitigating measures, including assessing how identification of ML cases, their investigation, prosecution and effective confiscation of illicit assets can be strengthened.

71. According to BoB's Banking Supervision Annual Report, 2015, Botswana has a fair formal access to banking services with about 1.13 million accounts out of the 1.49 million being of the adult population. Banks introduced new financial products, delivery channels and enhanced the existing services such as improved card security to reduce fraud, automatic teller machines to allow for cash deposits, improved mobile banking services covering cardless cash withdrawals (for account and non-account holders) and sending of money to local and international VISA cardholders, inter-account transfers. These measures have deepened and broadened access to banking services in Botswana. Furthermore, the authorities indicate that the introduction of mobile money transfer services has also contributed to reduction on reliance on cash. The authorities should continue working with the financial sector to ensure that transactions are conducted within the formal financial sector by ensuring that they apply a risk-based approach (e.g., simplified CDD measures) to implementation of the AML/CFT measures.

72. The authorities realising the need to strengthen Botswana's confiscation regime, have recently set up an administrative Asset Forfeiture Unit in the DPP. Although the Unit has started working, it is not yet focusing on confiscating proceeds relating to ML and the current low levels of investigation and prosecution of ML cases and lack of parallel financial investigations to identify/trace criminal proceeds and possible ML cases is limiting cases which can be referred to

the Unit. In order to address corruption cases, the DPP has a Unit which is responsible for receiving and expediting trials on corruption cases received from the DCEC. This arrangement has also been complemented by the appointment of specialised Judges to preside over cases from the Unit with each judge having a two year tenure. The appointment of specialised Judges has helped to expedite cases prosecuted by the Unit. Although, there are officers who are dealing with international cooperation matters in the DPP, the officers are not organised in a proper structure. Absence of such a structure was reflected by the inadequate information which is retained by the DPP on MLA and extradition matters, and at times the extradition process not guided by laid down procedures in the law.

73. Botswana produces gold, copper and nickel as precious metals, in addition to precious and semi-precious stones. Dealers in precious and semi-precious stones are required to be licensed and supervised for AML/CFT but are yet to be supervised due to lack of supervisory capacity. Dealers in precious and semi-precious metals are also required to be licensed but are not covered under the FI Act and therefore not subject to AML/CFT requirements and monitoring. The absence of such supervisory requirements create vulnerabilities for ML risks.

74. Across the board, designated supervisors for AML/CFT compliance lack capacity to monitor reporting entities under their purview. Further, the assessors are concerned that BoB has not taken any meaningful steps to implement the measures set out in the FI Act on the basis that it uses AML Regulations issued under the Banking Act which does not provide for specific AML/CFT obligations. As a consequence, there is little supervision of the banking sector for compliance with AML/CFT requirements in terms of scope and quality of inspections conducted. Supervisors for the DNFBPs are yet to monitor compliance due to lack of capacity. Furthermore, despite being aware of its supervisory responsibility under the FI Act, the Law Society is not convinced that it needs to be taking this role as in its view, it is in conflict with the lawyer/client privilege provided under the Legal Practitioners Act and will not have the resources to develop the supervisory capacity.

75. Further, there are gaps still to be addressed by the AML/CFT regime of Botswana. In particular, there are no legal requirements to apply enhanced CDD measures on PEPs, and also other crimes have not been domesticated to meet at minimum, the predicate crimes which have to be criminalised under the FATF Glossary. Botswana has also not come up with a framework to implement the UNSCRs, which is a major deficiency. Although PF could be of low risk in Botswana, there is no legal framework or mechanism which has been put in place to deal with it.

a) Overview of the legal & institutional framework and AML/CFT strategy

76. Botswana's AML/CFT systems have been relatively strengthened by the enactment of the PICA and CTA between 2014 and 2015. The enactment of these laws has criminalised the offence of TF, introduced a wider framework enabling confiscation, designated supervisors on AML/CFT, provided for a national committee to coordinate AML/CFT matters at domestic level, and widened the scope of reporting entities, among others. There has been enhancement on the institutions responsible for formulating AML/CFT policy, with the Ministry of Finance and Development Planning in the lead. The role of the FIA in terms of receiving STRs is no longer played by the DCEC but all STRs are now being reported to the FIA, which is now playing its role in analysing the different reports and disseminating intelligence reports. The only area of concern is that, the Banking Act requires banks to file STR on ML to it. In practice, however, all STRs are sent to the

FIA following issuance of a directive to banks to cease from filing STRs with BoB. However, since not all predicate offences generating proceeds of crime which can be laundered are criminalised, financial intelligence and other information available to law enforcement agencies from FIA is limited.¹⁴ In practice, the FIA receives all STRs on any suspicious transaction from the reporting entities, including on the non-criminalised predicate offences.

77. Botswana, at the time of the on-site visit had not finalised its NRA and consequently, it did not have an AML/CFT strategy. Although, there is the NCCFI established under the provisions of FI Act to coordinate AML/CFT matters, such matters are not based on an AML/CFT strategy.

78. The following ministries, agencies, and authorities oversee the AML/CFT regime in Botswana:

- a) **Ministry of Finance and Development Planning** - oversees the activities of the NCCFI and their implementation as provided under S. 6 (2)(a) of the FI Act; and makes determination on national AML/CFT legislative, administrative and policy reforms.
- b) **Ministry of Defence, Justice and Security** – has got five departments which consist of the Botswana Prison and Rehabilitation Services, Administration of Justice, Attorney General’s Chambers, Botswana Police Service and Botswana Defence Force which make up its co-functions.
- c) **Ministry of Foreign Affairs and International Cooperation** - is responsible for managing the country’s diplomatic relations with other countries and international organizations. This mandate includes political, economic, and social/cultural relations. MoFAIC shares information with relevant stakeholders (OP, DIS & FIA) on the UNSC sanctions list.
- d) **Attorney General’s Chambers** – the Attorney General serves as the principal legal adviser to government and as an ex-officio Member of Cabinet. All legal actions for and against the Government of Botswana are instituted by or against the AG in a representative capacity. The AG’s Chambers has got five divisions with different functions: Civil Litigation, Directorate of Public Prosecutions, International and Commercial, Corporate Service and Legislative Drafting.
- e) **Directorate of Public Prosecutions** – is a Directorate under the AG’s Chambers responsible for instituting all criminal prosecutions in the Courts of Botswana.
- f) **Financial Intelligence Agency** - is established under s.3 of the FI Act and has been in existence since 2013 but commenced its core functions in February 2014. Its Director is the Secretary of the NCCFI as provided under s.6(3) of the FI Act. In liaison with the Ministry of Finance, the FIA is responsible for coordinating AML/CFT issues which include legislative, administrative and policy reforms. It receives and analyses suspicious transaction reports and any other information from reporting entities designated under the FI Act and follows up on any other information relevant to the analysis before disseminating the results of the analysis to relevant competent authorities.
- g) **Directorate on Corruption and Economic Crime** – is an operationally independent law enforcement agency, whose main function is to investigate, prevent and educate the public on corruption and other economic crimes. Included in these crimes is the offence of ML. It

¹⁴ Please see footnote 43 under R.20 for emphasis.

has three divisions which include public education, investigation and corruption prevention and has presence in three of Botswana's major towns (Gaborone, Francistown and Maun).

- h) **National Coordinating Committee on Financial Intelligence** – formed in terms of the FI Act to assess effectiveness of policies and measures to combat economic crimes, make recommendations to the Minister of Finance for legislative, administrative and policy reforms. It consists of several stakeholders to the AML/CFT regime of Botswana, including: Ministry of Finance, DCEC, Botswana Police Service, AG's Chambers, DPP, BoB, BURS, NBFIRA, MoFAIC, DIS, Ministry of Defence, Justice and Security, and Department of Immigration and Citizenship.
- i) **Botswana Police Service** - consists of various branches and units and is responsible for investigating all crimes and maintaining law and order in general. Amongst the units, are the Serious Crimes Squad, which has a sub-unit, Fraud Squad, which is responsible for investigating financial crimes. However, the Police most of the times refer cases of ML to the DCEC for investigations. BPS also has a unit of INTERPOL, which helps with gathering of intelligence in response to law enforcement requests from other countries.
- j) **Directorate of Intelligence and Security Services**– a Directorate under the President's Office set-up to among other things investigate, gather, disseminate and store information for purposes of protecting the national security of Botswana, advising the President of threats to national security, and to protect the security interests of Botswana be it political, military or economic.
- k) **Botswana Unified Revenue Service** – is mandated to manage entry and exit points and the borders of Botswana, to collect revenue and to facilitate trade. Its mandate mainly includes assessment and collection of tax and limiting as much as possible tax evasion.
- l) **Department of Immigration** – is charged with facilitating free movement of legitimate travellers in and out of Botswana and protecting Botswana from unlawful entry, residence and movement in and out by people with ill-motives.
- m) **Bank of Botswana** – is responsible for supervising the banking sector for both AML/CFT and prudential. The banking sector is mainly made up of 10 commercial banks offering various products, including taking of deposits, money value transfer services, financial leasing and lending, issuing and managing means of payment, among others. There are also about 62 bureaux de changes and one micro-finance firm, which are also supervised by the BoB for AML/CFT.
- n) **Non-Bank Financial Institutions Regulatory Authority** – is in charge of supervising the non-bank financial services including the insurance, asset managers, pension and medical aid funds, international financial services centre accredited companies, investment advisors, stockbroking firms, among others. The NBFIRA supervises these sectors for both prudential and AML/CFT.
- o) **Ministry of Minerals, Energy and Water Resources** – the Diamond Hub in the Ministry licenses dealers in precious stones, whilst semi-precious stones are licensed by the Department of Mines. Dealers in semi-precious and precious stones are supervised for AML/CFT by the FIA. There are about 300 licensed dealers. Botswana also produces

precious metals, which are licensed by the Department of Mines but the FI Act does not designate dealers in precious metals as reporting entities for AML/CFT purposes.

- p) **Real Estate Advisory Council** – is designated under the FI Act as the AML/CFT supervisor for real estate agents, property managers and evaluators, and property auctioneers. In addition, the Council is also responsible for registering these agents, property managers, evaluators and auctioneers.
- q) **Gambling Authority** – is in charge of licensing and supervising the casinos for AML/CFT compliance. It was formally called the Casino Control Board.
- r) **Botswana Institute of Chartered Accountants (BICA)** – is responsible for the registration and AML/CFT supervision of accountants.
- s) **Law Society** – is in charge of supervising legal practitioners (lawyers, advocates, notaries, conveyancers and trusts and company services providers) for AML/CFT compliance.

79. The National Intelligence Community (consisting of the Police, DCEC, FIA, Foreign Affairs, Immigration, Intelligence and Security, BURS, BDF), Companies and Intellectual Property Authority, Bankers Association, and the Registrar of Societies also play an important role in the formulation and implementation of AML/CFT measures in Botswana. However, because the AML/CFT regime of Botswana is relatively under-developed, most of these institutions are still building their capacity and ensuring that institution or agency laws are consistent with the AML/CFT requirements.

80. Most of these institutions do not have internal AML/CFT policies and have not done their own ML/TF risk assessments in order to understand their ML/TF risks and implement informed mitigating measures. Most of the supervisors for DNFBCPs are not aware of the ML/TF risks which exist in their sectors and as a result no effective AML/CFT supervision is taking place in these sectors. Further, the reporting entities have not started implementing RBA to mitigate their ML/TF risks. The authorities, through the FIA have started to engage most of the DNFBCPs on their AML/CFT obligations. Botswana, should use the results of the NRA which it is currently undertaking to strengthen its policies on AML/CFT and allocation of resources. Botswana already has a reasonable institutional framework which needs more awareness on AML/CFT and enhancing of capacity, so that it can efficiently and effectively deal with ML/TF cases.

b) Overview of the financial sector and DNFBCPs

81. Botswana has participation in all financial activities listed in the FATF Glossary and its financial sector is divided broadly into the following segments:

82. **Commercial banks-** Botswana's banking sector's share in terms of total assets is 51.4% of GDP¹⁵. There is a total of ten commercial banks that are all subsidiaries of foreign banks. In terms of the 2015 banking supervision annual report, commercial banks dominated the banking sector by 91% of total assets (P76.6 billion). Commercial banks are involved in most financial activities including acceptance of deposits, lending, financial leasing, transfer of money, issuing and

¹⁵ Banking supervision annual report 2015

managing means of payment, and other services. The banking sector is supervised by BoB for prudential and AML purposes. According to the BSD annual report, the banking sector was dominated by commercial banks, which accounted for 91% of total banking assets. Of this total, four banks hold more than 80%. Total banking assets grew by 12.7% to P76.6 billion in 2015.

83. **Statutory banks**¹⁶ - The remaining 9%(P7.5 billion) market share in terms of total assets is attributed to three statutory banks which do not require banking licences and are ultimately under the control of the Minister of Finance and Development Planning. However, the Banking Act gives the BoB powers to supervise such banks, as well as building societies established under the Building Societies Act, hence the BoB carries out examinations of the Botswana Savings Bank, the National Development Bank and the Botswana Building Society.

84. **Bureaux de changes and microfinance institutions** – There are 58 bureaux de changes and 1 micro finance institution that are supervised by the BoB. At the time of the on-site visit, the BoB advised that the micro-finance institution was inactive.

85. **Non-bank financial institutions** - are supervised by NBFIRA for both prudential and AML/CFT purposes. The NBFI sector continued to experience growth both in the number of companies providing non-bank financial products and services as well as in total assets which increased by 2% to P94 billion as at 31 December 2014¹⁷. The non-bank financial institutions (NBFI) sector covers the following sectors:

- 64 insurers which comprises of 3 life insurance companies, 12 general insurance, 46 insurance brokers (total assets P375 million) and 3 reinsurance (total assets P193 million)
- 14 asset managers (total assets P144.1 billion)
- 9 medical aid funds (total assets P840 million)
- 87 pension funds (total assets P48.2 billion)
- 5 Management of CIUs(total assets (P6.32 billion) and 3 trustees of CIUs
- 218 micro lenders (total assets P3.06 billion)
- 4 stockbroking firms and 2 private equity
- 7 Investment advisors and 3 custodians
- 7 International Financial Services Centre (IFSC) accredited companies.

86. All the DNFBPs except for dealers in precious and semi-precious metals listed under the FATF Glossary practice in Botswana, and are subject to AML/CFT requirements and monitoring as prescribed under the FI Act. The supervisors are yet to monitor compliance due to lack of capacity. The Law Society of Botswana explained that the Legal Practitioners Act constrained it from effectively conducting its AML/CFT supervisory role due to lawyer–client privilege requirements. In addition, it indicated that it does not have funding to develop capacity to take up the role.

¹⁶ Statutory banks are Botswana Savings Bank, the National Development Bank and the Botswana Building

Society BBS with specific mission and operating under specific legislative frameworks on behalf of the Ministry of Finance.

¹⁷ NBFIRA 2015 Annual Report (page 8 corrected erratum on the website)

87. **Casinos** are licensed and supervised by the Gambling Authority (formerly known as the Casino Control Board) for compliance with AML/CFT requirements. The Authority was established in April 2016, a month before the on-site visit and is still building capacity to enable it to carry out its AML/CFT supervisory obligations. Botswana has 9 licensed casinos comprising 6 foreign-owned companies and 3 local owned companies. Casino operators, machines and games have to be licensed and comply with the requirements of the Gambling Act.

88. **Legal practitioners include attorneys, notaries and conveyancers (who also serve as trusts and company services providers), and advocates** who are admitted by the High Court of Botswana and supervised by the Law Society. Authorities indicated that trusts and company services are provided by notaries and conveyancers and are therefore not supervised for AML/CFT as it is only attorneys who are listed as reporting entities under the FI Act. At the time of the on-site visit there were 482 practicing legal practitioners registered with the Law Society of Botswana. Lawyers employed by the Government do not deal with private clients or carry out transactions on behalf of clients. The legal practitioners are classified as attorneys and advocates. Both of them deal with litigation, whilst attorneys also deal with commercial and corporate matters. Under the FI Act, the AML/CFT obligations are limited only to the attorneys.

89. **Accountants** are registered and supervised by the Botswana Institute of Chartered Accountants (BICA). At the time of the on-site visit there were 3100 individual members and 177 member firms providing a variety of financial services registered with BICA.

90. **Real estate agents** are registered and supervised by Real Estate Advisory Council (REAC) of Botswana. At the time of the onsite visit, the total number of registered estate agents was 142, comprising 52 real estate agents, 2 property auctioneers and 88 property managers and evaluators.

91. **Dealers in precious and semi-precious stones** are licensed by the Ministry of Trade and Minerals. However, dealers in precious metals are not within the AML/CFT regime as they are not listed as reporting entities under the FI Act. The FI Act prescribes the AML/CFT supervision of dealers in precious and semi-precious stones as the FIA and there is no role played by the same Ministry in ensuring compliance with the AML/CFT requirements by the dealers it licenses. Since the FIA has not yet started supervising this sector for AML/CFT, it means the dealers are for now to a large extent left to self-regulate themselves as most of them, being foreign owned or controlled have to implement AML/CFT obligations obtaining in the home jurisdiction of the parent company. The total number of licensed dealers was estimated at 313 at the time of the on-site visit.

92. **Car dealers, CEDA, BDC and money remitters** are supervised for AML/CFT by the FIA which is a supervisory authority for reporting entities that do not have a supervisory authority. Car dealers are licensed by the District/Town Council in terms of the Trade Act. State entities, CEDA and BDC are Public Companies wholly owned by Government and incorporated in terms of the Companies Act and regulated by the Minister of Trade and Industry. Money remitters are issued with a letter of no objection by BoB to enable them to operate. At the time of the on-site visit there were 13 money remitters and 760 car dealers. A number of reporting entities identified the imported second hand car dealership as posing a high ML/TF risk. However, although the ML risk associated with this sector was confirmed by the FIA, the assessors could not fully explore the ML risk in the sector as there was no clear information on the sector pertaining to AML/CFT. The FIA informed the assessors that it had started to engage the dealers in this industry, having already addressed those in the Northern part of the country and was to engage those in the Southern part in late June 2016. From the concerns raised by some members of the authorities, the second hand

dealership in motor vehicles pose moderate to high ML risk to Botswana. A proper ML/TF risk assessment of the sector should therefore be done by the authorities.

Table 1: Types of financial institutions in Botswana as at April 2016

| Type of financial institution | Activity Performed | Supervisor | No of institutions |
|---|---|------------|--------------------|
| Commercial banks, Statutory banks | <ul style="list-style-type: none"> • Acceptance of deposits • Lending • Financial leasing • Transfer of money or value • Issuing and managing means of payment • Financial guarantees and commitments • Trading in money market instruments • Trading in foreign exchange • Trading in exchange interest-rate and index instruments • Safekeeping and administration of cash or liquid securities on behalf of persons • Money and currency changing • Participation in the issuing of securities | BoB | 10 3 |
| Non-bank financial institutions | | | |
| Microfinance institution | | BoB | 1 |
| Bureau de change (excl money remitters) | <ul style="list-style-type: none"> • Trading in Foreign exchange • Money and currency changing | BoB | 58 |
| Money remitters | <ul style="list-style-type: none"> • Transfer of money or value | FIA | 13 |
| Botswana Stock Exchange | <ul style="list-style-type: none"> • Trading in Commodities • Trading in Transferable securities | NBFIRA | 1 |
| Life Insurance companies | <ul style="list-style-type: none"> • Underwriting and placement of life insurance and other investment related insurance | NBFIRA | 3 |
| Pension Funds Administrators | <ul style="list-style-type: none"> • Otherwise investing, administering or managing funds or money on behalf of other persons • Underwriting and placement of life insurance and other investment related insurance | NBFIRA | 2 |
| | | | |
| Asset Managers | <ul style="list-style-type: none"> • Trading in Transferable securities | NBFIRA | 14 |

| | | | |
|--|---|-------------------------------------|-----|
| | <ul style="list-style-type: none"> Individual and collective portfolio management Otherwise investing, administering or managing funds or money on behalf of other persons | | |
| General Insurance | | NBFIRA | 12 |
| Insurance brokers | <ul style="list-style-type: none"> Underwriting and placement of life insurance and other investment related insurance | NBFIRA | 46 |
| Medical Aid funds | | NBFIRA | 9 |
| Pension funds | <ul style="list-style-type: none"> Otherwise investing, administering or managing funds or money on behalf of other persons Underwriting and placement of life insurance and other investment related insurance | NBFIRA | 87 |
| Reinsurance | | NBFIRA | 3 |
| Stock Brokers | <ul style="list-style-type: none"> Trading in Transferable securities | NBFIRA | 3 |
| Management Companies of collective Investment Undertakings | <ul style="list-style-type: none"> Trading in Transferable securities Individual and collective portfolio management | NBFIRA | 5 |
| Micro Lenders | <ul style="list-style-type: none"> Lending | NBFIRA | 218 |
| Private Equity | | NBFIRA | 2 |
| Investment advisors | <ul style="list-style-type: none"> Otherwise investing, administering or managing funds or money on behalf of other persons Carries on the business of advising others concerning securities | NBFIRA | 7 |
| Custodians | | NBFIRA | 3 |
| IFSC Accredited Companies | <ul style="list-style-type: none"> Out of the 52 only 10 are carrying out FIs activities | NBFIRA (7) BoB (3) ¹⁸ | 52 |
| Trustees of CIU | <ul style="list-style-type: none"> Trading in Transferable securities | NBFIRA | 3 |

¹⁸ BoB is and/or was the licensing and supervisory authority for the following IFSC companies:

(i) African Banking Corporation Holdings (ABCH), a bank holding company for all banks operating under the trade name BancABC in the SADC region. The holding company and its subsidiaries were bought by Atlas Mara in August 2014, but the ABCH/ BancABC names are still used as the official trading names.

(ii) Kingdom Bank Africa Limited (KBAL). This bank is being liquidated as we speak, and its banking licence was revoked in June 2015.

(iii) ABN AMRO Bank (Botswana) OBU Limited, which cancelled its licence to transact banking business in March 2013.

| | | | |
|--|---|--|--|
| | <ul style="list-style-type: none"> • Otherwise investing, administering or managing funds or money on behalf of other persons. | | |
|--|---|--|--|

Table 2: The composition and size of the Financial Sector as at April 2016

| Type of financial institution (<i>Sample table to be adapted as appropriate</i>) | Number of Institutions | Total assets |
|---|------------------------|---|
| Commercial banks | 10 | P76.6 billion |
| Statutory banks | 3 | P7.5 billion |
| Life Insurance companies | 3 | P20,1 billion |
| Pension funds administrators | 2 | P70 billion |
| Asset Managers | 14 | P44.1 billion |
| General Insurance | 12 | Information not provided by the authorities |
| Insurance brokers | 46 | P375 million |
| Medical Aid fund | 9 | P840 million |
| Pension funds | 87 | P48.2 billion |
| Reinsurance | 3 | P193 million |
| Stock Brokers | 4 | information not provided by the authorities |
| Management Companies of collective Investment Undertakings | 5 | P6.32 billion |
| Micro Lenders | 218 | P3.06 billions |
| Private Equity | 2 | Information not provided by the authorities |
| Investment advisors | 7 | As above |
| Custodians | 3 | As above |
| IFSC Accredited Companies | 10 | As above |
| Trustees of CIU | 3 | As above |
| Money remitters | 13 | As above |

Table 3: The composition and size of the DNFBP sector as at April 2016

| Sector | In Botswana Activity performed by | AML/CFT requirements in Domestic Law | Oversight provided by |
|---|--|---|--|
| Casinos (including internet casinos) | 9 | Gambling Authority Act, 2012 and Gambling Act Regulations of 2016 | Gambling Authority |
| Real Estate Agents | 142 | Real Estate Professionals Act, Cap 61:07 | Real Estate Advisory Council |
| Dealers in precious and Semi-precious stones. | 313 | Precious and Semi-Precious stones Protection Act Cap 66:03 | Ministry of Mineral Energy and Water Affairs |
| Accountants | 3100 (2700 individual accountants and over 400 Accounting firms) | Accountants Act No 12 of 2010 | Botswana Institute of Chartered Accountants |
| Legal professionals | 482 | Legal Practitioners Act Cap 61:05 | Law Society |
| Car Dealers | 760 | Trade Act | City/Town /District Councils/ FIA |
| Company Service Providers | Information not provided | Companies Act. | Information not provided |

c) Overview of preventive measures

93. The legal and regulatory framework relating to AML/CFT preventive measures in Botswana is provided in the FI Act and the Financial Intelligence Regulations of 2013. The measures prescribed in the Act are not fully consistent with the FATF Standards.

94. In as much as the Act was enacted in 2009, implementation of AML/CFT measures in Botswana started when the FIA became operational in early 2014. In this regard most of the reporting entities are yet to develop and implement the prescribed preventive measures. Prior to the FI Act, the preventive measures implemented were those prescribed in the Proceeds of Serious Crimes Act and the Banking Laws and Regulations. However, these laws had significant inadequacies in that they had limited scope on AML/CFT, the relevant financial activities, entities and professions. In addition, designated non-financial businesses and professions were not included in the AML/CFT framework.

95. The FI Act has now provided for some of the AML/CFT preventive measures in line with the FATF Standards, however, there is limited implementation of the measures by the reporting

entities. It is only FIs, in particular the large foreign owned or controlled entities that have demonstrated a better awareness and understanding of their AML/CFT obligations and implementation of the preventive measures than others. For the foreign owned or controlled entities, the motivation to implement the measures is to comply with the group rather than domestic requirements. The smaller local reporting entities and the designated non-financial businesses and professions still have a limited understanding of their ML/TF risks and AML/CFT obligations. The estate agents and legal practitioners are prescribed as reporting entities in the FI Act, however, they are not being monitored for AML/CFT compliance even though the professions noted that the nature of their activities made them susceptible to high risk ML activities. As already indicated, the AML/CFT legal and regulatory framework in Botswana has material deficiencies in respect of the scope of the AML/CFT requirements (adequate CDD measures including verification of beneficial ownership, high risk customers and countries, wire transfers and correspondent banking relationships) and does not cover dealers in precious and semi-precious metals under the DNFBP category.

d) Overview of legal persons and arrangements

96. Legal persons in Botswana are incorporated after being registered by the Registrar of Companies in the Companies Register. Trusts assume their common law obligations after being registered at the Deeds Registry Office, however it is not a requirement in Botswana that trusts be registered and there are no specific laws regulating trusts. Whilst companies can be registered by any person, either alone or with other persons, trusts have to be registered by a notary public. The application for registration of a company has to be accompanied by a declaration certificate of compliance made by a person engaged in the formation of the company. Such persons include: a legal practitioner, a member of the Botswana Institute of Accountants, Chartered Secretaries or any other such person as may be prescribed by the Minister. The following companies can be formed in Botswana: a) a company limited by shares; b) a close company; and c) a company limited by guarantee. A company limited by shares or guarantee has to be either a private company or a public company and for such companies unless stated in their application for registration or constitution that they are a private company, they are regarded as public companies. At the time of the on-site visit, companies illustrated in Table 3, below, were in existence:

Table 4: Companies registered at CIPA

| TYPE OF COMPANY | NUMBER OF COMPANIES REGISTERED |
|--------------------------------------|----------------------------------|
| Company limited by shares a) Private | 204,309 (131 external companies) |
| b) Public | 591 (1 external company) |
| Close Company | 254 |
| Company Limited by Guarantee | 42 |

97. Trusts are registered with the Deeds Registrar just like any other property related deed. At the time of the on-site visit there were a total of 217 registered trusts. Majority of the trusts were community trusts taking up 32.7% of the number of registered trusts, then charitable trusts at 31.3%, with the remaining 35.9% falling in the category of family, churches, educational and businesses registered trusts. There are no legal requirements or specific obligations to identify the settlor/founder, trustees and beneficiaries of trusts and any other natural person exercising ultimate effective control over the trust.

98. There is no legal requirement for any of the competent authorities, companies or reporting entities to obtain, retain and maintain beneficial ownership information on legal persons. Only basic information on the creation of companies is recorded and maintained in the registers of CIPA. Basic information on both legal persons and trusts is publicly available at CIPA and the Registrar of Deeds, respectively.

99. Botswana acts as a major regional and continental economic hub of foreign direct investment. It has registered 52 companies under this arrangement. Out of these companies, 42 are international holding companies. Requirements relating to beneficial ownership are not pursued when these companies are being registered in Botswana which poses significant ML/TF risks.¹⁹

e) Overview of supervisory arrangements

100. FIs and DNFBPs supervisory authorities are designated under Schedule 2 of the FI Act to monitor compliance by reporting entities (listed under Schedule 1) with AML/CFT requirements. S. 2 of the FI Act further designates the FIA as the supervisory authority for reporting entities which do not have a supervisory authority. Some of the supervisors listed in Schedule 2 are also responsible for licensing the entities they supervise.

101. DNFBPs²⁰ are licensed and supervised by different regulatory bodies. Real Estate professionals are registered and supervised by the Real Estate Advisory Council. Casinos are licensed and supervised by the Gambling Authority. Legal practitioners are enrolled by the High Court and supervised by the Law Society. Authorities indicated that trusts and company services were provided by notaries and conveyancers who are also registered with the Law Society as practicing lawyers. Accountants are registered and supervised by the BICA. Dealers in precious and semi-precious stones are licensed by the Ministry of Trade and Minerals and supervised for AML/CFT compliance by the FIA.

102. FIA, as a supervisory authority for reporting entities that do not have a supervisory authority, is responsible for the supervision of 2 state entities, which are statutory banks (CEDA and BDC), dealers in precious and semi-precious stones, car dealers and money remitters. State entities are created by the Constitution and regulated by the Minister of Trade and Industry, car dealers are licenced under the Trade Act by the Town/District Council and money remitters are issued with a letter of no objection by BoB to enable them to operate.

¹⁹ See more information provided under 1.2 on Materiality

²⁰ See table 3 on page 37.

CHAPTER 2. NATIONAL AML/CFT POLICIES AND COORDINATION

Key Findings and Recommended Actions

Key Findings

- At the time of the on-site visit Botswana was in the process of carrying out its NRA and as a result there was no common understanding of its ML/TF risks at national level. Despite the NRA which is on-going, Botswana has got adequate institutions, structures and mechanisms which could have enabled it to identify its ML/TF risks at both national and sectoral scales. The institutions, structures and mechanisms are however not being effectively used to identify, assess, understand the ML/TF risks at national level and to take mitigating measures.
- The ML/TF risks associated with the offshore activities under the BITC regime of Botswana have not been adequately assessed nor are they understood by the authorities.
- Botswana has adequate structures to enable efficient national coordination and cooperation on AML/CFT matters but again these structures are not working to create a common understanding at national level of the high ML/TF risks in Botswana and development of national policies to address them. Again, there is no coordinated approach and systematic process in collecting, analysing and maintaining statistics to enable competent authorities to better understand ML/TF risks;
- Members of the NCCFI, which is the main statutory body composed of all the major stakeholders in AML/CFT at government level and has a wide ranging mandate to deal with financial crimes, including the offences of ML/TF, do not have the same appreciation of the ML/TF risks which exist in Botswana. It has also not taken its role to advise on AML/CFT policies prioritised on the ML/TF risks existing in Botswana.
- Although other competent authorities, the BPS, DCEC, BURS, NBFIRA and FIA appear to work together well, the cooperation/relationship between the FIA and BoB in terms of which Act to prioritise when it comes to AML/CFT matters is limited.
- The private sector still has a fragmented understanding of its ML/TF risks. Large FIs which are foreign owned or foreign controlled have a better understanding of their ML/TF risks by virtue of implementing their parent AML/CFT policies, whereas the remainder of the non-bank financial sector is in general, starting to have an understanding of AML/CFT and the ML/TF risks associated with the sector. The DNFBP sector has got very limited to no understanding of AML/CFT as well as ML/TF risks which exist in the sector and in some cases this also includes the AML/CFT supervisors in the sector.
- Some sectors are still outside the AML/CFT regime of Botswana: dealers in precious metals are not designated as reporting entities for AML/CFT purposes and the ML/TF risk associated with this sector is not known; PEPs are not included in the AML/CFT regime of Botswana and again the ML/TF risks they pose is not known.
- The low investigation, prosecution and confiscation of proceeds laundered creates a high vulnerability for ML risks.

- As there are no established areas of ML/TF high risk identified at national level, the allocation of resources is not prioritised according to the risks.

Recommended Actions

- Botswana needs to finalise its NRA so that it promotes a common understanding of the ML/TF risks which face Botswana at national level;
- The finalised NRA results should be shared with the domestic FIs and DNFBP sectors and all the other relevant sectors in order to improve on the understanding of their own ML/TF risks;
- Botswana should consider involving all relevant agencies as it finalizes the current NRA and in future exercises of a similar nature;
- Botswana should have a coordinated approach and systematic process in collecting, analysing and maintaining statistics to enable competent authorities to better understand ML/TF risks and effectively respond to the risks identified, and have the statistics provided and the understanding obtained form part of the basis for updating the NRA;
- The authorities should effectively use the current institutions, structures and mechanisms which are in place, particularly NCCFI to come up with the areas of ML/TF high risk and to give informed advise to the affected competent authorities and specific sectors which will improve on making policy decisions and prioritisation on allocation of resources;
- The NCCFI should prioritise better coordination and cooperation by all stakeholders so that there is the same understanding of ML/TF risks and AML/CFT matters at national level;
- The authorities should identify and understand any ML/TF risks associated with offshore activities under the BITC regime of Botswana.
- The BoB needs to improve its working relationship with the FIA as it derives its AML/CFT powers from the FI Act;
- The vulnerability to ML/TF risks created by inadequate investigations and prosecution of ML cases and satisfactory coordination of investigations of such cases should be effectively dealt with by the DCEC, BPS and BURS through establishing of Units to specifically deal with ML/TF. The DPP (in particular the Anti-Corruption Unit) should be adequately resourced in order to enable it to adequately deal with ML prosecutions. The DPP, DCEC, BPS and BURS should meet frequently to discuss and coordinate matters relating to ML/TF.
- There should be more awareness to the majority of the non-bank financial institutions and the DNFBP sector on the risks of ML/TF and the sectors should be encouraged to assess and understand their own ML/TF risks.
- The authorities should widen the scope of their AML/CFT regime to include PEPs, precious metals and other activities which may pose high ML/TF risks but are not currently designated for AML/CFT supervision and monitoring.

The relevant Immediate Outcome considered and assessed in this chapter is IO 1. The recommendations relevant for the assessment of effectiveness under this section are R1-2.

2.1 Immediate Outcome 1 (Risk, Policy and Coordination)

a) Country's understanding of its ML/TF risks

103. At the time of the on-site visit, Botswana's authorities were analysing data and other information on the NRA to identify, assess and understand ML/TF risks of the country at national level and finalise the NRA report. The NRA involved both the public and private sectors. Botswana had also produced a report on NTA which results were not shared with the assessors to determine the kind of risks identified as according to the authorities, the information was too sensitive. In the absence of the NRA, the assessors relied on interviews with the authorities, private sector, responses provided to the TC and Effectiveness Questionnaires and other sources of reliable independent information on Botswana²¹, through which it was established that most authorities had basic and limited understanding of ML/TF risks of the country. The authorities did not have the same level of understanding of the ML/TF risks facing Botswana as well as the same understanding of the areas which were vulnerable to ML/TF risks. Whereas some of the sectors were not aware of the ML/TF risks in general, those like the BPS, BURS, DCEC and the DPP had a limited understanding of some of the risks, though at different levels. The DPP, DCEC and the BPS, also had varying predicate offences which they viewed as being a ML risk and did not appear to meet frequently to discuss and coordinate ML cases as well as prioritisation of the cases which could have enabled them to have the same understanding of the ML/TF risks.

104. With respect to TF, the explanations provided by the DIS²² led the assessors to conclude that it understands the country's TF risks and that its operations to mitigate the TF risks are informed and guided by that understanding. However, this understanding was not shared at national level.

105. Based on the analysis of the STRs that it receives, FIA has a general understanding of the ML risks existing in Botswana. However, FIA's understanding of some of these ML/TF risks at national level has not been shared or used to influence the understanding of the ML/TF risks by the other members of the NCCFI. Also the regulated entities supervised by FIA for AML/CFT were not filing STRs with FIA and as FIA had also not started compliance monitoring of these entities, it had no understanding of the specific ML/TF risks existing in these sectors.

106. Whilst NBFIRA has an emerging understanding of the ML/TF risks relating to its regulated entities, the same cannot be said about BoB which has no understanding of the existing ML/TF risks within its regulated entities (see IO 3).

107. The assessors also did not get the satisfaction that ML/TF risks relating to legal persons and arrangements were adequately covered during the NRA and at the time of the on-site visit, the authorities had very limited understanding of the risks associated with this sector. In addition, the assessors, based on the on-site visit interviews are also of the view that the NRA did not adequately deal with the ML/TF risks associated with legal persons investing in Botswana under the BITC initiative.

108. The assessors hope that the results of the NRA will bring a common understanding of the ML/TF risks existing in Botswana at national level.

²¹ IMF & WB reports

²² Refer to Chap 1.1(a)- Overview of ML/TF and IO 9.

b) National policies to address identified ML/TF risks

109. The Minister of Finance and Development Planning sets out policies on AML/CFT for consideration by the Cabinet before they are issued into directives. The Ministry chairs the NCCFI, whereas the FIA serves as its Secretary. The FIA has also been charged with coordinating the NRA exercise. The NCCFI is, among others, charged with the responsibility of assessing effectiveness of policies and measures to combat financial offences and making recommendations to the Minister for legislative, administrative and policy reforms. However, at the time of the on-site visit, Botswana did not have national AML/CFT policies and in the absence of NRA results, AML/CFT interventions which were being implemented were not informed by identified, assessed and commonly understood ML/TF risks. This applied at both national and sectoral levels.

110. The assessors also noted that not all the supervisory authorities had been involved in the NRA. In particular, the REAC had not been involved in the consultations which had been undertaken on the NRA and yet the assessors and the authorities were in agreement that the real estate sector is one of the sectors which could be highly vulnerable to ML risks due to absence of AML/CFT compliance monitoring and that most of the transactions in the sector were done in cash which leaves limited audit trail. Non-participation of some of these supervisory authorities will lead to limited information to develop informed national policies on AML/CFT.

c) Exemptions, enhanced and simplified measures

111. The FI Act provides for full exemptions from the requirements of this Act on transactions conducted between a bank and a non-bank financial institution (e.g. an insurance company or a broker). However, these exemptions are not based on ML/TF risk assessment. The assessors are of the view that such exemptions are far-reaching, as they mean that a bank should not perform CDD, record keeping and STR procedures on a business relationship or a transaction it enters into or concludes with a non-bank financial institution.

112. Botswana does not apply enhanced measures on business relationships and transactions on any identified high risk customer or country. The legal framework does not provide this requirement and there has not been any assessment of the ML/TF risks in Botswana to determine low or high risk customers with a view to applying commensurate mitigating controls. As a result, there are no enhanced measures applied on PEPs, motor vehicle dealers and real estate, amongst others, which have been identified by the private and public sector to be vulnerable to ML. Furthermore, Botswana has no specific financial products which require application of simplified measures for lower risk scenarios.

d) Objectives and activities of competent authorities

113. In general, the objectives and activities of the competent authorities in Botswana are not based on AML/CFT policies and prioritised according to ML/TF risk. Most of the BPS' operational programmes relating to predicate and ML crimes are not to identify risks but to address the consequences of the risk in form of investigations and referring cases for prosecution. The BPS and BURS do not have specific Units to deal with ML investigations. Both DCEC and BPS highlighted the need to improve the skills and expertise they have in order to successfully realise the objective of carrying out ML investigations. Therefore, the investigations done by the LEAs are not aimed at identifying and addressing high ML/TF risk areas or coming up with definitive areas of high or

possibly low ML/TF risk. Prosecution in the DPP is also not prioritised according to risk factors, nor are such risk areas prioritised in training and allocation of resources. Further, the DPP has not taken specific measures to determine the extent of the ML risk posed by some of the predicate offences that are not yet criminalised.

114. Also, supervisory tools and frameworks of authorities responsible for AML/CFT supervision are not informed by AML/CFT policies or identified risks.

115. Some of the competent authorities and the private sector indicated to the assessors that they are optimistic that once the results of the NRA are made public, they will develop and implement their measures taking into account the identified risks and mitigation strategy.

e) National coordination and cooperation

116. The FI Act establishes a national AML/CFT coordination and cooperation framework steered by the NCCFI. There is also the NIC which coordinates policy and operational matters relating to national security. The NCCFI comprises of all relevant competent authorities, under the leadership of the Ministry of Economic Development and Planning. The main task of the NCCFI is to advise the Minister on legislative, policy and operational matters in relation to financial crimes including AML/CFT. Currently, the NCCFI is engaged in the NRA, which is led by the Ministry but coordinated by the FIA as its Secretariat. At the time of the on-site visit the NRA exercise was not yet completed and no preliminary findings were shared with the assessors.

117. The effectiveness of the NCCFI is undermined by the fact that almost all the members are still developing institutional capacity and are at different levels of understanding their ML/TF risks, therefore there is no common understanding of the risks at national level amongst the NCCFI members. There is limited inter-agency coordination and cooperation on AML/CFT matters including amongst LEAs and supervisors. While there is good cooperation between the FIA and NBFIRA, the same cannot be said about BoB which has not taken any meaningful steps to implement its supervisory and coordination roles under the FI Act due to the fact that even after the coming into force of this Act, BoB continued to use the Banking Act which has got no specific AML provisions. The assessors noted the concerns this raises as it undermines coordination and cooperation between supervisors especially with NBFIRA given that banks in Botswana have diversified their financial services portfolio to include financial activities licensed by NBFIRA. To the extent that there is no sharing of information on ML/TF risks between BoB and NBFIRA, there was no common understanding of the ML/TF risk by the two supervisors. In the absence of proper mechanisms to coordinate and cooperate with, the FIA and BoB are unable to collect information on types of transactions and business relationships that are vulnerable to ML/TF in the banking and bureau de changes sectors, and thus promoting a better understanding and supervision of the sectors on a risk-based approach. There is no coordination and cooperation in relation to supervisors of the DNFBP sector, and this undermines a holistic understanding of ML/TF risks in the sector and other associated sectors.

118. The coordination and cooperation of the DCEC, BPS, BURS and FIA relating to sharing of information and intelligence and in joint investigations in some instances between DCEC and BPS, and between the BPS and the BURS, is also noted. The only problem is that such coordination and cooperation at times is not supported by more tangible statistics or information and is not targeted at identifying ML cases and related proceeds of crime to achieve the desired outcomes. The DPP, DCEC, BPS and BURS, who are the major stakeholders on ML/TF investigations and prosecutions

do not have their own forum where they all meet together to discuss ML/TF cases, their coordination and prioritisation.

119. The authorities did not demonstrate that they have a coordinated approach and systematic process in collecting, analysing and maintaining statistics to enable competent authorities to better understand ML/TF risks and effectively respond to the risks identified, and that the statistics provided and the understanding obtained be included to form part of the basis for updating the NRA once it has been finalised.

f) Private sector's awareness of risks

120. The NRA of Botswana was still underway at the time of the on-site visit, therefore ML/TF awareness to the FIs, DNFBPs and other sectors, based on the risks identified during the NRA will only commence when the exercise has been finalised. However despite the NRA not having been completed, the large foreign owned FIs seemed well aware of the ML/TF risks prevalent in their respective sectors compared to their counterparts, the smaller and local FIs. The rest of the private sector had very limited knowledge of any ML/TF risks which could be existing in the sector.

121. In the absence of the NRA being finalised, the DNFBP sector also had very limited knowledge on the kind of ML/TF risks which might be existing in the sector. Most of the sector only became aware of its AML/CFT obligations, when there was preliminary consultation with it by the authorities to prepare the sector for the on-site visit. There has been less engagement of the DNFBP sector on AML/CFT issues by the authorities.

Overall conclusions on Immediate Outcome 1

122. Although, there are adequate mechanisms and institutions (e.g. the NCCFI, FIA, BURS, BoB, DPP, DIS, NBFIRA, BPS) to identify areas of high ML/TF risks, to enable efficient national coordination and cooperation, to provide informed advice on AML/CFT policies based on prioritisation of the ML/TF risk areas and to promote awareness and a better understanding of AML/CFT, the mechanisms are not being sufficiently and effectively used to achieve these objectives. The end result has been that there is no analyses, assessment and a common understanding at national level of the ML/TF risks that face Botswana. Due to lack of a coordinated assessment of the ML/TF risks by NCCFI, there is segmented understanding of ML/TF risks in both the public and private sectors. Added to the ineffective coordination of AML/CFT issues by the NCCFI, Botswana is still in the process of carrying out its NRA. The NCCFI which is composed of all the relevant AML/CFT stakeholders from the public sector of Botswana should do more to discuss areas of ML/TF risk, propose informed guidance on dealing with the areas including policy suggestions informed by the risks. The NCCFI should also ensure that its stakeholders have the same understanding of the ML/TF risks facing Botswana.

123. In the private sector, reporting entities which are foreign owned, particularly large banks, have a better understanding of their ML/TF risks and have taken appropriate measures to mitigate them, whereas the non-banking sector is starting to identify and understand its risks. DNFBP reporting entities have no understanding of their ML/TF risks, which defeats a holistic understanding of the risks. Some high ML/TF risk areas, like the real estate sector, although having a designated supervisor, are not being supervised and monitored for AML/CFT purposes and hence there is no awareness of the ML/TF risks within the sectors.

124. There is need for the authorities to have measures which will enable PEPs to be brought under the AML/CFT regime of Botswana in order to minimise the ML/TF risks that might be associated with them.

125. Coordination and cooperation between the BoB and the FIA, and the effective implementation of the FI Act by the BoB supported by the FIA is not taking place, reflecting a non-complementary relationship between the main stakeholders in Botswana's AML/CFT regime which needs to be quickly addressed. However, the good bilateral cooperation between other supervisors and competent authorities is commended.

126. Botswana has achieved *a low level of effectiveness* for IO 1.

CHAPTER 3. LEGAL SYSTEM AND OPERATIONAL ISSUES

Key Findings and Recommended Actions

Key Findings

IO 6

- FIA's receipt of reports from financial institutions is limited. It only receives STRs and other reports mainly from banks, and STR filing from the DNFBPs is almost non-existent with just 1 STR filed by a casino since 2014. Cross-border cash and BNI declaration reports are not filed to FIA and BURS does not obtain information on BNIs.
- The STRs and other reports filed by financial institutions especially banks are accurate and relevant to FIA's analysis function. On the other hand, STRs and other reports from the DNFBPs are of low quality as FIA has just commenced engaging this sector to comply with reporting obligations.
- Upon request, FIA accesses information held by various public institutions. In addition, FIA exchanges information with other FIUs most of which are from the region. The information obtained is used to add value to STRs.
- There is very low usage of financial intelligence by BPS, DCEC and BURS to initiate or support ML investigations and trace criminal proceeds largely due to LEAs' preference to pursue predicate offences and inadequate expertise to conduct ML investigations. There is insignificant request for information by LEAs from the FIA to support their investigations.
- Staff of FIA have undergone relevant training and mentorship programs which have enabled them to produce quality reports disseminated to DCEC, BPS and BURS. However, FIA is yet to conduct strategic analyses.
- At the time of the on-site visit, FIA was in the process of putting all reporting entities on the goAML platform which was not interlinked with the database for reports from some entities which were still submitting reports manually. The reports submitted manually were being filed away without any analysis.
- To some extent, FIA and LEAs cooperate and exchange information. Information exchanged is adequately secured to protect its confidentiality. In some instances, LEAs form task forces to deal with complex cases requiring divergent skills and FIA has been incorporated on certain cases such as second-hand car dealership. However, results from such cooperation have not led to any ML investigations or tracing of criminal proceeds.

IO 7

- The DCEC, the BPS and the BURS has each one of them officers trained in ML. Although there is need for more specialised training, the officers are currently not using the skills they have gained to identify and investigate cases of ML.
- The lack of a specialised unit within the BPS to deal with ML has affected its ability to efficiently appreciate the value of the information and intelligence reports it receives from the FIA and use them to identify and investigate the offences of ML. The DCEC has only started to a limited extent using such reports to identify ML cases.

- The BURS does not obtain information on BNIs, so such information is not used to inform any investigations.
- DCEC, BPS and the DPP do not engage each other in conducting prosecution guided investigations on targeted cases, in order to improve on the identification, investigation and prosecution of ML cases.
- Both the DPP and DCEC, as well as other investigative agencies do not analyse reasons for case acquittals in order to develop and design training materials to improve on both investigations and prosecution skills.
- Although there is good cooperation between the FIA, DCEC, BPS and BURS, identification and investigation of ML and conducting of parallel financial investigations with investigations of major predicate offences is not being done.
- The PICA has not been effectively used to investigate and prosecute ML cases of both natural and legal persons.
- The ML risks existing have not been identified to enable determination as to whether investigations and prosecutions are being done consistent with the country's threats and risk profile.
- There has not been any conclusive investigation of a ML case where in the end a decision was made that based on justifiable reasons it would not be possible to secure a ML conviction, and alternative measures were pursued.

IO 8

- Botswana does not pursue confiscation of criminal proceeds, instrumentalities and property of corresponding value as a national policy objective.
- Finalisation of criminal trials where confiscation might be required is hampered by high staff turn-over.
- There has not been any confiscation relating to a ML case and all efforts seem to be directed towards confiscation arising after convictions of predicate offences.
- There are limited skills to identify laundered assets subject to forfeiture or confiscation.
- There has not been any cases involving repatriation, sharing or restitution of proceeds or instrumentalities of crime with other jurisdictions.
- Confiscation is not being adequately used by customs authorities at the borders as an effective, proportionate and dissuasive means of sanction relating to cases of false/non declared cross-border transportation of currency.
- The authorities do not retain proper records of the cases where confiscation will have been applied and granted or denied.
- The case management system at the courts is not being effectively used to account for old outstanding cases to enable prioritising of litigation of such cases to finality.
- The assessment team was unable to determine if confiscation in Botswana is consistent with the assessed ML/TF risks, national AML/CFT policies and priorities, as such ML/TF risks have not yet been identified as Botswana is still to finalise its NRA.

Recommended Actions

IO 6

- Authorities should ensure that all specified parties in Botswana are complying with their reporting obligations. In particular, FIA should expeditiously guide DNFBPs on identification of suspicious transactions and filing of quality reports.
- BURS should urgently commence submission of information on cross-border cash declarations to FIA to add value to STRs and help with identification of possible ML issues.
- FIA should interlink its goAML system with the database used for manual receipt of CTRs and EFTRs for ease of enriching its STR analysis.
- FIA should be capacitated with skills to conduct strategic analysis and produce ML typologies and trends.
- The Authorities should take necessary steps, including training, to ensure that the BPS, BURS and DCEC understand the value of and use of the financial intelligence and other information produced by the FIA to actively pursue ML cases rather than predicate offences. This includes making requests to the FIA with a view to adopting “follow-the-money” approach when carrying out investigations.
- Authorities should ensure that cooperation and exchange of information lead to detection, investigation and prosecution of ML as well as identification and tracing of criminal proceeds.

IO 7

- The officers in the DCEC, BPS and BURS trained in ML investigations should implement the skills they have acquired into practical experience by identifying and investigating ML cases. The DCEC, BPS and BURS should make investigations of ML part of their own policies to encourage investigation of such cases.
- The BPS should dedicate a specialised unit with the capacity of trained officers it has on ML to deal with ML investigations and specifically assess the intelligence reports disseminated to the BPS by the FIA to identify ML cases. The officers should receive further training in ML investigations. The DCEC should continue to strengthen its capacity to investigate ML cases and effectively use the intelligence reports disseminated from FIA to identify ML cases for investigation.
- The BPS and DCEC should consider carrying out parallel financial investigations with most of the predicate offences investigated where the offence of money laundering has not been directly identified.
- The DPP, DCEC and BPS should come-up with a framework which should guide the three institutions on how to conduct prosecution guided investigations in complex targeted cases.
- The DPP should be capacitated so that it is adequately skilled to take other measures where a ML investigation has taken place but based on justifiable reasons it is not possible to secure a ML conviction.

- The DPP should properly guide the DCEC and the BPS in cases brought to it where laundering of illicit proceeds will be apparent and ensure that proper investigations and prosecution of such cases is done.
- The DPP, DCEC and BPS should analyse reasons for discharge of cases for purposes of including such weaknesses in developing training materials for their officers.
- The BPS should consider establishing a ML Investigations Unit, which should be well resourced and capacitated to effectively assess cases of non-declaration of currency and other matters referred to it by the FIA to determine the possibility of ML.
- The authorities should strive to change the culture of only dealing with investigations and prosecutions of predicate offences leaving out the ML aspects of such offences.
- The BURS should consider establishing within its structures a designated money laundering identification and investigative unit or adopt a formal mode to refer suspected ML or predicate offences to either the DCEC or the BPS for further investigation.
- The authorities should use the results of the NRA currently underway to ensure that investigations and prosecutions are prioritised in accordance with Botswana's identified ML/TF risks.

IO 8

- Botswana should pursue confiscation of criminal proceeds, instrumentalities and properties of equivalent value as a policy objective.
- The authorities should assess the causes of high staff turnover in the DPP and the courts, and devise ways of curbing it so that criminal cases where there would have been seizure of suspected illicit proceeds are timely prioritised and litigated.
- There is need to improve on the skills of all the relevant law enforcement agencies, including Prosecution dealing with ML cases to ensure that laundered assets are quickly identified, traced and confiscated.
- The BURS should use confiscation as an effective, proportionate and dissuasive means of measures relating to falsely/non-declared cross-border movement of currency cases and have the Customs and Excise Act amended to provide for declaration requirements on cross-border movement of BNIs to enable it to implement similar measures.
- The authorities should engage other jurisdictions in cases involving repatriation, sharing or restitution of proceeds or instrumentalities of crime arising from domestic or extraterritorial cases.
- The authorities should use the results of the NRA when it is finalised to ensure that confiscation is consistent with the identified ML/TF risks, national AML/CFT policies and priorities.
- The law enforcement agencies should keep proper statistics on cases where confiscation will have been ordered and use them to identify areas of ML/TF risks where confiscation should be prioritised.
- The case management system at the courts should be improved so that old outstanding cases where confiscation is required can be traced and properly managed to finality.

- The authorities should continue to strengthen the AFU and ensure that LEAs which play a pivotal support role to the Unit are on board.

The relevant Immediate Outcomes considered and assessed in this chapter are IO6-8. The recommendations relevant for the assessment of effectiveness under this section are R.3, R4 & R29-32.

3.1 Immediate Outcome 6 (Financial intelligence ML/TF)

a) Background information

127. FIA is established in terms of s. 3(1) of the FI Act, with its functions set out under s. 4 of the same Act. Although the legal framework in Botswana provides for receipt of suspicious transactions by the FIA from all reporting entities (s.4 of FI Act) and the BoB from the banks (s. 21(4) of Banking Act), in practice the FIA is recognised as the only national centre in Botswana responsible for receipt and analysis of suspicious transactions and other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis to competent authorities. Prior to the FIU's commencement of its core operations in February 2014, reporting entities were filing STRs to the DCEC with copies made to the BoB. In September 2014, the BoB wrote all banks advising them to stop sending any copies of STRs to the Central Bank. Setting up of the FIA started in 2013 and when it was ready to perform its core functions, all the 22 STRs held by the DCEC were handed over to the FIA²³. The FIA makes disseminations to the DCEC, BPS, BURS, DIS, and Immigration Department.

b) Use of financial intelligence and other information

128. The FIA has access to a variety of sources of information which includes some reporting entities and competent authorities for use in generating financial intelligence and other information with a view to identify potential proceeds of crime and financing of terrorism necessary for investigations. Similarly, LEAs have access to financial intelligence and a wide range of other information which they could use to develop financial investigations. From the evidence obtained during the on-site visit, LEAs designated to investigate cases of ML and TF do not use this financial intelligence and other information to conduct ML/TF investigations. Instead, the primary focus of the LEAs is investigation of predicate offences.

129. The FIA uses its powers to request for and receive additional information from reporting entities for further analysis on most of the STRs received. Additionally, the FIA accesses different sources of information mainly held by competent authorities in Botswana and, in some few instances, from other FIUs to supplement the information available for analysis. The FIA provided case examples to demonstrate use of the above avenues to collect information during analysis of an STR. Most of the requests are directed to banks but in a few instances other reporting entities provided information following request for additional information by the FIA. However, the assessors were concerned that no comprehensive statistics were kept by the FIA in relation to requests for additional information, which, in turn, made it difficult for the assessors to quantify

²³All STRs submitted to DCEC before FI Act were handed over to the FIA upon its establishment. The STRs were analysed by the FIA (22 STRs), however, they were of low quality. There has been improvement of the quality of the STRs since then.

the frequency of such requests, for example, against the number of STRs received in a particular period, to quantitatively determine effectiveness thereof.

130. The assessors established that the financial intelligence and other information generated by the FIA is of reasonable quality despite the FIA commencing analysis of STRs about two years before the on-site visit in June 2016. The assessors had sight of some of the reports which they concluded were of reasonable quality to enable LEAs in Botswana to either initiate or support ML investigations. The BPS, DCEC and BURS confirmed this finding in separate meetings. The main concern, however, was lack of use of the financial intelligence and other information to actively identify and investigate potential ML cases.

131. Since 2014, the FIA has been receiving STRs from the banking, MVTS, bureau de change, and insurance sectors with 91% of them filed by banks (Refer to IO4 for reporting breakdown by sectors). Although officers of the FIA generate quality intelligence, this is affected by the fact that the STRs database is negligible as FIA only started its core operations in February 2014 and the STRs are submitted by a few reporting entities, mainly the banks. The FIA has direct access to the database of the Department of Road Transport and Safety (DRTS) for details of vehicle ownership, and Government Payment Systems relating to salaries, procurement and other issues. Upon request, FIA gets further information from the DCEC, BPS, BURS, Ministry of Lands and Housing, CIPA, Registrar of Deeds, and Immigration Department. Furthermore, the FIA uses information from the media. However, cross-border cash²⁴ declaration reports are not made available to the FIA as required under the law, with BURS indicating that it would only file to the FIA detected suspicious transactions but had not submitted any by the time of the on-site visit.

132. In addition, the Crime and Criminal Record System (CCRS) of BPS is interfaced with Vehicle Registration and Licensing System (VRLS) of the Department of Road Transport and Safety, and National Identification System (NIS) of Labour and Home Affairs. The CCRS has also been interfacing with Automated Fingerprint System (AFIS) of the Criminal Records Bureau (CRD), a unit of BPS. Records on company registration and directorship are obtained on request from CIPA. The BPS has a database which it shares with the Immigration Department for investigation of persons of interest.

133. Further to that, the DCEC has access to Vehicle Registration and Licensing System (VRLS) of the Department of Road Transport, Immigration and CIPA databases. When the DCEC opens a case, it gets further information from a wide range of public sources including consulting the FIA to determine if there are any cross-border funds transfers.

134. The BURS has direct access to databases of the CIPA and National Identification system, information which it uses for verification of individuals, companies and the shareholders and link that with bank details and tax compliance issues. The BURS uses information from the FIA to follow-up on some cases, monitor activities of certain taxpayers, and carry out internal investigations and where in-depth investigations are required they are referred to the DCEC and BPS. In this regard, between 2008 and June 2016, BURS made 4 case referrals of which 1 was made to DCEC on false invoice and 3 to BPS on use of bogus company and false tax clearance certificates.

²⁴ See analyses to R. 32 on BNIs

c) STRs received and requested by competent authorities between February 2014 and June 2016

135. In terms of the FI Act, FIs and DNFBPs file STRs to FIA within a specified period. In addition, the FI Act provides for members of the public to submit suspicious transactions to the FIA for further consideration. Although, the Banking Act requires banks to submit STRs to the BoB, in practice they file such reports with the FIA only.

136. Presently, the FIA receives three types of reports, namely: STRs, CTRs and EFTRs. The FIA received a total of 246 STRs from 2014 to June 2016, with most of the reports filed by banks. In the DNFBP sector, only one STR has been filed by a casino since 2014. The authorities attribute this to the lack of understanding of AML/CFT requirements by the sector and compliance monitoring by supervisors. This situation is as a result of a decision by FIA to focus more on financial institutions than this sector. The assessors were informed by FIA that the STRs received from banks were relevant and accurate and that the quality of STRs from the banks had improved greatly over the years owing to training and feedback provided to the financial institutions. The FIA has an electronic platform, (goAML) dedicated to the receipt and storage of the STRs, CTRs and EFTRs. The FIA has been using the platform since 2014. Nevertheless, most banks and non-bank financial institutions are still working on compatibility of their systems with the FIA online goAML reporting system. At the time of the on-site visit, only 4 banks were filing STRs, EFTRs and CTRs through the goAML system while 6 more banks were expected to join the system by the 30th of June 2016. This meant that at the time of the on-site visit, nine banks (including both commercial and statutory banks) were still using manual submission of STRs, EFTRs and CTRs. Acknowledgement of the STR receipt is made automatically and instantly in the case of online reporting, while the FIA sends a letter to the reporting entity upon receipt and review of the STRs submitted manually.

137. As already indicated, the FIA and the BURS are working on modalities to make available cross-border cash declarations to the FIA. The assessors are concerned that the absence of such information undermines efforts by the FIA to produce financial intelligence and other information necessary to direct LEAs to detect and investigate illegal cross-border cash transactions which have been identified as high risk for ML in Botswana.

138. From 2015, the FIA started producing ML patterns in the country using the STRs received from the financial institutions. The FIA could have benefitted more if most DNFBPs and other financial institutions were dutifully filing STRs and other types of reports under the FI Act. While this is a commendable action by the FIA given its relatively recent existence as an operational FIU, the assessors were not provided with evidence to demonstrate the usefulness of the ML pattern reports in determining activities of high ML risks, and value added to the operations of the LEAs.

139. There has been a noticeable decrease in the number of STRs submitted over the years. The FIA attributed this to an improved understanding by the banks on suspicion being the basis for filing an STR. Further, FIA's training and dedicated feedback mechanism have helped the FIs to concentrate on filing quality reports as opposed to previously where the STRs were filed without proper consideration to what constituted suspicion which was a result of limited awareness. For instance, some banks were filing every customer transaction alert as an STR.

Table 5.1 STR receipts by the FIA

| Total STRs received | | | | |
|---------------------|------|------|------|-------|
| 2013 | 2014 | 2015 | 2016 | TOTAL |
| 22 | 114 | 95 | 15 | 246 |

140. In addition, the FIA received an STR each from an individual and an entity in line with the general reporting provision of the FI Act²⁵. The STRs, which were on fraud and ML allegations, were under analysis at the time of the on-site visit. The assessors are of the view that this particular provision could become crucial to the FIA's sources of information given the cash-intensiveness of the economy of Botswana. Already high value cash transactions among car dealers, real estate businesses, and buyers and sellers of cattle are some of the areas identified by the public and private sectors as posing high ML risks in Botswana.

141. Reporting entities submit reports on EFTRs above P10, 000 (USD1000) to the FIA in line with FI Regulation 19 and these are submitted every two days. By contrast, there is no threshold for CTRs, however, the FIA has a formal agreement with banks to adopt the EFTRs threshold on CTRs, which are submitted on weekly basis. The other reporting entities have since adopted this threshold and are also reporting the CTRs, although there is no similar formal agreement with them. The FIA has registers for submission of STRs, CTRs and EFTRs by the reporting entities to help monitor reporting trends. There is considerable progress on reporting of CTRs by the reporting entities. The FIA is still engaging some non-bank financial institutions to commence reporting while for DNFBPs only 1 casino is reporting CTRs to the FIA.

142. It is noted that the FIA makes a large number of requests to the tax authority which is consistent with the risk profile of ML in Botswana based on the STRs filed by the banks. It is evident from the low number of requests made to the FIA that there is very little reliance on the financial intelligence and other information of the FIA when LEAs carry out the investigations.

d) Operational needs supported by FIU analysis and dissemination

143. The operational analysis conducted by FIA incorporates all types of reports depending on the relevance and complexity of the subject matter²⁶. In order to further enrich the quality of analysis, the FIA utilises open sources, responses from requests made to foreign counterparts, information obtained from domestic competent authorities and additional requests from reporting entities. This has enabled the FIA to produce quality operational intelligence which is disseminated to LEAs depending on the type and nature of suspected criminality.

144. The STRs which the FIA gets from reporting entities are mainly on fraud and tax evasion and most of the cases involve politically exposed persons (PEPs). This is consistent with information provided to the assessors during interviews with both the public and private sectors that these predicate offences make up some of the crimes which are high risk for ML in Botswana.

²⁵Section 19 of FI Act

²⁶ Refer to paragraph 135 above for the types of reports filed with the FIA.

145. Since July 2015, the FIA has conducted analysis of STRs and other reports which has enabled it to develop patterns of potential ML and predicate offences produced on a quarterly basis and are contained in the dissemination to LEAs. Generally, disseminations by the FIA are made based on the type of potential predicate offences. For instance, reports containing elements of corruption are referred to the DCEC. However, in some of the circumstances the FIA disseminates a report to more than one LEA. The authorities have, however, not demonstrated the usefulness of the trend analysis to LEAs to identify and investigate potential ML cases.

146. The assessors established that the FIA produces quality reports enough to support the DCEC and BPS in initiating and investigating predicate offences and money laundering as well as tracing of assets linked to subjects of interest. Although the LEAs rated the quality of FIA’s disseminations as very good, the pursuit of ML by the DCEC and BPS arising from such disseminations is very low while the BURS in practice does not investigate ML but refers complex cases to the DCEC and BPS. For cases that would not be reasonable to prosecute, the BURS applies administrative sanctions.

147. The FIA made 26 disseminations from February 2014 to June 2016. Most disseminations were done between end of 2015 and early June 2016 and investigations were still going on for some of the cases. The DCEC got 6 disseminations out of which 2 were closed for lack of enough evidence. The BPS also got 6 disseminations, 2 of which were closed undetected and 1 was withdrawn before court. The FIA got 3 spontaneous requests from the DCEC and BURS to support their investigations. The DCEC indicated that it was still investigating four cases to determine if there could be potential for ML charges. (Refer to IO7 for details of ML cases pursued by DCEC and BPS).

148. As one way of addressing low ML investigations, the FIA and DCEC arranged for staff exchange in which two financial analysts from FIA were attached to the DCEC for 6 months each, from November 2015 to April 2016 and May 2016 to October 2016, respectively. The aim of the attachments were to impart ML investigative and analytical skills to the DCEC and provide guidance on making requests and spontaneous disclosures to the FIA. However, fruits from this exercise are yet to be realised.

Figure 5.3 Disseminations from the FIA from February 2014 to June 2016

| Competent Authority to whom Disseminations were made | Total |
|--|-------|
| BURS | 14 |
| DCEC | 6 |
| BPS | 6 |

149. The FIA uses goAML for online receipt of STRs and instant commencement of analysis based on set parameters. However, EFTRs and CTRs received manually are not integrated with that of the goAML system. Since the FIA does not get information from various sectors and its internal databases are not interlinked, it is disadvantaged on the ability to extract possible suspicious transactions and identify assets linked to ML. From 2014 to the time of the on-site visit, the FIA had only extracted 2 suspicious transactions from the CTRs it had received.

150. When an STR is submitted through goAML, it is systematically given a reference number and shielded by the system and only accessed by the Chief Financial Analyst who forwards it to the Director. The STR is then unshielded and allocated to an Analyst and thereafter shielded again and accessed by the Director and Chief Financial Analyst, only. Upon conclusion of analysis, the FIA makes disseminations to authorised law enforcement agencies.

e) Cooperation and exchange of information/financial intelligence

151. The FIA and the competent authorities in Botswana cooperate and exchange information to some extent. This is evident in the authorities' recent use of cross-agency task forces in dealing with complex cases under investigation or consideration. For instance, the DCEC indicated that task forces are formed for a case which has a number of issues attached to it and requiring diverse skills from various agencies such as the DCEC, FIA, BURS and BPS. The assessors were further informed that the FIA was recently taken on board in a task force aimed at dealing with illicit proceeds related to second-hand car dealership popularly known as "grey market".

152. Between 2010 and 2013, the DCEC and BPS carried investigations on illicit land dealings in which money amounting to P10 million was transacted. The case is before the courts, but no ML investigation was done. In another joint operation, the BPS and BURS instituted investigations following a tip-off in March 2016 relating to a syndicate in which real estate developer and law firm were buying, developing and selling houses to members of the public without paying transfer duty. The case is still under investigation.

153. Other competent authorities, like the BURS indicated that they have not rigorously made requests to FIA on the basis that they have no set parameters for information sharing. As at the time of the on-site visit, there were 4 requests to the FIA; 1 from the BURS on tax evasion, 2 from the DCEC on corruption by PEPs, and 1 from the Ministry of Youth, Sports and Culture on verification of an international company. In responding to the requests, where applicable the FIA provided information on details of incorporation and directors of the concerned companies, statement of accounts, sources of income, assets owned by the subjects, and also requested information from other FIUs.

154. When making disseminations, the FIA requests the LEA to provide feedback as soon as the matter has been determined or completed. In addition, the FIA makes follow-ups periodically on disseminations made to LEAs. In some instances, the FIA has received feedback on the disseminations made without any follow-up. In this regard, the FIA received feedback on 143 requests made to the BURS between January 2013 and June 2016 which included on tax registration status (1), compliance status (120), kept for BURS intelligence (9), referral for further investigations within BURS (12), and establishing source of funds (1).

155. The FIA and the LEAs use secure channels for exchanging information, and protect the confidentiality of information exchanged or used. Disseminated reports are only delivered to LEAs upon authorisation by the FIA Director. The FIA's senior officer in the monitoring and analysis department hand-delivers the disseminations to another senior officer of a relevant LEA and they both append their signatures in the FIA's Reports Delivery Register. On the other hand, the LEAs follow a similar process of protecting information as prescribed in the public service procedures.

156. The FIA exchanges information with other FIUs which it has MoUs or other arrangements. Between October 2014 and June 2016, the FIA made 29 requests to other FIUs out of which 27 were

responded to, and got 8 requests from other FIUs between April 2014 and June 2016 and responded to all of them. The requests to other FIUs related to background checks on individuals and entities (3), and information relating to cases under analysis on potential ML (9), tax evasion (3), corruption (7), illegal diamond dealing (1) and abuse of office (1), and there was no determination on 5 requests. The information received from the responses was analysed and the results thereof were disseminated to LEAs for further investigation.

f) Resources for the FIA

157. The FIA is funded adequately by the Government of the Republic of Botswana. The Permanent Secretary for the Ministry of Finance and Development Planning indicated during the on-site visit that the FIA was even failing to utilise all the allocated funds for a financial year. He also indicated that government had also allocated land for the construction of the FIA offices.

158. The FIA is well structured to enable it carry out its core functions as required under the FI Act consistent with FATF Standard. The FIA has a dedicated Unit responsible for undertaking the core functions including monitoring of transactions.

159. The FIA is adequately resourced in terms of technical expertise and tools. It has filled 32 out of 38 established positions and of those filled, 8 belong to Monitoring and Analysis Department recruited prior to February 2014. The FIA is also in the process of enhancing its data mining and analysis tools to facilitate online receipt of reports from all financial institutions and production of high quality financial intelligence. Despite the FIA being in its infancy, the staffing level in Monitoring and Analysis Department at the time of the on-site visit was fairly adequate and the FIA had adequate IT expertise to support this department. The FIA has qualified and skilled analysts with a variety of backgrounds such as law enforcement, auditing, banking and tax investigations. Between 2013 and 2015, the FIA has had some benchmarking exercises with FIUs of Malawi, Namibia and South Africa. At the time of the on-site visit, the FIA's Monitoring and Analysis Department was getting technical support from the South African FIC and this has helped FIA to enhance the quality of its analysis.

160. The FIA's monitoring and analysis staff have received training including on goAML application, Certified Anti-Money Laundering Specialist (CAMS) certification, Certified Financial Crime Specialist program, forensic auditing, financial investigations and analysis, cyber-crime investigations, and they also get guidance from time to time from FIC South Africa on various analysis operations. However, the analysts require training to conduct strategic analysis.

Conclusions on Immediate Outcome 6

161. The FIA receives transactions reports, and has access to information obtained through open sources, domestic competent authorities and foreign counterparts which is used to carry out analysis and produce quality financial intelligence and information for dissemination to LEAs. Similarly, the LEAs have access to financial intelligence from the FIA and a wide range of information from other competent authorities necessary to identify and investigate potential ML and TF cases.

162. However, the STR database is negligible due to low reporting from the DNFBPs and some FIs. In addition, the FIA does not get cross-border currency declarations from the BURS despite most disseminations from FIA being made to the BURS.

163. The quality of financial intelligence and other information disseminated to LEAs by the FIA is considered of reasonable quality to sufficiently contribute to active identification and investigation of potential ML and TF cases. The STRs received and analysed by the FIA and the subsequent disseminations are consistent with the general risk profile as identified through interviews with the private and public sectors as well as open sources. The only drawback is that the DCEC and BPS are yet to optimally use the disseminations to actively pursue ML cases. This has undermined the contributions of the FIA's efforts to assist LEAs to successfully identify ML/TF cases and trace criminal assets and forfeit them to the State. Further, the DCEC and BPS have made few spontaneous requests to the FIA to help support their investigations.

164. In recognition of the analytical capacity of the FIA, LEAs in Botswana are making requests to and beginning to include the FIA in their operations – albeit from a low base. There is room for improvement on the LEAs side, to ensure that the quality of financial intelligence and other information received by them from the FIA is used to actively pursue not only the predicate offences but most importantly ML cases and trace criminal assets for forfeiture to the State. The FIA needs to improve its strategic analysis by ensuring that it receives all the reports from the reporting entities for integration into the existing data and information, and that the LEAs should actively use the studies to inform their investigations.

165. Overall, the objectives of the Immediate Outcome are partially being met. Botswana has achieved *a moderate level of effectiveness* for IO 6.

3.2 Immediate Outcome 7 (ML investigation and prosecution)

a) Background information

166. ML is criminalised under the PICA. The PICA prescribes a police officer in terms of the Botswana Police Act, a customs officer in terms of the BURS Act, a person authorised to conduct an investigation in terms of s. 7 of the Corruption and Economic Crime Act and any other person as may be prescribed, to carry out investigations in terms of its provisions. Since the coming into operation of the PICA in 2014, the authorities indicated during the onsite visit that there were two money-laundering cases under investigation by the DCEC, and one money laundering case under the investigation of BPS. BURS indicated during on-site visit that it was not investigating any ML related cases, all investigations related to ML were referred to the DCEC. ML cases investigated by the DCEC are referred to the Anti-Corruption Unit of the DPP for prosecution.

b) ML identification and investigation

167. Money laundering investigations arise from financial intelligence reports from FIA, reports from members of the public, parallel financial investigations and investigated predicate offences. The DCEC, the BURS and the BPS, which are the three competent authorities prescribed to investigate ML, do not have mechanisms in place to identify and detect money-laundering cases from the identified predicate offences or any other source. The DCEC and the BPS mainly pursue investigations on identified predicate offences whilst the BURS only focuses on tax matters.

168. In the same context, the investigations carried out do not extend to financial aspects of the crime to determine the source, objective of the predicate offence and destination of finances involved. Although Botswana appears to have an adequate institutional framework to address issues of ML, all the three agencies (DCEC, BPS, BURS) which compose this framework do not

consider money laundering as a risk to national security and economy for it to be prioritised. The PICA and other supporting legislation provide the DCEC, BPS and the BURS with adequate powers to enable them to successfully investigate the offence of ML and related predicate offences. However, the legal framework provided by these laws is not being adequately used to identify, investigate and prosecute ML offences. Further, the fact that not all the designated categories of offences under the FATF Glossary are criminalised in Botswana creates limitations for the DCEC and BPS to investigate all crimes that might be generating proceeds which can be laundered. The non-criminalisation of illicit trafficking in narcotic drugs pose a vulnerability of Botswana being used as a transit point to transport narcotic drugs to other countries and provides a very limited scope for the competent authorities in Botswana to exchange information on illicit narcotic drugs with other foreign competent authorities.

169. During the onsite visit, the DCEC had investigated one case which from the circumstances provided should have called for a ML investigation. The case is summarised in the table 6, below.

Table 6

Corruption case: Is an old case, having occurred in the year 2000, where a payroll officer for the BPS opened bank accounts on behalf of his wife and nephew to facilitate fraudulent activities at his work place. He then proceeded to falsify the payroll of the BPS to include payment of salaries to the two bank accounts of his wife and nephew, who were not employees of the Government. He also falsified his salary to pay himself more than his usual salary. In order to disguise the fraud which amounted to P1.2 million, he registered a company and acquired a loan from one of the banks in the name of the company. He used the loan to purchase buses. Then he started to service the loan with the proceeds which he was paying as salaries to his wife and nephew's accounts as well as the extra amounts he paid himself. The amounts going into his wife and nephew's accounts and the transfers led the banks involved to raise STRs which were reported to the DCEC then before the coming into being of the FIA. The DCEC eventually led an investigation into the matter. Upon getting the registration number of one of the buses which was being owned by the company whose loan was being offset by the funds from the accounts, the DCEC went to the database of the VRLS to check who had registered the bus. Upon getting the name of the company that had registered the bus, the DCEC proceeded to CIPA to find out who the directors of the company were, which eventually led to the identity of the payroll officer as the owner of the company as well as the other two buses and one of the buses was registered under his wife who was not employed at the time. DCEC also realized that the accused was living well beyond his means. The illicit assets involved were seized. Upon enactment of the PICA in 2014 (which has retrospective application of 20 years), and formation of the AFU in the DPP, attempts to confiscate the benefits generated out of the proceeds amounting to P1.9 million have now been resuscitated (as of November 2015) using civil forfeiture proceedings and at the time of the on-site visit, a civil confiscation order had been granted by the magistrates court²⁷. In the criminal matter, the accused was charged with the offence of stealing by a person employed in the public service and the criminal trial is still continuing with the accused person now having made an application

²⁷ DPP vs David Loftus William Case No. MCMBR-000002-15

for permanent stay of the proceedings to the High Court on the basis that his case has taken too long to be finalised.

170. Although the above case had elements of ML, none of the accused persons were investigated and eventually prosecuted with ML. The authorities informed the assessors during the on-site visit that the public officer could not be charged with ML because under the repealed Proceeds of Serious Crimes Act, which criminalised ML then, a person had to be convicted of the predicate offence first before being charged with the offence of ML, therefore ML investigations were not pursued. The case highlight the need for the investigating authorities to make effort in pursuing ML investigations as the ability to identify the proceeds of crime which can be laundered seems to be of average level as some of the officers from DCEC, BPS and BURS have been trained in ML investigations.

171. In addition to the above case, the assessors were also furnished with a Court of Appeal Judgment²⁸, which upon reading the circumstances of the case it was quite clear that the parties concerned should have been charged with self-laundering and third party laundering, respectively. Instead, the accused persons were charged with obtaining money by false pretences. The circumstances of this case are such that, they demonstrate a need for a greater understanding of the offence of ML right from the stage of initiating the investigation up to the time of prosecution of the case and guidance and pronouncements on the proper charges which should have been preferred being made in the judgments of the courts which would have presided over such cases.

172. Limited understanding of the offence of ML or interest in pursuing ML offences is strongly affecting identification of potential cases of ML and their appropriate investigation. Of importance is for the investigating authorities to move away from the culture of focusing their investigations only on predicate crimes and not pursue the ML aspect.

173. The BURS, which through the department of Customs and Excise monitors and enforces control of imports and exports of goods, has confiscated undeclared or falsely declared currency and has not, out of these cases pursued money-laundering investigations or referred any of the cases to the DCEC or the Police to conduct money laundering or financial crime investigations relating to the undeclared currencies. As illustrated in Table 7 below, between 2011 and 2014, the BURS confiscated BWP720, 843.95, USD415, 253.00, ZAR 1,379,905.20 NAD 170.00, JPY 121,000.00, OMR 5,360.00, MYR 1,100.00 and CHY2, 057,650.20, and out of all these confiscations the BURS did not identify any one case to be involving money laundering and there were no parallel financial investigations conducted in any of the cases nor was there a referral to the DCEC or the BPS for identification and investigation of possible ML involved.

174. The BURS is only interested in tax collection hence it does not pursue ML investigations relating to cases it deals with. Despite the powers prescribed to it by the PICA to investigate ML, it has no specialized unit designated to investigate ML cases but in practice it is supposed to refer all cases involving money laundering to the DCEC for investigations. Between 2011 and 2014, the BURS referred four cases mainly pertaining to tax claims using false invoices, and alteration and

²⁸ A. G. Vs Bateng's Building Construction (PTY) Ltd & Others, 1999(1) BLR 431

use of forged tax clearance certificates to the BPS and DCEC for investigations. None of these cases has led to a ML investigation, or had been finalised by the time of the on-site visit.

Table 7

| | BWP | USD | ZAR | NAD | JPY | OMR | MYR | CHY |
|--------------|-------------------|-------------------|---------------------|---------------|-------------------|-----------------|-----------------|---------------------|
| 2011 | 63,990.00 | 203,050.00 | 369,256.00 | | 121,000.00 | 5,360.00 | 1,100.00 | 763,756.00 |
| 2012 | 0.00 | 0.00 | 540,420.00 | 20.00 | | | | 540,440.00 |
| 2013 | 325,009.75 | 198,958.00 | 69,819.20 | | | | | 7,805.00 |
| 2014 | 331,844.20 | 13,245.00 | 400,410.00 | 150.00 | | | | 745,649.20 |
| Total | 720,843.95 | 415,253.00 | 1,379,905.20 | 170.00 | 121,000.00 | 5,360.00 | 1,100.00 | 2,057,650.20 |

175. The BPS, is mandated to investigate all crimes but does not normally investigate money laundering cases, instead it refers such cases to the DCEC. However, in the event that the BPS has to carry out a ML investigation, the Fraud Squad, which is a sub-unit under the Serious Crimes Squad of the Criminal Investigations Department, carries out the investigation. Although, the BPS indicated that about 417 officers had received training on commercial crime investigations, which also included components of ML, the focus of investigations by the BPS is still on predicate offences not ML. The authorities did not demonstrate to the assessors during the on-site visit that the BPS uses any of the training received by its officers to identify and successfully investigate cases of ML. The BPS only cited one case which had been prosecuted in the magistrates' court where a charge of ML had been preferred under the repealed Proceeds of Serious Crimes Act ²⁹ and that it had one case under consideration for a money laundering investigation. Other than the prosecuted case, the BPS has not carried out any other investigation on ML.

176. Although the DCEC and BURS indicated that they have trained officers in money laundering investigations, there are very few cases of ML being investigated. Further, although the DCEC indicated that it is empowered under the CECA to conduct parallel financial investigations for purposes of identifying proceeds laundered or that might be laundered, it did not provide the assessors with any cases where it had taken this approach. The other LEAs have also not conducted any parallel financial investigations. The DCEC has five designated officers trained on ML investigations, whilst the BURS has no designated officers for ML investigations. However, BURS at the time of the on-site visit had a total number of 31 officers trained on ML between 2014 and 2015. Of these 31 officers, 11 have been trained in ML, whilst 20 have been trained in ML including beneficial ownership.

177. All the LEAs are of the view that their investigators still need to improve their skills in the investigation of ML cases by applying the acquired skills to practical cases. According to them, this is the reason why there is a low number of ML investigations carried out vis-a-vis the average number of BPS, DCEC and BURS officers reported trained on ML. However, the assessors are of the view that with the training currently provided on ML to BPS, DCEC and BURS, there should have been more cases of ML identified and investigated.

²⁹ S vs Evans Kanunula Case no. CMMVL 000087/06

178. The DCEC and the BPS receive intelligence reports disseminated from the FIA, however the number of ML cases investigated by both agencies does not reflect on the good quality intelligence reports received from FIA. This could be an indicator that the investigators despite their training in ML might not be capable enough to fruitfully use the disseminated information to commence ML investigations and more specialised training could be required.

179. Coordination of intelligence, evidence and other information relevant to their investigations is relatively strong between the DCEC, BPS and BURS as shown by the joint operations conducted in complex cases. Between 2012 to June 2016, the DCEC, BPS and BURS conducted joint operations in 6 cases relating to tax evasion, fraud and corruption. However, out of the 6 joint operations only one ML case has been identified and investigations initiated.

180. The units in the DCEC and BPS meant to investigate ML are reasonably resourced but this is not reflected as such given the limited number of ML cases being investigated and in some cases failure to pursue ML investigations where elements of ML are present. The assessors concluded based on the foregoing that the authorities in addition to not having applied the ML training into practice, they have little interest in investigating ML cases as in some cases investigated, the elements of ML were quite apparent but still no ML investigations had been pursued.

c) Consistency of ML investigations and prosecutions with threats and risk profile, and national AML policies

181. At the time of the on-site visit, Botswana had not finalised its NRA, or developed AML/CFT policies guided by the findings of a NRA. There are no ML threats and risks that have been identified and profiled, as a result investigations are not being pursued based on policies aligned with the risks identified. There are no types of money laundering cases identified and investigated based on results of the threat assessment, national risk assessment or a general understanding of the risks.

182. The authorities identify fraud and corruption as major proceeds generating predicate offences but there are no money laundering investigations which have been pursued by the authorities on such kind of cases. The money laundering cases under investigation have no link to the national AML/CFT risk profiling or assessment but are based on financial intelligence reports received from FIA, which is also not yet prioritising its work according to identified high ML/TF risks.

183. ML investigations are mainly referred to the DCEC for investigations, although the BPS and the BURS are also mandated in terms of the PICA to investigate such offences. All cases investigated by the DCEC are prosecuted by the Anti-Corruption Unit (Unit) of the DPP headed by an Assistant Director and at the time of the on-site visit had a total of eight prosecutors plus three others on attachment from the DCEC. Of the 8 Prosecutors, 7 were stationed in the capital, Gaborone and one was stationed in another city, Maun. To complement quick trials of cases from the Unit, there are designated judges appointed to preside over such cases on rotation with each judge having a two year tenure. The corruption cases prosecuted before the designated judge are heard in Francistown, Botswana's second largest city.

184. At the time of the on-site visit, the Unit informed the assessors that only two ML prosecutions had been done under the repealed Proceeds of Serious Crimes Act in 2004 and 2006³⁰. In the

³⁰ S vs Mothusi & Another CRB VL 16/04, also DPP vs Mothusi 2011 2 BLR 537 CA,

Mothusi case, the two accused persons, who were both legal practitioners, had been convicted of the 7 counts ranging from conspiracy to steal by false pretences to ML, the original record of the court proceedings went missing then there were problems with reconstructing the trial record when one of the accused persons wanted to appeal against his convictions. This resulted with the judge who eventually presided over the appeal, after the part reconstruction of the original record only upholding the conviction on the first count of conspiracy and allowing the appeal in respect of counts 2-7. And since the ML charge constituted the 7th count, it means the accused persons were both acquitted on that count, with the authorities effectively remaining with only one case of ML prosecuted. No ML case has been prosecuted by the Unit since PICA came into force in 2014. The Unit, however, indicated that it has 17 cases of corruption, mostly relating to corruption by public officers, which are at different stages of trial before the designated judges presiding over corruption cases but none of these cases had parallel financial investigations done to determine whether there were proceeds of crime laundered and the possibility of the offence of ML having been committed. The Unit also prosecutes other offences under the Penal Code of Botswana and most of these prosecutions are in the Magistrates Court. Between January 2011 and 31st December 2015, 62 cases were finalised. Of these cases there were 14 convictions, 4 acquittals, 14 withdrawn with lack of evidence given as the main reason for the withdrawals. Prosecutors from the Unit indicated that prosecution guided investigations had been done in some cases and in others, they got the cases too late to do prosecution guided investigations. None of the cases where there has been prosecution guided investigations relate to the offence of ML or can they be said to have been prioritised in terms of the risk profile or AML policy.

d) Types of ML cases pursued

185. The authorities have not identified the type of ML offences prevalent in their jurisdiction. They also have not identified and categorised investigated cases according to elements of a foreign predicate offence, self-laundering, third-party laundering, or stand-alone ML offences.

e) Effectiveness, proportionality and dissuasiveness of sanctions

186. The PICA criminalises ML and provides a sanction for the offence.³¹ Although, the penalty provision appear to be only applicable to natural persons, the authorities explained that it is also applicable to legal persons in terms of provisions of their Penal Code.³² After provision of case studies of where Courts have applied similar provisions in sanctioning legal persons, the assessors accepted the authorities' position. However, at the time of the on-site visit there was no case that had been prosecuted, finalised, conviction secured and sanctions imposed on a legal person or natural person or both to determine how in practice the courts would apply the sanctioning provision under the PICA.

187. Of the two cases of ML which have been brought before the courts for trial under the repealed Proceeds of Serious Crimes Act, in one of the cases a penalty of a fine of P7 500 and in default of payment of the fine, a term of imprisonment of 12 months³³ was imposed. The

S vs Evans Kanunula Case no. CMMVL 000087/06

³¹ The penalty provision in section 47(3) provides as follows: "A person convicted of an offence under this section shall be liable to a fine not exceeding P20 000 000, or to imprisonment for a term not exceeding 20 years, or to both".

³² See analyses made in R. 3.10.

³³S vs Evans Kanunula Case no. CMMVL 000087/06

proportionality, effectiveness and dissuasiveness of the sanctions under PICA as alluded to in the above paragraph, has not yet been tested and the assessors could not determine whether when applied in practice would be proportional and have a dissuading effect.

Conclusion on Immediate Outcome 7

188. Botswana has not investigated money laundering cases which are proportionate to instances where the predicate offences investigated could easily have been pursued into a ML investigation by the authorities, particularly the DCEC and BPS. The BURS has not identified any potential criminal offences out of the confiscated non-declared currency cases it has dealt with, which it has referred to the DCEC or the BPS for further investigation on possible ML or related predicate offences. There have only been two prosecutions of ML cases under the DPP and the Anti-Corruption Unit has not conducted any prosecution guided investigations relating to ML which could have helped the DCEC and BPS to identify and conduct more ML investigations. The ability of the LEAs to investigate all crimes generating proceeds which can be laundered is limited by Botswana not having criminalised all the designated categories of offences under the FATF Glossary and the non-criminalisation of illicit trafficking in narcotic drugs is of concern as it creates vulnerabilities for ML.

189. The number of cases investigated since 2014, when the PICA came into force, is not reflective of the training and enhanced capability on investigation skills received by the investigators. For the three institutions DCEC, BURS and the BPS, the low number of ML investigations reflects on the institutions not being committed to pursuing ML investigations as some of the cases had clear evidence of ML, or lack of adequate skills to identify such cases. The DPP, also, did not give proper guidance to the investigators to have offences of ML investigated out of the predicate offences submitted to it for prosecution, where it was evident that the offence of ML had been committed. The investigators and the DPP, although they have average skills to identify ML cases, they are not doing so. Due to the lack of any test case of ML having been brought before the judges assigned to deal with cases from the Unit for prosecution under the PICA, the capacity of the courts to deal with such cases can only be based on the two cases which have been prosecuted under the repealed Proceeds of Serious Crimes Act leaving untested the much improved legal and institutional framework which is now provided under the PICA to investigate and prosecute such cases. However, courts in their judgments should endeavour to provide guidance on appropriate charges in cases where it would be apparent that a more serious offence, including a ML offence has been committed. Botswana has not demonstrated an effective investigation and prosecution system of ML cases.

190. Botswana has achieved a *low level of effectiveness* for IO 7

3.3 Immediate Outcome 8 (Confiscation)

a) Confiscation of proceeds, instrumentalities and property of equivalent value as a policy objective

191. Botswana, as a country, does not pursue confiscation of criminal proceeds, instrumentalities and property of corresponding value as a policy objective. LEAs indicated that they follow the money in most of the cases they investigate but the information provided show that this approach is not taken for the purposes of identifying assets that can be seized and confiscated, but only for purposes of obtaining evidence during investigations of predicate offences. A representative from the DPP explained to the assessors that investigations are largely focused on investigation of

offences and less on identification of the illicit assets connected with the offences. The cases and values of confiscation are still very low. The lack of initiative to forfeit proceeds of crime is illustrated in the case of *S vs Mothusi & Another*, cited above. The State at the end of the trial after it had secured conviction of both accused persons, did not apply for forfeiture of a Mercedes Benz motor vehicle which had been earlier seized in connection with the case. As the full judgment of the case was not made available to the assessors, the reasons for not applying for the forfeiture could not be determined.

192. However, the DPP recently appears to have a clear policy objective to pursue confiscation of criminal proceeds, instrumentalities and property of corresponding value in the proceedings they undertake. However, this process is not yet being used to pursue proceeds relating to ML offences. The Asset Forfeiture Unit (AFU) was established in the DPP in September 2015, and is specifically dedicated to handling confiscation proceedings in line with the provisions of the PICA. At the time of the on-site visit, the Unit was manned by four prosecutors who had received 1 to 2 years specialized training in asset recovery. However, for this Unit to work effectively, it will need the involvement and support of all the other stakeholders (FIA, DCEC, BPS, BURS) in the chain of identification of illicit proceeds, which capacity is currently limited and where it exists (as described under IO 7 above), it is not being effectively used for this purpose. In the absence of such support at national level, the good intention set by the AFU might have very limited success.

b) Confiscations of proceeds from foreign and domestic predicates, and proceeds located abroad

193. At the time of the on-site visit, the AFU had brought three cases which it considered to be test cases regarding confiscation before the courts. In one case it had instituted and secured a restraining order and in the other case it had applied for a civil penalty order. The criminal trial of the latter case which involved stealing by an employee in a public office highlighted the high staff-turnover problems which are being faced by both the DPP and the trial courts. The criminal trial of the case commenced in 2002³⁴ and over the years the magistrates and prosecutors involved with the case have been resigning resulting in applications to start the case afresh being made by the DPP and at the time of the on-site visit the defendant had applied to have proceedings in the matter permanently stayed, the application was still pending which explains the need for the civil penalty order to deal with some of ill-gotten proceeds. In another matter where a restraining order had been issued, the criminal judgment has been pending for the past eight years. Follow-up by the DPP with the Registrar's Office on the case had not yielded any positive results. The high staff turnover is having a negative impact on timeous conclusion of litigation in criminal cases and affects the condition of assets seized which are subject to confiscation as they would have deteriorated with the passage of time. The delay in finalising such cases might also expose the State to incurring unnecessary costs in restoring the value of the property in the event of the defendant eventually being acquitted when the value of the property has deteriorated over the years whilst in the custody of the State.

194. The three cases referred to above all involve proceeds arising from domestic predicate offences. The proceeds involved in the three cases were not moved out of Botswana. There have been no cases where proceeds recovered have been repatriated or shared with other jurisdictions. The AFU indicates that it has five cases it is considering.

³⁴ Table 6 in IO 7.

195. Representatives from BPS and DCEC indicate that there had been other cases where confiscation orders had been granted by the courts upon conviction of the accused persons of predicate offences. However, both the BPS and the DCEC could not avail the cases and actual statistics of these cases to the assessors. There is a serious need for the authorities to reflect on how they maintain their statistics as this does not only benefit the authorities in knowing how many confiscations have been secured but also determining other legal means of recovering the illicit proceeds where a criminal confiscation has not been successful and trends used by the criminals to conceal the proceeds. It is also hoped that the introduction of the Office of the Receiver under the PICA (s. 46) whose duty will be to preserve the value of property in the office's possession acquired in terms of the PICA and the Confiscated Assets Trust Fund, where all funds collected in terms of the PICA shall be paid (s. 68), will help the authorities to better maintain their statistics relating to confiscated assets.

196. Investigating Officers from BPS, DCEC and BURS have received financial investigation training covering identification of assets subject to confiscation, but the authorities indicate that the capacity in the identification of illicit proceeds for confiscation is still not adequate and further training is needed.

197. The DPP, which is responsible for confiscation of illicit proceeds/assets and guiding investigations into the identification of such proceeds is not adequately resourced with skilled and experienced prosecutors in money laundering and asset recovery issues. The DPP initially had 7 prosecutors trained in money laundering, but all the seven have since resigned. Currently, the DPP has four prosecutors trained on asset recovery, it is these four officers who are running the AFU. However, the problem of inadequate resource seems to be beyond the DPP's control, as structurally the DPP is under the Attorney General, who controls the budget and determines deployment of newly recruited Attorneys, including to the DPP. Given the current problems relating to staff turnover in the DPP, it would be advisable to have a better management system of the resources which ultimately enables the DPP to get and retain more staff.

c) Confiscation of falsely or undeclared cross-border transaction of currency/BNI

198. Botswana follows a declaration system to regulate cross-border transportation of currency. All persons entering or leaving Botswana are required to fill Form J (Baggage, Currency and Bearer Negotiable Instrument Declaration Form) and make currency declaration of Botswana Pula exceeding 10,000 (US\$1, 000) and other currencies. Note has to be taken that although the Form requires declaration of BNIs, these are not covered under the Customs and Excise Duty Act. Non declaration or false declaration is sanctioned by a fine, custodial sentence or the property being liable for forfeiture.

199. The BURS, as the competent authority which implements the law on cross-border declaration of currency, has taken steps to target false and non-declaration of currency. (Please refer to Table 7, above which shows the amounts of money and currency intercepted by BURS and confiscated for non-declaration from 2011 to 2014)³⁵.

200. According to the BURS, the trend from confiscated currency is that currency is largely being imported into Botswana. However the declarations made are not reviewed, filed with the FIA nor

³⁵ Please refer to Table 7 described under ML identification and investigation above which gives the figures of the different currencies that have been confiscated by the BURS.

further investigated to determine if they are proceeds of predicate offences being laundered in Botswana. The requests for information seen by the assessors made by the BURS to FIA did not include requests for information on non-declared currencies. This could be denying FIA of vital information to build its database. Further, as already indicated in IO 7, none of the confiscations have been done in respect of ML.

d) Consistency of confiscation results with ML/TF risks and national AML/CTF policies and priorities.

201. Botswana has no AML/CFT policy in place. At the time of the on-site visit the NRA exercise had not been completed and there had not been proper determination of the ML/TF risks to assist with national AML/CFT policies which could guide prioritisation of confiscation cases to be pursued. However, the Anti-Corruption Unit in the DPP indicated that it had 17 cases of corruption mostly involving public officers still pending in the courts. Although, such prosecutions address one of the risks which was identified by some of the institutions interviewed during the on-site, it did not come out clearly which ones of these cases involved assets which had been seized and likely to be confiscated or have been confiscated. Further, the 5 cases in which confiscation proceedings are being considered by the AFU are not related to ML/TF.

Conclusion on Immediate Outcome 8

202. The BPS, DCEC and BURS, although having officers who have received training in identifying proceeds of crime laundered or which can be laundered, instrumentalities used or intended to be used, or property of corresponding value, the officers have not used the training in successfully identifying any of such properties relating to ML. Even on the two cases prosecuted under the repealed Proceeds of Serious Crimes Act, no assets were forfeited although one of them had a motor vehicle which had been seized in connection with the ML offence. The AFU that has been established in the DPP is still at an infancy stage and is still to apply for confiscation in a ML case. However, the setting up of the AFU in the DPP is commended and if well administered will go a long way in improving the confiscation regime of Botswana but it will need a lot of support from all the other stakeholders in the AML/CFT framework of Botswana for it to succeed in its work. Further, the DPP needs adequate resources to enable it to play its role in the identification, investigation and confiscation of proceeds of crime more effectively. The DCEC and BPS have to maintain results (statistics) of cases where there would have been successful confiscation. The BURS where possible has to establish the source of funds confiscated for purposes of determining whether there could be suspicion of ML/TF and where necessary refer such cases to either the BPS or the DCEC for further investigations to determine whether such funds are not illicit proceeds intended to be laundered in Botswana. Based on the above findings the assessors determined that Botswana is not yet prioritising identification of criminal proceeds, instrumentalities and property of corresponding value in the course of investigations and their eventual confiscation as a policy objective.

203. Botswana has achieved *a low level of effectiveness* for IO 8.

CHAPTER 4. TERRORIST FINANCING AND FINANCING OF PROLIFERATION

Key Findings and Recommended Actions

Key Findings

TF Offence IO. 9

- Botswana has not demonstrated that it has a clear understanding of its TF Risks. The methodology used to come up with the country's NTA was not clearly explained by the authorities to enable the assessors to determine the kind of risks identified and whether they comprehensively and reliably cover the TF risks.
- Botswana has not identified an investigative unit that has to be responsible for the investigation of TF, as a result TF cases may not be easily identified and their investigations prioritized. In the absence of an identified unit to investigate TF, the officers who have received training on TF are not charged with the task of identifying and investigating TF cases.
- Besides the DIS which appears to be well aware of the TF situation in Botswana, the other LEAs have limited information on TF which is limiting their understanding of the offence and the risks associated with it. The other LEAs appear not to be informed about TF even after the NTA which according to the authorities is updated annually.
- Botswana lacks a comprehensive TF strategy which would include an outline of the role of the various security and law enforcement agencies involved in combating TF. Currently, Botswana relies on the SADC Regional Counter Terrorism Strategy which requires to be customized to address the country's domestic circumstances.

Targeted Financial Sanctions Related to TF IO.10

- Botswana does not have a legal framework to implement both the UNSCR 1267 and 1373, as a result, targeted financial sanctions for 1267 and 1373 cannot be implemented.
- Botswana authorities have started to circulate UN Sanction Lists to reporting entities though the circulation is done after considerable delay. Further, the circulation of the List is for information purposes since specified entities lack guidance and legal basis to implement targeted financial sanctions. The current institutions (FIA, BoB and NBFIRA) circulating the lists have got no legal mandate or obligation to be circulating the lists.
- The TF risks associated with the NPO sector and the NPOs likely to be exposed to such TF risks have not been considered by Botswana. There is no awareness which has been carried out by the authorities on TF to this sector so that it can be aware of its TF vulnerabilities.

Targeted Financial Sanctions Related to PF IO 11

- Botswana does not have both a legal and institutional framework, nor has it come up with any mechanism to implement targeted financial sanctions relating to proliferation.
- There is very little awareness in regards to implementation of targeted financial sanctions relating to proliferation amongst the reporting entities in Botswana.

Recommended Actions

TF Offence IO. 9

- Botswana should conduct a comprehensive TF Risk Assessment in order to clearly understand its TF risks.
- Botswana should develop and implement a counter terrorism strategy that will also outline how TF risks will be identified and investigated.
- The roles and responsibilities of the agencies involved in the identification and investigation of TF should be clearly outlined as this will enable targeted capacity building among the relevant agencies.
- There should be a common understanding of TF by all LEAs and also, if the NTAs deal with any TF risks, these should be shared amongst all LEAs.
- The BPS should consider establishing a separate unit to investigate TF or enhance one of its existing Units with trained investigators in TF to consider such cases.

Targeted Financial Sanctions Related to TF IO.10

- Botswana should develop and implement a legal framework for the implementation of UNSCR 1267 and 1373.
- Botswana should develop procedures that will allow transmission and implementation of targeted financial sanctions (TFS) without delay.
- The authorities should develop a system of circulating the Sanctions Lists which does not result in the duplication of the function by different competent authorities which might end up confusing the reporting entities in terms of reporting in case of positive match.
- The authorities should carry out TF risk assessment in the NPO sector to determine which of the NPOs might be exposed to TF risk and develop a targeted approach to assist identified NPOs in mitigating such risks. The Registrar of NPOs should be encouraged to carry out awareness on the possible abuse of the NPO sector for TF purposes for the registered NPOs.

Targeted Financial Sanctions Related to PF IO 11

- The authorities should establish a legal, regulatory, and institutional framework to monitor, supervise, and effectively implement targeted financial sanctions related to proliferation.
- The authorities should build awareness and provide guidance on targeted financial sanctions related to proliferation to reporting entities, specifically with regards to sanctions evasions.
- Competent authorities should monitor and ensure that reporting entities are complying with the obligations relating to implementation of targeted financial sanctions related to proliferation.
- Authorities should consider assessing the risk of financing of proliferation in Botswana to enable competent authorities and reporting entities to properly understand the possible

proliferation finance risk in Botswana and coordination of actions to prevent sanctions evasions by different agencies.

The relevant Immediate Outcomes considered and assessed in this chapter are IO9-11. The recommendations relevant for the assessment of effectiveness under this section are R.5-8.

4.1 Immediate Outcome 9 (TF investigation and prosecution)

a) Background and Context

204. Terrorism financing has been criminalized in terms of s. 5 of the Counter-Terrorism Act, 2014. However, there is a deficiency regarding criminalization of an individual terrorist.

205. The authorities indicated that they had done a NTA which they update annually and it included terrorism threat assessment. This information was not availed to the assessors nor was the process of updating it explained³⁶. Further, the authorities have not considered the country's and sectoral TF vulnerabilities which are required in order to come up with the TF risk profile, consequently, the level of authorities' understanding of TF vulnerabilities with the exception of the DIS, cannot be determined.

206. Competent authorities in National Intelligence Community (Botswana Defence Forces, BPS, MoFAIC, Immigration, DCEC, DIS and FIA) have powers to timely access information. The Police require a court order to access financial information whilst FIA has power to access the information directly from the financial institutions, however, the authorities have not used these powers for TF investigations as no case has been identified in the recent past.

b) Prosecution/conviction of types of TF activity consistency with the country's risk-profile

207. There has not been any prosecution in Botswana for terrorism or TF activities. The DIS utilizes the existing intelligence and information gathering machinery as well as information from foreign partner agencies to identify potential TF cases. There have only been two suspected TF cases which were identified between 2011 and 2012 which were disrupted with no ensuing prosecution. In the absence of TF risk analysis, or a clear explanation as to how the authorities go about conducting their NTA, the assessors cannot determine whether the absence of any TF prosecution is in line with the country's TF risk profile.

208. In the absence of any prosecution or conviction, the assessors are not able to assess the extent to which TF activities are prosecuted and the offenders convicted.

c) TF identification and investigation

209. Terrorism is identified as one of the threats to national security under the DIS Act. The authorities have not identified any TF threats other than the ones that were identified in 2011 and 2012. The information provided by the DIS assisted the assessors to understand how TF issues are handled in Botswana. The DIS indicated that it had been monitoring TF since 2015 and since then it had not identified any individuals or entities that have been linked to terror financing. Some of the measures put in place to reduce the risk of TF and identify those involved include: categorising the sectors of the economy which they consider vulnerable to TF risks and imposing stringent visa

³⁶ The authorities had fears that some of the information could be too sensitive to be shared with the assessors.

requirements and screening of visitors to Botswana from countries considered to be of high TF or terrorism risk. It was further explained that where the DIS has suspicion of an individual to be involved in TF or on the source of funds, they profile the sources of income of the suspected individual, monitor the movements of the individual and where necessary take immediate action to address situations identified as TF or terrorism threatening to Botswana. The DIS was also of the view that frequent SADC meetings to discuss terrorism threats and TF in the SADC Region, it attends with the other members of Botswana's security fraternity also adequately informs them of the TF situation in the Region and uniform measures being put in place to try and have a common approach to issues of TF. Although the assessors were of the view that with the measures explained by the DIS it might be possible to identify TF cases in Botswana, they also noted the weaknesses in identifying such cases created by the lack of a legal framework to implement the UNSCRs, despite the UNSC sanctions lists being circulated by their supervisors and FIA, and voluntarily implemented by some of the FIs and DNFBPs. Further, there is no TF risk assessment which has been undertaken in the NPO sector to help the authorities understand the extent to which some of the NPOs, if any, are exposed to the TF risk and likely to be abused for TF purposes. However, the DIS was of the view that the NPO sector in Botswana was of low risk to TF, since they have not had a TF case involving any of the NPOs. However, this view does not dismiss the likelihood of possible TF risks associated with the sector until a proper sectoral TF risk assessment is done. Some of the LEAs talked of some points of Botswana's borders being porous. This also poses a threat to timely identification and investigation of TF, if it was to happen.

210. Although, the BPS has officers who have been trained on counterterrorism and CFT, there is no specific unit that has been identified to investigate TF cases, as a result, there are no mechanisms in place to ensure that the officers who have been trained on TF investigations are available to identify and investigate TF cases. Further, although, there is no indication from the authorities that there is a problem in securing adequate resources to investigate TF cases, the absence of an identified unit within the BPS responsible for the investigation of TF negatively impacts the prioritization of TF investigations in the event that such cases are identified³⁷.

211. Botswana does not have a national strategy to deal with TF, however, the authorities rely on the SADC Regional Counter Terrorism Strategy which the country is party to and intend to later customize as its national TF strategy. The authorities should however ensure that when this is eventually done, it is done consistent with the identified country TF risks. The NIC which is the country's second highest security forum provides a platform to deliberate and determine strategies to combat terrorism and TF issues. The NIC is not clear on whether it has really assessed the TF risks and if it has done so, in which areas were these risks and how it is mitigating the risks in terms of prioritisation. However, no case of TF has been brought before the NIC and there are no clear guidelines or protocols on how the agencies involved can coordinate and cooperate in the event of a TF case being identified, investigated and prosecuted. The NIC is also supposed to be disseminating information on terrorism and TF to the relevant investigating agencies for action but this is not happening yet.

212. Further, the Counter Terrorism Analysis and Fusion Centre which is envisaged under the Counter-Terrorism Act to provide a basis for integration of strategies including development and fusion of Counter Terrorism strategies across investigating authorities and facilitate the

³⁷ The authorities informed the assessors at the time of the face to face visit that they had subsequently formed a Unit to investigate terrorism and TF cases in the BPS.

identification of TF risks is yet to be set up. The role of the Counter Terrorism Analysis and Fusion Centre is currently being undertaken by the DIS.

d) Effectiveness, proportionality and dissuasiveness of sanctions

213. The effectiveness of the sanctions cannot be determined as there has not been any prosecutions and convictions on TF. The term of imprisonment for life provided for committing TF offences, although, this could not be determined based on sanctions applied, it is dissuasive but would be difficult to implement in terms of proportionality as it does not allow for application based on the gravity of the TF offence committed. Further, although the sanction has not been applied in practice, it would not apply to legal persons (which cannot be sentenced to a term of life imprisonment), therefore its effectiveness, proportionality and dissuasiveness relating to legal persons is not possible to determine. It also does not apply to an individual terrorist as the offence is not criminalised.

e) Alternative measures used where TF conviction is not possible (e.g. disruption)

214. The authorities, during the period between 2011 and 2012 indicated successfully implementing disruption measures in two (2) cases of suspected TF by deporting the suspects. The authorities opted for disruptions since prosecution was not possible as TF had not yet been criminalized and there was no sufficient evidence to mount a prosecution under the other existing laws. As sanitised circumstances of the two cases were not provided to the assessors by the authorities, the assessors cannot determine whether the two cases really have to do with TF given that some of the competent authorities participating in the NIC are not really aware of Botswana's TF risks.

Conclusion on Immediate Outcome 9

215. The institutional framework provided by the Counter Terrorism Act to have the Counter Terrorism Analysis and Fusion Centre should be put in place to support the current structures that are there to deal with TF and terrorism issues. Although the DIS is well informed about the TF situation in Botswana, generally, most of the authorities did not demonstrate that they understand their TF risks, even providing sanitised information on TF based on the NTA that had been conducted. This left the assessors with little information to determine the overall understanding of the TF risks by all the relevant stakeholders that deal with TF at national level. The NRA which could have helped the authorities in the identification of some of the areas vulnerable to TF has not been finalised and based on this, most of the authorities could not contextualise the possible TF risks in Botswana. The DIS should continue doing the good work but this information should be shared with the other relevant competent authorities so that there is a common understanding of TF by all parties concerned. The institutional framework to identify and investigate TF can also be improved by setting up a unit to identify and investigate TF in the BPS, since it already has trained officers on TF. The authorities also need to consider the TF risk which might be posed by some points of the country's borders which are porous. If a TF offence was identified and prosecuted, it would not be possible to implement the sanction proportionally as it only provides for imprisonment for life. The sanction also does not apply to legal persons and individual terrorists.

216. Botswana has achieved *a low level of effectiveness* for IO 9.

4.2 Immediate Outcome 10 (TF preventive measures and financial sanctions)

a) Background and context

217. There is no legal regime in Botswana to implement freezing measures for targeted financial sanctions pursuant to the UN Security Council Resolutions. Some FIs and DNFBPs do receive the UNSC Sanction Lists from their supervisors based on which they check against their data-bases to determine whether they have business relationships with listed entities, however, should they get any positive match, they lack legal basis to implement any sanctions or take any other action.

218. In the meantime, FIA sends the UNSC Sanctions Lists received from the MoFAIC to some of the supervisory bodies who in turn disseminate the same to their reporting entities. The FIs and DNFBPs have not been provided with guidance on what course of action to take in case of a positive match. Some of the specified entities that carry out activities regulated by more than one supervisory body receive the List from more than one source which has potential to result in confusion as to who to report to in case of a positive match.

b) Implementation of targeted financial sanctions for TF without delay

219. Botswana lacks a mechanism to effectively implement TFS related to TF without delay. In the absence of a proper mechanism/procedure, the UNSC Sanctions Lists are distributed by FIA to Regulators who in turn disseminate the same to Financial Institutions and some DNFBPs long after they have been issued by the UN Sanctions Committees.

220. The UN Sanctions List is received by authorities several weeks after it has been released by the UN Sanctions Committees. This is attributed to the authorities lacking a clear transmission procedure of the UN Sanctions Lists from the moment they are issued by the UN Sanctions Committees down to the stage when they are supposed to reach the reporting entities in Botswana.

221. An illustration is the amended UNSCR 1267 List that was issued on the 20th of April, 2016, which was sent to some of the reporting entities on the 15th of June, 2016 (during the on-site visit). Further, there has been no guidance provided to reporting entities on what action to take in case of a positive match. Some FIs were of the view that in case of a positive match they would initiate a process to terminate their business relationship with the customer followed by returning the funds held to the customer while others were of the view that they would write to their regulators to seek for instructions on what action to take. The lack of a legal framework and guidance on how to implement UNSC Sanctions Lists undermine the effective implementation of the UNSCRs.

c) Targeted approach, outreach and oversight of at-risk non-profit organisations

222. Although, the Societies Act of Botswana requires all NPOs to submit annual financial returns, constitution of the NPO, true and correct names of the office bearers and members and any changes thereto, and their identification information (e.g. national identification numbers), the information is not assessed all the time, not to mention for purposes of assessing the TF risk exposure. The annual financial returns are not analysed for purposes of identifying irregular transactions or which of the NPOs might be exposed to the TF risk. The oversight powers that authorities supervising the NPO sector have on the accountability and transparency of the funds being received by the NPOs are therefore not being adequately used.

223. The authorities have not done a TF risk assessment in the sector to understand the sector's TF risks and neither are the authorities aware of the kind of TF risks which might be existing in

the sector. The authorities in the absence of awareness of the TF risks that might be existing in the NPO sector are not doing any targeted approach of the NPOs that might be at higher risk of exposure to TF abuse to assist them to continue carrying out their legitimate activities but at the same time ensuring that they are taking measures to limit their vulnerabilities related to TF risks. This would also assist the authorities in the allocation of resources to assist the NPOs they would have identified to be exposed to the TF risk more rationally without interfering with their day to day legitimate dealings.

224. The authorities have not carried out any awareness to the NPO sector or engaged any of the NPOs on their likeliness of exposure to the TF risk, or issued possible guidance on measures the sector might put in place to prevent such exposure and possible abuse, particularly those with a likelihood to be abused for TF purposes. The assessors did not get the impression that the authorities consider the TF risk to be of concern to the sector regardless of the activity and size of the different NPOs in this sector.

d) Deprivation of TF assets and instrumentalities

225. The competent authorities did not share with the assessors any specific approach they have adopted to target terrorist assets. The authorities have not yet used tracing of assets and provisional measures to complement targeting of terrorist assets. Although, the authorities, particularly the police indicate that they do parallel financial investigations they are done mainly to obtain evidence on other predicate offences investigated and have not been done relating to terrorism cases or with the intention to target terrorist assets.

e) Consistency of measures with overall TF risk profile

226. The measures described by the DIS already discussed in paragraphs 57 and 202, above seem to indicate some of the TF risks that Botswana might be exposed to. And some of the measures taken like categorisation of countries by their TF and terrorism risks and applying certain conditions of visa requirements and monitoring of movement of persons from some of the categorised jurisdictions, seem to show implementation of measures which are broadly in line with some of the TF risk profile. The only weakness noticed by the assessors is that although some of the LEAs, other than the DIS, could be implementing these measures, other than the main objective of maintaining law and order, they are not aware of the TF risk component in the measures. The interviews held with some of the LEAs did not confirm their awareness and understanding of TF. Overall, the assessors could not determine whether the measures being taken are consistent with the TF risks identified and whether they meet the TF risk profile of Botswana as the results of the NRA were not yet out.

Conclusion on Immediate outcome 10

227. Botswana does not have the legal framework to implement the UNSCRs, a situation which has led to delays in circulating the UNSC Sanctions Lists to FIs and DNFBPs. Further, although the implementation of the sanction lists is still on voluntary basis by the reporting entities, most of them are receiving the lists from more than one point and in case of a positive match, it would become difficult for the reporting entity to know where to file the report. In addition, there is no proper guidance which has been given to the reporting entities, guiding them on how to implement the sanctions lists. Lack of supervision of the NPO sector for AML/CFT is aggravated by the lack of measures by authorities to understand TF risks associated with the sector. The

authorities should as a matter of priority put in place adequate systems to enable implementation of targeted financial sanctions without delay and take steps to understand TF risks associated with the NPO sector. The authorities should also take measures to assist the NPOs which are likely to face a high risk of being abused for TF purposes without necessarily interfering with their legitimate activities and make the NPOs aware of the possible risk of them being abused for TF. The authorities should develop measures which are consistent with Botswana's overall TF risk profile, when the results of the NRA are out.

228. Botswana has achieved a *low level of effectiveness* for IO 10.

4.3 Immediate Outcome 11 (PF financial sanctions)

a) Implementation of targeted financial sanctions related to proliferation financing without delay

229. Generally, the same weaknesses pertaining to implementation of targeted financial sanctions relating to UNSCR 1267, also apply to implementation of targeted financial sanctions relating to UNSCRs 1718 and 1737 on proliferation. There is no legal framework in place or institutional framework to monitor and supervise the implementation of targeted financial sanctions related to proliferation financing without delay in Botswana.

230. None of the reporting entities in Botswana are guided by any framework to build on internal measures allowing implementation of targeted financial sanctions related to proliferation financing. Unlike with the implementation of the sanctions lists relating to UNSCR 1267, where some of the FIs are voluntarily implementing the sanctions, with those relating to proliferation, most of the reporting entities interviewed were not aware of proliferation financing related sanctions, let alone implementing them without delay.

b) Identification of assets and funds held by designated persons/entities and prohibitions

231. The risk associated with proliferation financing in Botswana has not been assessed and neither have been mechanisms put in place for reporting entities to apply measures on identified assets and funds held by designated persons/entities and prohibitions. Botswana due to the absence of any framework to identify assets or funds of designated persons is vulnerable to proliferation financing and the level of the risk cannot be determined as a risk assessment has not been done.

232. The authorities view identification of assets and funds held by designated persons or entities relating to proliferation financing and application of the appropriate measures as a new area which they still need to build expertise, more or less along the same lines with the assets and instrumentalities relating to TF.

c) FIs and DNFBPs' understanding of and compliance with obligations

233. The FIs and DNFBPs' understanding of, and compliance with PF obligations cannot be determined as there is no legal framework setting obligations for them to comply with the implementation of targeted financial sanctions relating to PF. None of the reporting entities in Botswana are guided by any framework to build on internal measures allowing implementation of targeted financial sanctions related to PF. The institutional framework to check on compliance

with the implementation of such measures will need to be included in the current supervisory framework on AML/CFT. The DNFBPs have not started complying with other obligations of the AML/CFT legal framework in general, therefore they have not yet taken any initiative to comply with the UNSCRs relating to the combating of financing of proliferation on their own.

d) Competent authorities ensuring and monitoring compliance

234. The legal and institutional framework to enable competent authorities to monitor compliance with implementation of targeted financial sanctions relating to financing of proliferation is not yet in place, therefore the competent authorities have no enabling mechanism based on which they can monitor their implementation.

235. As no significant action has been taken by the authorities to monitor and assess the exposure of Botswana's trade or possible financial links to proliferation related sanctions evasion, the assessors could not determine how much of a risk this could be to Botswana. Coordination of actions to prevent proliferation sanction evasion by different agencies of Botswana is still to take place, which means no monitoring of compliance with the implementation of the financial sanctions is taking place. There were no links, or restrictive measures which were mentioned by the authorities to the assessors connected to trading with countries which are currently under the UNSC sanctions list relating to proliferation financing.

Conclusion on Immediate Outcome 11

236. There is no legal or institutional framework in Botswana to enable implementation of targeted financial sanctions relating to financing of proliferation by reporting entities on AML/CFT. The possible risks associated with proliferation financing have not yet been determined in Botswana. The current supervisory authorities on AML/CFT have no legal mandate to monitor compliance by FIs or DNFBPs on implementation of the financial sanctions relating to PF and have not started monitoring any of their supervised entities for compliance. The institutions designated as reporting entities have also on their own not taken the initiative to voluntarily implement the UNSCRs on proliferation financing. There is generally very little awareness on targeted financial sanctions relating to financing of proliferation by some of the competent authorities and the reporting entities.

237. Botswana has achieved a *low level of effectiveness* for IO 11.

CHAPTER 5. PREVENTIVE MEASURES

Key Findings and Recommended Actions

Key Findings

- Overall, FIs and DNFBPs had the legal obligation to implement AML/CFT requirements from 2009 following the coming into force of the FI Act. In practice however, implementation of the AML/CFT requirements started in 2013 after the setting up of the FIA which is responsible for the administration of the FI Act. Prior to the FI Act, banks applied AML Regulations issued by the BoB under the Banking Act which had no force of law as the Act does not provide for specific AML/CFT requirements.
- The FI Act provides for a limited number of preventive measures (AML/CFT requirements) covering duty to identify customers, record keeping and reporting of transactions and appointment of compliance officers. The obligations to FIs and DNFBPs to implement mitigating controls in the AML/CFT statutes fall short of the minimum criteria under the FATF standard.
- Precious metal dealers are not covered under the FI Act for implementation and compliance with the AML/CFT requirements.
- DNFBPs, in general, have little or no appreciation of ML/TF risks facing them and lack the understanding and application of AML/CFT requirements. This is attributed to limited attention given to this sector as the authorities were implementing the AML/CFT measures on an incremental basis, initially focusing on the financial sector.
- The AML/CFT statutes in Botswana do not require FIs and DNFBPs to conduct ML/TF risk assessment to inform application of the AML/CFT measures when dealing with customers. In practice however, foreign owned or controlled banks have developed ML/TF risk assessments which they apply when implementing AML/CFT requirements. The rest of the FIs and the entire DNFBPs are yet to carry out ML/TF risk assessment to inform their application of the AML/CFT measures.
- There is no direct obligation for FIs and DNFBPs to establish the true identity of beneficial owners. In addition, there is little or no understanding and application of verification of identities of customers by FIs and DNFBPs.
- All FIs in Botswana have audit functions which regularly perform review of the internal ML/TF mitigating controls. However, they do not have adequate compliance function units which are commensurate to the size and the complexity of their business operations. The DNFBP sector is yet to set up compliance function to take charge of implementation of AML/CFT requirements.
- There is over-reliance on CDD information obtained through introduced customers or businesses without taking reasonable steps to conduct CDD procedures under a principal-agent arrangement especially when the customer holds a bank account.

Recommended Actions

Botswana should take the following actions:

- Amend the FI Act to ensure that the scope of the AML/CFT requirements provided under the Act is sufficiently broadened consistent with the FATF Standards.

- Take legislative steps to require all FIs and DNFBPs to carry out internal risk assessment and implement AML/CFT measures on a risk based approach to ensure that mitigating controls are being applied on areas identified as higher risk.
- Take necessary actions to subject precious metal dealers to AML/CFT requirements.
- Engage on outreach programmes and ensure application of AML/CFT requirements focusing on, amongst others, cross-border wire transfers, establishment of internal controls, reporting of suspicious transactions, identification and verification of ultimate beneficial ownership and enhanced CDD measures in general, and consider issuing specific guidelines to facilitate proper implementation.
- Domestic FIs and the entire DNFBP sector should identify, assess and understand ML/TF risks that apply specifically to them using the NRA once completed as a basis, and should put in place mitigating controls which are informed by the risks identified.
- Take necessary action, including monitoring and supervisory actions and issuance of guidelines, to ensure that FIs and DNFBPs have compliance functions commensurate to risks and size of business to adequately implement AML/CFT requirements.

The relevant Immediate Outcome considered and assessed in this chapter is I04. The recommendations relevant for the assessment of effectiveness under this section are R9-23.

5.1 Immediate Outcome 4 (Preventive Measures)

a) Understanding of ML/TF risks and AML/CTF obligations

238. The AML/CFT legal and regulatory framework in Botswana does not require financial institutions and DNFBPs, referred to as reporting entities, to apply AML/CFT obligations on a risk based approach. Furthermore, the AML/CFT framework has significant gaps in that a number of AML/CFT obligations, as required by the FATF Standards, are not covered under the FI Act as read with its Regulations. As a result of these material deficiencies, the understanding and application of the mitigating controls in Botswana, including on a risk basis, are largely driven by the desire of the financial institutions and DNFBPs to comply with AML/CFT requirements of the country of origin than domestic requirements.

239. Financial Institutions and DNFBPs demonstrated a varied understanding of ML/TF risks and AML/CFT obligations that apply to them. From the onset, financial institutions demonstrated a better awareness and understanding of ML/TF risks and AML/CFT obligations that applied to them than the DNFBPs.

DNFBPs

240. In general, the DNFBPs are not aware of their ML/TF risks and AML/CFT obligations. The foreign-owned or controlled accountants, casinos and dealers in precious stones operating in Botswana demonstrated a better understanding of the ML/TF risks and AML/CFT obligations that apply to them due mainly to reliance on group policies than local laws. The rest of the DNFBPs demonstrated little or no awareness of ML/TF risks and AML/CFT obligations. Consequently, the foreign-owned or controlled accountants, casinos and precious stones dealers have adopted procedures to report suspicious transactions and have in place better measures to conduct KYC procedures and have appointed MLROs. Overall, the authorities and the DNFBPs attribute the low

level of understanding of ML/TF risks and application of AML/CFT obligations to a lack of monitoring for compliance with the requirements by the sector. The FIA has since 2015 started engaging DNFBPs on their obligations. Furthermore, there is little or no interaction between the DNFBP Regulators and DNFBPs themselves to ensure that they identify and understand their risks as well as AML/CFT requirements that apply to them.

241. Real Estate Agents and Legal Practitioners (Attorneys) provide services assisting clients with the buying and selling of property in Botswana. The authorities and real estate agents interviewed during the on-site visit consider the sector as quite vulnerable to ML risks. The lawyers involved in transactions relating to the buying and selling of cattle view the sector as posing ML risks in Botswana. Both sectors are known to be cash-intensive, which leaves a number of unrecorded transactions which are outside of the AML/CFT requirements. In addition, precious metal dealers are not subject to AML/CFT requirements. The FIA has so far managed to conduct awareness-raising activities to the DNFBP sector only, to inform them of their responsibilities under the FI Act. The assessors are of the view that the lack of assessment of ML/TF risks in the DNFBP sector and absence of compliance monitoring programmes represents a significant ML vulnerability.

Financial Sector

242. As already indicated above, FIs have a better understanding of their ML/TF risks and application of AML/CFT requirements to business relationships and transactions they engage in with their customers. These has enabled them to implement mitigating controls which take into account customers, transactions, delivery channels, and products identified as posing higher risks.

243. Within the financial sector, however, there is variance in relation to the degree of understanding of the ML/TF risks and application of the AML/CFT procedures between foreign-owned or controlled and domestic FIs. In the banking sector (which comprises of international banks only) the assessors identified that the big four commercial banks demonstrated a comprehensive understanding of ML/TF risks that apply to them and have put in place the relevant AML/CFT procedures to address the risks identified relying on the FI Act and group policies of their respective countries of origin laws. For example, they had already put in place compliance functions, staff training programmes, CDD, record keeping, transactions reporting, systems to implement UNSCR sanctions and risk assessments, amongst others. The remaining banks have demonstrated a reasonable understanding of ML/TF risks and emerging application of the AML/CFT obligations – albeit not as robust as the big four commercial banks. While cross-border wire transfers are regarded as high risk transactions, the remaining six banks do not engage, (also confirmed by BoB), in these kind of transactions.

244. The small to medium banks have no ML/TF risk assessment in place and, as a result, have more awareness than understanding of ML/TF risks facing them. This means that the vulnerability of the remaining six commercial banks is more pronounced than the bigger four. In general, the transactions considered posing a higher ML/TF risks in Botswana relate to cash-intensive sectors such as real estate and second-hand motor vehicle dealers (grey market). The big four banks tend to generally consider a wider array of factors when reviewing the ML/TF risks of their domestic market and business activities.

245. The intensity of application of the AML/CFT measures differ between the six small to medium and big four banks, they have both taken reasonable steps to implement the requirements under the FI Act and its Regulations and their respective country of origin laws. These measures

even include those not provided for in the FI Act such as a full range of CDD measures, PEPs, wire transfers, beneficial ownership, correspondent banking and UNSCRs targeted financial sanctions. The main focus of the financial activities are targeted at providing financing to low income individuals and government employees. This has materially reduced their exposure to ML/TF risks. The banks further explained that they provide salary backed motor vehicle and housing finance to government employees where 70% of the financing is guaranteed by government. The servicing of these facilities is done from source, that is, direct deductions from the client's government salary. In such instances implementation of the requirements relating to beneficial ownership do not arise as the clients are individuals. Similarly, applying of CDD measures is limited as identifying the source of funds is not necessary as the funds are deducted directly from the clients' government salaries.

246. Non-Bank Financial Institutions have a general awareness and emerging understanding of ML/TF risks and their AML/CFT obligations, albeit at varying degrees. The insurance and securities sectors appear more advanced compared to the lending activities and retirement funds financial services providers. This is attributed to the NBFIRA's strategy of focusing on the two, while building internal capacity to ensure proper supervision and monitoring of the other sectors. Presently, all the non-bank financial institutions under the NBFIRA are aware of their obligations to implement AML/CFT procedures on account of thematic guidance provided by the supervisor to promote understanding of AML/CFT measures that apply to them. The thematic guidance only took effect following the ESAAMLG Pre-Mutual Evaluation Workshop in November 2015. At the time of the on-site visit, most of the entities were in the process of developing AML/CFT policies, implementing adequate CDD measures and appointing Money Laundering Reporting Officers. Assessors noted that, in general, the minimal KYC measures being implemented, were done strongly biased towards credit/business risk than mitigating ML/TF exposures.

247. Foreign currency exchange operators (supervised by BoB) demonstrated a similar pattern in which foreign-owned or controlled businesses demonstrated a better understanding of ML/TF risks and application of the AML/CFT measures. The local foreign currency exchangers demonstrated a low level of understanding of their risks and the necessary application of mitigating controls.

248. In respect of money or value transfer service providers, Botswana has different types of licensees which pose a different level of risk and application of AML/CFT measures. These are: stand-alone, affiliated to a commercial bank or agents and mobile payment providers affiliated to telecommunications companies. In general, the MVTs demonstrated a reasonable understanding of ML/TF risks and application of AML/CFT procedures to deal with the identified risks. The foreign-owned and controlled MVTs have conducted assessment of ML/TF risks

249. The assessors noted that non-bank financial institutions which are subsidiaries of foreign companies demonstrated a better understanding of their ML/TF risks and application of AML/CFT obligations than domestic ones which are still at the early stages of developing an understanding of the risks and mitigating controls.

250. The assessors met with representatives from the Money Remitters and Mobile Money Service providers' to assess their ML/TF risks. The Money Remitters interviewed appeared to have a general understanding of their ML/TF risks. This was on account of their being foreign controlled or owned entities. The entities have preventative measures in place to mitigate their identified

ML/TF risks. The money or value transfer services providers interviewed explained that for a remittance to be done, they require information providing identification and verification of the sender and receiver, residential address and source of funds of the proposed transaction. These are mandatory fields that have to be completed. Amounts exceeding money or value transfer services providers' daily limits require senior management approval and supporting documentation for the transaction to be carried out. Secondly, one reporting entity upon its finding that it was dealing with a significant number of refugees and asylum seekers, and to accommodate this segment of their customer base, revised its identification requirements for foreigners to include refugee documentation which can be verified with the issuing office (refugee camp).

251. The Mobile Money Service providers interviewed demonstrated a general understanding of their ML/TF risks on account of their affiliation to the GSM Association (global association that supports and promotes mobile operators using the GSM mobile standard). The entities exhibited no understanding of their AML/CFT obligations under the FI Act. For example, they indicated that STRs were reported to the partner bank instead of FIA.

252. However, it is worth noting that these entities are foreign owned or controlled and relying on their home policies and procedures. The entities are of the view that the regulatory requirements contained in the FI Act are onerous and skewed to banks. There is low or limited interaction with the Regulator to supervise and provide appropriate guidance to the entities in implementing risk mitigating measures commensurate with their risks.

253. In order to improve compliance throughout the remittance sector, it is advisable for the sector participants to consider creating a professional association of remitters. This would assist in establishing professional standards and act as an intermediary to engage the FIA in advocating for AML/CFT obligations that are commensurate to the activities and risks obtaining in the sector.

254. There is varying awareness and understanding of targeted financial sanctions across the range of reporting entities with commercial sanction screening software being used to screen clients and payments against UNSCRs sanction lists pertaining to the financing of terrorism in the foreign owned banks. These UNSCR lists are circulated by the respective Regulatory Bodies and FIA but often very late to meet the requirement of without delay. There is need for a coordinated approach in the dissemination of sanction lists by the Regulators to avoid the dual reporting being done to the Sector Regulator and to the FIA. In addition there is need for specific guidance or awareness to be provided to reporting entities on compliance with targeted financial sanctions.

b) Application of risk mitigating measures

255. The AML/CFT legal framework in Botswana is rules-based and therefore does not provide for enhanced nor simplified due diligence on business relationships and transactions. Despite this deficiency, financial institutions with ML/TF risks assessments have different mitigating controls for each type of risk consistent with the risk profile of the customer or transaction. Generally, all financial institutions and DNFBPs, regardless of whether or not they have in place a ML/TF risk assessment, have a general understanding of customers, products and transactions which pose a high risk. For instance, during the interviews with some of the FIs and DNFBPs, they commonly referred to PEPs, cash-intensive businesses and outward wire transfers as posing ML/TF risks in the financial system of Botswana. Generally there is appreciation of the need to apply CDD measures on the identified ML/TF risks to understand the nature of the customer and the transaction being conducted. However, the application of the CDD measures in practice differed

across the reporting entities largely based on whether they are domestic or foreign-owned or controlled, the size and sophistication of the business, complexity of the transaction or business relationship and identified ML/TF risks.

256. Banks have conducted internal risk assessments and this is evident in the financial products, types of customers and delivery channels they use. The measures being used appear to be commensurate to the ML/TF risks identified. For example, funds remitted have to originate from a customer account which has been subjected to CDD measures. Customer profiling is conducted upon establishing business relationships and on-going basis with periodic reviews done and the record kept, thereof. The frequency of the review is determined by the respective profiling or classification of the customer. PEPs' accounts, for instance, have a shorter review period (every 6 months), subject to the classification of the account. Enhanced due diligence is conducted for PEPs where further scrutiny of the source of funds is needed with prior senior management approval being required for on-boarding.

257. The majority of the NBFIs have not undertaken internal risk assessments. However, the entities interviewed were able to identify some of the vulnerabilities in their sectors and to demonstrate some level of understanding of their risks as evidenced by the types of customers they established business relationships with, products offered and delivery channels used.

258. The level of cash transactions in the business activities of the NBFIs is very low. The entities do not handle cash from or to customers, instead, they channel the funds through the banks, which in their opinion are better suited to vet their customers.

259. A significant proportion of customers access the broader financial system by way of the banking sector, through which most of the non-bank financial services are channelled. The Assessors note with concern that FIs, in particular insurance companies, rely on the information, risk profile and CDD performed by the banks and do not conduct their own independent CDD measures on their customers. This is premised on the non-bank financial services holding bank accounts and payments to them by their clients being made through these bank accounts and not 'directly' to the institutions. The non-bank financial services are of the view that since they do not accept cash payments made directly to them, this somewhat relieved them from the CDD requirements on their clients. This is in breach of section 10 of the FI Act. In a number of cases, this reliance on a third party exposes the institutions to difficulties in their customer profiling by, either having insufficient customer information as not all the relevant information is being passed across, or because the recipient institution is not thoroughly undertaking further analysis. The insurance companies admit that the challenges are even greater when they rely on agents such as brokers. They indicated that brokers generally refuse to provide them with all records pertaining to a prospective client for fear of the insurance company 'poaching' the customer, and thus not receiving their dues. They also indicated that in the event that the agents provide the records, most of the time they are not sufficient. Both scenarios have been confirmed by the NBFIRA, during the on-site visit. This shows the vulnerability of the sector due to the failure of the 'principal-agent' relationship to produce adequate records including CDD information to determine ML/TF risk levels and apply appropriate mitigating controls.

260. In the remittance sector, the money value transfer services, bureaux de changes and mobile money operators have set daily transaction limits on customer transactions, which during the on-site visit were P4,000(US\$400) for mobile money operators and P10,000(US\$1000) for the bureaux de change. For amounts exceeding the daily limits, the money value transfer services require prior

senior management approval and supporting documentation from the customer for the transaction to be conducted. The mobile money remitters encourage their customers to conduct transactions which are of a higher value through the banks.

261. DNFBPs, with the exception of foreign-owned or controlled casinos, accountants and precious stones dealers, do not have appropriate mitigating measures in place as they have identified some risks (e.g., cash-intensive nature of operations in the real estate sector and second-hand motor vehicle market) but are yet to adequately understand how the funds are laundered.

c) Application of enhanced or specific CDD and record keeping requirements

CDD Measures

262. FIs are aware and understand the application of CDD measures when establishing business relationships or carrying out transactions, including once-off transactions. The primary form of identification for natural persons is the national identity card (Omang) for citizens and passport for foreigners. In Botswana, it is a requirement for all citizens to obtain the Omang from the age of 16 years and the omang is relatively easy to obtain. Although, the omang expires after 10 years, the FIs interviewed stated that as a mitigating measure they do not process a business relationship or transaction unless a renewed omang is provided. This is a standard practice across the financial sector as an expired Omang is by law invalid.

263. The natural person identity requirements includes: full name(s); residential address (including country of residence); date of birth; and country of citizenship. Where the individual is a citizen, an omang identity number and date of birth of such individual are required whilst if it is a foreigner, a passport number and date of birth of such individual are required.

264. Generally, the CDD requirements for natural persons are applied by all the reporting entities, however, at different degrees depending on the level of sophistication, size of the business, and ML/TF risks, amongst others. For instance, reporting entities which have identified and understood their inherent ML/TF risks apply enhanced due diligence and on-going measures on transactions and business relationships that are classified as high risk or emanating from high risk jurisdictions. There are also measures in place to conduct further due diligence measures by using the HQ's resources in the country of origin. Further, there is focus on the customer's occupation or source of income, source of funds involved in the transaction, nature and location of business activities, if any.

265. Verification requirements being used by the banks for identity verification include: valid government-issued identity document which is an a) omang (citizen); or b) passport (non-citizen) (includes resident & work permits). The aforementioned can be confirmed by production of a government-issued and valid driver's license. The reason for requesting for the driver's license from the client must be recorded by the bank.

266. Options for address verification being used by the banks include: independent documentary evidence of the residential address of the individual as determined by the Anti-Money Laundering Compliance Officer (AMLCO) from time to time; the customer's physical address must be verified and any of the following will serve as acceptable methods for such verification:

- For individual customers: a) utility bills (less than 3 months old); b) council rates slips; c) payslip; d) lease agreement; e) invoice from security alarm service provider

- showing the physical address; f) bank statement (less than 3 months old); g) Govt/Local Authority Bills (less than 3 months old); h) employer introduction letter confirming the physical address (irrespective of time known); i) introduction by doctor, accountant, lawyer, clergyman, headman or tribal authority (Kgosi/Kgosana); j) government issued document showing physical address; k) introduction by an existing customer (irrespective of time known); or l) non-documentary means (such as reference to an electronic database) may be used if they are determined by the AMLCO to be reliable;
- The legal person identity requirements include: full name; registered number; registered address in country of incorporation; business address (if different); full names of all Executive Directors (Chairman, CEO, CFO, COO); and names of individuals who own or control 10% or more of its shares or voting rights;
 - Verification requirements include: ownership structure/organogram; proof of the entity's existence that is consistent with practices in the local market, for example, a print-out of the web-page of a government-sponsored corporate registry; proof of a governmental issued registration number if not in the above; and the physical address from which the entity operates. If multiple addresses exist, the street address of the office seeking the business relationship and the head office address must be obtained and verified, including verification of the Executive Directors.

267. The following documents are being used for verification of the records: Memorandum of Articles of Association/Constitution; Form 7 (Notice of Adoption/Alteration/Revocation of the Constitution), if Memorandum/Constitution will not be provided Certificate of Incorporation, Form 3, 4 & 5 for old companies, newly registered 8, 13, 14 and 15 or 2A, 2B, 2C, 2D (whichever is applicable to select of company); Share Certificate; annual return, Form 31,31A,31B or 32 (whichever is applicable to select of company) where a company has been in existence for over 12 months; Application for Incorporation as a Public Company (Form 1) or Application for incorporation as a Private Company Limited by Shares (Form 2) or Application for Incorporation as a Company Limited by Guarantee (Form 3) or Application for Incorporation as an Unlimited Company (Form 4) or Application for Registration as a Foreign Company (Form 46 appendices 'A (1)' and 'B (1)' (Where an entity has been in existence for less than 12months); Notice of change of situation of Registered Office/Postal address (where applicable); Notice of Persons Ceasing To Be Members Of a Company Limited by Guarantee , Form 54 and Notice of Persons Becoming Members of a Company Limited By Guarantee, Form 62 (where applicable) the following identification documents can be used: Copies of ID 's or Passports for all Directors. This should include those for Managers who will be authorised to sign or transact on the account, e.g. MD, FD. (NB: For non-nationals passports only); family tree (organogram) for an Intermediate/Complex structure duly certified by accountants/lawyers; latest accounts or business plans (if new business) if unavailable statement of business affairs completed in the application booklet; Council occupancy certificate; any Botswana Government document showing physical address; © Google search results; Stock Exchange search results (recognised stock exchanges); Industry/Professional website search results (e.g. BICA, BIE, Law Society, etc); introduction by a Company Secretary (registered with BICA).

268. The assessors observed that, in general, reporting entities have little understanding of the requirements for verification of identity documentation using an independent source or by the issuing authority. NBFIs require the applicant to submit certified copies of the documentation

whilst Banks require original documentation to be submitted from which a copy is made with an attestation of the authenticity of the document being made by a bank official after having sight of the original document.

269. The large and well-resourced institutions take reasonable steps to identify ultimate beneficial owners using privately owned/commercial databases to verify the identity of ultimate beneficial owners. With the exception of large institutions with international affiliation, the concept of ultimate beneficial ownership is generally not yet well understood in Botswana, and as a result, most FIs and all DNFBPs do not conduct beneficial ownership procedures when carrying out CDD.

270. Interviews with a cross-section of FIs and DNFBPs revealed different understanding of what they viewed to be identification of beneficial ownership. Majority of the reporting entities understand it to be identifying the shareholding structures and ownership. There is lack of consistency on application of risk assessment based on the level of share ownership.

271. On average, the reporting entities indicated that in practice they adopted a risk consideration of 10% shareholding as a minimum requirement to identify and verify the ultimate beneficial owner. The rest of the reporting entities rely on the basic information held by the registrar of companies and are not on their own taking any reasonable steps to establish the true identity of the ultimate beneficial owner.

272. The insurance companies are aware and understand the requirement to identify and verify all their customers. In Botswana, the insurance sector, in the majority has a high proportion of its customers on-boarded by brokers who collect CDD information when conducting client mobilisation. As already stated above, the assessors have identified that where the information collected by the brokers is insufficient, the insurance companies do not take necessary steps to either collect or instruct the broker to collect the outstanding information to ensure that full CDD has been conducted on the prospective client. The Assessors further identified that where the broker has full CDD information the same is not being provided to the insurance company for fear of the company directly engaging with the prospective client. The reliance on third parties raises concern in relation to ML/TF risks for the insurance sector on the basis that they are unable to determine the appropriate risk profile and thus mitigating controls against the customer.

273. There is a general concern that reporting entities do not currently have the ability to independently verify the identity of clients as they do not have access to the databases of competent authorities such as the Omang office (for verification of the true identity of the customer) and CIPA (to verify basic and legal ownership information on companies as it does not obtain information on beneficial ownership)³⁸. It should be noted that according to CIPA, the information it obtains does not extend to identification of beneficial ownership as this is not provided in the Companies Act. Similarly, reporting entities face challenges in identifying and verifying beneficial owners and keeping accurate and up to date beneficial ownership information.

274. Due to lack of independent sources to verify beneficial ownership information, reporting entities place over-reliance on the customer's self-declaration. A significant number of reporting entities interviewed require their customers to submit copies of their information documents certified by a commissioner for oaths. It is only the banks that require the submission of the original documents. However, it is not the practice to utilise independent sources for verification, it is only

³⁸ See IO 5 for more details

where doubts arise as to the authenticity of the documentation that the option is exercised by the banks. At most times reporting entities, including banks, place reliance on the submitted information by the customer, which is of concern where the ownership chain is complicated.

275. Large foreign owned or controlled banks demonstrated that they perform a fairly comprehensive CDD, record keeping and account and transaction monitoring. Most of these FIs have designed and implemented measures to identify high risk clients and relationships, such as PEPs and correspondent banking. They are also applying additional specific AML/CFT controls, such as senior management approval for new relationships and transactions monitoring as well as regular review of relationships and recording of the findings, thereof. Other FIs are performing basic CDD and record keeping, while most lack adequate mechanisms to perform account and transaction monitoring, which is one of the causes of the low levels of reports filed by NBFIs to the FIA.

276. DNFBPs, in general, apply (basic) CDD measures on the transactions and business relationships. The real estate agents and lawyers are not aware of their CDD requirements such as due diligence measures to verify customer and conduct customer profiling. Given the vulnerability of the sectors to large cash-intensive transactions, the absence of specific mitigation measures being applied poses a significant ML risk. DNFBPs with foreign ownership or control apply CDD measures but have limited appreciation of the local CDD requirements.

277. All reporting entities do not continue with the transaction or the on-boarding when CDD is incomplete or when the reporting entity is not certain about the veracity of the information. This measure however, is not accompanied with consideration of filing an STR to the FIA as required under the FATF Standards.

Record Keeping Measures

278. The reporting entities are generally applying record keeping requirements in terms of the FI Act relating to CDD and transaction information and any other information including any reviews conducted on customers and transactions. However, the quality of the information in some cases was found to be inadequate. Insurance companies have about 75% of the on-boarding of their customers conducted by insurance brokers who directly interact with the customers. The insurers' concern was that the brokers have a tendency of collecting and/or releasing incomplete customer information to the insurance companies, as discussed earlier. This record keeping weakness was confirmed by their Supervisor, NBFIRA, based on inspections it had carried out on the entities.

279. The assessors further observed that the primary purpose for obtaining and keeping records is for business operations and not AML/CFT purposes. This is consistent with their limited application of the AML/CFT requirements to obtain the necessary information under application of CDD measures.

280. All types of records are held in both electronic and hardcopy for periods ranging between 5 – 7 years after conclusion of a business relationship or conclusion of the single transaction. In addition, the majority of the reporting entities have off-site data recovery sites which are accessible at easy should a need arises.

281. In addition to applying the normal CDD measures and not having a legal requirement, foreign owned or controlled reporting entities demonstrated that they understood what constitute a high risk customer and high risk jurisdiction, and thus the need to apply proportionate enhanced due diligence measures.

PEPs

282. Although there is no specific legal obligation for banks to carry out CDD in general and EDD particularly relating to PEPs, in general FIs, in particular commercial banks have put measures in place to mitigate risks relating to PEPs. Banks indicated that they considered both domestic and foreign PEPs as high risk to which they applied enhanced due diligence and on-going monitoring of the transactions and business relationships. For the foreign PEPs, reliance is made on the privately/commercially-owned international softwares/databases to identify and verify the true identity of PEPs. Software databases such as world check are being used by the banks to verify identification of PEPs. In respect to the local PEPs, some banks have developed their own criteria given the lack of supervisory guidance on the issue. These include persons that hold prominent functions in government, district councils, town/city councils, heads of parastatals, military chiefs as well as close relatives. The banks are of the view that it would be helpful if guidance on PEPs is provided by the Supervisors.

283. When on-boarding, the banks conduct screening for PEPs. Most of the FIs have processes in place for vetting PEPs and these include obtaining source of funds/source of wealth information. The on-boarding or transaction require verification by head office in consultation with the Compliance Officer and Senior Risk Officer and approval of on-boarding made by senior management staff at EXCO level. The relationship has a short tenure of at least 6 months for review compared to the other reviews that are conducted on an annual basis or as and when there are material legislative changes impacting the relationship.

High Risk Jurisdiction

284. Despite there being no legal requirement and guidance on the mitigating controls required for transactions and business relationships emanating from high risk jurisdictions, the FIs indicated that they relied on information on the FATF List relating to non-cooperative jurisdictions and to apply additional measures to counter the identified ML/TF risks from such countries. As a general practice, FIs indicated that they do not enter into business relationships nor process transactions from or to a high risk jurisdiction.

Correspondent Banking

285. Although Botswana does not have a legal framework that deals with correspondent banking, the banks have measures in place to enter into correspondent banking relationships. Technically, banks in Botswana do not enter into correspondent banking relationship. Operationally, the banks use the existing correspondent relationship arrangements of their mother bank in the country of origin to process transactions emanating in Botswana. In the event that a bank has identified a potential bank for purposes of a correspondent relationship, all information on such a prospective bank is sent to HQ for vetting and authorisation.

286. The banks have adopted a risk-based approach to determine the extent of due diligence that is required with respect to correspondent banking business relationship or transactions. Additional CDD measures include approval at senior management level before establishing a relationship whilst some banks go as far as conducting an on-site visit to the entity to verify the information submitted. For monitoring purposes, the relationships are reviewed on an annual basis or as and when there are material changes that may impact on the robustness of the measures applied on the relationship.

Cross-Border Wire Transfers

287. As already stated, there are no specific obligations for FIs to implement wire transfer measures consistent with Recommendation 16. Despite this material deficiency, there are standard cross-border wire transfer forms (i.e. SWIFT) being used by the banks to facilitate the transfer of funds in and out of Botswana. The assessors noted that the forms provide for basic information on the sender's details, the purpose of funds transfer and beneficiary details to be obtained. The assessors are of the view that the information being obtained or collected accompanying the cross-border wire transfers appeared reasonable to establish the identity of the customer or transaction being conducted for cross-border wire transfers under the FATF Standards.

Simplified CDD

288. Despite the FI Act and its Regulations not providing flexibility in the application of the CDD measures, FIs have taken some steps to relax the rigidity of the requirements by allowing simplified CDD measures where the customer is allowed to produce other information as form of identification as an alternative to the prescribed ones. For instance, MVTs did in some circumstances require other forms of identity for foreigners that were classified as refugees in form of refugee documentation (instead of a passport as required under the FI Act and its Regulations) which is verified with the issuing office (refugee camp).

New Technologies

289. Although there are no specific requirements in respect of new technologies for FIs and DNFBPs to have in place, the assessors identified that there were no challenges experienced by the entities to guard against possible ML/TF risks. For instance, larger banks informed the assessors during the on-site visit that before introducing a new financial service/product, delivery method or technology, they normally conduct a product risk assessment that includes ML/TF risk factors, and determine the controls needed to mitigate any identified risk. Further, the assessors identified that arising from proliferation of mobile money services without proper registration/licensing taking in place, especially as the FIA (as the designated supervisor) had not yet started any compliance monitoring programme on these financial service providers, continue to evolve and grow without any formal assessment and mitigation of ML/TF risks. The threshold limits put in place for transactions per day per customer, without any formal assessment of the ML/TF risks associated with the evolving and growing sector, are insufficient to mitigate the risks.

Targeted Financial Sanctions relating to TF

290. Botswana does not have a legal or regulatory framework for implementation of targeted financial sanctions relating to TF. In late 2015, the authorities through FIA and supervisory bodies set up a stop gap measure in which the UNSCRs 1267 and 1373 lists received from the MoFAIC are disseminated to the reporting entities via their respective Supervisors. The UN sanctions list was first circulated in January 2016. Thereafter, there has been periodic dissemination, albeit often late, of the list with the latest list circulated during the time when the assessors were on-site visit. The assessors noted that there was no clear guidance on the process to report back as well as the actions that should be taken such as freezing of the assets by the reporting entities as part of application of CDD measures in the event of a positive match.

291. FIs screen their customers against the UN list either for a once-off transaction or when establishing a business relationship. The majority of the FIs, especially the large and well-

resourced ones have acquired software to enable them to screen transactions and customers on a regular basis.

e) Internal controls and legal/regulatory requirements impending implementation

292. The FI Act and its Regulations require reporting entities to put in place a compliance programme that includes appointment of an AMLCO that should be at management level. The assessors observed that this requirement was not being adequately implemented across the sectors. For instance, in some banks it appeared that the designated officer was not at a senior management position but subordinate to the Head of Compliance. Based on the understanding of the seniority of the banks staff structure and decision-making, the assessors concluded that in the majority of the banks, the compliance officers appeared not senior enough to influence AML/CFT policy and implementation. From the discussion held with the banks, the existing compliance structures do not have sufficient personnel to effectively direct the institutions' AML/CFT functions.

293. Most of the reporting entities in the NBFIs have recently established a compliance function following the guidance provided by the NBFIRA that sets out the need for the reporting entities to have a compliance function which takes into account the size of the reporting entity. In this regard, in the smaller reporting entities the compliance function is incorporated under other existing departments like Finance or Risk, while some of the large NBFIs have independent AML/CFT compliance functions.

294. The assessors were informed by one NBFi during the on-site visit that the designated compliance officer was not resident in Botswana but in another country and came into the country whenever a need arose. Given the emerging awareness of this function, there is need for the respective Supervisors to appropriately guide the reporting entities that the compliance function should take into account the size, nature and complexity of business and ML/TF risks of the reporting entity. The assessors further recommend that given the nature of the functions of a AMLCO, for the position to function more effectively, it would be ideal for the designated officer to be resident in Botswana.

295. Generally, the reporting entities have an independent audit function to test the system in place as part of enterprise-wide risk management systems. Reporting entities also have screening procedures to ensure high standards when hiring employees and most of those interviewed, conduct annual training programmes that include AML/CFT awareness. This training is in addition to the normal orientation training that takes place 3 months after recruitment. The banks have a better understanding and implementation of their AML/CFT policy and procedures which are domesticated taking into account their group policy and procedures while the NBFIs have an emerging awareness and are at various stages of developing their AML/CFT policies following guidance from NBFIRA.

f) Reporting Obligations and tipping off

296. More than 99 percent of the total STRs filed with FIA were from the FIs, with the majority coming from commercial banks with an average of 83% for the period under review. This is despite the provisions of s. 43 of the Banking Act which prohibit banks to exchange transaction information without seeking authorisation from the customer involved. Further, all banks filed STRs to the FIA only in direct contradiction of s.21 of the Banking Act which requires submission

of the same to the BoB. The rest are contributed by insurance companies, bureaux de change, MVTS and with only one STR filed by the casino for the same period.

297. The FIA explained that initially the quality of the STRs submitted by the reporting entities were of poor quality due to limited awareness. However, at the current tactical analysis level, the FIA is satisfied that the quality of the STRs received continues to improve. This is despite not all reporting entities filing STRs.

| Specified party category | Total STRs received according to years | | | | |
|--------------------------|--|------------|-----------|--------------------|------------|
| | 2013 | 2014 | 2015 | 2016 ³⁹ | TOTAL |
| Banks | 15 | 111 | 88 | 11 | 225 |
| Insurance companies | 0 | 1 | 0 | 0 | 1 |
| Bureaux de change | 6 | 1 | 1 | 2 | 10 |
| MVTS providers | 1 | 1 | 6 | 1 | 9 |
| Casino | 0 | 0 | 0 | 1 | 1 |
| TOTAL | 22 | 114 | 95 | 15 | 247 |

298. Large foreign owned banks meet their reporting obligations appropriate to their level of risk, such as developing computerised monitoring systems, appointment of money laundering reporting officers, staff training and ongoing reviews of their AML program. The STRs are filed electronically with the majority being filed using the goAML platform whilst the others are filed using protected emails and discs.

Conclusions on Immediate Outcome 4

299. The legal and regulatory framework in Botswana providing for preventive measures has a number of deficiencies. The inadequate requirements and procedures to conduct on-going CDD and transaction monitoring as well as a lack of adequate reporting of STRs; and a lack of mandatory requirements in respect of beneficial ownership identification and verification, cross-border wire transfers, PEPs, targeted financial sanctions, and correspondent banking have undermined uniform implementation of and compliance with the measures across the board. Where the measures are covered, a large number of them are insufficient to meet the FATF Standards. Generally, the understanding of ML/TF risks and application of AML/CFT obligations is varied between the FIs and DNFBPs, and between the commercial banks and the NBFIs due to some of the FIs having conducted assessment of their inherent institutional ML/TF risks. Furthermore, there is a clear distinction in the level of ML/TF risk understanding and application of the AML/CFT measures between foreign-owned or controlled FIs and domestic FIs. In particular, four big commercial banks (all 10 commercial banks in Botswana belong to international financial groups) demonstrated a better understanding and application of mitigating controls against the ML/TF risks identified through assessments conducted. The small to medium banks showed awareness of ML/TF risks and emerging understanding of AML/CFT measures.

300. The NBFIs which are foreign-owned or controlled showed a fairly good understanding of the ML/TF risks and application of mitigating controls. Generally, foreign-owned or controlled FIs

³⁹ Statistics are up to June

and DNFBPs took reasonable steps to apply appropriate AML/CFT preventive measures commensurate to the size, nature and complexity of business and ML/TF risks that apply to them and vice versa. In general, the reporting entities have not conducted internal risk assessments to appropriately understand their ML/TF risks. The absence of a NRA on ML/TF risks, sectoral and/or entity specific ML/TF risk assessment is generally the major contributing factor to the absence of a risk based approach to combating ML and TF.

301. The DNFBP sector showed a similar structure as the FIs whereby the foreign-owned or controlled casinos, accountants and dealers in precious stones demonstrated a reasonable understanding of their ML/TF risks and the implementation of appropriate mitigating controls. The majority of the DNFBP sector, especially, the real estate and trust and company service providers which are regarded as having higher risks, did not demonstrate an understanding of the risks and the appropriate mitigating controls. Further, precious metal dealers are not subject to AML/CFT requirements.

302. The overall level of adequate implementation of preventive measures by reporting entities is emerging, albeit from a low base, due to the absence of proper guidance and monitoring for compliance to promote implementation of the AML/CFT requirements. This has in turn affected the level of effectiveness

303. The absence of guidance on how to deal with high risk countries and appropriate counter measures poses significant risks to the effectiveness of the AML/CFT regime of Botswana. ML/TF risks within MVTs and new technologies are not being adequately identified, assessed, understood and effectively mitigated. Absence of a legal framework to implement simplified and enhanced CDD is also of serious concern.

304. Botswana has achieved a *low level of effectiveness* for IO 4.

CHAPTER 6. SUPERVISION

Key Findings and Recommended Actions

Key Findings

- Regulators responsible for licensing or registration of FIs and DNFBPs subject to AML/CFT requirements have frameworks in place to ensure for lawful conduct of business activities in Botswana. The measures include statutes, manuals, processes and procedures. Generally, FIs regulators take reasonable steps to identify and verify the true identity of ultimate beneficial owners, though in some instances there is more focus on immediate and significant shareholders on whom fit and proper requirements are applied to determine their integrity.
- In respect of MVTs, there is no legal or regulatory framework in Botswana for licensing of the financial service which could be applied to prevent criminals from owning, controlling, and/or managing a MVTs entity.
- With the exception of casinos, the DNFBP regulators have not demonstrated how the nature and extent of their licensing and registration frameworks enabled them to prevent criminals from holding a significant interest or a management position in their regulated entities.
- All supervisors in Botswana lack capacity/capability to effectively discharge their AML/CFT supervision and enforcement responsibilities. Where inspections were undertaken, they were not on a risk based approach and the quality and scope of the inspections was very basic to enable identification of non-compliance areas, and apply commensurate remedial actions. This situation has heavily undermined effective supervision of regulated entities by the supervisors in Botswana.
- The lack of adequate supervision of banks by BoB owing to capacity and absence of understanding of its supervisory role under the FI Act, represent a significant concern for detection and prevention of ML and TF in Botswana based on risk exposure and materiality of the sector.
- Supervisors are yet to develop a common understanding of ML/TF risks facing their regulated entities, especially as their regulated entities offer financial services licensed by more than one supervisor. The supervisors intend to use the findings of the NRA, once completed to develop a common understanding of ML/TF risks and implement supervisory actions to promote application of mitigating controls that are commensurate to address the identified risks.
- Dealers in precious metals are not within the AML/CFT regime, as they are not listed as reporting entities in the FI Act and are therefore not supervised.

- The sanctions provided in the FI Act have not been applied as the supervisors are yet to conduct meaningful compliance checks on reporting entities. In addition, the nature and extent of the sanctions under the same Act are not dissuasive and proportionate and thus unlikely to be dissuasive and effective, when applied.

Recommended Actions

- The competent authorities responsible for licensing or registration of FIs and DNFBPs subject to AML/CFT requirements, should strengthen and consistently apply the statutes, manuals, procedures and processes to enable them to adequately deter criminals from participating in the ownership, control or management of FIs and DNFBPs, including in relation to fitness and probity of the ultimate beneficial owners
- Supervisors should as a matter of urgency take the necessary steps to understand their ML/TF risks, supervisory responsibilities under the FI Act and establish supervisory capacity to adequately supervise and enforce compliance with AML/CFT requirements on a risk based approach, taking into account the findings of the NRA, once it is completed.
- DNFBP supervisors should develop capacity to carry out their AML/CFT supervisory roles, including awareness programmes to assist their regulated entities to adequately understand and apply the AML/CFT obligations on a risk-sensitive basis.
- In light of the concerns expressed by the Law Society regarding it being an AML/CFT supervisor for the legal profession, the authorities should consider designating another supervisor to take up this role.
- Once the supervisory body for dealers in precious metals has been designated under the FI Act, it should put in place commensurate capacity to supervise and monitor the sector for compliance with AML/CFT requirements.
- Owing to its coordinating role as a supervisor under the FI Act, the FIA should as a matter of urgency develop supervisory capacity necessary to provide guidance to the other supervisors and to ensure that there is uniform interpretation and application of the AML/CFT statutes by the respective supervisors when supervising their regulated entities.
- Botswana should amend the FI Act to provide for a broad range of sanctions and apply them against non-compliance by FIs and DNFBPs in a manner which is proportionate and dissuasive to ensure effective implementation of the AML/CFT requirements.

The relevant Immediate Outcome considered and assessed in this chapter is IO3. The recommendations relevant for the assessment of effectiveness under this section are R26-28 & R.34 & 35.

6.1 Immediate Outcome 3 (Supervision)

a) Background and Context

305. The FI Act establishes a coordinated supervisory framework in which supervisory authorities are responsible for monitoring compliance with AML/CFT requirements of reporting entities under their purview. All supervisors have authority to issue instructions, guidelines, or recommendations to their respective regulated entities but this must be done in consultation with

the FIA. The FIA is responsible for ensuring AML/CFT compliance by reporting entities which do not have a supervisory authority.

b) Licensing, registration and controls preventing criminals and associates from entering the market

306. **BoB** - Prudential Supervision Division (PSD) of BoB is responsible for licencing and supervision of banks, while Bureau de Change Division (BCD) is responsible for licensing and supervision of foreign currency exchange entities. Banks are subject to licensing requirements in terms of s. 3 of the Banking Act, while bureau de change are licensed under s. 30 of the Bank of Botswana Act. In the absence of a legal or regulatory framework for licensing of money or value transfer dealers, BoB issues a “*Letter of no Objection*” which serves as authorisation to operate the service. There are no fit and proper and AML/CFT requirements nor supervision activities being conducted on MVTs providers and their agents.

307. **NBFIRA** – NBFIRA has four regulatory divisions, namely: capital markets; insurance lending activities; and retirement funds and investments. The Capital Markets Division is responsible for licensing and supervision of securities institutions including IFSCs. The Insurance Division is responsible for the licensing and supervision of reinsurers, insurers, medical aid funds, insurance brokers and insurance agents. The Lending Division is responsible for the licensing and supervision of micro-lenders, pawnshops, finance and leasing companies. The Retirement Funds and Investment Institutions Division has a dual role of licensing of pensions, provident fund administrators as well as licensing of investment institutions including CIUs, management companies of CIUs, asset managers, private equity firms, investment companies with variable capital, trustee banks, custodians and investment advisers. All four regulatory divisions within NBFIRA carry out licensing requirements in terms of section 42(1) of the NBFIRA Act, which is supplemented by sector specific regulations, licensing procedures, rules and processes relevant to each division.

308. Botswana has a sound licensing regime in place for all core principles and other financial institutions. BoB and NBFIRA have put in place sound measures to ensure that shareholders, directors and senior management of FIs (excluding MVTs providers) are subject to fit and proper assessments. Fit and proper assessments are conducted when FIs are licensed, and when financial institutions notify supervisors of a change in senior management, directors or ownership structure as required by supervisors’ licensing and registration frameworks. Legal entities are requested to provide registration documentation from the Registrar of Companies, which include certificate of incorporation and memorandum and articles of association and confirmation of regulatory standing from foreign regulators are also requested. The due diligence process on natural persons includes assessment of integrity of these persons, requesting letters from foreign regulators, obtaining references and curriculum vitae for employment history and police clearance certificates. Due diligence for foreign based directors and shareholders include obtaining police clearance certificates from the country of origin. Fit and proper requirements are conducted on significant shareholders with 5% (for BoB) and 20% (for NBFIRA) ownership and above. Post licensing, financial institutions supervisors conduct on-going monitoring which is triggered by events such as acquisitions, mergers or change in management and ownership structure. FIs supervisors require FIs to inform them when there is a change in the management and ownership structure to ensure that directors and shareholders remain fit and proper.

309. *Casinos* – Measures to prevent criminals from holding a significant interest or a management position in a casino are implemented by the Gambling Authority. Fit and proper measures include obtaining and verifying criminal proceedings or convictions of directors, shareholders and management of a casino.

310. *Other DNFBPs including car dealers* – The assessors are of the view that licensing or registration rules including forms implemented by all DNFBP supervisors cannot demonstrate that they are implementing measures to prevent criminals from holding a significant interest or a management position in these institutions, even though some had a legislative requirement to do so at market entry and at renewal stage (dealers of precious/semi-precious stones, accountants and lawyers). Although lawyers, accountants and real estates are subject to on-going oversight and monitoring of conduct undertaken by their local professional bodies, in practice, licensing procedures do not subject them to investigation of criminal convictions before admission to their body registers. Precious and semi-precious stones supervisors obtain police clearance certificates from their members at licence renewal stage in line with their primary law requirement, however the same is not obtained at admission stage.

311. *All supervisors* - If the shareholder is a legal entity, the identification and verification of the ultimate beneficial owner is not conducted by all supervisory authorities as the assessment is only done on the immediate/significant shareholders. This means that the authorities do not take reasonable steps to establish different layers of shareholding structure to identify the ultimate beneficial owner. Some authorities indicated that they are aware of instances of unlicensed operators providing specific services particularly in real estate and MVTs. However, authorities have not taken any action to detect and close down these illegal operators.

c) Supervisors' understanding and identification of ML/TF risks

312. Supervisors in Botswana are currently part of a NRA process to identify and assess ML/TF risks. The FIA, BoB and DNFBP supervisors have little or no understanding of the ML/TF risks that apply to their supervised entities. NBFIRA, on the other hand, has demonstrated a relatively higher understanding of the ML/TF risks facing its regulated entities than the rest of the supervisors. This variance arises from the fact that NBFIRA had already started the process of identifying and assessing its ML/TF risks on its own before being a participant in the NRA. The process of assessing the risks within NBFIRA was coordinated by an AML Project Team (started in November 2015 – six months before the on-site visit) which was formed specifically to determine how the NBFIRA can optimally coordinate supervision activities of all its divisions.

313. In general, the assessors observed that the supervisors lacked the relevant information and data to adequately identify and assess the ML/TF risks prevalent in their regulated entities. This is attributed to the lack or absence of internal supervisory capacity and the limited scope of the inspections conducted, as they provided little or no information to determine the level of compliance and therefore generate the necessary ML/TF risk indicators.

314. The FIA has no knowledge of the ML/TF risks prevalent in the MVTs sector which it is responsible for by virtue of the sector not having a supervisor (in the absence of a legal framework, BoB issues a Letter of no Objection only and does not supervise the sector for AML/CFT purposes).

315. DNFBP supervisors indicated, in broad terms, certain vulnerabilities in the business operations of their regulated entities, but could not demonstrate in specific terms the extent to

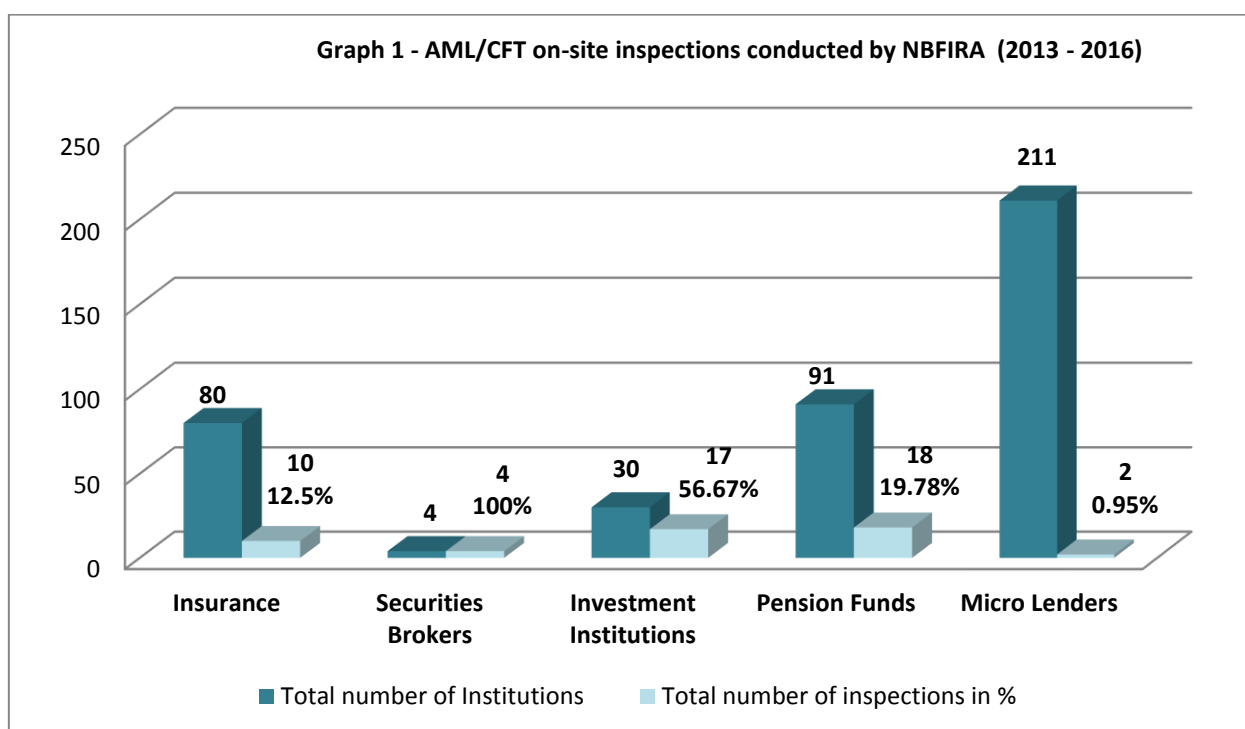
which the ML/TF vulnerabilities could manifest. The absence of supervision activities has directly contributed to the supervisors' lack of understanding of the specific ML/TF risks that are applying in their sectors. Further, the Law Society of Botswana is not convinced that it needs to be a supervisor, as in its view, this will create a conflict with the lawyer/client privilege provided under the Legal Practitioners Act and that it does not have the capacity to carry out the obligations of an AML/CFT supervisor.

d) Risk-based supervision of compliance with AML/CTF requirements

316. FIs and DNFBPs supervisors do not supervise or monitor their regulated entities on a risk-sensitive basis. In this regard, the frequency, intensity and scope of on-site and off-site AML/CFT inspections are not based on the institution's ML/TF risk profile. Risk based models being implemented by financial institution supervisors do not cover specific ML/TF risks, as they are biased towards prudential risk determination. The assessors identified that supervisory actions do not cover CFT for all supervisors.

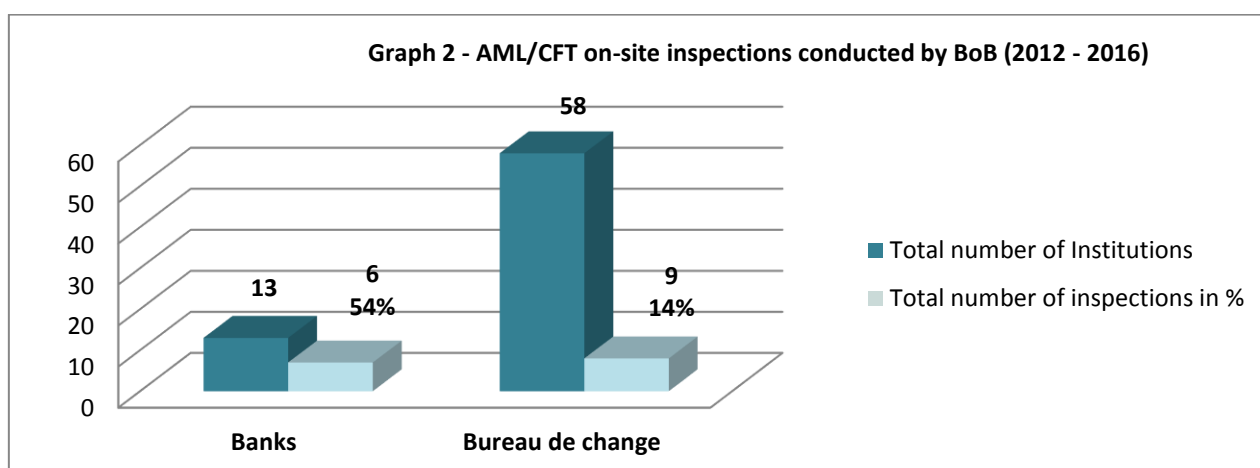
317. **NBFIRA** - The current risk model used by the NBFIRA does not cater for ML/TF risks, and accordingly the supervisory actions, including inspections, does not consider such risks. For example, NBFIRA considers IFSCs as high risk for ML, there has been no inspections undertaken except for the familiarisation visits that were conducted 2 months prior to the on-site visit which were merely to enable NBFIRA to appreciate the potential ML/TF risks of the IFSCs operations.

318. The assessors noted that the majority of the AML inspections by the NBFIRA were very recent (within 6 months prior to the on-site visit). Before that, there were very few inspections which had been conducted by NBFIRA, most notably in the securities and insurance sectors which started in 2013. Nonetheless, the total number of inspections undertaken by the NBFIRA are still very low when compared to the total number of registered entities (see Graph 1 below). Except for the recent inspections which were conducted based on the materiality (size) of the institution, the overall level and type of supervisory approach is not determined according to the institution's risk profile.



319. **BoB** - The BoB applies a rules-based approach to supervision of banks and bureau de change institutions. BoB does not supervise its regulated entities for compliance with the FI Act and its Regulations due to a lack of appreciation of its supervisory role under the same Act. Instead, the BoB uses the Banking Act, BoB Act and its Regulations to conduct AML inspections. In practice however, the PSD has conducted 9 inspections including follow-up inspections over the period (2012-2016). Of concern is that seven (7) banks have not been subjected to any form of AML inspections over this period. It is clear that the choice of entities to supervise is not determined by any level of ML/TF risks identified. Excluding 2 joint inspections with foreign supervisors conducted in 2016, the content of all inspections conducted by BoB are very brief and the scope is limited to CDD, AML policy and training requirements only. Significant requirements under the FATF Standards such as correspondent banking, wire transfers, home-host requirements, PEPs, risk based approach, cash threshold reporting, electronic funds transfers and UNSCR list implementation, among others, were not covered by the supervisory actions. The assessors noted that despite the large foreign owned or controlled banks having ML/TF risk assessments, the BoB did not consider or use these assessments when planning or carrying out its inspections on the banks.

320. Just like NBFIRA, BoB's inspection coverage is very low when compared to the total number of entities supervised (see graph 2 below) and is not risk-based. The inspection scope covered AML obligations implemented by bureaux de change.



321. *FIA and DNFBP supervisors* – The FIA and DNFBP *supervisors* had not yet commenced with AML/CFT supervision of their regulated entities at the time of the on-site visit. Generally, DNFBP supervisors did not have sufficient resources to conduct supervision and monitoring for AML purposes, taking into account the size of the sectors supervised or monitored. The FIA has only issued guidance notes to the DNFBP sector, money remitters and gambling sector and has also conducted sensitisation workshops in conjunction with NBFIRA to non-bank financial institutions, car dealers and bureau de change entities.

e) Remedial actions and effective, proportionate, and dissuasive sanctions

322. The assessors identified that the nature and extent of the inspections carried out by the NBFIRA and BoB does not enable the two supervisory authorities to determine non-compliance. The main focus of the inspections are generally either to familiarise the regulated entities with the AML/CFT requirements or the scope and depth is negligible to identify areas of non-compliance and subsequent sanctioning. As already indicated, both the FIA and the DNFBP supervisors are yet to commence with AML/CFT inspections. The nature of breaches identified by BoB were failure to identify customers, record keeping, filing of suspicious transactions and employee training. The administrative sanctions imposed by BoB were too low, ranging from P1 120(US\$106) to P4 480(US\$426) to dissuade non-complying bureaux de change. In addition, NBFIRA and BoB have issued remedial instructions. Generally, inspections in Botswana are conducted mainly to increase the FIs' level of understanding of AML obligations.

f) Impact of supervisory actions on compliance

323. Interviews carried out with the private sector and the supervisors clearly showed that the low level of understanding and application of the AML/CFT requirements by reporting entities in Botswana is directly related to the basic supervisory actions taken by the supervisors. Across the board, there is lack of internal capacity (expertise and number of personnel) dedicated to inspections on AML/CFT. When the supervisors do get to conduct the inspections using the insufficient resources, the scope and level of depth is very basic to generate information necessary to inform the supervisors of material non-compliance areas. Consequently, the impact on compliance level in all regulated entities is insignificant.

324. The assessors further noted that banks were more knowledgeable on AML/CFT obligations that applied to them than BoB, primarily due to the banks' reliance on AML/CFT requirements from the country of origin and the failure by BoB to conduct its supervisory actions using the FI Act which has a broader scope than the AML Regulations it relies on. This means that generally the relatively better compliance level by the big four banks (in terms of market share) is not attributed to supervisory action taken by BoB. Where non-compliance was identified and sanctions levied, as explained above, the sanctions applied are not sufficient to impact positively on the attitude of the entity concerned and the rest of the sector.

325. Although the current supervisory focus of the NBFIRA is on familiarisation phase, the assessors noted that there has been some meaningful steps taken by the regulated entities to improve on their application of AML/CFT obligations as required under the FI Act and its Regulations. At the time of the on-site visit, the results showed that almost all the entities regulated by NBFIRA had appointed AML/CFT compliance officers and developed AML/CFT policies and procedures to guide systematic implementation of the requirements following issuance of a guidance by NBFIRA to establish compliance functions.

326. There has not been any supervisory action applied on the DNFBP sector and the MVTS as the supervisors had not yet started with supervisory action due primarily to a lack of understanding of their responsibilities and supervisory capacity to implement the FI Act and its Regulations.

g) Promoting a clear understanding of AML/CTF obligations and ML/TF risks

327. DNFBP supervisors and BoB have not undertaken any initiatives to sensitise or participate in any awareness-raising to reporting entities under their purview to improve compliance levels. NBFIRA and FIA have undertaken individual and coordinated or joint awareness raising initiatives and workshops to promote AML/CFT understanding by reporting entities under their purview, which cover all FI Act obligations, however this was done close to the on-site visit. As already indicated in IO 4, the level of understanding of ML/TF risks and application of the AML/CFT obligations is generally low across the sectors with the exception of the big four foreign owned or controlled banks owing to their reliance on AML/CFT obligations from country of origin. The supervisors have indicated that they would use the findings of the NRA and the completion of the on-going AML/CFT legislative review to promote clear understanding and application of the measures on a risk based approach.

Conclusion on Immediate Outcome 3 (Supervision)

328. The FI Act has designated the regulators of the FIs and the DNFBPs as AML/CFT supervisors. With the exception of the NBFIRA which has just started implementing the FI Act, the rest of the supervisors are yet to carry out AML/CFT supervision of their regulated entities under the FI Act due to a lack of understanding of their supervisory responsibilities and/or capacity. The BoB conducts limited AML/CFT supervision using the AML Regulations issued under the Banking Act and the BoB Act which have no specific AML/CFT requirements. This is so because the BoB does not apply the supervisory powers conferred to it by the FI Act and, as a result, has not taken steps to supervise banks and bureaux de change for compliance with the AML/CFT requirements set out in the FI Act and its Regulations. All supervisors demonstrated a lack of understanding of the AML/CFT risks that apply to their regulated entities. The NBFIRA and the BoB applied a prudential risk model which either has little or no ML/TF factors to

determine the level of risk and the necessary mitigating controls. Generally the scope and intensity of the inspections conducted by the NBFIRA and the BoB (under their primary laws and regulations) were very limited to enable the supervisors to determine or impact meaningfully on the level of understanding of and compliance with the requirements.

329. Botswana has achieved *a low level of effectiveness* for IO 3.

CHAPTER 7. LEGAL PERSONS AND ARRANGEMENTS

Key Findings and Recommended Actions

Key Findings

- The authorities in Botswana are not aware of the ML/TF risks which may be posed by legal persons and arrangements in Botswana.
- Botswana has a legal framework for creation of companies, and obtaining and recording of basic ownership information. However, the law does not require disclosure of beneficial ownership information for legal persons and trusts. There is also no mechanism to deal with nominee shareholding.
- Basic information on the creation of companies is recorded and maintained in the registers of Registrar of Companies. Although the registers are manual, the information can be obtained over the counter from CIPA offices upon request.
- The information maintained at CIPA is not always up to date as it is not regularly updated posing the risk of the information not being always accurate and reliable. The CIPA has not imposed any of the administrative sanctions provided by the Companies Act on any of the companies for violations of the same Act.
- The efficient functioning of the Registrar of Companies is hampered by shortage of staff and at times the companies not submitting the required information on time.
- Although, the Registrar of Deeds through registration of a Notarial Deed of the trust may obtain and maintain information on beneficial ownership relating to trusts, trusts are not regulated in Botswana, hence there is no requirement or obligation for the same Registrar to obtain and record adequate, accurate and current information on the identity of the settlors, trustees, beneficiaries, or the natural persons who are actually in or who have ultimate effective control of the trust. Trusts are registered by the Registrar of Deeds just like any other property related deed and no court decisions were provided to understand the obligations of trustees under Botswana's common law.
- There are no clear provisions requiring FIs to obtain beneficial ownership information when opening a business relationship with a legal person or trust. Further, where the information might involve the ultimate beneficial owner being a PEP, the laws in general do not require that they are identified and enhanced due diligence be undertaken, posing ML risks to the FIs in terms of identification of beneficial ownership where PEPs are involved.

Recommended Actions

- The authorities should conduct an assessment (taking into account the findings of the NRA, once finalised) to determine the exposure of both legal persons and arrangements to ML/TF risks, ensure that they understand the risks and undertake the necessary actions to address any of the ML/TF risks identified.
- The authorities have to ensure that the records and information kept by CIPA are up to date and accurate and it is recommended that for such information to be easily maintained and accessible, the authorities should consider computerising the system.

- In order for CIPA to keep up to date and accurate basic information on the companies it registers as envisaged under the Companies Act, it should start sanctioning the companies in order to enhance compliance with the Companies Act by the companies.
- There should be requirements to ensure that the relevant competent authorities, like the CIPA, and BURS also obtain information on ultimate beneficial ownership.
- The authorities should ensure that CIPA is well resourced to be able to carry out its mandate and ensure that companies which do not submit the required information on time in terms of the law are sanctioned and that the sanctions are dissuasive enough.
- In order to ensure that reliable information is available on trusts, including on beneficial ownership, the authorities are encouraged to have mechanisms in place to enable the Deeds Registry obtain and record this information during registration of trusts.
- Supervisors should provide awareness to the reporting entities they regulate on the need for them to obtain and maintain information on beneficial ownership of legal persons and trusts.

The relevant Immediate Outcome considered and assessed in this chapter is IO5. The recommendations relevant for the assessment of effectiveness under this section are R24 & 25.

7.1 Immediate Outcome 5 (Legal Persons and Arrangements)

a) Public availability of information on the creation and types of legal persons and arrangements

330. In Botswana companies are registered and administered by the Companies and Intellectual Properties Authority (CIPA). This Authority is responsible for, amongst other things, the overall implementation and administration of Companies, Business Names and Industrial Property Rights registered in Botswana.

331. Companies are the most common forms of legal persons in Botswana. For the types of companies which exist in Botswana, please, refer to Table 4 at page 46.

332. Different types of trusts can be formed in Botswana. Refer to paragraph 98 at page 46 for the types of trusts which exist in Botswana. The assessors were not informed of any other type of legal arrangements which exist in Botswana other than trusts.

333. Basic information on the creation of companies is recorded and maintained in the registers of CIPA in manual form. The information on registered companies is immediately accessible to members of the public upon payment of a fee of Pula 10 (1 USD) for search and Pula 30 (USD 3) for making copies. The LEAs have access to the information for free as they are exempted from payment of fees. To ensure that the basic information kept by CIPA is easily available to the public and cut on the fee of 10 Pula they pay for the search of information, CIPA should consider computerising and keeping the information in electronic form to enable it to share the information on line.

334. With respect to Trusts, the information and records are maintained in manual form by the Registrar of Deeds. The records are kept forever. The information on registered trusts is accessible to members of the public over the counter for free. Due to the rise in demand for copies, the

Registrar of Deeds informed the assessors that the Deeds Registry Office is contemplating on charging a fee for the copies obtained by members of the public. The Deeds Registry Office also receives requests for information from LEAs and where such information is available, it is provided.

b) Identification, assessment and understanding of ML/TF risks and vulnerabilities of legal entities

335. Botswana has not assessed ML/TF risks associated with legal persons and arrangements that are created in Botswana or foreign companies incorporated in Botswana. The authorities did not demonstrate that they identify, assess and understand vulnerabilities and the extent to which legal persons existing in Botswana can be misused for ML/TF purposes. According to CIPA, it did not identify or try to understand ML/TF risks associated with companies it registers as its mandate in terms of the Companies Act does not extend to what is done by the company after its registration. CIPA has very limited awareness of any ML/TF risks and vulnerabilities associated with the companies it registers. Although the CIPA indicated that it had participated in the NRA exercise, the assessors got the understanding that its contribution was quite minimal as it could not share any information on possible ML/TF risks which might be existing in the sector.

336. The possibility of ML/TF risks existing in the sector is heightened by the fact that at the time of the on-site visit there were 132 foreign companies incorporated in Botswana. Assessment of whether any possible ML/TF risks are posed by any of the foreign companies had not been done. The authorities also do not seem to have covered the risks relating to the kind of crimes, (e.g. tax related, corruption) which can be committed through misuse of companies during their NRA. Overall, there is still limited understanding by the authorities of the ML/TF risks that legal persons can be exposed to. Some of the entities, including both competent authorities and reporting entities spoken to during the on-site visit were still to understand the concept of ML relating to legal persons which limited their identification, assessment and understanding of ML risks related to the sector.

c) Mitigating measures to prevent the misuse of legal persons and arrangements

337. Although a company can be registered by any person in Botswana, in order to ensure that the provisions of the Companies Act have been met, the application for registration has to be accompanied by a declaration certificate of compliance made by a person engaged in the formation of the company. Such persons include: a legal practitioner, a member of the Botswana Institute of Accountants, Chartered Secretaries or any other person as prescribed by the Minister. This at least ensures that companies formed meet the requirements of the law. The Registrar upon receipt of such any application is supposed to enter the particulars of the company on the register and assign it a unique number as a company number after which the company is issued with a certificate of incorporation in a prescribed form which has to serve as conclusive evidence that the company has complied with all the legal requirements and has been duly incorporated. This basic information is maintained in the registers of CIPA which are publicly available.

338. CIPA is also listed as a supervisor under Schedule II of the FI Act. However, it did not demonstrate that it is carrying out any of its obligations as set out under the Act to prevent the misuse of legal persons for ML/TF. Although designated as a supervisor, CIPA did not appear clear of the role it is supposed to play in that capacity as according to it, it is only responsible for registering the companies but not licence them to trade, which is done by the other different arms

of Government depending on the activity the company is going to engage in. Therefore, it did not see what its role as a supervisor could involve.

339. However, other reporting entities were able to demonstrate in a satisfactory manner that from their own initiative, they are at least implementing some measures intended to prevent the misuse of legal persons and arrangements for purposes of ML/TF. In particular, large banks and non-bank financial institutions which are foreign owned spoke of having measures to be implemented when entering into a business relationship with a legal person or trust. However, the mitigation of the ML/TF risks relating to legal persons and arrangements being done by these reporting entities is minimal as similar measures are not being taken by all the reporting entities, with the majority of the DNFBPs not even having commenced to implement any of the CDD requirements. However, note has to be taken that there are no legal requirements on identification of beneficial ownership in Botswana. The mere fact that Botswana is largely a cash based economy with reasonable involvement of the informal sector, creates opportunities for legal persons to deal with the sector creating the risk of not all transactions conducted being documented opening up chances for illicit funds to be brought into the formal sector. The extent of the ML/TF risks created this way has not yet been determined.

340. Legal arrangements, which are mostly trusts can exist under Botswana's common law system without being registered. Where a trust has to be registered with the Registrar of Deeds, the registration can only be done by a notary public, who has an obligation to bring genuine information. In practice during registration of the Notarial Deed of the trust, the Registrar of Deeds requires the identification of trustees, beneficiaries to the trust, a Resolution of the Board of Trustees and the address where the trust will be operating from. The Registrar also checks the set objectives of the trust. Such checks by the Registrar of Deeds are not extended to establishing who the settlor is, or any other persons who might be in ultimate control of the trust. However, once a trust has been registered and issued with a number any changes to it have to be done by a notary public through lodging a Notarial Deed of Amendment with the Registrar of Deeds and if the Registrar is satisfied with the amendments, the Notarial Deed of Amendment is registered and an endorsement is made on the original Trust Deed to confirm the amendment.

341. The above measures and practices in some way mitigate the misuse of both legal persons and trusts. However, Botswana to a large scale, has not implemented any mitigating measures to prevent misuse of legal persons and arrangements for ML/TF purposes, nor are the competent authorities aware of ML/TF risks likely to relate to legal persons and arrangements, and taking of appropriate measures to mitigate the risks.

d) Timely access to adequate, accurate and current basic and beneficial ownership information on legal persons

342. When companies are being registered with CIPA, they are required to provide the following information: the full name and address of the applicant for registration of a company; the full name and residential address of every director and secretary of the proposed company; the full name and residential address of a shareholder or member; the registered office of the company; and the physical address of the principal place of business of the company. This information, although limited to legal ownership of the company and not beneficial ownership, is publicly available. Further, companies are required to notify CIPA upon changes being made on shareholding, reduction of capital, changes in the name or residential address of a director or secretary of a company, and change of registered office. The timeframe specified to notify the CIPA ranges from

10 to 21 working days. Companies are also required to file annual returns containing particulars such as the physical and postal address of the registered office of the company, shareholding, names and addresses of directors and secretaries, and list of shareholders. This additional information, if made available can be publicly accessed. The authorities, however, indicated that this basic information on companies is not frequently updated due to insufficient staff and also that the updates by the CIPA depend on the information provided by the companies themselves which most of the time do not provide such information, timely. Therefore, the basic information on companies maintained by CIPA is not always up to date, accurate and reliable. Competent authorities, particularly those in the law enforcement can use the powers they have to access basic information on legal persons obtained and maintained by FIs and other reporting entities. The frequency of when this basic information obtained by FIs and DNFBPs is updated was varying, indicating that in most cases it is not regularly updated.

343. There are no requirements for any of the competent authorities or reporting entities to obtain information on beneficial ownership. CIPA does not obtain beneficial ownership information nor do companies disclose beneficial ownership information to it. Companies only maintain basic information such as registers of shareholders containing particulars such as names and address of shareholders, number of shares allotted and transferred at their registered offices. As explained in the above paragraph, this information helps in identifying legal ownership of the companies but not beneficial ownership.

344. The BURS has requirements for people applying for registration as taxpayers or supplementary/change of registration in Form BURS 1(revised in 2015) under Section D to furnish particulars of two major beneficial shareholders information. Included in the particulars to be provided is the surname and first name, residential addresses, contact details (email, cellphone, telephone numbers for both office and home), nationality, omang or residence permit number, and for non-citizens, passport number, work permit number or exemption certificate. Although, the scope of the beneficial shareholders is only limited to two even in situations where there might be more than two, the information required can assist with establishing the natural beneficial owner of the shares to that limited extent. However, it was not clear whether this information can be made available to other LEAs on request. The BURS also indicated that it only uses this information on a case by case basis when it becomes necessary for it to establish the ultimate beneficial owner involved in a case they will be dealing with. The number of cases this has been done was not provided. The BURS has 20 officers trained in ML, including beneficial ownership.

345. The FIs and DNFBPs, in general, do not obtain information on beneficial ownership. Where some of the FIs (particularly large foreign banks) have on their own initiative commenced obtaining such information (to meet obligations of their foreign head office), in instances involving several layers of persons which have to be penetrated to get to the ultimate beneficial owner, some of the FIs are not following this through. Most of the FIs interviewed during the on-site visit were not aware on the need to verify the information they get on beneficial ownership and those FIs which were aware of the need for verification, highlighted the difficulties which they faced when it came to finding an independent source to verify the information as most of the competent authorities which ordinarily would be expected to be in possession of such information did not obtain such information. The FIs confirmed that in the end they have to rely on the information provided by the same clients without necessarily verifying it with another independent source. Therefore the adequacy and accuracy of the information being obtained by the few FIs on beneficial ownership might not be reliable in all cases.

346. Majority of the DNFBPs, in general have not started implementing any of the requirements of the FI Act on CDD and in addition, do not on their initiative obtain any beneficial ownership information.

347. The LEAs spoken to during the on-site visit, although they have powers to access this information from the reporting entities and other competent authorities, where such information is not readily available, they use other means to get the information. The DCEC and BPS have access to databases of the Vehicle Registration and Licensing System (VRLS), Department of Road Transport, Immigration and CIPA (with the exception of BPS, although it has put in place a working arrangement with CIPA only to cover obtaining of intelligence information). The BPS, also has access to the database of the Births and National Registration Offices. The agencies use information from these databases to establish the identities of legal persons and in uncomplicated cases of beneficial ownership, to determine such ownership through the basic information held by CIPA when conducting their investigations. This has slightly mitigated the lack of adequate established sources which directly obtain and maintain information on beneficial ownership. The DCEC cited a case where it had successfully used the database of the VRLS to identify the legal owner of one of the buses involved in the investigation they were conducting through use of the registration plates and then checking with CIPA to find out who were the directors of the company under which the bus was registered and based on the basic information they got from CIPA they were able to eventually identify the ultimate beneficial owner of the company.⁴⁰

348. LEAs can also approach the DPP for mutual legal assistance pertaining to obtaining of basic and beneficial ownership information on legal persons under investigation in Botswana but domiciled abroad. During the time of the on-site visit, the assessors were availed with one such case involving a criminal investigation of a company based in the United Kingdom on suspicion of obtaining money by false pretences from a person based in Botswana, which had taken place in August 2013. The communication between the DPP and the UK Central Authority shows that the request for information pertaining to the company in question had been expeditiously executed by both parties resulting in part of the information which was enough to disclose the basic and beneficial ownership information of the company in the UK being provided to the DPP. Botswana, however, did not provide any case where it has been requested for information on ultimate natural persons who own or control foreign companies incorporated in Botswana.

e) Timely access to adequate, accurate and current basic and beneficial ownership information on legal arrangements

349. As described in (c) above, basic information on trusts such as the trustees, beneficiaries, Resolution of the Board of Trustees and the address where the trust will be operating from is accessible from the Offices of the Registrar of Deeds. However, where there are changes to the trust, the Registrar of Deeds is only able to update the records they keep if the information on the changes is provided by the notary public. Where information on such changes is not provided then the records would be inaccurate and unreliable. Trusts are formed under common law in Botswana, and assessors did not get the benefit of any court judgments to determine the specific obligations of the trustee, particularly where there have been changes to the trust, or the time limits of the obligation to notify the Registrar of Deeds through a notary public of such changes. From the submissions of the Registrar of Deeds during the on-site visit, timely access to adequate,

⁴⁰ Refer to the case of DPP vs David Loftus William described in Table 6 at page 71

accurate and current basic information on trusts in Botswana can only be reliable in circumstances where there have not been any changes to the trust or where they have been such changes and they have been in a timely manner brought to the attention of the Registrar resulting with changes being effected to the original trust deed. There was no indication to the assessors that any foreign trusts are registered with the Registrar of Deeds.

350. The Registrar of Deeds does not obtain information on the beneficial ownership when registering trusts. Although, information on trustees and beneficiaries is contained in the notarial deed of the trust to be registered, the Registrar does not check this information for ML/TF purposes. The information is collected as routine information which has to be part of the deed to meet the practice of the Office, hence in the event of a beneficiary not being cited by his/her name in the deed no further measures would be taken. Copies of identification of the trustees required at the time of registration of the trust are also collected as routine requirement without further verification. Further, the Registrar of Deeds is not familiar with what beneficial ownership or ultimate beneficial ownership relate to and the Deeds Registry Office does not establish who is in ultimate control of the trust upon its registration or when changes to the beneficiaries are requested. With more awareness, the Deeds Registry Office can improve on the systems it already has and assist in obtaining more specific information on natural persons who are in ultimate control of a trust or beneficiaries of the trust, which information was not readily available at the time of the on-site visit.

351. Although, the general impression created by the Deeds Registry Office to the assessors was that it provides information requested by LEAs promptly, the average time it takes it to provide such information was not provided despite such information being requested. However, the Deeds Registry cited a specific case where it had taken it three days to provide information to a specific request made by the FIA to provide information on all trusts registered with it.

352. As most of the reporting entities are not obtaining this information, there are limitations to timely access of adequate, accurate and current basic and beneficial ownership information on trusts other than the information which can be obtained from some of the banks and the Deeds Registry.

f) Effectiveness, proportionality and dissuasiveness of sanctions

353. The authorities indicated that no sanctions had been imposed against any company for failure to deliver notices relating to changes on the basic information after incorporation or to submit annual returns to CIPA. The sanction provided for failure to notify CIPA of changes after incorporation is a fine not exceeding Pula 10,000 or not exceeding Pula 20,000. The effect of these sanctions could not be determined as they have not been applied by CIPA to companies for failure to meet the information requirements under the Companies Act. Botswana does not require that beneficial ownership information on legal persons and arrangements be obtained and consequently there are no sanctions for failure to obtain this information. LEAs interviewed during the on-site visit did not express any difficulties with accessing both basic and beneficial ownership held by other competent authorities or by reporting entities, therefore, there have been no cases where sanctions could have been imposed arising from the DCEC, BPS, BURS or any other LEA having been obstructed to get the information where it was available.

Overall Conclusion on Immediate Outcome 5

354. Botswana has not assessed ML/TF risks associated with legal persons and arrangements that are created in Botswana. The authorities, are therefore not aware of the risks likely to be facing legal persons and arrangements in Botswana and to what extent such kind of risks exist. There should also be an effort by the authorities to identify any possible ML/TF risks posed by foreign companies that are incorporated in Botswana and take measures to address them, if any. It is hoped that the NRA will identify some of the ML/TF risks in this sector. The basic information kept by the Companies Registry on legal persons, although easily accessible and publicly available, it is not always updated in a timely manner therefore it is not always accurate and reliable. The CIPA lacks adequate staff to update its records on basic information on the companies it would have registered and also to monitor timely submission of annual returns by the companies and where it is not done, to effectively apply the sanctions provided under the Companies Act. As a result no sanctions have been applied by CIPA against companies which have failed to comply with the requirements of the Companies Act pertaining to updating of information. More resources need to be provided to CIPA so that it can efficiently perform its duties, which will ensure more transparency with registration of companies in Botswana and will enable it to follow-up on cases where there is infringement of the Companies Act and impose the necessary sanctions. Other competent authorities other than the BURS although limited, do not obtain beneficial ownership information on companies and trusts, as a result access to adequate, accurate and current beneficial information by other competent authorities like law enforcement agencies is very limited. It would benefit other competent authorities, particularly other LEAs, if the expertise on beneficial ownership in the BURS, if it has been put in practice to be shared with other LEAs.

355. FIs other than banks, in practice do not on their own initiative identify and obtain information on the ultimate beneficial owner or the natural person who is in ultimate control. The few FIs which voluntarily obtain information on beneficial ownership have difficulties in finding independent sources to verify the information which affects the accuracy and reliability of the information they obtain. The Deeds Registry Office is not well informed about beneficial ownership. In general, all the competent authorities and reporting entities interviewed, other than foreign banks have very little awareness on beneficial ownership requirements and in practice are not obtaining such information and the basic information which they maintain is not always up-to-date.

356. Although, the DCEC appear to have the ability to identify natural persons who ultimately own or control legal persons using other means, such ability could not be fully determined as this had only happened relating to one criminal case. The BPS which also confirmed that it has access to other databases which can assist it to carry out its investigations did not indicate of any instances when the other sources of information have been used to assist in identifying natural persons who ultimately own or control either legal persons or arrangements. As currently there is no mechanism enabling identification of beneficial ownership relating to legal persons and trusts, the LEAs should be encouraged to use their access to other databases in addition to information obtained from other sources to identify natural persons who own or are in control of companies that are used for criminal activities, including tax related crimes.

357. Botswana has achieved *a low level of effectiveness* for IO 5

CHAPTER 8. INTERNATIONAL COOPERATION

Key Findings and Recommended Actions

Key Findings

- Botswana has a legal system in place to facilitate international cooperation in mutual legal assistance and extradition matters. However, non-domestication of all offences under the AML/CFT Conventions limit the scope of the assistance that can be requested and provided in circumstances where dual criminality is required.
- International cooperation is sought to pursue prosecution of predicate offences. A very limited number of requests has been made for purposes of pursuing investigations and prosecution of ML and TF cases.
- MLA matters are not properly coordinated between the MoFAIC and the DPP. The number of requests which the Ministry said it has submitted to the DPP, are not tallying with the cases which the DPP says it has received from the Ministry.
- Although, there are officers dealing with international cooperation in the DPP, there is no specific unit which deals with such matters for proper accountability and monitoring of how such matters are executed. This could probably explain why most of the statistics on MLA were incomplete.
- The turnaround time of executing requests, particularly extradition requests, is generally long and at the time of the on-site visit, there were extradition requests made in 2013 which were still pending.
- The DPP is not sufficiently staffed and trained to efficiently deal with international cooperation matters.
- Effectiveness in international cooperation is undermined by the lack of set timeframes by agencies executing requests to allow rapid provision of the mutual legal assistance required and the absence of provisions requiring the disclosure and retention of beneficial ownership information on legal persons which limits the information that can be provided.
- IA, LEAs and Supervisory Authorities cooperate frequently with their foreign comparable bodies.

Recommended Actions

- Botswana needs to criminalise at a minimum the remaining predicate offences in order to cover all the designated categories of offences in the FATF Glossary which will widen its scope on international cooperation including on extradition.
- There is need for Botswana to conduct more investigations on ML and increase international cooperation relating to ML.
- The authorities need to put in place a better mechanism to monitor movement of requests on both MLA and extradition between the DPP and the MoFAIC to ensure that the statistics of the requests shared are consistent and reconcilable.
- There should be clear processes and procedures set on handling of MLA requests, when they are received, acknowledgement of receipt, allocation, progress of the assistance

required, quality check of the information requested or received, confidentiality of the information gathered, timelines for handling the requests and when the information is dispatched.

- In order to improve on the efficient monitoring of MLA requests, it is recommended that a special Unit be established in the DPP to deal with international cooperation matters.
- The authorities should further ensure that the Unit is properly staffed and trained to efficiently deal with international cooperation matters.
- Procedures relating to extradition matters should be properly followed to ensure that requests granted by the courts are not later challenged in the requesting jurisdiction.
- The authorities should improve on the turnaround time of executing requests, particularly extradition requests.

The relevant Immediate Outcome considered and assessed in this chapter is IO2. The recommendations relevant for the assessment of effectiveness under this section are R.36-40.

8.1 Immediate Outcome 2 (International Cooperation)

a) Background and Context

358. The Directorate of Public Prosecutions (DPP) is the Central Authority for purposes of mutual legal assistance and extradition requests. Most of the requests from the DPP are referred to the MoFAIC, which facilitates transmission of the requests through the diplomatic channels to the relevant jurisdictions. That is the same process which is followed when foreign requests are received. However, the DPP in some cases receives requests on MLA from requesting jurisdictions, directly. The assessors were not made aware of any instances when the DPP itself, made a direct request to any jurisdiction.

b) Providing constructive and timely MLA and extradition

359. The statistics provided by the DPP indicate that during the period spanning from January 2011 to May 2016, Botswana received 11 MLA requests. Out of these requests, 3 MLA requests related to money laundering. As at the time of the on-site visit, 5 MLA requests had been finalized and 6 MLA were still pending. However, statistics provided by MoFAIC indicate that during the period spanning from March 2013 to September 2015 a total number of 16 MLA requests was received and 14 out of these requests concluded. Due to the discrepancies with the statistics, the assessors cannot reliably determine the exact number of MLA requests received and processed.

360. The DPP has a manual record where all information on MLA requests is captured. The information includes: the name of the person involved (accused/complainant), country making the request, date when the request was received; date when the request or response was dispatched; duration it took to attend to the request; and outcome of the request. The information recorded does not indicate the nature of the request (evidence gathering, exhibit request, enforcement of a foreign judgement, etc), whether it is a request which has been sent direct to the office of the DPP or it has been sent through the MoFAIC, quality check of the information, who checks it, and the name of the person allocated to deal with the request, the executing agency (BPS, DCEC, etc), date when sent to the executing agency and date when the information was received by the DPP from the executing agency, and whether further instructions on the adequacy of the information

provided by the executing agency were given by the DPP to improve on the quality of the information provided. Although, there is provision for indicating the duration it would have taken the request to be dealt with, the assessors note that from the records provided by the DPP, there is no one case where the duration it had taken the office to deal with a request is provided. Further, other than the date of dispatch there is no other information which is provided to know whether the information was dispatched through the MoFAIC or direct to the requesting foreign Central Authority and whether there was feedback or any acknowledgement of the information provided. This is all necessary information which would have enabled the assessors to determine how effective the MLA regime is in Botswana.

361. MLA requests are not prioritised. A representative from the DPP indicated that the time frame provided for working on the incoming requests by the DPP, is one month which is the same approach taken with any other case being dealt with by the Directorate. Once the DPP has received the request and is satisfied that it meets legal requirements, it authorizes execution of the request by the agency relevant to the information being requested. The executing agency is not given a timeline within which to execute the request.

362. The MLA request, after it has been executed is forwarded to the DPP for perusal. The records provided by the DPP to the assessors do not show that any quality check is done at this stage as the records do not show further information being requested by the DPP from the executing agency on any of the cases or the kind of feedback given to the executing agency by the DPP on the information provided. However, the DPP informed the assessors that when it has satisfied itself that the response to the request has been properly attended to, it then dispatches it to the MoFAIC for onward transmission to the requesting state. The average turnaround time of four months, to provide the mutual legal assistance requested could not be verified as the register provided by the authorities did not capture the dates when the request is sent out to the executing agency and remitted back to the DPP after execution by the agency for further actioning.

363. Information provided by the DPP on communication which had been made through email and letters following up on some of the MLA requests showed various processes undertaken by the DPP relating to MLA requests. In one of the cases, there was confirmation of the quality of the assistance received. This communication if it was being properly recorded in sequence of the progress of the requests in the case management system, would have enriched the information provided by the DPP on each of the MLA requests handled. Since most of this communication was printed direct from the emails exchanged with no separate record in either electronic or hard copy showing constant periodical updates on the progress of the cases, the assessors still had difficulties using the copies provided to determine whether in the matters concerned, MLA was provided or obtained in a timely manner.

364. During the period (2011-2016), Botswana received 34 extradition requests, all relating to predicate offences. At the time of the on-site visit, 10 extradition requests had been finalized and 24 of the requests were still pending. Some of the pending extradition requests had been received as far back as 2013. During the interviews with the authorities during the on-site visit, the assessors noted that the authorities were not following the extradition procedures as laid down in the Extradition Act, there was no set framework to have the requests assessed by the Minister of Justice as required under the Act or authority from the Minister delegating the DPP to do the assessment. The authorities informed the assessors that under the laws of Botswana, the Minister could

delegate such functions and had done so to the DPP but the authorities could not produce any proof or document to confirm the delegation.

c) Seeking timely legal assistance to pursue domestic ML, associated predicate and TF cases with transnational elements

365. Botswana seeks mutual legal assistance mainly to pursue prosecution of predicate offences. Statistics provided by the Authorities indicate that for the period of 5 years, i.e. from January 2011 to May 2016, Botswana had made 56 MLA requests, out of these requests three requests were made to different jurisdictions pertaining to one ML case which was under investigation at the time of the on-site visit. There has not been any requests relating to terrorist financing. The DPP has received responses pertaining to 28 of the requests out of the 56 made. The manual and case management systems provided by the authorities do not have a column indicating the details of the responses provided and the charges upon which the responses were being provided.

366. The Authorities indicated that responses on MLA requests are not always obtained on time. The average turnaround time for MLA requests made by Botswana to other jurisdictions is 2 years and in most cases the responses are inadequate. However, this information confirming the quality of the responses received is not recorded nor do the records maintained by the DPP show that in instances where the information provided is inadequate further information is requested as follow up.

d) Seeking and providing other forms of international cooperation for AML/CTF purposes

367. **Law Enforcement Agencies** such as the BPS, DCEC and BURS regularly seek and provide other forms of international cooperation with their foreign counterparts on a wide range of issues. BPS, as a member of Southern African Regional Police Chiefs Cooperation Organization (SARCCO) agreement, cooperates and provides mutual assistance and exchange of information in the field of combating crime and carries out joint investigations with foreign counterparts in relation to cross-border and related crimes under this arrangement. Under the SARPCCO arrangement, the BPS conducted 42 investigations in 2013, 41 investigations in 2015 and 11 investigations in 2016. All these investigations relate to cross border predicate crimes. Similarly, BPS hosted in 2013 five joint investigations, 19 investigations in 2015 and 5 investigations in 2016.

368. BPS also uses the Interpol network to exchange information and conducts joint investigations under the Interpol general framework. Similarly, BPS through the NCB Gaborone, facilitates extraterritorial investigations for other law enforcement officers in Botswana. The cooperation arrangement through Interpol network is also used by other law enforcement agencies in Botswana.

369. The DCEC has a number of channels through which it can seek and provide other forms of international cooperation. DCEC exchanges information through the Association of the Anti-Corruption Agencies in the Commonwealth Africa Agreement to which Botswana is a signatory. For other countries that are not parties to this agreement, DCEC uses the Interpol network through the Gaborone NCB to seek and exchange information.

370. BURS cooperates with other foreign revenue authorities through the framework of the SADC Protocol on Trade and the Memoranda of Understanding, it has signed under the framework of the SADC. BURS has also signed memoranda of understanding with Zambia Revenue Services (ZRS) in 2007, Zimbabwe Revenue Authority (ZIMRA) in 2013, South African Revenue Service (SARS) in 2011, Lesotho Revenue Authority(LRA) and Swaziland Revenue Authority(SRA).

Article 2, which is crafted in the same way in all the Memoranda of Understanding entered into by the BURS provides for cooperation on among other things: development of common approaches towards risk profiling and assessment, and development of common approaches towards illicit revenue activities.

371. FIA - The FIA has entered into MoUs with the other FIUs which it uses as the basis for exchange of information. In addition to the MoUs, it also has other reciprocal arrangements with other FIUs which it has successfully used to exchange information. For the period from October 2014 to June 2016, the FIA used these arrangements to make 29 requests to other FIUs and out of these 27 were responded to. The FIA received 8 requests from counterpart FIUs between 2014 and June 2016. It has responded to all of them (refer to the IO 6 for the type of requests made). The FIA found the information it received from the other FIUs useful for its analyses.

372. BoB and NBFIRA - The BoB has signed MoUs with the Central Banks of Zimbabwe, Namibia, India, South Africa, Zambia and Malawi which include components of exchange of information. The NBFIRA has also signed MoUs with Non-Bank Financial Supervisors of Mauritius, India, South Africa, Angola and Swaziland, covering various issues including exchange of information. NBFIRA is also a CISNA member (which has 13 other member countries as signatories), therefore a party to the Exchange of Information and Surveillance of Securities, Insurance and Retirement Activities with the other 12 countries which are members to this group. BoB and NBFIRA use these MoUs for other forms of international cooperation and exchange of information. Between the years 2013 – 2016, NBFIRA made 8 requests mainly requesting licensing and fit and properness information. All the 8 requests have been responded to with useful information which has assisted NBFIRA in determining the applications for licensing involving the 8 requests. The BoB did not provide the assessors with any statistics.

e) International exchange of basic and beneficial ownership information of legal persons and arrangements

373. The DPP provided one case, described under IO 5 (d), where it successfully requested for basic and beneficial ownership information of a company in the United Kingdom which had been used to defraud a Botswana citizen of money.

Conclusion on Immediate Outcome 2

374. Although, Botswana has an enabling legal framework to provide MLA and extradition, the system has not been adequately used to request for information relating to ML cases. Botswana has only made three requests to different countries pertaining to one case where an investigation is being carried out on a suspected case of ML. Botswana is commended for having an electronic case management system, but the system needs to be further developed so that it can be easy to determine the turnaround time of requests, quality of the requests/responses upon being dispatched or acknowledged by the authorities. The MoFAIC and the DPP need to establish a mechanism to better coordinate the movement of requests between the two competent authorities, so that proper accurate records of the requests made are maintained. There is also need for the DPP to prioritise the requests according to their urgency and acknowledge receipt of the requests to foreign authorities. In order to improve on the efficiency of the work on MLA and extradition, it is recommended that the DPP consider establishing a well-staffed Unit with trained officers in handling international cooperation matters to deal with such matters. The DPP, in order to avoid procedural technical issues arising with extradition requests it makes or made to it, needs to ensure that proper extradition procedures as laid down in the Extradition Act are followed. Although,

other competent authorities like law enforcement agencies are doing well in exchange of information with foreign counterparts, there has been only one case where information on a ML investigation has been collected and none on TF. The authorities need to make efforts to deal with ML cases and obtaining from other involved jurisdictions information to support such investigations and gathering of evidence.

375. Botswana has achieved *a moderate level of effectiveness* for IO 2

TECHNICAL COMPLIANCE ANNEX

1. This annex provides detailed analysis of the level of compliance with the FATF 40 Recommendations in their numerical order. It does not include descriptive text on the country situation or risks, and is limited to the analysis of technical criteria for each Recommendation. It should be read in conjunction with the Mutual Evaluation Report.
2. Where both the FATF requirements and national laws or regulations remain the same, this report refers to analysis conducted as part of the previous Mutual Evaluation in 2007. This report is available from www.esaamlg.or.tz.

Recommendation 1 - Assessing Risks and applying a Risk-Based Approach

At the time of the 1st mutual evaluation report (MER), there was no requirement for a National Risk Assessment (NRA) or other risk related requirement set out in R. 1.

Obligations and decisions for countries

Risk assessment

Criterion 1.1 (Not met) Botswana is currently conducting its first NRA, to assist it identify, assess and understand its ML/TF risks. There were no preliminary results that were shared with the assessors of the on-going exercise. However, the authorities indicated having carried out a National Threat Assessment (NTA). Although the results of the NTA were not shared with the assessors, one of the security agencies demonstrated a good understanding of the TF risk.

Criterion 1.2 (Met) The FIA has been designated to coordinate and lead the Botswana risk assessment initiatives and the NCCFI, which is a committee made up of representatives from different AML/CFT stakeholders has been constituted to conduct the risk assessment and the committee is a statutory entity established in terms of s. 6 of FI Act.

Criterion 1.3 (Not met) Botswana is currently conducting its first NRA and the authorities indicated that it will be continuously updated.

Criterion 1.4 (Not met) Botswana is yet to develop a mechanism to share the results of the NRA once completed.

Botswana has not yet developed mechanisms to provide information on the results of the NRA to all relevant competent authorities and self-regulatory bodies, financial institutions and DNFBPs and information on the kind of report (whether it will be the whole report or sanitised report) to be circulated was also not provided. There are no requirements for some of the competent authorities to carry ML/TF risk assessments of their own sectors, particularly the BURS, CIPA and the NPO sector, which can then be shared with other competent authorities.

Risk mitigation

Criteria 1.5 – 9 (Not met) In the absence of a completed NRA in Botswana, there is no risk-based approach applied in the allocation of resources and implementation of measures to prevent or mitigate ML/TF risks in the country under any circumstances set out in these criteria of R.1.

Obligations and Decisions for Financial Institutions and DNFBPS

Risk assessment

Criterion 1.10 - 12 (Not met) There are no AML/CFT mandatory requirements for FIs and DNFBPs to apply a risk based approach to, i) determine their inherent institutional risks under any circumstances, ii) apply preventive or mitigating measures on the identified risks, and iii) apply simplified measures on lower risks, consistent with these criteria under R.1.

Weighting and Conclusion

Botswana is still to finalise its NRA and as a result, the criteria under R. 1(except for c.1.3) are not met.

Botswana is rated **non-compliant** with R.1.

Recommendation 2 - National Cooperation and Coordination

In the 1st Round of Mutual Evaluations, Botswana was rated partially compliant on the requirements to this Recommendation (pages 116-117). The main deficiency was that Botswana had no effective cross-agency mechanism for coordination among relevant agencies. The deficiency has now been rectified by the provisions creating the National Coordination Committee on Financial Intelligence (NCCFI) under Section 6 of the Financial Intelligence Act (FI Act).

Criterion 2.1 (Not met) Botswana has not yet come up with AML/CFT policies informed by identified risks.

Criterion 2.2 (Met) S. 6 of the FI Act provides for creation of the NCCFI with a wide range of functions including policy reforms in respect to financial crimes, which include ML, TF and any other illicit proceeds.

Criterion 2.3 (Met) There is a NCCFI formed to assess the effectiveness of policies and measures to combat financial crimes; make recommendations to the Minister for legislative, administrative and policy reforms in respect to financial crimes; promote coordination among the Agency, investigatory authorities, supervisory authorities and other institutions with a view to improving the effectiveness of existing policies and measures to combat financial crimes; formulate policies to protect the international reputation of Botswana with regard to financial crimes; and generally advise the Minister in relation to matters relating to such crimes (ss. 6 & 7 of the FI Act).

Criterion 2.4 (Not met) Botswana has got no legal framework or other mechanisms to deal with proliferation of weapons of mass destruction.

Weighting and Conclusion

The national AML/CFT policies in Botswana are not informed by identified risks which are regularly reviewed as Botswana is still to finalise its first ML/TF risk assessment. Although, the NCCFI is designated to advise on AML/CFT policies, the authority is not guided by identified ML/TF risks, which also affects the advice it is supposed to give to the Minister on AML/CFT policies as such advice is not informed by identified ML/TF risks. There are no coordination mechanisms to proliferation of weapons of mass destruction as there is no legal framework dealing with proliferation.

Botswana is rated **partially compliant** with R. 2.

Recommendation 3 - Money laundering offence

In the 1st Round of Mutual Evaluations, Botswana was rated partially compliant on the requirements to this Recommendation. The major deficiencies were that the scope of offences was not wide enough and excluded several serious offences, self-laundering had not been criminalised and there had not been effective implementation of the ML legal framework. The deficiency relating to criminalisation of predicate offences to cover all serious offences has not been fully addressed.

Criterion 3.1 (Met) The offence of ML is criminalised in terms of s. 47(1) of the PICA. The provisions of the section are broadly consistent with Article 3(1)(b) and (c) of the Vienna Convention and Article 6(1) of the Palermo Convention. The section provides for the *mens rea* (based on knowledge, suspicion, or reasonable grounds) and physical elements (conversion, transfer, concealment, disguise, possession, removal and disposition) of the offence of ML.

Criterion 3.2 (Partially met) Predicate offences for ML in Botswana are crimes described in s. 47(1)(b) of the PICA as confiscation offences, or a foreign serious crime related activity. A confiscation offence is defined in terms of s. 2 of the same Act as meaning “any offence under the Laws of Botswana”. Botswana, therefore, for domestic offences uses an all crimes approach to determine predicate offences for ML which would include all serious offences. The only deficiency is that not all the designated categories of offences are criminalised in Botswana. Based on the table of designated categories of offences (see Annex 2 at the end of the report) provided to the assessors during the on-site visit the following predicate offences are not criminalised: illicit trafficking in narcotic drugs; illicit arms trafficking, illegal restraint; and hostage taking. This is a major deficiency which the authorities should attend to.

A foreign serious crime related activity is defined in terms of PICA as a “any act or omission that at the time of its commission, was a foreign offence that, if committed in Botswana, would have been a serious offence.....”. A serious offence is defined in s. 2 of the same Act as “any offence for which the minimum penalty is a fine of P2000 or imprisonment for a period of 2 years, or to both”. Therefore foreign predicate offences have to be an offence with a threshold of a minimum of 2 years imprisonment in Botswana for it to be considered as a predicate offence for ML in Botswana. This qualification negatively impacts on some of the offences committed outside Botswana where they are recognised as predicate offences for ML but because of the threshold requirement in Botswana would not qualify to be predicate offences for ML although the type of offence would be equally recognised in Botswana (please see c. 3.6).

Criterion 3.3 (Partially met) Botswana uses a combined approach. It uses an all crimes approach for domestic predicate offences and a threshold approach for foreign predicate offences to be recognised in Botswana. The threshold of a minimum of a fine of P2000, or a 2 year term of imprisonment or both, applied for crimes committed outside Botswana to qualify as predicate offences for ML in Botswana could have a serious impact on such offences as most of the domestic predicate offences for ML do not have a minimum 2 year term of imprisonment (see table in c. 3.6). It is not clear why for foreign offences there is this higher standard whereas there is lower one for the same conduct if committed domestically.

Criterion 3.4 (Met) The criminalisation of ML under s. 47 also covers any property which is proceeds of crime and under s. 2, the term “property” is defined to cover a wide range of property.

Criterion 3.5 (Met) The pre-requisite requirement under s. 47 (a) is that the property involved has to represent proceeds of crime and does not require that the person be convicted of the predicate offence from which the proceeds were derived. S. 48 (1) of PICA, also provides for discretion for the court to convict a person of the offence of ML in the absence of a conviction for the predicate offence.

Criterion 3.6 (Partially met) Although s. 47 creates the offence of ML arising from proceeds of a foreign serious crime related activity, the scope of the offences the provision can be applied is limited as not all predicate offences are criminalised for purposes of ML in Botswana. In addition, based on the definition of a foreign serious crime activity (explained in c. 3.2), the domestic predicate offences for ML described in the table below, if committed outside Botswana and they are considered to be predicate offences for ML where they will have been committed would not constitute a predicate offence for ML in Botswana unless they had a penalty which has a threshold of a minimum term of imprisonment of 2 years in Botswana, which is not currently the case.

| | Offence | Section & Act | Sentence provided (No minimum term of imprisonment) |
|----|---|--|---|
| 1. | Participation in an organised criminal group | s. 392 of the Penal Code Cap. 8.01 | Maximum of 7 years imprisonment |
| 2. | Trafficking in human beings | S. 9 of the Anti-Human Trafficking Act | Fine not exceeding P500 000 (US\$50 000) or maximum imprisonment of 25 years. |
| 3. | Sexual exploitation | S. 141 of Penal Code | Minimum of 10 years imprisonment |
| 4. | Sexual exploitation of children | S. 16(1)(b) of the Cyber Crime Act | Minimum sentence P40 000, maximum fine not exceeding P100 000 and imprisonment term, not exceeding 2 years. |
| 5. | Abduction of person for immoral purposes | S. 144 of the Penal Code | Imprisonment term not exceeding 7 years |
| 6. | Indecent assault | S. 146 of the Penal Code | Imprisonment term not exceeding 7 years |
| 7. | Defilement of idiots | S. 148 of the Penal Code | Imprisonment for a term not exceeding 14 years |
| 8. | Illicit trafficking in stolen and other goods | S. 320 of the Penal Code | Maximum of 7 years imprisonment |
| 9. | Corruption | S. 24 – 32 of the Corruption and | Maximum imprisonment term of 10 years or fine maximum of P500 000 |

| | | | |
|-----|--|---|---|
| | | Economic Crime Act Cap 8.05 | |
| 10. | Bribery | S. 99 of the Penal Code | Maximum of 3 years imprisonment |
| 11. | Fraud/Obtaining by false pretences | S. 308 of the Penal Code | Maximum of 7 years imprisonment |
| 12. | Counterfeiting | S. 376(1) of the Penal Code | Maximum of 2 year imprisonment |
| 13. | Piracy of products | S. 31 of the Copy of Rights and Neighbouring Act Cap. 68.02 | Maximum of P200 000 or maximum of 10 years imprisonment |
| 14. | Environmental crime | S. 9(5) of the Environmental Assessment Act Cap 65.07 | Fine maximum P100,000 or 5 years imprisonment |
| 15. | Kidnapping | S. 253 of the Penal Code | Maximum of 7 years imprisonment |
| 16. | Robbery | S. 291 & 292 of the Penal Code | Maximum of 20 years imprisonment for ordinary robbery but minimum of 10 years for armed robbery |
| 17. | Theft | S. 271 of the Penal Code | 3 years imprisonment |
| 18. | Stealing wills | S.272 of the Penal Code | Imprisonment not exceeding 10 years |
| 19. | Stealing Postal Matter | S. 273 of the Penal Code | Imprisonment not exceeding 10 years |
| 20. | Stealing stock | S. 274 of the Penal Code | Imprisonment not exceeding 10 years |
| 21. | Stealing from the person: Stealing in transit | S. 275 of the Penal Code | Imprisonment not exceeding 1 year |
| 22. | Stealing in the Public Service | S. 276 of the Penal Code | Imprisonment not exceeding 7 years |
| 23. | Stealing by a Servant/Clerk | S. 277 of the Penal Code | Imprisonment not exceeding 7 years |
| 24. | Stealing by Directors or officers of companies | S. 278 of the Penal Code | Imprisonment not exceeding 7 years |
| 25. | Stealing by agents | S. 279 of the Penal Code | Imprisonment not exceeding 7 years |
| 26. | Stealing by tenant or lodgers | S. 280 of the Penal Code | Imprisonment not exceeding 7 years |
| 27. | Smuggling in relation to customs | S. 90(1) of the Customs and Excise Act | Maximum imprisonment term of 5 years |
| 28. | Smuggling in relation to excise duties and taxes | s. 90(1) of the Customs and Excise Act Cap 50.01 | Maximum fine of P20 000 or imprisonment term of 5 years |

| | | | |
|-----|----------------|---------------------------------|---|
| 29. | Tax crimes | S. 122(2) of the Income Tax Act | 1 month imprisonment |
| 30. | Direct taxes | S. 123(1) of the Income Tax Act | P4000 fine or 2 years imprisonment |
| 31. | Indirect taxes | S. 128 of the Income Tax Act | P4000 fine or 2 years imprisonment |
| 32. | Extortion | S. 296 of the Penal Code | Maximum of 14 years imprisonment |
| 33. | Forgery | S. 344 of the Penal Code | Maximum of 3 years imprisonment |
| 34. | Racketeering | S. 50 of the PICA | Maximum fine of P20 000 000 or maximum of 20 years imprisonment |

Criterion 3.7 (Met) S. 48(1)(b) of PICA provides for a court to convict a person for both the predicate offence and the offence of ML involving laundering generated from the same predicate offence (self-laundering).

Criterion 3.8 (Met) S. 47 provides for knowledge and intend to be inferred from factual circumstances to prove the offence of ML, which is further supported by court precedence⁴¹.

Criterion 3.9 (Met) The sanctions provided under s. 47(3) of PICA for natural persons are effective, proportionate and dissuasive.

Criterion 3.10 (Met.) A legal person defined in terms of s. 49 of the Interpretation Act as a person, can be charged with the offence of ML under s. 47 of PICA. Although from the wording of s. 47 (3) of PICA, it appears the sanction under that section is only applicable to a natural person, the authorities explained, relying on s. 27(3) of the Penal Code supported by case law of application of similar provisions that in sentencing a company the court can use its discretion in terms of s. 27(3) to determine a fitting punishment for a legal person. The assessors were satisfied that the sanction under that section can be applied on a legal person.

In determining whether the sanction provision is proportionate and dissuasive, as the sanction provision has not yet been used in courts, the assessors had to be assisted by sanctions provided in Botswana of similar serious offences, such as racketeering. After looking at the sentencing regime of serious offences in Botswana, the assessors were satisfied that the sanction provided for the offence of ML is both proportionate and dissuasive.

Criterion 3.11 (Met) The Penal Code provides for the ancillary offences of conspiracy to commit an offence (ss. 392, 393); accessory after the fact (s. 394); attempt to commit offence (s. 389); facilitation (s. 21(b)); counselling the commission of an offence(s. 23); and common purpose (s. 22).

Weighting and Conclusion

⁴¹ See *Seeletso v State* 1992 BLR HC 71

The criminalisation of predicate offences to the offence of ML still remains with serious deficiencies, as not all predicate offences as per the FATF Glossary are criminalised. The mere non-criminalisation of the minimum categories of predicate offences required under the FATF Standards has an effect on other Recommendations such as R. 20, R. 31, R. 39, R. 40 and limits the powers and functions of the FIU under R. 29, as the scope of predicate offences guiding disseminations of intelligence reports to law enforcement might be limited. Further, the threshold of a serious offence provided for foreign offences of a similar conduct in Botswana creates difficulties as predicate offences in Botswana do not have a minimum threshold which also affects issues of dual criminality and reciprocity under R. 39 and R. 40. This creates a serious deficiency to the requirements of this Recommendation which also has an impact on other Recommendations.

Botswana is rated *partially compliant* with R. 3.

Recommendation 4 - Confiscation and provisional measures

In the 1st Round of Mutual Evaluations, Botswana was rated partially compliant on the requirements to this Recommendation. The main deficiency was that the provisions of the Proceeds of Serious Crimes Act and the Criminal Procedure and Evidence Act had not been effectively applied (pages 34-36).

Criterion 4.1 (Partially met) Confiscation measures are provided for under Botswana legal and institutional frameworks mainly under the PICA and CP & E Act. S. 18(1) of the PICA provides for conviction based forfeiture of proceeds and instrumentalities⁴² of crime. This section is complemented by s. 319(2) of the CP & E Act, which provides for the court upon convicting a person in any crime where a weapon, instrument or other article was produced to the court, to order forfeiture of such a weapon, instrument or any other article so produced. S. 3 provides for the confiscation of benefits derived from proceeds of crime through an application for a pecuniary penalty order by the DPP upon conviction of the person of the crime. Confiscation of property of corresponding value is provided for under section 20 of the PICA but is only limited to instruments of crime and is only conviction based. Where a person has been convicted of a confiscation crime, the DPP may apply for what is referred to under that section as “an instrument substitution declaration”. If granted this allows for the specification of property used, or intended to be used in or in connection with the commission of the confiscation crime; and specification of the property which is to be substituted for the property used or intended to be used during the commission of the crime, which can include property in which the person had an interest in at the time that the confiscation offence was committed; or is of the same general nature or description as the property originally used or intended to be used.

Civil forfeiture of proceeds and instruments of crime is provided for under s. 26 of PICA. S. 11 of PICA provides for civil penalty orders which allow the Director of Public Prosecutions or a prescribed person to apply to a magistrate’s court or to the High Court to require a person

⁴² Definition of instrument provided under s. 2 of PICA covers both instrumentalities used or intended to be used in the commission of serious offence

(respondent) to pay to the Government an amount assessed by the court as the value of the benefits derived by the respondent from a serious crime related activity that took place within a certain prescribed period (not more than 20 years) before the making of the application.

Criterion 4.2 (Largely met) S. 51(1) of the PICA provides for production orders which can be issued where there is suspicion that a person is in possession of information which might assist in tracking, identifying the proceeds of the offence, or determining the value of the proceeds under the possession or control of any person. S. 53 provides for monitoring orders which require a specified party to provide information about a transaction conducted by a person through an account held by the reporting entity.

Ss. 99 & 125(6)(a) of the Customs & Excise Act meet the powers of seizure of property subject to forfeiture and a custom and excise officer, a magistrate or police officer can exercise such powers in terms of s. 99. In terms of s. 30 of the PICA, a prescribed officer can seize currency, BNI, precious stones or any other precious materials as well as any other class of property considered to be a proceed or instrument of crime for purposes of an administrative forfeiture. Ss. 51 to 53 of the CP & E Act empowers police officers to carry out searches and under specific circumstances described under s. 52, the police can do so without a warrant. Ss. 54-59 of the CP & E Act empower the police with varying seizure powers.

There are no provisions of the law providing for taking of steps that can prevent or void actions that prejudice Botswana's ability to freeze or seize or recover property that is subject to confiscation. In addition, there are no other appropriate investigative measures provided for under Botswana law.

Criterion 4.3 (Met) The protection of interests of bona fide 3rd parties are provided for under s. 44(1) of PICA.

Criterion 4.5 (Met) In terms of s. 68 of PICA, the Minister is empowered to establish the Confiscated Assets Trust Fund to which all the funds collected under PICA as well as any profits derived or investments or sales made by the Receiver in relation to the confiscated property shall be deposited into. S. 46 establishes the office of the Receiver, who is appointed by the Minister on such terms and conditions as he/she sees fit. The duties of the Receiver will be among other things: to preserve the value of the property in his/her possession as mandated under the Act, including becoming a party to any civil proceedings affecting the property; maintenance of the property to preserve its value; ensuring that the property is insured; realising or otherwise dealing with securities or investments, if the property consists, wholly or partly, of securities or investments; if the property consists of shares in a company, the Receiver may exercise the rights attaching to the shares as if he or she were the registered holder of the shares to the exclusion of the registered holder; employing, or terminating the employment of persons in the business and doing any other thing that is necessary or convenient for carrying on the business on a sound commercial basis, if the property consists, wholly or partly, of a business; and selling any of the property by any means

reasonably calculated to derive the best price and prudently invest the proceeds in an interest bearing account (s.45(5)).

Weighting and Conclusions

Botswana is largely compliant with the requirements of this Recommendation. The only deficiencies are that confiscation of property of corresponding value is only limited to instruments of crime and there are no provisions of the law providing for taking of steps that can prevent or void actions that prejudice Botswana's ability to freeze or seize or recover property that is subject to confiscation. The absence of a provision covering confiscation of all property of corresponding is a major deficiency which requires to be quickly addressed.

Botswana is rated *partially compliant* with R. 4.

Recommendation 5 - Terrorist financing offence

In the 1st Round of Mutual Evaluations, Botswana was rated non-compliant on the requirements to this Recommendation. The major deficiency was that the offence of TF had not been criminalised. The offence has now been criminalised but with deficiencies still remaining (pages 32-36).

Criterion 5.1 (Partially met) Botswana has ratified all the conventions which are Annexes to the International Convention for the Suppression of the Financing of Terrorism (TF Convention). However, some elements of the TF Convention have not been domesticated in Botswana. Therefore, criminalisation of TF in Botswana is still not consistent with Article 2 of the TF Convention. Further, the offence of carrying out any other act with the intention to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict⁴³, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act as provided under Article 2(1)(b) of the TF Convention is not criminalised.

Criterion 5.2 (Partially met) S. 5(1) of the Counter Terrorism Act does not criminalise the use or provision of the property, or the provision of any financial or other service, or the provision of economic support, intending that the property, financial or other service or economic support, as the case may be, be used, or while such person knows or ought reasonably to have known or suspected that the property, service or support concerned will be used, directly or indirectly, in whole or in part by an individual terrorist.

Criterion 5.3 (Met) The provisions of s. 5 extend to any funds whether legitimate or illegitimate. However, the term funds is not defined consistent with the definition given under the TF Convention as well as under the FATF Glossary.

Criterion 5.4 (Partially met) S. 5(4) adequately provides for the requirement that a TF offence should not require that the funds be actually used to carry out or attempt a terrorist act(s). However, the

⁴³ The assessors in reaching this conclusion took note of the definition of *act of terrorism* provided under s. 2 of the CTA

laws do not require the commission of a TF offence not to require that the funds be linked to a specific terrorist act(s).

Criterion 5.5 (Met) The part of s. 5(1) which reads "...ought reasonably to have known or suspected that the property, service or support concerned will be used.." provides for intent and knowledge required to prove the offence of TF to be inferred from objective factual circumstances.

Criterion 5.6 (Partially met) A term of imprisonment for life provided for committing a TF offence under s. 5 of the Counter Terrorism Act is dissuasive enough. However, the sentencing provision does not provide for proportionality when applying it as it only provides for a term of imprisonment for life. In addition, an individual terrorist is not criminalised so the sanctions would not apply to that offence.

Criterion 5.7 (Not met) Although, a legal person can be charged with a TF offence in terms of the definition of person provided in terms of s. 49 of the Interpretation Act, it is not clear in terms of sanctions how the legal person can be sentenced as the sanction provision under s. 5(1) of the Counter Terrorism Act only provides for a custodial sentence for life with no other options in the event of a legal person, which cannot be sentenced to a term of imprisonment being convicted. Considering this deficiency the provision does not cover a legal person. Added to this, there are no provisions for civil and administrative sanctions.

Criterion 5.8 (Partially met) S. 8 of the Counter Terrorism Act adequately criminalises an attempt to commit the TF or attempted TF offence. Although, the same section also criminalises conspiring with another person to commit an offence, this is limited in terms of scope compared to being an accomplice, as one might conspire to commit an offence but not necessarily be an accomplice in the actual commission of the offence. Directing or organising others to commit a TF offence(s) or attempted offence is adequately criminalised under s. 9. The law does not however criminalise contribution to the commission of one or more TF offence(s) or attempted offence(s) by a group of persons acting with common purpose.

Criterion 5.9 (Met) The offence of TF qualifies to be a predicate offence for ML in terms of the definition of a "confiscation offence" provided in PICA (see R. 3).

Criterion 5.10 (Met) S. 26 (a) and (b) of CTA enables the High Court of Botswana to have both domestic and extra-territorial jurisdiction to try offences under that Act regardless of whether the act was committed in or outside Botswana.

Weighting and Conclusion

Whilst the majority of the requirements under R. 5 are provided there are still deficiencies with some of the criteria. Commission of a TF offence by an individual terrorist is not criminalised. The requirement that for a TF offence to be committed, it should not be a requirement that the funds provided be linked to a specific terrorist act(s), is not provided. The ancillary offences of participating as an accomplice in a TF offence and contributing to the commission of one or more

TF offence(s) or attempted offence(s) by a group of persons acting with common purpose are not criminalised. The sanction provided for the offence of TF does not include sanctions for legal persons and is not proportionate.

Botswana is rated *non-compliant* with R. 5.

Recommendation 6 - Targeted financial sanctions related to terrorism and terrorist financing

In the 1st Round of Mutual Evaluations, Botswana was rated non-compliant on the requirements to this Recommendation. The main reason for the rating was that Botswana did not have a legal framework to implement the requirements on freezing funds used for TF. Botswana has not yet put in place a legal framework to implement the requirements of UNSCRs (pages 36-37).

Criterion 6.1 (Not met) The requirement under R. 6.1(a) goes beyond the provisions of s. 12(1) of the CTA cited by the authorities. Whereas the section identifies the President (although the section is not clear whether it applies to proposals under 1267/1989 and 1988 or 1373 sanction regimes) as the competent authority to declare a structured group believed to be engaged in terrorism, and/or a person convicted of an offence under the CTA as a terrorist or terrorist group, it does not proceed further to require such declarations to be proposed to either the 1267/1989 Committee, or the 1988 Committee for listing. Further, s. 12(1)(b) is very limited in scope as it requires the person to be convicted of an offence under the Act first, in order for the President to declare the person as a terrorist which is above the evidentiary standard of *reasonable grounds* or *basis* required under this criterion. There is no legal framework to implement requirements under R. 6.1(b)-(e) as the regulations to provide such a framework have not yet been issued.

Criterion 6.2 (Not met) Although, s. 12(1) identifies the President as the competent authority to declare a structured group believed to be engaged in terrorism, and/or a person convicted of an offence under the CTA as a terrorist or terrorist group, it does not proceed further to provide for examination and effecting of requests from other countries. Further, s. 12(1)(b) is very limited in scope as it requires the person to be convicted of an offence under the Act first, in order for the President to declare the person as a terrorist which is above the evidentiary standard of *reasonable grounds* or *basis* required under this criterion. There is no legal framework to implement R.6.2 (b)-(e).

Criterion 6.3 (Not met) There is no legal framework to implement the requirements of Criterion 6.3 as set out under the UNSCRs requirements.

Criterion 6.4 (Not met) Although, s. 17 of the CTA provides for freezing without delay, it is not clear whether the freezing is in relationship to the UNSCRs as no reference to it is made in the provision. This is important to determine given that the procedure provided under the section involves making an *ex-parte* application in court for an order to be given to enable freezing of the funds concerned, therefore there is no express authority to any competent authority through set mechanisms to enable the immediate freeze of such funds without delay and this is not consistent with the Standard. The second deficiency is that since such freezing, in terms of this section, will require to be done through an *ex-parte* application in court, the court might use its discretion and dismiss the application as the applicant has to show reasonable grounds (in terms of s. 17) supporting the application thus defeating the whole purpose of Lists issued under UNSCR1267 and its successor Resolutions. The third deficiency is that the term, "funds" used in this section is

not defined in the Act, therefore it is not clear as to what it is covering. The section does not meet the requirements for implementation of UNSCR1267 and its successor Resolutions.

Criterion 6.5 (Not met)(a)There is no direct obligation requiring all natural and legal persons within Botswana to freeze without delay and without prior notice, funds or other assets of designated persons and entities, such freezing can only be done subject to a court order to such effect being granted by a court in terms of s. 17 of the CTA. (b)The scope of the funds covered under s. 17 is not defined to know whether it covers all the types of funds or other assets described under criterion 6.5(b). Further, under s. 18 of the CTA, the term property is used and in its definition under s. 2 of the same Act, funds are only one of the components of it. Without the definition of the term funds under the CTA, the scope of what is covered under funds is unclear and it is only one element of the term property used in this section. In both sections 17 and 18 of the CTA there is no consistency on what has to be frozen, in the event the freezing order is granted by the courts due to the terms *funds* and *property* being used inter-changeably. (c)There is no provision prohibiting nationals or any other person or entities within Botswana from making any funds or other assets, economic resources, or financial or other related services, available, directly or indirectly, for the benefit of designated persons and entities; entities owned or controlled, directly or indirectly, by designated persons or entities; and persons acting on behalf of, or at the direction of, designated persons or entities, unless licensed, or otherwise notified in accordance with the relevant UNSCRs. The provisions of s. 4(1)(a) & (b) of the CTA are limited to prohibiting providing assistance to a person with the intention being to commit an act of terrorism and the provisions do not prohibit assistance provided to persons or entities designated under the UNSCRs for different reasons (TF) which might not necessarily be to commit an act of terrorism as described under s. 4. The section also does not provide exemptions from certain requirements for the person being licensed or authorised, or notified in accordance with the requirements of the UNSCRs. (d) There are no laid down mechanisms upon which designations are communicated to the financial sector and DNFBPs immediately upon such actions being taken. There is no framework setting out mechanisms on how obligations in taking action under the freezing mechanisms by FIs, other persons or entities, including DNFBPs should be undertaken. However, the guidance which has been provided by FIA is that should the financial sector and DNFBPs find themselves holding targeted funds or other assets linked to designated persons, they should report to the FIA but there is no framework through which such obligations are enforced.

(e) There is no legal framework requiring FIs and DNFBPs to report to competent authorities any assets frozen or actions taken in compliance with the prohibition requirements of the relevant UNSCRs, including attempted transactions. (f) There are no provisions dealing with the protection of bona fide 3rd parties where measures have been taken in furtherance to implementing the requirements of R. 6 (the UNSCRs). The only claims provided for under s. 31 of PICA relate to seized property during a formal criminal investigation not to property frozen under the UNSCRs.

Criterion 6.6 (Not met) Botswana's current legal framework does not have procedures or mechanisms to implement de-listing, unfreezing, and providing access to frozen funds or other assets frozen under the UNSCRs measures [R. 6.6(a)-(g)].

*Criterion 6.7 (Not met)*There are no provisions authorising access to funds or assets frozen in terms of the UNSCRs for purposes of meeting basic expenses, payment of certain types of fees, expenses and service charges, or any other extraordinary expenses guided by the procedures set out in

UNSCR 1452. The provisions set out in s. 35(4) of the PICA are only meant to deal with restraining orders issued relating to property subject to confiscation under that Act, therefore do not apply to the requirements set out under UNSCR 1452 particularly relating to UNSCR 1267 and its successor Resolutions, which do not require court processes but are complied with guided by directions from the 1267/1989 Committee or 1988 Committee.

Weighting and Conclusion

Botswana has got no legal framework which enables implementation of targeted financial sanctions related to terrorism and TF. The authorities in coming up with the regulations to implement provisions of either CTA or PICA, which will enable implementation of the UNSCRs, should properly streamline which provisions apply to the implementation of UNSCRs and those which apply to the criminal processes of the offence of ML and other serious offences. The term “funds” should be properly defined so that it meets the requirements of the TF Convention and the definition provided under the FATF Glossary in terms of scope.

Botswana is rated *non-compliant* with R. 6.

Recommendation 7 – Targeted financial sanctions related to proliferation

The requirements to R. 7 were not assessed on Botswana during the 1st Round of Mutual Evaluations as they were added to the FATF Recommendations when they were revised in 2012.

Criteria 7.1 – 7.5 (Not met) Botswana has not yet put in place a legal framework to implement financial targeted sanctions related to proliferation or to prevent proliferation financing.

Weighting and Conclusion

Botswana does not have a legal framework which provides for the implementation of targeted financial sanctions related to proliferation financing.

Botswana is rated *non-compliant* with R. 7.

Recommendation 8 – Non-profit organisations

In the 1st Round of Mutual Evaluations, Botswana was rated non-compliant on the requirements to this Recommendation. The major deficiencies cited by the assessors for the rating were absence of effective monitoring and enforcement regime of NPOs for AML/CFT; failure to review adequacy of laws and regulations for TF purpose; lack of TF risk assessment for the NPO sector; and there being no appropriate transparency mechanisms (pages 113-115). Most of these deficiencies have not been addressed by the authorities.

Criterion 8.1 (Not met) Botswana has just commenced its National Risk Assessment on ML/TF risks and a sectoral risk assessment has not been done on the NPO sector to enable the authorities to review the adequacy of the laws and regulations that relate to entities that can be abused for TF including the NPOs. Although in terms of s. 16(1) of the Societies Act, the Registrar of Societies may request to be furnished with certain information concerning the NPO, none of the information or measures are intended to identify the features and types of NPOs that might be at risk of being abused for TF or other forms of terrorist support by the nature of their activities or characteristics. Further, no periodical reassessments of new information on the NPO sector to determine the sector’s potential vulnerabilities to terrorist activities are done.

Criterion 8.2 (*Not met*) The Registrar of Societies has not done an outreach to the NPO sector concerning TF awareness or other related issues.

Criterion 8.3 (*Partially met*) Although in terms of Section 11(1)(a) of Societies Act, the Registrar is empowered to cancel the registration of any NPO where such an NPO is or has become a branch of or affiliated to or connected with any organization or group of a political nature established outside Botswana and to publish notice in the Government Gazette about registration, exemption from registration, rescission of exemption and cancellation of NPOs registration, there are no other policies provided by the authorities promoting transparency, integrity and public confidence in the administration and management of all NPOs, particularly relating to TF.

Criterion 8.4 (*Not met*) The Registrar of Societies does not maintain records on which NPOs account for a significant portion of the financial resources under the sector as well as a substantial share of the sector's international activities in order to be able to determine the extent of TF risk exposure of such NPOs. In addition, the Registrar is not required to determine the identity of the natural persons who own or control or direct the NPO's activities in order to be able to determine their possible exposure to TF and the likely abuse of the NPOs for TF purposes. The requirements for NPOs to be registered, licenced and submit annual financial returns are not for purposes of determining the TF risk in the sector but for general accountability of the NPOs in the sector.

Criterion 8.5 (*Not met*) The Societies Act does not have provisions requiring the Registrar to maintain updated information on the purpose and objectives of the NPO's activities but instead, the obligation is on the NPOs themselves in terms of ss. 12 and 13 of the Societies Act to provide information on the purpose and objectives of the NPOs' activities but not information on the identity of the persons who own or control such NPOs. In case of violations of this obligation or to notify the Registrar of any changes to the NPO, a fine not exceeding 200 pula (US\$20) is prescribed. Also, in terms of s. 16(1) of the Societies Act, the Registrar has powers to request for any information from the NPO at any time. However, it should be noted that the information kept by the NPOs does not meet all the requirements under Criterion 8.4 and it is not retained for TF or terrorism purposes and a sanction not exceeding 200 pula (US\$20) is not proportionate and dissuasive.

Criterion 8.6 (*Not met*) Although the Registrar, in terms of ss. 16(1) & 17(1) of the Societies Act has powers to ask for wide ranging information from any NPO, including audited accounts by an auditor approved by his office, and information on the NPO's activities, there are no mechanisms in place to ensure that relevant information in order to take preventive or investigative action when there is suspicion or reasonable grounds to suspect that a particular NPO is: a front for fundraising by a terrorist organisation; or being exploited as a conduit for TF, including for purposes of escaping asset freezing measures; or concealing or obscuring the clandestine diversion intended for legitimate purposes but redirected for the benefit of terrorists or terrorist organisations is collected.

Criterion 8.7 (*Not met*) Botswana does not have appropriate points of contact identified, and procedures to respond to international requests for information regarding particular NPOs suspected of TF or other forms of terrorist support.

Weighting and Conclusion

Although, the Societies Act of Botswana requires NPOs to be registered and licensed, including the Registrar of Societies having powers to ask for a wide range of information from the NPOs when necessary, all the measures regulating the activities of NPOs in Botswana under the Societies Act are not for purposes of dealing with the possible exposure of the NPO sector to abuse for TF activities and identification of which NPOs are at risk to be exposed to TF and the kind of measures which can be taken to mitigate the TF risks faced by such NPOs. Also the requirements under the Societies Act are not currently being used by the Registrar of Societies to assist the Office to understand the possible exposure of the sector to the TF risk. No awareness is being done on TF risks to the NPO sector.

Botswana is rated *non-compliant* with R. 8.

Recommendation 9 – Financial institution secrecy laws

In the 1st Round of Mutual Evaluations, Botswana was rated compliant on the requirements to this Recommendation (pages 67- 68).

Criterion 9.1 (Not met) S. 43 of the Banking Act prohibits a director, principal officer, officer employee, or agent of a bank or any other person, who by virtue of his professional relationship with a bank has access to records of a bank from disclosing any information concerning any customer without a written and freely given permission of the customer. Other than the few exemptions provided in s. 43(2), particularly subsections (b) which only relates to court proceedings, and (c) which specifies the DCEC as the only LEA authorised to have access to such information directly when carrying out an investigation and the police through a court order upon satisfying certain conditions which include serving the application for the order on the respondent which includes the client of the bank concerned with the information required, there are no provisions which override this section. The section is in conflict with the reporting obligations provided in the FI Act (s. 17) as it prohibits banks from providing any information about their customers without their consent. In terms of this provision, it means that the banks cannot also provide additional information (s. 28(1) of the FI Act) to the FIA without express consent of their customer. In addition the customer has an option not to accede to the bank's request and at the same time the bank is likely to be violating the tipping off provisions (s. 25(3) of the FI Act) in consulting the customer. The prohibition of the banks to disclose any information to other competent authorities including the FIA, limits the FIA's ability to exchange information with other domestic and international competent authorities on AML/CFT. Therefore, these legal restrictions are not consistent with the FATF requirements.

Weighting and Conclusion

Although, the FI Act contains legal provisions which would facilitate implementation of the FATF Standards, compliance with the obligations is seriously inhibited by the restrictions imposed by the Banking Act. The banks are a hub of financial transactions and, therefore, restrictions imposed on them have far reaching implications as far as compliance with the FATF Standards is concerned. It is not possible for the FIA and other competent authorities (other than the DCEC and to a limited extent the police) to exchange information which they do not have because access to it is restricted. This deficiency is considered to be significant.

Botswana is rated *non-compliant* with R.9.

Recommendation 10 – Customer due diligence

In the 1st Round of Mutual Evaluations, Botswana was rated non-compliant on the requirements to this Recommendation due to a number of deficiencies which included absence of clear prohibition of anonymous accounts and accounts in fictitious names, lack of a requirement on nature and purpose of business relationship, lack of ongoing monitoring and exemptions of CDD requirement for business transactions and services for another specified party, and that identification of customers was not risk-based. The country enacted the FI Act in 2009 which is the main AML/CFT law, and issued Regulations on this law in 2013. However, some of the deficiencies have not yet been addressed.

Criterion 10.1 (Not met) There is no legal requirement prohibiting FIs from keeping anonymous accounts or accounts in obviously fictitious names.

When CDD is required

Criterion 10.2 (Not met) In terms of s.10(1) of the FI Act, FIs are required to identify and verify the identity of a customer before establishing a business relationship or carrying out a transaction regardless of the monetary value. However, this does not apply when establishing a business relationship with, or conducting a transaction on behalf of a legal person or legal arrangement. There are no requirements for FIs to undertake CDD measures when: d) there is a suspicion of ML or TF regardless of the value of the transaction involved; and e) there is a doubt about the veracity or adequacy of previously obtained customer identification data.

Required CDD measures for all customers

Criterion 10.3 (Partially met) S. 10.3 of the FI Act as read with Regulation 11(1)(g), requires identification of a customer who is a natural person through production of a national identification document, or a passport, and verification of the documents to be conducted using any reliable document, data or information to the extent that the FI is able to demonstrate that it has taken reasonable measures to establish and verify the true identity of a customer. However, there are no requirements in the FI Act on identification and verification of customers who are legal persons and arrangements.

Criterion 10.4 (Met) In terms of s.10 (1)(c) of the FI Act as read with Regulation 10 of the FI Regulations, FIs are required to identify and verify that any person who purports to act on behalf of the customer has been authorised to do so by the customer and that the identity of that person acting on behalf of a client is verified.

Criterion 10.5 (Not met) There is no requirement for FIs to identify a beneficial owner and take reasonable measures to verify the identity of the beneficial owner and satisfy themselves that they know who the beneficial owner is.

Criterion 10.6.(Not met) The FI Act does not require FIs to understand and obtain information on the purpose and intended nature of the business relationship.

Criterion 10.7 (Not met) There is no requirement for financial institutions to conduct ongoing due diligence, including an obligation to carry out transaction monitoring and keeping up-to-date CDD documents and data, and reviewing records of high risk customers.

Specific CDD measures required for legal persons and legal arrangements

Criterion 10.8 (Not met) There are no legal requirements for financial institutions to understand the nature of the customer's business and its ownership and control structure, where such a customer is a legal person or legal arrangement.

Criterion 10.9 (Not met) As discussed under c. 10.3, there are no legal requirements to identify and verify the identity of legal persons or legal arrangements. So requirements under c. 10.9(a)-(c) are not provided for.

Criterion 10.10 (Not met) As discussed under c. 10.5, there are no legal requirements to identify beneficial ownership relating to legal persons. Therefore, c. 10.10(a)-(c) are not provided for.

Criterion 10.11 (Not Met) As discussed under c. 10.5, there are no legal requirements to identify beneficial ownership relating to legal arrangements. Therefore, c. 10.11(a)-(b) are not provided for.

Criterion 10.12 (Not met) There is no requirement for FIs to conduct CDD measures on beneficiaries of life insurance and other investment related insurance policies in addition to CDD measures required in respect of the customer and the beneficial owner.

Criterion 10.13 (Not met) There is no requirement for FIs to consider the beneficiary of a life insurance policy as a relevant risk factor in determining whether or not to apply enhanced CDD measures. In addition, there is no obligation for a FI to take enhanced measures if it determines that the beneficiary who is a legal person or legal arrangement presents a higher risk.

Timing of verification

Criterion 10.14 (Partially met) S. 10(1) of the FI Act requires a reporting entity not to establish or conclude a transaction with a customer before verifying the identity of the customer. However, the obligation does not extend to beneficial owners. The option of verification of the identity of a customer after the establishment of the business relationship is not provided.

Criterion 10.15 (Not applicable) In Botswana, in terms of s. 10 of the FI Act, it is not permissible for a FI to establish a business relationship or conduct a transaction before verifying the identity of a customer. Consequently, it follows that a customer cannot utilise the business relationship prior to verification.

Existing Customers

Criterion 10.16 (Partially met) S. 10(2) of the FI Act requires FIs to remediate accounts which were established prior to the coming into force of the FI Act, and prohibits any transactions within such business relationships unless verification has taken place. There is however no requirement to conduct the remediation process on the basis of materiality and risk. In addition, the FI Act and its Regulations do not provide for adequate CDD requirements (see, c.10.3 above).

Criterion 10.17 (Not met) There is no requirement for FIs to apply enhanced due diligence where ML/TF risks are higher.

Criterion 10.18 (Not applicable) The legal framework does not permit FIs to apply simplified CDD measures. Therefore the conditions under which such simplified measures should be permitted do not apply to Botswana.

Failure to satisfactorily complete CDD

Criterion 10.19 (Partially met) S. 10 (1) of the FI Act provides that a reporting entity shall not establish a business relationship or conclude transactions until it has undertaken due diligence to establish and verify the identity of the customer. So by implication it means, if a FI is unable to comply with the relevant CDD measures, it cannot open an account, commence business relations, or perform a transaction. Although s. 10.2 prohibits reporting entities from concluding transactions of existing customers, it does not provide for termination of such accounts, or consider making an STR report where there are unable to comply with relevant CDD measures.

CDD and tipping-off

Criterion 10.20 (Not met) – There is no provision requiring financial institutions not to pursue the CDD process, if that is deemed to have the possibility of tipping-off the customer but instead be required to file an STR.

Weighting and Conclusion

Botswana has met criterion 10.4; partly met 10.3, 10.14, 10.16 and 10.19; not met 10.1, 10.2, 10.5, 10.6, 10.7, 10.8, 10.9, 10.10, 10.11, 10.12, 10.13, 10.17 and 10.20; and not applicable on 10.15, and 10.18. FIs are required to identify and verify the identity of customers (natural persons) when entering into a business relationship and conducting a transaction. However, the legal and regulatory requirements in relation to application of CDD measures on business relationships and transactions have major deficiencies particularly due to insufficient general requirements on CDD. There are no requirements for FIs to apply CDD measures when establishing a business relationship or conducting transactions with a legal person or arrangements. In addition, there is no requirement for FIs to identify and verify the identity of beneficial owners. There are no requirements prohibiting FIs from keeping anonymous accounts or accounts in obviously fictitious names. Further, FIs are not required to apply CDD measures on business relationships and transactions on a risk-based approach to allow for application of reduced or enhanced due diligence measures. It is the view of the assessors that the deficiencies have a significant impact on the obligations provided for purposes of CDD.

Botswana is rated **non-compliant** with R.10.

Recommendation 11 – Record-keeping

In the 1st Round of Mutual Evaluations, Botswana was rated largely compliant on the requirements to this Recommendation. The main reasons for the rating were that not all FIs and DNFBPs were required to keep records (pages 53-65). All FIs and DNFBPs are now required to keep records.

Criterion 11.1 (Met) The FI Act requires FIs to keep records of, among others, the nature of a transaction, amount involved and the parties to the transaction, all accounts involved in a transaction [s. 11(1) of FI Act]. This includes transactions carried out during a business relationship

and those of a single transaction. Since the Act refers to a transaction and does not prescribe any exclusions, it is understood to include both domestic and international transactions. With reference to s. 12(1), these records are required to be kept for a period of at least five years from the date a transaction was concluded. All records are required to be kept in electronic form.

Criterion 11.2 (Not met) FIs are under obligation to keep records of documents or copies of documents obtained to verify the identity of a customer [s. 11(1)(i) of FI Act] for at least five years from the date of the transaction [s. 12(1) of FI Act], but there is no requirement to keep the records after termination of business relationship. In addition, as observed in the analysis of R. 10 above, FIs are not obliged to verify the identity of legal person and legal arrangements, including their beneficial owners. So financial institutions cannot keep information which they are not required to obtain in the first place. In addition to this, there is no requirement in the laws to keep or maintain records of account files and business correspondence, and results of any analysis undertaken for at least five years following the termination of the business relationship or after the date of the occasional transaction.

Criterion 11.3 (Not met) According to s. 11 of FI Act, FIs are required to keep important details in relation to transactions (see discussion in c.11.1). However, the absence of verification documents relating to legal persons, legal arrangements and beneficial owners provides a significant setback to the reconstruction of the transactions to provide evidence for prosecution of a criminal activity.

Criterion 11.4 (Partially met) There is no specific legal provision requiring financial institutions to ensure that all CDD information and transaction records are available swiftly to domestic competent authorities. S.11(2) provides that CDD information and transaction records shall be kept in electronic form, which can facilitate quick retrieval of required information, when required but it is not clear who has access to this information. Furthermore, S. 16 (4) of the FI Act gives authority to examiners of the FIA or supervisory authority to have full and free access to records of a reporting entity but not to other domestic competent authorities.

Weighting and Conclusion

Botswana has met 11.1, partially met 11.3 and 11.4 but not met 11.2. The legal framework does not contain a provision requiring financial institutions to keep all records obtained through CDD measures, account files and business correspondence and results of any analysis undertaken for at least five years after the termination of a business relationship. In addition, since there is no obligation to verify documents obtained relating to legal persons, legal arrangements and beneficial owners ((see discussion under R.10), it would be difficult to have sufficient documents which will facilitate reconstruction of transactions to provide evidence for prosecution of a criminal activity. The shortcoming on CDD verification documents and information provided under s. 10(3) of the FI Act, affects applicability of provisions stated under this requirement. R. 10 has a cascading effect on R.11 due to the quality of CDD records being required under R.10. Furthermore, there is no specific legal provision which obliges financial institutions to provide documents swiftly to domestic competent authorities. These are significant deficiencies.

Botswana is rated **non-compliant** with R.11.

Recommendation 12 – Politically exposed persons

In the 1st round of MEs, Botswana was rated non-compliant with the requirements of this Recommendation. The main reason was that there were no requirements in the AML/CFT law regarding Politically Exposed Persons (PEPs) (pages 64-65). Botswana has not yet issued laws to deal with PEPs.

Criteria 12.1 - 4 (Not met) There is no legal framework in Botswana providing obligations on PEPs.

Weighting and Conclusion

All the requirements of R. 12 are not met as Botswana has no legal framework dealing with obligations which apply to PEPs.

Botswana is rated *non-compliant* with R.12.

Recommendation 13 – Correspondent banking

In the 1st round of MEs, Botswana was rated non-compliant to this Recommendation as it did not have any legal framework in place to deal with correspondent banking relationships and similar arrangements (pages 64 - 65). Botswana has not yet issued AML/CFT law dealing with correspondent banking.

Criteria 13.1 – 3 There are no specific legal obligations for FIs in Botswana to apply specific measures when engaging in correspondent banking relationships and transactions as set out in R.13.

Weighting and Conclusion

Botswana has not met all the criteria relating to this Recommendation as it does not require FIs to apply AML/CFT requirements on correspondent banking relationships and transactions.

Botswana is rated *non-compliant* with R13.

Recommendation 14 – Money or value transfer services

In the 1st round of MEs, Botswana was rated non-compliant with the requirements of this Recommendation. The main deficiency was absence of registration/licensing of all natural and legal persons providing money or value transfer services, absence of coverage of all natural and legal persons providing money or value transfer services, absence to monitor all natural and legal persons providing MVTS and absence of sanctions for all natural and legal persons providing MVTS (pages 104 -105). Botswana still does not have an adequate legal framework to properly regulate MVTS

Criterion 14.1 (Not met) The Banking Act and financial services laws in Botswana do not require MVTS to be licensed or registered. Licensed banks provide money and value transfer services, however, other MVTS providers (excluding registered/licensed financial institutions authorised to perform MVTS) are not subject to licensing or registration requirements. Other MVTS providers in Botswana operate on notification to BoB only, which issues them with a letter of no objection and BoB does not have the legal mandate to issue such letters.

Criterion 14.2 (Not met) No measures have been put in place by Botswana to identify unregistered MVTS providers and sanctions applicable to these unregistered providers (excluding registered/licensed financial institutions authorised to perform MVTS) are not provided under the laws of Botswana.

Criterion 14.3 (Met) Money remitters are subject to supervision and monitoring by the FIA pursuant to s.4(2)(d) of the FI Act.

Criterion 14.4 (Not met) Agents of MVTS providers are not subject to licensing or registration requirements and there is no requirement for MVTS providers to maintain a current list of its agents which is accessible to competent authorities.

Criterion 14.5 (Not met) There is no requirement for MVTS providers that use agents to include them in their AML/CFT programmes and monitoring.

Weighting and Conclusion

Botswana has not met 4 of the 5 criteria as set out above. The main deficiencies are the absence of registration/licensing of natural and legal persons providing money or value transfer services (excluding registered/licensed financial institutions authorised to perform MVTS), absence of coverage of all natural and legal persons providing money or value transfer services and absence of sanctions for natural and legal persons providing MVTS without a license or registration.

Botswana is rated *non-compliant* with R14.

Recommendation 15 – New technologies

In the 1st round of MEs, Botswana was rated partially-compliant with the requirements of this Recommendation. The main deficiency was that there was no requirement in place to address non-face to face business relationships and transactions and this deficiency has still not been addressed (pages 64 - 66).

Criterion 15.1 (Not met) Authorities and financial institutions do not identify and assess ML/TF risks that may arise in relation to the development of new products and new business practices including new delivery mechanisms and the use of new or developing technologies for both new and pre-existing products.

Criterion 15.2 (Not met) There is no requirement in law or regulation for financial institutions to undertake risk assessments prior to the launch or use of new or pre-existing products, practices and technologies, and there is no requirement for financial institutions to take appropriate measures to manage and mitigate risks relating to new technologies.

Weighting and Conclusion

Botswana does not meet the criteria under R.15 as the country does not require FIs to apply AML/CFT requirements on financial services provided through new technologies platforms.

Botswana is rated *non-compliant* with R15.

Recommendation 16 Wire transfers

In the 1st round of MEs, Botswana was rated non-compliant with the requirements of this Recommendation. The major deficiencies identified included the absence of a requirement that identification information should circulate with the wire transfer, originator information should be maintained and handling of wire transfers be done on a risk-basis (page 71). Most of these deficiencies have not been addressed.

Criterion 16.1 (Not Met) Whereas, s. 21 of the FI Act and FI Regulation 19(2) require a report of wire/electronic transfer transactions (including name of originator) above P 10,000 to be made to FIA, it is not a requirement on FIs to ensure that all cross-border wire transfers carries the name of originator. It is also not a requirement on FIs to ensure that all cross-border wire transfers carry the account numbers and the law does not state that the purpose of the account number and the unique reference number is to allow traceability of the transaction. In addition, the place of birth is not a requirement in the report to the FIA. Further, there are no provisions dealing with disclosures of beneficiary information when effecting wire transfers in and out of Botswana and dealing with disclosures of beneficiary account number when effecting wire transfers in and out of Botswana.

Criteria 16.2 - 16-8 (Not met) The requirements are not provided in the law.

Criteria 16.9 – 16.12 (Not met) There is no law or regulation providing for these requirements.

Criterion 16.13 – 16.15 (Not Met) There is no law or regulation providing for these requirements.

Criterion 16.16 (Not met) There is no law or regulation providing for this requirement.

Criterion 16.17 (Not met) While MVTs operators are one of the reporting entities and required to file STRs, the requirement for a MVTs that controls both the ordering and beneficiary side of a wire transfer to take into account all the information from both sides to determine whether an STR has to be filed is not provided for.

Criterion 16.18 (Not met) There is no law or regulation providing for this requirement.

Weighting and Conclusion

Botswana does not meet the criteria under R.16 as it does not require FIs to apply specific AML/CFT requirements on wire transfers.

Botswana is therefore rated *non-compliant* with R.16.

Recommendation 17 – Reliance on third parties

In the 1st round of MEs, Botswana was rated partially compliant with the requirements of this Recommendation. The major deficiency was that Botswana did not have a legal framework on introduced business and reliance on third parties outside the banking sector (pages 66 – 67).

Criteria 17.1- 3 (Not applicable) – FIs in Botswana are not permitted to rely on third parties or introduced businesses to perform CDD measures on their behalf or to introduce business to them.

Weighting and Conclusion

Since FIs in Botswana are not permitted to use third parties or introduced businesses to undertake CDD on their behalf, this Recommendation is not applicable to Botswana.

R. 17 is rated *not applicable* to Botswana.

Recommendation 18 – Internal controls and foreign branches and subsidiaries

In the 1st round of MEs, Botswana was rated partially compliant and N/A with the requirements of Recommendation 15 and 22, respectively. The main deficiencies were insufficient specificity of the content of the internal controls particularly on the appointment of a money laundering officer; insufficient guidance on training requirements for designated bodies other than banks and forex bureaus; and the absence of employee screening requirements for all designated bodies (pages 80 – 84). There has been a significant improvement on addressing the deficiencies relating to internal controls whilst the majority of the deficiencies remain unaddressed.

Criterion 18.1 (Largely met) Section 9(1)(a) of the FI Act requires reporting entities to implement and maintain a customer acceptance policy, internal rules programmes, policies, procedures or such controls as may be prescribed to protect its system from financial offences. A financial offence is defined as “money laundering, financing of terrorism or the acquisition of property from the proceeds of any other offence”. These include:

- Compliance management arrangements – which includes the appointment of a compliance officer at the management level [s. 9(1)(b) and (d) of the FI Act].
- Screening procedures when hiring employees [s. 9(2)(a) (i) of the FI Act]
- An ongoing employee training programme [Section 9(2)(a) (ii) of the FI Act];
- An independent audit function to test the system [s. 9(1) (e) and 9(2)(a)(iii) of the FI Act]

However, Section 9(1)(a) is deficient in that it does not require the FIs to implement programmes against ML/TF, which have regard to the ML/TF risks and size of business.

Criterion 18.2 (Not Met) There is no legal requirement for financial groups to implement group-wide programs against ML/TF risks to all branches and subsidiaries of the financial group, including: (a) policies and procedures for sharing information required for the purposes of CDD and ML/TF risk management; (b) provision in the law for financial groups to provide, at group-level compliance, audit, and/or AML/CFT functions of customer, account, and transaction information from branches and subsidiaries when necessary for AML/CFT purposes, and (c) safeguards on confidentiality and use of information.

Criterion 18.3 (Not Met) There is no provision requiring financial institutions to ensure that their foreign branches and majority-owned subsidiaries apply AML/CFT measures which are consistent with the home country requirements, where the requirements of the host country are less strict. In addition, there is no obligation for financial groups to apply appropriate additional measures to manage ML/TF risks and report to the home country supervisors, if the host country does not permit proper implementation of AML/CFT measures.

Weighting and Conclusion

Botswana largely meets criterion 18.1 but does not meet criteria 18.2 and 18.3. The absence of a requirement for financial groups to implement group-wide programs against ML/TF risks to all

branches and subsidiaries of the financial group and FIs to ensure that their foreign branches and majority-owned subsidiaries apply AML/CFT measures which are consistent with the home country requirements, where the requirements of the host country are less strict. Currently, Botswana does not have any of its FIs operating outside of its borders.

Botswana is rated *partially-compliant* with R. 18.

Recommendation 19 – Higher-risk countries

In the 1st round of MEs, Botswana was rated non-compliant with the requirements of this Recommendation. The main deficiencies were that Botswana had no requirement for monitoring transactions and business relationships involving countries not sufficiently applying FATF Recommendations and the absence of competent authorities to require designated bodies to implement countermeasures (pages 71 – 73). The deficiencies have not been adequately addressed.

Criterion 19.1 (Not met) No provision in the laws requiring FIs to apply enhanced due diligence to business relationships and transactions with natural and legal persons from countries for which this is called for by the FATF.

Criterion 19.2 (Not met) Botswana does not apply countermeasures proportionate to ML/TF risks when called upon to do so by the FATF or independently of any call by the FATF to do so.

Criterion 19.3 (Not met) There is no mechanism in place to ensure that financial institutions are advised of concerns about the weaknesses in the AML/CFT systems of other countries.

Weighting and Conclusion

Botswana does not meet the criteria under this Recommendation as it does not require FIs to apply specific AML/CFT measures in relation to business relationships and transactions from high risk countries.

Botswana is rated *non-compliant* with R. 19.

Recommendation 20 – Reporting of suspicious transaction

In the 1st round of MEs, Botswana was rated non-compliant with the requirements of this Recommendation. This was mainly because it was only the banking sector which was submitting suspicious transaction reports and the requirement to report suspicious transactions across different legislation and regulations was not consistent. With the enactment of the FI Act, all financial institutions and DNFBPs are required to submit STRs to the FIA.

Criterion 20.1 (Partially met) Pursuant to s.17 of the FI Act, FIs are required to report a suspicious transaction to the FIA within such periods as may be prescribed. Regulation 18 of the FI Act Regulations provides that the said report should be sent to the FIA as soon as possible but not later than 15 working days after forming suspicion unless the FIA, in writing, approves the sending of the report after the expiry of the period. A suspicious transaction is defined in s.2 of the FI Act as: “ ..a transaction which (a) gives reasonable suspicion that it may involve financial offence, (b) gives rise to a reasonable suspicion that it may involve property connected to, or to be used to finance terrorism, whether or not the property represents proceeds of an offence”. Furthermore, a financial offence is defined as ‘money laundering, financing of terrorism or the acquisition of property from proceeds of any other offence’.

The language of Regulation 18 suggests that it is acceptable to submit a suspicious transaction 15 working days after forming suspicion. Considering that R.20 requires that the report should be submitted *promptly*, this does not meet the expectations of the criterion when compared to the other FATF MERs⁴⁴. Furthermore, s. 37 of FI Act, states that transactions among others, between a bank and non-bank financial institution are exempted from the application of this Act. This means that a bank cannot report a suspicious transaction concerning a non-bank financial institution to the FIA regardless of the risk posed by the transaction. Assessors also view the secrecy provision of s. 43 of the Banking Act as inhibiting compliance with this obligation by banks (see discussion under R.9). In addition, s.21 of the Banking Act requires banks to file suspicious transactions to BoB only in respect of ML and not predicate offences or TF. The assessors considers the lack of harmonisation of this section with section 17 of the FI Act, when it was enacted, material as it means that banks must file STRs on ML to BoB and the FIA, respectively. Furthermore, there is a scope issue arising from uncovered predicate offences (see c.1.3 under R.3 for more details).

Criterion 20.2 (Met) The definition of a transaction, provided under s. 2 of the FI Act, includes a 'proposed transaction' which may be considered as having incorporated the concept of 'attempted transaction'. In addition, the FI Act does not include a threshold for a suspicious transaction, which means that all transactions irrespective of the amount, must be reported.

Weighting and Conclusion

Botswana has met c. 20.2 and partially met c. 20.1. The period allowed for submission of a suspicious transaction report falls short of the required urgency, especially when this is considered in the context of terrorist financing. There are also deficiencies under R.3, R. 10 and R. 11 as well as R. 16 which have a cascading effect on the type of information to be monitored by financial institutions to enable them to identify suspicious transactions. There is also the aspect of exempt transactions, provided under s. 37 of the FI Act, which include transactions between a bank and a non-bank financial institution. S. 43 of the Banking Act may also inhibit compliance of banks with the reporting obligation.

Botswana is rated *partially compliant* with R.20.

Recommendation 21 – Tipping-off and confidentiality

In the 1st round of MEs, Botswana was rated largely-compliant with the requirements of this Recommendation. The provision on the prohibition of tipping-off was found to be unclear by the assessors and that the prohibition can be uplifted once the investigation has been concluded (pages 77, 78, 80) . The deficiencies have not been addressed.

Criterion 21.1 (Not met) S.26 of the FI Act provides that no civil or criminal proceedings shall lie against any person for having reported in good faith, any suspicion he or she may have had or supplied any information to the FIA pursuant to a request made. S. 26(2) states that no evidence concerning the identity of a person who has made, initiated or contributed to a report or who has furnished additional information concerning the report shall be admissible as evidence in

⁴⁴ a) Anti-Money Laundering and Counter-Terrorist Financing Measures Italy –MER 2016 pg. 169

b) Anti-Money Laundering and Counter-Terrorist Financing Measures Australia –MER 2015 pg. 166

proceedings before a court. On the other hand, contrary to the above provision, s. 43 of the Banking Act subjects directors, principal officers, officers, employees or agents of a bank or any other person having access to records of a bank to secrecy obligations. S.43 (12) of the Act provides that any person who acts in breach of this shall be guilty of an offence and liable to a fine of P10,000 and to imprisonment of 3 years. The FI Act does not contain a secrecy overriding provision.

Criterion 21.2 (Not met) S. 25 (3) prohibits a person involved in the reporting under this Part to disclose to the person involved in the transaction or to an unauthorized third party that the transaction has been reported to the FIA or that the FIA has requested for further information. However, there is no provision which prohibits a financial institution, director, officer and employees other than the person involved in reporting an STR from disclosing that an STR or related information is being submitted to FIA.

Weighting and Conclusion

Botswana has not met both criteria. Banks and all those acting on their behalf do not seem to have legal immunity in view of s. 43 of the Banking Act. This has a negative impact on the effective implementation of the FI Act and compliance with FATF Recommendations considering that the banking sector handles the majority of financial transactions out of all reporting entities. The tipping off provision is limited to the person who is involved in reporting an STR only. The materiality of these deficiencies is quite significant.

Botswana is rated *non-compliant* with R. 21.

Recommendation 22 – DNFBPs: Customer due diligence

In the 1st round of MEs, Botswana was rated non-compliant with the requirements of this Recommendation. The main deficiency was that DNFBPs were not subjected to any of the AML/CFT preventive measures set out in the Recommendation (page 106). The FI Act which was passed in 2009, now includes DNFBPs as reporting entities subject to AML/CFT obligations.

Preamble: Scope of DNFBPs

In terms of the 1st Schedule to the FI Act, the following types of DNFBPs are included in the list of specified parties: Casinos, Real Estate Professionals, Dealers in precious stones, Dealers in semi-precious stones, Attorneys, Lottery Providers, Accountants and Car Dealers. However, Dealers in Precious Metals and independent Trust and Company Service Providers (TCSPs) are not covered. Just like financial institutions, the DNFBPs covered by the FI Act are subject to CDD measures as required under R. 10. These obligations are applicable to all reporting entities irrespective of the amount.

Criterion 22.1 (Not met). S. 10 of FI Act set out CDD requirements for reporting entities, including DNFBPs. The obligations are not subject to any threshold. However, a full range of CDD requirements is not covered (see R.10 for the analysis of the deficiencies). In addition, Dealers in precious metals and Trust and Company Service Providers are not designated reporting entities under the FI Act.

Criterion 22.2 (Not met) Pursuant to ss. 11-16 of FI Act all the DNFBPs (excluding those not covered by FI Act) are required to comply with record-keeping obligations as described above under R.11.

However, a full range of documents listed under R.11 is not covered (see R.11 for the analysis of the deficiencies).

Criterion 22.3 (Not met) The scope of AML/CFT legal framework in Botswana does not include obligations in relation to PEPs. So, all DNFBPs are not under obligations to comply with requirements set out in R. 12.

Criterion 22.4 (Not met) There are no requirements to comply with this criterion, and the authorities have not provided any guidance to DNFBPs with respect to ML/TF risk assessment for new services and products. Furthermore, the DNFBPs do not identify and assess ML/TF risks associated with new products and new business practices.

Criterion 22.5 (Not applicable) The DNFBPs are not permitted to use third party DNFBPs to undertake CDD on their behalf. Therefore, this criterion is not applicable to Botswana. R. 17 is also rated *not applicable* to Botswana.

Weighting and Conclusion

Botswana has not met all the criteria under this Recommendation. Although Botswana's AML/CFT legal framework covers obligations of DNFBPs in relation to CDD and record keeping, the provisions are deficient. In addition, the legal framework does not extend to PEPs and new technologies. The deficiencies are considered to be significant.

Botswana is rated *non-compliant with R 22*.

Recommendation 23 – DNFBPs: Other measures

In the 1st round of MEs, Botswana was rated non-compliant with the requirements of this Recommendation. The main deficiency was that no AML/CFT provisions existed.

Criterion 23.1- (Partially compliant) All entities listed in the 1st Schedule, in terms of s. 17(1) of the FI Act have an obligation to report suspicious transactions to FIA. However, there are deficiencies as discussed under R. 20 which also impact on DNFBPs (for details, see analysis of the deficiencies under R. 20). In addition, dealers in precious metals and Trust and Company Service Providers (other than attorneys and accountants) are not listed as reporting entities in the 1st Schedule and therefore are not covered by s. 17 requiring reporting of suspicious transactions.

Criterion 23.2 (Largely met) S. 9 of the FI Act, provides for obligations for reporting entities in relation to internal controls, including appointment of compliance officers at management level, screening procedures, ongoing training, and independent audit function. However, there are no requirements to implement group-wide programs against ML/TF risks to all branches and subsidiaries of the group and to ensure that the foreign branches and majority-owned subsidiaries apply AML/CFT measures which are consistent with the home country requirements, where the requirements of the host country are less strict. Considering, that the DNFBPs operating in Botswana do not have foreign branches or majority-owned subsidiaries, these deficiencies are not considered to be material.

Criterion 23.3- (Not met) Botswana does not comply with any of the requirements under high risk countries, therefore it does not meet any of the criteria under this Recommendation (see analysis under R. 19 for details on deficiencies).

Criterion 23.4 (Largely met) S. 26 of the FI Act provides that no civil or criminal proceedings shall lie against any person for having reported in good faith, any suspicion he or she may have had or supplied any information to the FIA pursuant to a request made. However, there is no provision which prohibits a DNFBP, director, officer and employees other than the person involved in reporting an STR from disclosing that an STR or related information is being submitted to FIA [s. 25(3) of FI Act].

Weighting and Conclusion

The preventive measures on suspicious transaction reporting, internal controls, tipping off and legal immunity set out in the FI Act, also apply to DNFBPs. However, there are some deficiencies in the Act with respect to these areas. For instance, tipping off obligations are only limited to persons involved in handling an STR. In addition, the legal framework does not cover obligations in relation to high risk countries, the legal framework does not provide for the application of countermeasures proportionate to the risks when called to do so by the FATF and independently of any call by the FATF (R. 19). There is also no mechanism for DNFBPs in Botswana to be advised of concerns about weaknesses in the AML/CFT systems of other countries [for details see Recs 18, 19, 20 and 21].

Botswana is rated *partially compliant* with R 23.

Recommendation 24 – Transparency and beneficial ownership of legal persons

In the 1st Round of Mutual Evaluations, Botswana was rated non-compliant with this Recommendation mainly due to requirements of the Companies Act not being enforced, information maintained in the registry not being up to date and the possibility of use of nominee directors and shareholders (110-112). There have been no significant amendments to the Companies Act to address the deficiencies.

Criterion 24.1 (Partially met) Information on the different types of legal persons which can be formed in Botswana is provided in s. 19 (2) of the Companies Act Cap. 42:01. The kind of legal persons which can be formed have already been described in paragraph 96 at page 38 of this report⁴⁵. A company created which is limited by shares or guarantee has to be either a private company or a public company, and a company limited by shares or by guarantee has to be a public company unless its application of incorporation or constitution specifically states that it is a private company. An application for the creation or registration of a company has to be made to the Registrar of Companies on a prescribed form, signed by each applicant and meet all the other requirements set out in ss. 19- 21⁴⁶ of the Companies Act, including obtaining a declaration of

⁴⁵ A company limited by shares; a close company; or a company limited by guarantee

⁴⁶ Requirements for incorporation include a company having: a name; one or more shares in the case of a company limited by shares; one or members in the case of a close company or a company limited by guarantee; one or more directors in the case of a private company and two or more directors in the case of a public company; and a secretary for all companies other than a close company and an accounting officer if it is a close company (s. 19); any person either alone or with another person can apply for registration of a company (s. 20); the application for registration has to be made to the registrar in a prescribed form; signed by each applicant; accompanied, in the case of a company other than a close company, by a document in the prescribed form signed by every person named as a director or secretary, containing his consent to be a director or secretary and a certificate that he is not disqualified from being appointed or holding office as a director or secretary of a company and providing the identity number of the director ; in the case

compliance from the person engaged in the formation of the company confirming that the application complies with the requirements of the Companies Act, which apply to formation of all the three types of companies which can be created in Botswana. S. 21 adequately covers the requirements of obtaining basic information when creating a company in Botswana but not on beneficial ownership. There are no requirements to obtain beneficial ownership information on legal persons under Botswana laws, even for reporting entities when establishing a business relationship with a legal person. The basic information obtained by the Companies Registry is publicly available.

Criterion 24.2 (Not met) The authorities have not done a ML/TF risk assessment to determine the kind of risks associated with the legal persons created in Botswana. During the on-site visit the Registrar of Companies explained to the assessors that their role ended with incorporating the company and thereafter, they did not engage the companies to see what they were doing. According to the Registrar, the registry had been engaged by FIA around February 2016 and after that, they now had a 'bit of light' on ML/TF risks but not necessarily applying them specifically to legal persons.

Criterion 24.3 (Met) S. 10 of the Companies Act creates the position of the Registrar of Companies, who is responsible for administering the Companies Act. A company intending to be incorporated in terms of the Companies Act is required to provide information described in footnote 33, above. A certificate of incorporation issued in terms of s. 22 as read with s. 23 serves as evidence that all the requirements of the Companies Act have been met and from the date of incorporation recorded on the certificate that the company is incorporated in terms of the Act. In terms of s. 182, all companies should have a registered office in Botswana. Once registration has been done all the above information is accessible to members of the public (s. 13).

Criterion 24.4 (Met) S. 186 of the Companies Act requires companies to maintain information set-out in Criterion 24.3 and under this criterion, at their registered offices⁴⁷ or at any other place which is notified to the Registrar (in terms of s. 186(4)). In terms of s. 83, companies having a share capital are required to maintain a share register and companies which do not have a share capital are required to keep a register of members. Information contained in the share register includes the

of a close company, a document in the prescribed form signed by every person named as a member, containing that person's consent to being a member and stating the particulars required by section 248(4); in the case of a company limited by guarantee, a document signed by each person named as a member, or by an agent of that person authorised in writing, containing that person's consent to be a member and stating a named amount up to which the member undertakes to contribute to the assets of the company, in the event of its being wound up while that person is a member, or within one year after ceasing to be a member, for payment of the debts and liabilities of the company contracted before that person ceases to be a member; if the document has been signed by an agent, the instrument authorising the agent to sign it: a notice reserving a name for the proposed company and a document certified by one of the applicants as the company's constitution. The application has to state: the full names and address of each applicant; full name and residential address of each director and the secretary; full and residential address of every shareholder or member; if it's a company limited by shares, the number of shares to be issued to every shareholder and amount to be paid or other consideration to be provided by the shareholder for the issue of the shares; whether the company is a private company or close company; the registered office and physical address of the principal place of business of the company. The application has to be accompanied by a declaration of compliance with the provisions of the Companies Act made by a legal practitioner, a chartered accountant, Chartered secretary, or any other person prescribed by the Minister (s. 21) who will have been engaged in the formation of the company.

⁴⁷ S.182 requires a company to have a registered office in Botswana in order to satisfy delivery of communication and notices, and address for service of legal proceedings on the company

names, latest known address of a person who is a shareholder or who has been a shareholder within the last seven years, number of shares of that class held by each shareholder within the last seven years, the date of issue of the shares and the movement of the shares. The register of members contains information on the names and addresses of the members, the date each person was entered into the register as a member and the date of ceasing to be a member.

Criterion 24.5 (Met) Companies are required under the Companies Act to notify CIPA upon changes being made on shareholding, reduction of capital, changes in the name or residential address of a director or secretary of a company, and change of registered office within a period of 10 to 21 working days and also to file annual returns informing the Registrar of any changes which might have occurred in the company relating to the information listed under criteria 24.3 and 24.4⁴⁸.

Criteria 24.6-24.9 (Not met) Botswana has got no mechanisms complying with requirements under criteria 24.6, 24.7, 24.8 and 24.9 on obtaining of information on beneficial ownership of a company by that company, FIs, DNFBPs or by any other competent authority, and for it to be kept available at a specific location in the country, or for it to be determined in a timely manner by the competent authorities and for that information to be accurate and kept up-to-date as possible.

Criterion 24.10 (Largely met) The competent authorities in Botswana, particularly law enforcement agencies have powers to obtain basic and beneficial ownership information from competent authorities and other reporting entities. The officers from the BPS, BURS and DCEC, upon obtaining proper authorisation from the Commissioner of Police, Director of Customs and Director of the DCEC, respectively, can in terms of s. 58 of the PICA issue information notices to all reporting entities requesting for information on any confiscation offence (any offence under the laws of Botswana) which should be provided within 3 days. The information obtained by LEAs, however, does not include beneficial ownership information as there is no requirement under the laws of Botswana to obtain such information.

Criterion 24.11 (Not met) In terms of s. 52 of the Collective Investment Undertaking Act Cap 56:09, a management company, or investment company, or a trustee can issue registered certificates or **bearer securities**. However, the same Act does not define what bearer securities are, but can be issued representing one or more portions of the collective investment undertaking which it manages, or alternatively, in accordance with the provisions of the trust deed or articles, written confirmations of entry of units or fractions of units in the register without limitation as to the splitting up of the units. There are no requirements to ensure that these bearer securities are converted into registered shares or share warrants, or required to be held with a regulated financial institution or professional intermediary or to use other mechanisms identified by Botswana.

Criterion 24.12 (Not Met) Although, the provisions of s. 152(1) allow appointment of nominee directors, there are no provisions requiring such appointees to disclose the identity of their nominator or ultimate beneficiary to the company or to any relevant registry, nor is there a requirement for them to be licensed or any other mechanisms identified to regulate such appointments.

Criterion 24.13 (Not met) The sanction provided under the Companies Act for failure to notify CIPA of any changes after incorporation is a fine not exceeding Pula 10,000 or not exceeding Pula 20,000

⁴⁸ Ss. 50(4); 51(3),(4);155(2)(d);175(3);& 184(2) of the Companies Act Cap. 42:01

(ss. 492(1),(2) & 493(1)). The fact that there are no provisions of the law effectively dealing with issues of transparency and beneficial ownership of legal persons makes any penalties provided by the Companies Act or any other law, insignificant as there are major deficiencies with the legal and institutional frameworks currently in existence in Botswana relating to transparency and beneficial ownership of legal persons. Even where the Companies Act has provided sanctions for breaches by companies to update information on changes in their companies, the sanctions (as cited above) are insignificant to be proportionate and dissuasive.

Criterion 24.14 (Partially met) The Mutual Assistance in Criminal Matters Act provides the Central Authority on MLA, the DPP with wide powers to provide mutual legal assistance which might include any MLA on information relating to basic and beneficial ownership information. The provisions have been used to obtain beneficial ownership only in one case⁴⁹. There are no specific provisions facilitating access by foreign competent authorities to basic information held by the Registrar of Companies. Although, the DCEC can use ss. 7 & 8 of the Corruption and Economic Crimes Act to obtain information on crimes under investigation, and the BPS, BURS and DCEC can use the provisions of s. 58 of PICA to issue information notices to all reporting entities requesting for information relating to any confiscation offence, there are no legal provisions expressly providing LEAs with powers to obtain beneficial ownership information on behalf of their foreign counterparts.

Criterion 24.15 (Partially met) Although, there is no formal framework of monitoring the quality of assistance requested from other countries on basic or beneficial ownership information, the requirements of the Companies Act (described in 23.3 & 23.4, above) adequately mitigate this deficiency in as far as basic information on legal ownership of companies is concerned as they are comprehensive enough but not on beneficial ownership. The same provisions of the Companies Act can be used to monitor the quality of assistance on basic information received from other countries. The DPP which is the central authority for MLA, although this is not being done, can use its general legal framework provided under the Mutual Assistance in Criminal Matters Act to determine the quality of the assistance received on requests for basic information, although it might be constrained when it comes to monitoring the quality of assistance requested or received relating to beneficial ownership information.

Weighting and Conclusion

Botswana meets criteria 24.3, 24.4 and 24.5. It largely meets criterion 24.10. It partially meets criteria 24.1, 24.14 and 24.15. It does not meet criteria 24.6 to 24.9, and 24.11 to 24.13.

Botswana is rated *non-compliant* with R. 24.

Recommendation 25 – Transparency and beneficial ownership of legal arrangements

In the 1st Round of Mutual Evaluations, Botswana was rated non-compliant with this Recommendation mainly due to information on beneficial ownership of trusts not being accurate, current and accessible in a timely fashion (pages 112-113). The authorities have not yet addressed these deficiencies.

⁴⁹ See description given under IO 5 (d).

Criterion 25.1 (Not met) There is no requirement for trustees of express trusts or any other type of trust existing in Botswana to obtain adequate, accurate, and current information on the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust. Further, there is no authority or mechanism which governs the registration of trusts and hence the above information is not obtained. Trusts can however be registered with the Registrar of Deeds for the trust deed to be recognised under common law. In such circumstances, the Registrar only scrutinises the objectives of the trust to see if they are not in violation or conflict of any laws of Botswana and requires the Notary Public to lodge copies of identification of the trustees only as supporting documents to the registration. Trustees of any trust in Botswana are also not required to hold basic information on other regulated agents, and service providers to the trust, including investment advisors or managers, accountants, and tax advisors. There were no decided cases provided by the authorities to assist the assessors to determine the obligations of the trustees under common law as practiced in Botswana. There is no requirement for any of the reporting entities to obtain and maintain any kind of information on trusts.

Criterion 25.2 (Not met) There are no requirements to ensure that any information held pursuant to legal arrangements is kept accurate, up to date and is updated on a timely basis.

Criterion 25.3 (Partially met) There is no requirement for trustees to disclose their status to FIs and DNFBPs when forming a business relationship or carrying out an occasional transaction above the threshold.

Criterion 25.4 (Met) There are no specific laws or enforceable means preventing trustees from providing information on trusts to competent authorities or FIs and DNFBPs upon request.

Criterion 25.5 (Largely met) The DCEC in terms of ss. 7 & 8 of the Corruption and Economic Crime Act has powers necessary to obtain timely access to information held by trustees and any other parties on the beneficial ownership and control of a trust, including: the beneficial ownership; residence of the trustee; any assets held or managed by the FI or DNFBP, in relation to any trustees with which they have a business relationship, or for which they undertake an occasional transaction. In terms of s. 58 of the PICA, members of the BPS upon authorisation by the Commissioner of Police, a customs officer upon authorisation by the Director of Customs, and a person authorised to conduct an inquiry or investigation in terms of s. 7 of the Corruption and Economic Crimes Act above and has been authorised by the Director of the DCEC who are then referred to as prescribed investigators, can issue information notices requesting reporting entities to provide information on any confiscation offence (which is an offence under the laws of Botswana). However, the deficiency is that not trustees, FIs and DNFBPs are required by law to obtain information on the beneficial ownership and control of trusts.

Criterion 25.6 (Not met) Although, the DPP in terms of the Mutual Assistance in Criminal Matters Act has wide powers to provide mutual legal assistance which might include any MLA on information relating beneficial ownership information on trusts, such information is not obtained by any of the competent authorities as a prerequisite. However, the Registrar of Deeds through some of the registered express trusts might have such information in the Deed of Trust but this might not be always the case. There are no specific provisions facilitating access by foreign competent authorities to basic information held by the Deeds Registry, other domestic authorities, or reporting entities. Although, the DCEC can use s. 7 & 8 of the Corruption and Economic Crime

Act to obtain information on crimes under investigation, and the BPS, BURS and DCEC can use the provisions of s. 58 of PICA to issue information notices to all reporting entities requesting for information relating to any confiscation offence, there is no law expressly providing for these domestic investigative powers to be used by these LEAs to obtain beneficial ownership information on behalf of their foreign counterparts or exchanging domestically available information on trusts with foreign counterparts. The authorities were not clear however, on whether these general powers in practice, can be used by the different LEAs to facilitate access by foreign competent authorities to information held by the Deeds Registry on trusts.

Criterion 25.7 (Not met) Botswana being a common law jurisdiction and not having any set legal framework to regulate trusts, the authorities could not assist the assessors with any decided cases to help them determine the obligations of the trustees under common law as practiced in Botswana.

Criterion 25.8 (Partially met) S. 16(5) as read with ss. 16(7) and (8) of the FI Act provides sanctions of a fine not exceeding P100 000 or to imprisonment for a term not exceeding five years or to both for reporting entities which fail to grant to an investigatory authority timely access to information regarding the trust referred to in criterion 25.1. The scope of the sanctions, or civil or administrative measures which could be taken is limited as it does not cover trustees.

Weighting and Conclusion

Botswana does not have any legal framework or other mechanisms requiring trustees of any express trust to obtain and hold adequate, accurate, and current information on the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and other natural person exercising ultimate effective control over the trust. It is also not the case that for registered trusts, the Deeds Registry would also have the full details on the trust as it is not required by law to obtain this information upon registration of a trust. In addition FIs and DNFBPs are not required to obtain information on beneficial ownership and control of trusts. The Deeds Registry could be encouraged to obtain this information upon registration of trusts which could provide a central point to access such information. There are no specific provisions enabling access by foreign competent authorities to basic information held by the Deeds Registry, exchanging domestically available information on trusts and use by competent authorities of their domestic investigative powers to obtain beneficial ownership information on behalf of foreign counterparts. Trustees have no obligation to disclose their status to FIs and DNFBPs. Overall the legal and institutional framework on trusts and trust information in Botswana is still very weak.

Botswana is rated *non-compliant* with Recommendation 25.

Recommendation 26 – Regulation and supervision of financial institutions

In the 1st round of MEs, Botswana was rated non-compliant with the requirements of this Recommendation. The main reasons for the rating were that there was no clarity on the designation of competent authorities, absence of licensing requirements for insurance companies and MVTs, and absence of monitoring and compliance checking for all MVTs (pages 86 – 104). Most of the deficiencies have still not been addressed.

Criterion 26.1 (Met) S. 2 of the FI Act defines a “supervisory authority” as a person listed in the Second Schedule to this Act except that the FIA shall act as a supervisory authority for a reporting entity that does not have a supervisory authority. The second schedule of the FI Act lists the BoB established under the Bank of Botswana Act and NBFIRA established under the NBFIRA Act as designated supervisors. S. 27(1)(a) of the FI Act states that a supervisory authority shall regulate and supervise a reporting entity for compliance with the Act including through on-site examinations.

Market Entry

Criterion 26.2 (Largely met)

Core principles financial institutions:

All financial institutions subject to core principles are licensed in Botswana to provide financial services. Other financial institutions except for MVTs are licensed to carry out the business of providing financial services.

Conducting a business of banking – All banks must apply for and be granted a license to operate a banking business by BoB in fulfilment of the licensing requirements set out in s. 3 of the Banking Act under which licensing requirements are being applied. The Act criminalises a conduct of operating a bank without a license, and attracts monetary and custodial sanctions. There is no specific law in Botswana which prohibits establishment or continued existence of shell banks. However, the process of licensing and authorising establishment of a bank does not provide room for shell banks to exist. At the time of the on-site visit, there was no shell bank operating in Botswana.

Non-bank financial institutions – NBFIs (insurers, securities, pension and investment funds and lending activities) must receive approval to provide any of the non-bank financial service by NBFIRA in terms of ss. 42 and 43 of the NBFIRA Act. There are sanctions for providing such a financial service without a duly approved license. MVTs are not being licensed or registered by any regulator, with BoB only issuing a letter of no objection in the absence of a legal or regulatory framework for licensing purposes.

Bureau de change – Section 30 of the Bank of Botswana Act requires money or currency changing service providers to receive a license for operations. There are sanctions for conducting a business of buying and selling foreign exchange without a valid license from the BoB.

Citizen Entrepreneurial Development Agency (CEDA) and Botswana Development Corporation (BDC) – They are state-owned agencies which are licensed by the Ministry of Trade and Industry to provide development funds (lending) to Botswana and are registered with CIPA. They fall under the First Schedule to the FI Act as a reporting institution.

Savings and credit societies – are engaged in the business of accepting deposits from their members and advancing loans to their members only, and are under the regulatory purview of the Department of Cooperatives at the Ministry of Investment, Trade and Industry.

Criterion 26.3 (Largely met)

Banks - S. 29(1) of the Banking Act and its Regulations provides for fit and proper requirements of principal officers to be determined by boards of directors of banks (s.2 defines principal officers as chief executive officer, or other person, by whatever title he may be referred to, who is, subject to

the directions of the board of directors, responsible for the day to day management of the affairs of the bank). However, the self-certification is done as a preliminary exercise prior to submission of the application to BoB. The Bank undertakes 'fitness and propriety' checks for all members of the boards of directors of supervised banks, the results of which are used to either approve or reject an applicant.

Under the same fit and proper requirements, BoB can revoke a licence if the bank's shareholders, board of directors and principal officers are exercising their influence in a manner that is detrimental to the interest of depositors [s.29 (2-3)]. S. 29(4) provides for the fit and proper requirements of only directors of banks to be determined by BoB. S.30, further provides for the disqualification of directors, principal officers and management of a bank, if they are convicted of an offence involving fraud and act of dishonesty after the bank has started operations.

The fit and proper requirements are further detailed in the Banking Act Regulations 3, which requires the details of directors, principal officers and shareholders to be furnished in an application for a licence. However, the banks licensing policy states that BoB may conduct background investigations of the directors, executive officers and controlling shareholders as it deems fit which may include credit and security checks. Although in practice, BoB advised that it conducts criminal checks on prospective directors, senior management and shareholders who hold shares of 5 percent or more, the licencing policy does not explicitly compel BoB to conduct background checks on all directors, shareholders and management of banks, as this might mean that BoB conducts selective verification of fit and proper assessments. The same standards are also applied on new shareholders, directors and management who wish to join or acquire significant shareholding in a financial institution subsequent to the licensing stage.

Non-Bank Financial Institutions - S. 50(2) of the NBFIRA Act provides that a prudential rule may impose requirements with respect to fit and proper person requirements for controllers and managers of prudentially regulated non-bank financial institutions. These fit and proper requirements are set out in all sectoral licensing rules which require NBFIs to request approval for the appointment of controllers. S 4(1) of the NBFIRA Act, defines a controller as a person who is in a position to control or exert significant influence over the business or financial operations of the relevant person including a person that holds at least 20% of the shares of the body corporate and a person that has the power to control at least 20% of the voting rights. Fit and proper requirements set out in licensing rules include background checks for, inter alia, criminal record of senior management, directors and significant shareholders. The same standards are also applied on new shareholders, directors and senior management who wish to join or acquire significant shareholding in a financial institution subsequent to the licensing stage.

Bureau de change – S. 30(1) of Bank of Botswana Act states that an application to transact foreign exchange business shall be in the prescribed form and shall be accompanied by such documentation and any additional information deemed necessary. Regulation 3 requires curriculum vitae of principal officers, owners, partners or directors of bureau de change and Regulation 5(2)(e) requires BoB to approve any change in the composition of shareholders and principal officers. Regulation 10 provides for the revocation of a licence if the owner of the bureau de change has been convicted of a criminal offence.

Money remitters – As detailed in c. 26.2, there is no legislation or regulatory measure relating to licensing/registration including fit and proper requirements regarding MVTs providers.

Risk-based approach supervision and monitoring

Criterion 26.4 (Not met) When supervising and monitoring core principles institutions and all other financial institutions, supervisors have no regard to any type or form of ML/TF risk that might be present in the FIs. Under the FI Act, financial sector supervisory authorities have and apply their responsibilities to supervise and monitor FIs primarily for compliance with licensing and prudential requirements. While supervisors apply risk-based supervision, the focus does not cover ML/TF risk factors. The supervisors require FIs to have in place internal control and governance frameworks which are generally approved by senior management and board committees. They also provide for policies, procedures and process relating to, amongst others, KYC and transactions reporting. The supervisory actions conducted in internal controls and governance framework are biased towards prudential compliance and, where they cover AML issues, the scope, frequency and intensity are insignificant. The assessors identified that there appears to be adequate authority for BoB and NBFIRA to carry out group-wide monitoring and supervision oversight, however there is no proof of existence and demonstrated application of any arrangement and/or procedure to do so.

Criterion 26.5 (Not met) Botswana has not yet adopted AML/CFT risk-based supervision and therefore the frequency and intensity of on-site and off-site inspections is not guided by ML/TF risks or policies, internal controls and procedures or ML/TF risks present in the country.

Criterion 26.6 (Not Met) - In the absence of any assessment of ML/TF risk profile of financial institutions in Botswana, there can be no review of the assessment of the risk profiles by the supervisors as well as when there are major events or developments in the management and operations of the financial institution or group, on a risk sensitive basis.

Weighting and Conclusion

Botswana has met c. 26.1, largely met c. 26.2 - c. 26.3, and does not meet criteria 26.4 - 26.6. Botswana has designated supervisory bodies for AML/CFT under the FI Act. There are minor deficiencies in relation to market entry requirements. By contrast, there are major deficiencies in relation to AML/CFT supervision in the absence of a risk-based approach. As a consequence, BoB and NBFIRA are largely still focused on prudential risks and therefore are yet to adequately conduct AML/CFT supervision and monitoring on a risk-based approach. The FIA has not yet conducted any supervision on the MVTS providers. The lack of supervision on a risk-based approach is a major deficiency under this Recommendation.

Botswana is rated ***non-compliant*** with R. 26.

Recommendation 27 – Powers of supervisors

In the 1st round of MEs, Botswana was rated largely compliant with the requirements of this Recommendation. The major deficiencies identified by the assessors included lack of a clearly designated authority empowered to apply sanctions, lack of implementation and enforcement action (pages 101-103). Most of the deficiencies have been addressed.

Criterion 27.1 (Met) Ss. 27(1)(a) and 4(2)(d) of the FI Act provide AML/CFT supervisory powers to BoB and NBFIRA and the FIA for compliance with AML/CFT requirements.

Criterion 27.2 (Met) Ss. 16(1), 16(2), 27(1)(a) and Regulations 26(1) of the FI Act give authority to supervisors to conduct AML/CFT inspections to determine compliance by financial institutions with requirements.

Criterion 27.3 (Largely met) Section 16 of the FI Act gives an examiner of the FIA or supervisory authority access to any records and may make extracts from or copies of any such records. It further empowers the supervisors at any time to cause to be carried out on the business premises of a financial institution an examination and audit of its books and records to check whether the financial institution is complying with AML/CFT requirements under the FI Act, or any guidelines, instructions or recommendations issued under this Act. Furthermore, Regulation 26(2) provides that a person shall, when requested under sub regulation (2) by the FIA or supervisory authority to do so, produce every security, book, records, accounts or documents of a reporting entity to which such person has access and shall, at the request of the FIA or supervisory authority, provide any information at such person's disposal relating to the affairs of the reporting entity. The powers of the inspector to have access to information or compel production of any information do not extend to banks as described under R.9, and this represents a material deficiency in relation to access to information held by banks licensed by BoB for determining compliance.

Criterion 27.4 (Partially met) Ss. 9(3), 10(5), 15(1), 18(2), 21(2), 25(1)(a)-(c), and 27(2)(a)-(b) of the FI Act provide for disciplinary and financial sanctions including the power to suspend or revoke the FI's license. The Act does not provide for criminal sanctions to cater for serious violations. In most cases, the fines are levied against the financial institution do not include directors and senior management of the institution. Some fines are considered too small, ranging from about P10 000 (USD1000.00) to P50 000(USD 5000.00) to discourage entities from non-compliance behavior. For this purpose, the sanctions are not proportionate and dissuasive as required under Recommendation 35.1.

Weighting and Conclusion

Botswana meets criteria 27.1 to 27.2, largely meets c. 27.3 and partly meets criterion 26.4. Botswana has powers to supervise and ensure compliance with the FI Act and there are no restrictions or conditions which may impede onsite inspections including production of documents other than limitations relating to inspectors described in R. 9. However, there are no criminal sanctions against serious violations of the FI Act. In addition, most fines apply to the financial institutions, leaving out their directors and senior management. The shortcomings are considered to be minor.

Botswana is rated *largely-compliant* with R. 27.

Recommendation 28 – Regulation and supervision of DNFBPs

In the 1st round of MEs, Botswana was rated non-compliant with the requirements of this Recommendation. The main deficiency was that no AML/CFT provisions applicable to DNFBPs existed (pages 107 - 108). This has been partly addressed.

Criterion 28.1 (Met) Casinos are required to be licensed by the Gambling Authority in terms s. 9(1) of the Gambling Authority Act, and subject to AML/CFT regulation and supervision by the same Authority. Ss. 85 and 86 of the Gambling Authority Act provides for the licensing of employees classified as key employees (directors and management) to make an application for an employee licence to the Authority, in Form 42 set out in Schedule 11 of the same Act. Form 42 requires determination of a criminal offence to be verified by obtaining original set of fingerprints from the

Botswana Police Service and criminal clearance from a law enforcement agency in the country of origin, in respect of foreign applicants. S.371 (b) of the Gambling Authority Act provides for integrity of directors, owners, management and shareholders of casinos which includes police criminal checks. In terms of the Second Schedule of the FI Act, casinos fall under the supervision of the Casino Control Board (now called the Gambling Authority under the new law) for compliance with AML/CFT requirements.

Criterion 28.2 (Partially met) The Law Society of Botswana (lawyers, notaries and conveyancers), Real Estate Advisory Council (real estate business), Botswana Institute of Accounts (accountants) and Casino Control Board (casinos) are designated supervisory authorities to monitor compliance with the FI Act. There is no supervisor for dealers in precious metals, as they are not covered as reporting entities for AML/CFT purpose.

Criterion 28.3 (Not met) There are no requirements for supervisors to have systems in place to monitor AML/CFT compliance of reporting entities.

Criteria 28.4 (Not met) With the exception of the Casino Control Board, the rest of the DNFBP regulators do not have the necessary measures to prevent criminals or their associates from holding (or being a beneficial owner) or significant shareholding or holding a management function in a DNFBP. As detailed in c. 27.4, sanctions that supervisors have in terms of the FI Act are not proportionate and dissuasive as required under criterion 35.1.

Criteria 28.5 (Not met) Supervision of DNFBPs for AML/CFT compliance has not started and therefore there is no monitoring on a risk-based approach.

Weighting and Conclusion

With the exception of casinos, it was not clear what legal or regulatory measures the other DNFBP regulators have to prevent criminals or their associates from holding a significant or controlling interest. The authorities have not carried out a risk assessment of the DNFBP sector to inform development and implementation of AML/CFT risk-based supervision. In addition, the DNFBP sectors are yet to undertake supervisory action due to capacity constraints. The deficiencies are significant and pose vulnerability to the DNFBP sector.

Botswana is rated *non-compliant* with R. 28.

Recommendation 29 - Financial intelligence units

In the 1st round of MEs, Botswana was rated NC on this requirement. At that time there was no FIU and suspicious transactions were reported to the BoB and the DCEC (pages 37 – 41). Botswana has a legal framework to establish and operationalise an FIU. However, there exist some significant deficiencies in relation to STR filing obligation by banks and constrained access to information by the FIA based on some of the provisions of the Banking Act.

Criterion 29.1.(Met) Botswana established the FIA in terms of S. 3 of the FI Act, and has been operational since February 2014 as a national centre responsible for receipt and analysis of STRs and other information relevant to ML, TF and associated predicate offences; and for dissemination of the results of the analysis to LEAs.

Criterion 29.2 (Not met) S. 4 of the FI Act provides for the FIA as a central national agency responsible for receipt of disclosures of information from reporting entities including suspicious

transactions and other reports. However, for STRs from the banking sector, the FIA is not a central agency as the same reports must be filed to the BoB under s.21 (4) of the Banking Act. It is in this regard that the BoB wrote all banks in September 2014 advising them to stop sending STRs to the Central Bank.

Criterion 29.3 (Partially met) S. 28 (1) of FI Act empowers the Director of the FIA to obtain further information from reporting institutions, supervisory authorities, investigatory authorities and any other administrative agencies of Government for purposes of carrying out analysis. The information is supposed to be provided without a court order. However, banks would be constrained by S.43 of the Banking Act which imposes secrecy obligations on them.

Criterion 29.4.(Partially met) FIA, through its monitoring and analysis department, is responsible for carrying out operational analysis. Initially, FIA carried out the analysis manually but later acquired the GoAML system in 2014. The FIA is able to follow the trail of particular transactions or activities and determine links between targets and possible proceeds of crime, money laundering and terrorist financing. However, FIA has not yet started carrying out strategic analysis and no staff is trained in this aspect.

Criterion 29.5 (Partially met) In terms of S. 4(2), FIA has mandate to submit its financial intelligence reports after it has conducted its analysis to LEAs for investigations. However, the legal framework does not cover requests for information from FIA by LEAs to support investigations. The LEAs can get information held by reporting entities through a court order as provided under s.16 (7) of the FI Act. The disseminations from FIA to LEAs are done using dedicated, secure and protected channels.

Criterion 29.6 (Met) S. 33 of the FI Act provides for access for FIA's information by authorised persons only. Before commencing their duties, the Director and officers of FIA are vetted by the DIS in line with S.5 of the FI Act. In addition, the Director and officers take an oath of confidentiality when joining FIA and maintain that confidentiality as required under s. 34(1) of the FI Act. Further, access to the FIA's offices is limited through use of biometric gadgets and CCTV cameras are installed in all strategic points of the offices as a security measure and to check on access to various data. Offices of the monitoring and analysis department are accessed by the staff of that department and the Director, and in some instances ICT staff when needed to provide support. When STRs are received from specified parties, access is limited to the Director and in some cases the Chief Financial Analyst, and other analysts access the only STRs allocated to them. The officers of this department access their data through a shared drive which allows full access to general information and their work but no access to analysis by a member of the same department. The analysts are also not allowed to access internet from their own desks but through dedicated computers in a separate room accessed by members of the department only.

When disseminating financial intelligence, the FIA's Chief Financial Analyst hand-delivers the disseminations to another senior officer of a relevant LEA and they sign for that in the FIA's Reports Delivery Register. This process ensures that the information is only handled and accessed by the people concerned.

Criterion 29.7 (Met) S. 4(1) of FI Act provides that the FIA is responsible for receiving, analysing and disseminating disclosures of financial information to investigatory authorities, supervisory authorities or any comparable body. Furthermore, s. 3(4) says that the FIA shall not be subject to

the direction or control of any other person in the performance of its functions. S. 4(2)(g) of FI Act, further provides that the FIA can exchange information with a comparable body. The Director is appointed by the Minister, according to s. 3(2) of the FI Act, while the other officers are recruited by the Director following prescribed public sector recruitment procedures under Public Service Act. The Director develops an organogram for the Agency and details of the established positions to be filled at a particular time are communicated to the Directorate of Public Service Management. The FIA is a department under the Ministry of Finance and Development Planning (MFDP) but with distinct powers from those of the Ministry. It is appropriated its own funding annually by the government and the resources are expended independently. It is the only body in Botswana which may seek recognition by the Egmont Group or comparable body to exchange financial intelligence information on the basis of reciprocity and mutual agreement (s.31 of FI Act).

Criterion 29.8 (Not met) The requirement is sufficiently provided for but FIA is still processing an application for EGMONT membership. As part of the application process, Botswana has two sponsors – South Africa FIC and Malawi FIU.

Weighting and Conclusion

Considering the provisions of the FI Act described under criteria 29.1, 29.5 and 29.7, the FIA is adequately independent and resourced to carry out its operational functions. However, the FIA is not the central agency for the receipt of disclosures in respect of the banks as explained under c.29.2. Further, obtaining of additional information from the banks by the FIA is constrained by s.43(1) of the Banking Act. The FIA also does not conduct strategic analysis and has not unconditionally applied for EGMONT membership.

Botswana is rated **non-compliant** with R. 29.

Recommendation 30 – Responsibilities of law enforcement and investigative authorities

In the 1st Round of Mutual Evaluations, Botswana was rated partially compliant with this Recommendation. The main deficiencies noted by the assessors included there being no clear legal authority for the DCEC to conduct ML investigations and insufficient implementation of the current provisions to investigate ML (pages 42-45). The deficiency relating to lack of legal authority of the DCEC to investigate ML offences has been sufficiently addressed. Issues relating to implementation of the law will be dealt with under Effectiveness.

Criterion 30.1 (Largely met) S. 3 of the CECA establishes the Directorate on Corruption and Economic Crime (the Directorate) which is empowered in terms of s. 6 to investigate corruption and contravention of any provisions of the fiscal and revenue laws, and under s. 2 of the PICA, has prescribed investigators to investigate cases under the PICA which include the offence of ML. However, although fiscal and revenue laws are not defined under the CECA but defined in terms of s. 2 of the Botswana Unified Revenue Service Act, there is no cross-referencing to that definition under the CECA. Ss. 6 and 16(5) of the Police Act authorises the police to prevent and detect crime, to bring offenders to justice and enforce all written laws of Botswana, which would include the offences of ML/TF and the predicate offences of ML. Part IV of the Counter Terrorism Act designates investigating officers, who are defined under s. 2 of the same Act as being, “a member of the Botswana Police Service; a member of the Botswana Defence Force; and an officer of the Directorate of Intelligence and Security” to investigate any violations of the Counter Terrorism

Act, including the offence of TF. S. 29 of the Counter Terrorism Act empowers an examining officer, who is defined under s. 18 of the same Act as, “an immigration officer, customs officer as well as investigating officer” to question persons either arriving or leaving Botswana in order to determine whether there is reasonable suspicion supporting that the person is a terrorist and in doing so is authorised to stop or detain the person, ship, vehicle or aircraft.

Criterion 30.2 (Largely met) There is no general provision which provides LEAs with the responsibility to conduct parallel financial investigations. However, the CECA has general provisions (s. 6(c) and (d)) which allow the DCEC to investigate any matter involving any alleged or suspected contravention of any of the provisions of the fiscal and revenue laws of Botswana. Although this is limited to the fiscal and revenue laws, at least it gives the DCEC wide powers to investigate anything under these laws which can include carrying out parallel financial investigations. Sections 6 and 16 of the Police Act provides the BPS with general powers which can also be used to conduct parallel financial investigations.

Criterion 30.3 (Partially met) Although, there are no specific provisions designating one or more competent authorities to expeditiously identify, trace, and initiate freezing and seizing of property that is or may become subject to confiscation, or suspected to be proceeds of crime, different statutes which set up certain competent authorities have provisions which enable them to carry out some of the above processes but mostly for evidence gathering purposes. In terms of s. 34(2) of the Counter Terrorism Act, an examining officer, defined in terms of s. 28 of the same Act, can seize any article or thing for purposes of examination or if required in criminal proceedings. The CECA, in section 11 provides for an officer from the Directorate to search an arrested person or premises, and seize and detain anything which the officer believes to be or to contain evidence to any of the crimes committed under that Act. The Director of Public Prosecutions, in terms of s. 51 of the PICA, may apply for a production order for purposes of tracking or identifying or assessing the value of proceeds of crime. S. 57 of the Criminal Procedure and Evidence Act empowers the police to seize or take property affording evidence to the commission of an offence. However, apart from the DPP in terms of PICA and where he/she has applied for a production order and has been granted by the courts empowering LEAs to trace and identify proceeds of crime through enforcement of the order, there is no other competent authority directly designated to do expeditious identifying, tracing, and initiation of freezing and seizing of property that may be subject to confiscation. Most of the competent authorities including the police, only carry out searches and seizures as part of their ordinary police duties, which provides them with very limited scope to identify and trace property subject to confiscation as in most criminal investigations that might not be the end objective.

Criterion 30.4 (Met) The NBFIRA is the only competent authority outside the law enforcement authorities *per se* which is empowered in terms of s. 54 to appoint a person to be an investigator or inspector and, in terms of s. 56, to investigate contraventions of any of the financial laws, or any non-bank financial institution not complying or has not complied with any of the financial laws, or suspects that a person may have in his possession or under his control anything that may afford evidence relevant to the matter.

Criterion 30.5 (Met) S. 6(b) of the CECA authorises the Directorate to investigate any alleged or suspected offences under the CECA, or any other offence disclosed during such an investigation. The latter part, although general, can include an investigation of ML/TF offences. Provisions of s. 8(1)(a) & (b) of CECA grants the Director of the DCEC wide powers to obtain information which might allow identification and tracing for purposes of freezing and eventually seizing of assets.

Weighting and Conclusion

The CECA does not define what fiscal, revenue laws mean, and it cannot be conclusively said to mean or include money laundering. Although, there are provisions providing for ML/TF investigations, powers to conduct parallel financial investigations are only assumed based on the general powers both the DCEC and BPS have to investigate crime. There are no specific provisions designating one or more competent authorities to expeditiously identify, trace, and initiate freezing and seizing of property that is or may become, subject to confiscation, or suspected to be proceeds of crime as such powers are exercised upon a production order being obtained. There are also no institutions to expeditiously carry out these functions for purposes of confiscation.

Botswana is rated *partially compliant* with Recommendation 30.

Recommendation 31 - Powers of law enforcement and investigative authorities

In the 1st Round of Mutual Evaluations, Botswana was rated compliant with this Recommendation (pages 45-47).

Criterion 31.1 (Largely met) The DCEC can ask for the production of records or any other documents relating to the functions of any public or private body from any person (ss. 7(1)(b) and 8(1)(c),(d) of the CECA); the DPP can apply for a production order from the courts to enable production of any document containing information required for the identification or tracking of property which is proceeds of crime (s. 51(1) of the PICA); a policeman can apply for a court order to inspect any documents, records or accounting devices of a bank which may afford evidence to the commission of an offence (s. 250(1) of the Criminal Procedure and Evidence Act); the Commissioner General of the Botswana Revenue Authority or any officer authorised by him can, in terms of s. 70 of the Income Tax Act enter any premises for the purposes of obtaining information, including documents, which he or she considers necessary in relation to the liability of any person to tax; and an officer appointed in terms of the Customs and Excise Duty Act, can require from any person the production of any book or document or thing required under the Act to be kept or exhibited or relating to or suspected of relating to matters dealt with under the Act on the premises or in the possession, or custody or under the control of any person [s. 6(5)(b)]

- The CECA provides the Directorate with powers to search both with (s. 13) and without a warrant (s. 14), respectively. Judicial officers are empowered to issue search warrants on persons and premises, or other places in terms of s. 51 of the CP & E Act upon application by the police laying reasonable grounds supporting issuing of the warrant. Under s. 52 of the same Act, a police officer of the rank of Sergeant or above, if he believes on reasonable grounds that a delay might defeat the objective of any search, may search any person or premises, or any other place and upon anything being seized take it before a judicial officer to regularize the search. The DPP may upon

conviction of a person of a serious offence or where there is reasonable suspicion that on any premises there is information which will enable tracking, identification or assessment of value of any proceeds of crime apply for a search warrant from the courts (s. 67(1) of PICA). The Police Act, for purposes of any criminal matter, allows a policeman to lay information before a magistrate and apply for a search warrant (s. 17). An authorised officer under the Customs and Excise Duty Act can without previous notice, at any time enter any premises whatsoever and make such examination and enquiry as he deems necessary (s. 6(5)(a)).

- Ss. 8(1)(a) and (b) which provide for written statements, they both relate to suspects not witnesses as envisaged under the standard. There are no provisions which provide for taking of witness statements.
- The CECA allows an officer who has arrested a person under the provisions of the Act to seize and detain anything which such officer has reason to believe to be or to contain evidence of any of the offences in terms of the Act (s. 11(1)(b)). The police, in terms of the CP & E Act may seize or take anything which they believe on reasonable grounds, will afford evidence as to the commission of any offence (ss. 54 - 57). In terms of s. 70(1)(b) of the Income Tax Act, the Commissioner General or an officer authorised by him may seize any documents which he or she considers may afford material evidence of the liability of any person to tax. The Customs and Excise Duty Act provides for an officer, magistrate or member of the police force to detain any vehicle, plant, material or goods at any place for the purpose of establishing whether that vehicle, plant, material or the goods are liable to forfeiture under the same Act.

Criterion 31.2 (Partially met) There is no explicit provision for the use of undercover operations.

- The Counter Terrorism Act for the purpose of obtaining evidence of the commission of an offence, provides for an investigating officer to apply to a magistrate court or the High Court *ex parte*, for an order to intercept communications (s. 20(1)). However, the procedure is only limited to offences related to the Counter Terrorism Act and does not cover any other offences.
- S. 23(1) of the Cyber Crime Act provides for a police officer, or any person authorised by the Commissioner or by the Director, in writing, where he has reasonable grounds to believe that stored data or information would be relevant for the purposes of an investigation or the prosecution of an offence, to apply to a judicial officer for the issue of an order to enter any premises to access, search and seize such data or information. A taxation officer, who has been authorised by the Commissioner General in writing, in circumstances where a hard copy or computer disk of computer-stored information is not provided, may seize and retain the computer in which the information is stored for as long as is necessary to copy the information required (s. 52(1)(f) of Value Added Tax Act).
- There is no provision that explicitly authorise the use of controlled delivery. The authorities provided the case of *Chukwu vs State* 2000 (2) BLR 17 (CA) to support the position that the police through their administrative powers can do controlled delivery. The assessors read the circumstances of the case and are in agreement that the police can use its administrative powers to do controlled delivery.

Criterion 31.3 (Largely met) The CECA (s. 7(1)(b)) and the PICA (ss. 51(1) and 53(1)) provide sufficient mechanisms for identification, in a timely manner, whether natural or legal persons hold

or control accounts and with the exception of s. 51(1) of PICA, which does not specifically provide for production orders to be applied for *ex parte*, competent authorities through *ex parte* court applications have a process which enable them to identify assets without prior notification to the owner.

Criterion 31.4 (Not met) There is no provision enabling competent authorities conducting investigations of ML, associated predicate offences and TF to ask for all relevant information held by the FIU.

Weighting and Conclusion

The powers that law enforcement and investigative authorities have are limited in scope as they do not extend to recording of witness statements, carrying out undercover operations, and asking for all relevant information held by the FIU. Further, applications for production orders are not explicitly provided for as *ex parte* applications, which might defeat the whole objective of making such applications.

Botswana is rated *partially compliant* with Recommendation 31.

Recommendation 32 – Cash Couriers

In the 1st Round of Mutual Evaluations, Botswana was rated non-compliant with this Recommendation. The major deficiencies were that there were no legal provisions requiring the declaration of BNIs, restraining of currency for a reasonable time to allow authorities to establish if there was evidence of ML or TF and to confiscate currency in accordance with UNSCRs relating to TF (pages 49-52). The authorities have still not addressed the deficiencies.

Criterion 32.1 (Partially met) S. 14 of the Customs and Excise Duty Act (CEDA) requires all persons entering or leaving Botswana to unreservedly declare goods in their possession including goods held for other persons, goods in include currency (Section 2). Section 13 (1) of the same Act provides that goods imported or exported by post, the particulars on any such form or label completed by the sender shall be taken as the declaration to be made by the importer in terms of the requirements of the Act(s. 40). The definition of goods provided under s. 2 does not cover BNIs and there are no other provisions enabling the declaration for cross border transportation of BNIs.

Criterion 32.2 (Largely met) Section 14 (1) of the CEDA requires all persons entering or leaving Botswana, in a manner determined by the Director to unreservedly declare all goods upon their persons including goods of another person upon their person or in their possession. Regulation 39 to the CEDA as read with Second Schedule to the Regulation provides the requirements for lodging a declaration including a list describing the required forms to be used for declaration purposes. There is no requirement for persons making a physical cross-border transportation of currency or BNIs of a value exceeding a pre-set maximum threshold of USD/EUR15 000 to submit a truthful declaration to a designated competent authority but section 14(1)(b) requires the declaration to be made to an officer by furnishing full particulars thereof, answering fully and

truthfully all questions by such officer and if required by such officer, produce and open such goods for inspection.

Criterion 32.3 (Not applicable) This criterion is not applicable as Botswana uses a declaration system.

Criterion 32.4 (Partially met) The Customs and Excise Duty Act provides where, a certificate or declaration or other proof has been furnished regarding the origin of the goods to comply with the provisions of any other requirement or any practice, an officer may, for the purposes of verifying or investigating such certificate, declaration or other proof, require-(a) the exporter; or (b) any other person appearing to the officer to have been concerned in any way with the furnishing of such certificate, declaration or other proof, to furnish such information in such manner and within such time as the officer may determine, and to produce on demand for inspection and to allow the making of copies or extracts from such information in whatever form, as the officer may specify but this provision does not cover BNIs (s. 6(14)).

Criterion 32.5 (Partially met) A person who makes a false declaration and does not prove his case is liable to criminal sanctions of a fine not exceeding P40 000.00 or treble the value of goods to which such statement relates, whichever is the greater, or to imprisonment of 10 years and the goods shall be liable to forfeiture upon being convicted. The sanctions are proportionate and dissuasive with the only deficiency being that BNIs are not covered (s. 95(1)).

Criterion 32.6 (Partially met) S. 20 of the FIA requires the BURS to forward to the FIA records in such form as may be prescribed, of cash in excess of such amount as may be prescribed, conveyed into or out of Botswana. However, such submissions have to be subject to the Customs and Excise Duty Act (CEDA). It is not clear what this means in terms of limitations of the information which can be submitted to the FIU and also, the fact that the section only provides for records relating to cash to be submitted to the FIU, limits the scope of the information which can be submitted.

Criterion 32.7 (Largely met) The Director of the Revenue Authority can cooperate with any institution necessary for the proper administration of the CEDA (s. 3(2A)). To coordinate border controls, there are joint teams which conduct joint operations. The teams consist of the BURS, Immigration, BPS, Botswana Defence Forces, Department of Wildlife, DIS and Veterinary Services. Border control and joint intelligence meetings are done monthly. Coordination of specific joint operations is normally done by the initiating competent authority. The BURS has signed a MoU with the Ministry of Labour and Home Affairs and the BURS and Immigration are also members of the National Intelligence Community where information on border control and immigration is also shared.

Criterion 32.8 (Partially met) In terms of s. 99(1)(a) of the CEDA, competent authorities (an officer, magistrate or member of the police force) may detain any goods at any place for purposes of determining whether the goods are liable to forfeiture under this Act. The provision is only limited to detaining of goods relating to suspected violations under the CEDA. Although, s.124 (5) of the CEDA does somehow mitigate this deficiency, however, it can only be used by a customs officer

upon request by a police officer or an authority administering such law, which means a customs officer on his/her own has got no direct powers to detain goods on suspicion of ML/TF without the request from a police officer or the authority administering such law.

Criterion 32.9 (Not met) There is no provision requiring the retention of information for use in international cooperation and assistance in line with R. 36 – 40, when a declaration exceeding the prescribed threshold is made; or when there is a false declaration; or when there is suspicion of ML/TF.

Criterion 32.10 (Partially met) S. 6(3) of the CEDA provides adequate safeguards for proper use of information acquired by a customs officer in the course of performing his duties. However, the authorities did not provide any requirements regarding the other competent authorities which work with the customs authorities at exit and entry points, for example the BPS, Immigration and other LEAs which might have access to information collected through the declaration systems.

Criterion 32.11 (Partially met) The CEDA provides for proportionate and dissuasive criminal sanctions as well as seizure of goods liable for forfeiture, (ss. 91, 95, & s. 99). However, the scope of the sanctions is limited as they only apply to offences committed under this Act which would not include ML, or TF, or any other predicate offences provided outside this Act. S. 124(5) of the CEDA which partially mitigates this deficiency is also limited in its application as it can only be applied by a customs officer upon being requested to do so by a police officer or authority responsible for administering a specific Act. The sanctions also do not cover BNIs.

Weighting and Conclusion

The legal framework providing for cash couriers in Botswana is still inadequate. The declaration system does not include BNIs, offences committed and sanctions provided are only limited to violations of the Customs and Excise Duty Act which does not cover ML, or TF, or any other predicate offences outside this Act. S. 124(5) of the CEDA is also limited in its application as a customs officer has got no powers to directly use the section without being requested to do so by either the police or authority responsible for administering a particular Act. Although Botswana has a reasonable legal framework to deal with cash couriers, this framework still needs to be strengthened to include BNIs and powers of other LEAs which work together with BURS in monitoring activities of cash couriers, and ensuring that customs officers have specific direct powers to detain goods where there is suspicion of ML or TF or any other predicate offences outside the CEDA.

Botswana is rated *partially-compliant* with Recommendation 32.

Recommendation 33 – Statistics

In the 1st Round of Mutual Evaluations, Botswana was rated non-compliant with this Recommendation. Reasons for the rating included Botswana not having a systematic collection of detailed statistics in respect of investigation, prosecution and convictions of ML cases; receipt and

dissemination of STRs; mutual legal assistance and extradition requests; and other forms of international cooperation. Most of the deficiencies have not been adequately addressed.

Criterion 33.1 (Not met) The FIA as the agency responsible for receiving, analysing and dissemination of STRs is not required to maintain statistics on the STRs received and disseminated. The only statistics it is required to keep in terms of s. 31(6) of the FIA are to do with exchange of information with other FIUs. Although, there has been a positive development by the DPP from the last round of mutual evaluations in introducing a Case Management System Manual, a perusal of the requirements of the Manual shows that it still does not require all appropriate information on cases handled by the DPP to be captured. It provides for cases closed or concluded each month but does not require that the results of the case be provided (conviction or acquittal); it also requires that the number of pending applications be provided but does not require the type of applications to be indicated; the same with the applications for MLA and extraditions. It again does not require that the type of requests be indicated. Although, the DCEC is said to have a Case Management System and the BPS, a Police Crime and Criminal Record System, these were not provided for examination by the assessors. In the end, for purposes of determining matters relevant to the effectiveness and efficiency of the AML/CFT system, the statistics are not comprehensive enough. Statistics on other forms of international cooperation are not captured, so is the statistics on confiscation cases.

Weighting and Conclusion

Botswana still does not have the appropriate legal and institutional frameworks to enable the authorities to maintain comprehensive statistics on STRs received and disseminated, ML/TF investigations done and convicted cases, confiscations, types of court applications handled and the types of MLA and other requests handled on international cooperation.

Botswana is rated *non-compliant* with Recommendation 33.

Recommendation 34 – Guidance and feedback

In the 1st Round of Mutual Evaluations, Botswana was rated non-compliant with this Recommendation. The main deficiencies were that although guidelines had been introduced for the banking sector, they were unclear and likely to bring confusion and that no general feedback is given to reporting entities (pages 107-108). The deficiencies have not been sufficiently addressed.

Criterion 34.1 (Partially met) In terms of s. 4(2)(e) of the FI Act, FIA has the mandate and responsibility to provide guidance to a reporting entity regarding the performance by the reporting entity of duties under the Act. FIA has issued guidelines to money remitters, gambling and other DNFBP sectors which include all FI Act AML/CFT obligations and guidance on the reporting obligations. Furthermore, FIA has conducted workshops to sensitise reporting entities and law enforcement agencies on AML/CFT obligations. Pursuant to s.4(f) of the FI Act, FIA is required to provide feedback to a reporting entity regarding a report made to it.

Considering that the AML/CFT regime is still young in Botswana, the guidelines should be enhanced to provide more information on the implementation of the goAML system as all reporting entities raised concerns regarding the challenges in implementing some of the requirements of the goAML reporting tool. More guidance is also required on ML/TF risk assessment, detection of unusual and suspicious transactions. Although FIA has issued guidelines to certain reporting entities which include all AML/CFT requirements, there is a significant need

for FIA's guidance in sensitising all other supervisors especially DNFBP sector supervisors on their AML/CFT supervisory obligations.

S. 27(1)(b) of the FI Act provides for supervisory authorities, to issue instructions, guidelines or recommendations, in consultation with the FIA, in order to help a reporting entity comply with this Act. So far, only NBFIRA has issued guidance on the KYC form checklist, AML policy checklist, and a directive on appointment of compliance officers. FIA has provided inputs to some of NBFIRA's inspection tools and has conducted joint inspections and workshops with NBFIRA.

Weighting and Conclusion

With the exception of NBFIRA, all supervisory authorities have not yet provided any meaningful guidance and feedback to their supervised entities. FIA's guidelines should be enhanced to provide for more guidance on ML/TF risk assessment and detection of STRs, more specifically the implementation of the goAML system by reporting entities. Guidance is also required to assist the supervisors, especially the DNFBP sector supervisors to understand their supervisory roles. Requirements to issue guidance are adequately provided for, even though there is still a need to issue more guidance in practice.

Botswana is rated *partially-compliant* with R. 34.

Recommendation 35 – Sanctions

In the 1st Round of Mutual Evaluations, Botswana was rated non-compliant with this Recommendation. The main reason was that there were no effective, proportionate and dissuasive sanctions (pages 85-104). The deficiency is now partially addressed through the sanctions provisions of the FI Act and the PICA.

Criterion 35.1-2 (Not met) There is no legal framework to implement the requirements of R. 6, therefore no sanctions are provided for non-compliance with requirements of R. 6. The legal framework currently dealing with NPOs in Botswana does not comply with the requirements of R. 8 on NPOs. The measures in place are not TF risk based and are not intended to identify NPOs which are subject TF risk and abuse, therefore the sanctions in as far as vulnerability to TF abuse is concerned are not proportionate, effective and dissuasive as TF risk to such NPOs is not covered under the existing legal framework⁵⁰. The FI Act provides for criminal, civil and administrative sanctions for violations of some of the preventive measures.⁵¹ Some of the sanctions provided for violations of certain obligations include fines of P10 000 and P50 000, which are considered not proportionate, effective and dissuasive and also the fines do not apply to directors and senior management of institutions.

Weight and Conclusion

Botswana's current legal framework does not provide for sanctions for violations of R. 6 and R. 8 as the legal framework to implement these Recommendations is not yet in place. On the preventive measures that are provided under the FI Act, sanctions for violations do not cover directors and

⁵⁰ Conversion Rate 1usd=11Botswana Pula on 28 May 2015

⁵¹ Ss. 9(3), 10(4), 10(5), , 15(1), 15(2), 16(5), 18(2), 19(3), 25, 28(3), and 33

senior management of reporting entities and where sanctions of fines are provided, they are insignificant amounts which are considered not dissuasive and proportionate.

Botswana is rated *non-compliant* with Recommendation 35.

Recommendation 36 – International instruments

In the 1st Round of Mutual Evaluations, Botswana was rated partially compliant with this Recommendation mainly due to lack of criminalisation of some of the serious offences under the Palermo, monitoring of cross-border movement of cash and absence of an FIU (pages 117-119). Botswana now has an FIU and some of the serious offences under the Palermo have been criminalised although there are still deficiencies with the criminalisation of some of the predicate offences as required under the FATF Glossary and cross-border transportation of BNIs is still not covered by the law.

Criterion 36.1 (*Met*) Botswana ratified the Vienna Convention on the 13th of August 1996; the Palermo Convention on the 29th of August 2002; the United Nations Convention against Corruption (the Merida Convention) on the 27th of April 2011; and the Terrorist Financing Convention on the 2nd of September 2000.

Criterion 36.2 (*Partially met*) The current laws of Botswana do not fully domesticate all offences set out in the four Conventions. The offences of illicit arms trafficking, hostage-taking, proliferation of weapons of mass destruction and kidnapping, have not yet been criminalised for purposes of ML. The TF offence does not criminalise an individual terrorist and does not define “funds” in line with the TF Convention and the FATF Glossary and is used interchangeably with the term property when they do not mean the same thing under the laws of Botswana; and the forfeiture regime is not consistent with both the Vienna and Palermo Conventions requirements.

Weighting and Conclusion

The provisions of the Vienna, Palermo, Merida and TF Conventions have not been fully domesticated in Botswana. The lack of criminalisation of some of the predicate offences to ML and of an individual terrorist, and the confusion created by not defining the term “funds” and its interchangeable use with the term “property” relating to TF offences create major deficiencies to the AML/CFT system of Botswana.

Botswana is rated *partially compliant* with Recommendation 36.

Recommendation 37 - Mutual legal assistance

In the 1st Round of Mutual Evaluations, Botswana was rated largely compliant with this Recommendation. The potential to have impediments and absence of a mechanism for determining the best venue for prosecuting a defendant were cited as deficiencies (pages 119-123).

Criterion 37.1 (*Largely met*) The Mutual Assistance in Criminal Matters Act (MACMA) provides the legal basis to provide the widest possible range of mutual legal assistance in all criminal matters including prosecutions and related proceedings. However, the Act does not set timeframes to allow rapid provision of the mutual legal assistance.

Criterion 37.2 (*Largely met*) In ss. 6 and 7 of the Mutual Assistance in Criminal Matters Act, the Attorney General is cited as the Office responsible for international assistance in criminal matters.

S. 7 specifically provides for requests for MLA being made by Botswana to be done by the Attorney General and s. 8 provides for foreign requests to be made to the Attorney General or a person authorised by him in writing to receive such requests. The authorities did not provide information on whether there is a clear process which enables timely prioritisation and execution of MLA requests. However the DPP's has a Case Management Manual which among other things provides for pending MLA cases to be recorded but it is not clear from the Manual whether the same process allows for monitoring of the progress of such applications.

Criterion 37.3 (Met) S. 6 gives the Attorney General the discretion to refuse to grant a request by a foreign country or to determine the conditions under which such requests can be granted. S. 5 outlines the grounds that can be considered by the Attorney General to refuse to grant a request by a foreign country. None of these grounds are unreasonable or unduly restrictive, nor can they be said to be outside the norms of international law.

Criterion 37.4 (Largely met) The Mutual Assistance in Criminal Matters Act defines a criminal matter where MLA can be provided to include taxation, customs duties or other revenue matter or relating to foreign exchange control (s. 2(1)). Secrecy and confidentiality requirements on financial institutions or DNFBPs are not listed as part of the reasons to refuse MLA under s. 5(1). However, this position might be compromised by the provisions of s. 43 of the Banking Act, where obtaining of information from banks is concerned, as the section provides secrecy and confidentiality restrictions to accessing of information relating to clients of the bank without first obtaining their consent.

Criterion 37.5 (Largely met) There is no direct requirement to maintain the confidentiality of MLA requests received by the authorities and the information contained in them in order to retain the integrity of the investigation or nature of inquiry. However, confidentiality of information in the possession of public officers is in general covered under General order 37.4, which reminds officers that it is a serious offence under the National Security Act Cap. 23:01 to share confidential information obtained as a Public Officer to any unauthorised person either during service or after leaving the Public Service. According to the authorities, this provision mainly covers breaches relating to national security, but is also applicable to all breaches of confidentiality in the Public Service. All public officers sign confidentiality clauses in terms of the Public Service Act.

Criterion 37.6 (Partially met) Ss. 5(2)(a) & (b) of the MACMA leaves the discretion to the Attorney General to refuse or accede to requests where there is no dual criminality. The circumstances when he may accede to such requests are not provided to determine whether it would include requests not involving coercive actions.

Criterion 37.7 (Largely met) MLA will be provided by Botswana, if the circumstances of the case relating to the request are such that if such conduct had happened in Botswana it would be regarded as an offence regardless of whether the conduct would be in the same category of offences in both Botswana and the requesting jurisdiction (ss. 5(2)(a) & (b)). In addition, the Attorney General in terms of the same subsection, can still use his discretion and determine whether to accede to the request or not. However, these provisions may be seriously affected by the definition of a "foreign serious crime related activity" and its application in Botswana to predicate offences to ML which will have occurred outside Botswana but recognised as an offence in Botswana (see R. 3). Further, not all predicate offences are criminalised in Botswana to allow a wide scope of dual criminality when providing MLA.

Criterion 37.8 (Not met) There are no provisions enabling powers and investigative techniques required under R. 31 or available to domestic competent authorities to be used in response to foreign requests for MLA or in response to a direct request from a foreign jurisdiction or law enforcement to domestic counterparts.

Weighting and Conclusion

Botswana can provide a wide range of MLA, however, there are limitations as there are no enabling provisions for competent authorities to use the same powers they have to carry out domestic investigations to comply with foreign requests for MLA. Such a deficiency can have a serious impact on the potential of law enforcement to provide MLA where special investigative techniques have to be used. In addition, there are no requirements to maintain the confidentiality of MLA requests received by the authorities and the information contained in them in order to retain the integrity of the investigation or nature of inquiry. Lack of dual criminality can be used to decline requests for MLA.

Botswana is rated *largely compliant* with R. 37.

Recommendation 38 – Mutual legal assistance: freezing and confiscation

In the 1st Round of Mutual Evaluations, Botswana was rated largely compliant with this Recommendation. Botswana had insufficiently implemented the provisions relating to ML and had not considered asset sharing and setting up an asset forfeiture fund (pages 121-123). A legal framework for managing forfeited assets is now provided for.

Criterion 38.1 (Partially met) Ss. 12 & 30 of the MACMA provide for foreign countries to make requests to the Attorney General of Botswana for search and seizure pertaining to tainted property that is believed to be located in Botswana relating to an investigation of a serious offence which has commenced in another country. The Attorney General, where he is satisfied that a person has been convicted of the offence and the matter is no longer subject to an appeal in the foreign country making the request for the enforcement of a foreign confiscation order of property believed to be located in Botswana, may apply for the registration of the order in the High Court of Botswana for it to have similar force of law in Botswana. The Attorney General has similar powers relating to enforcement of foreign restraining and production orders (s. 29). Although, the MACMA uses the terms tainted property and property interchangeably, s. 2 of the Act only defines, tainted property, which it defines as “*property used in, or in connection with, the commission of the offence; or (&) proceeds of the offence*”. As the term property is not defined under this Act, it is not clear whether it also covers instrumentalities intended to be used in the commission of a crime or property of corresponding value which also have to be covered under this criterion.

Criterion 38.2 (Not met) MACMA does not establish powers to provide assistance or to request for co-operation made on the basis of non-conviction based proceedings and related provisional measures, including situations where the suspect is no longer available by reason of death, absconded or the perpetrator is unknown. PICA does not provide for its provisions to be used to effect foreign requests on MLA, nor does the MACMA make cross-reference in the application of its provisions to PICA. The provisions of section 29 and 31 of MACMA which provide for

registration of a foreign confiscation order and application for restraining orders, are based on a criminal conviction and/or criminal proceedings commenced in a foreign country.

Criterion 38.3 (Largely met) The Attorney General in terms of the MACMA has the authority to make arrangements for coordinating seizure and confiscation actions with other countries. S. 46 of PICA creates the office of Receiver for preserving any seized or confiscated property but such powers are not extended to disposal of such property unless the property is volatile, or wasteful in nature, or is likely to significantly depreciate in value.

Criterion 38.4 (Not met) There are no provisions providing for sharing of confiscated property with other countries.

Weighting and Conclusion

The MACMA does not provide for MLA on requests relating to instrumentalities intended to be used in committing a crime and property of corresponding value. The term “property” used in the Act is not defined to understand what it covers. There are no provisions authorising MLA requests on the basis of non-conviction based confiscation proceedings. Sharing of confiscated property with other countries is not provided for.

Botswana is rated *partially compliant* with Recommendation 38.

Recommendation 39 – Extradition

In the 1st Round of Mutual Evaluations, Botswana was rated partially compliant with this Recommendation. The extradition system had no flexible mechanism to expedite extradition requests and the scope of countries with arrangements on extradition with Botswana was limited (pages 123-125). The Extradition Act has a flexible mechanism to expedite extradition requests, although the processes for securing the fugitive for extradition might still be cumbersome.

Criterion 39.1 (Largely met) In terms of the penalty provisions for ML & TF offences, they are both extraditable offences based on the definition of extraditable offences under s. 2(2) of the Extradition Act. The DPP has a Case Management Manual which requires pending cases on extradition to be recorded but it does not provide for clear processes for the timely execution and prioritisation of the requests where appropriate. The authorities did not provide any guidance on the processes followed to ensure timely execution and prioritisation of the extradition requests. The measures provided under s. 7(1) of the Extradition Act on extradition of a fugitive are not restrictive as they meet the standard requirements on extradition under international law with the exception of Botswana’s own nationals (described in R. 39.2 below).

Criterion 39.2 (Not met) In terms of s. 7(1)(i) of the Extradition Act, Botswana does not extradite its own nationals unless the country which is making the request has provision under its law, or by arrangement, providing for fugitive criminals who are also citizens of that country to be extradited to Botswana on being requested. In the absence of such a provision or arrangement, Botswana cannot extradite its own citizens. In situations where a Botswana citizen has not been extradited due to the requirements under s. 7(1)(i), Botswana does not have provisions requiring, upon

request of the country seeking extradition, the case to be submitted without undue delay to its competent authorities for the purpose of prosecution of the offence provided in the request. This is further affected by the definition of a foreign serious crime related activity (as explained in R. 3), which creates possibilities for Botswana citizens who will have committed predicate offences abroad viewed to be of the same conduct in Botswana but because of the threshold used of a serious offence will neither be prosecuted in Botswana nor extradited, if the requesting country also does not meet provisions of s. 7(1)(i), described above.

Criterion 39.3 (*Largely met*) The provisions of s. 7(1)(h) adequately provides for dual criminality. Determination of the dual criminality of the offence upon which a request for extradition is being made in terms of this section is based on the facts of the case not the terminology with which the offence is known in both Botswana and the requesting jurisdiction. However, this could also be affected by the definition of a foreign serious crime related activity (as explained under R. 3), as this is based on a threshold (and dual application of the conduct involved).

Criterion 39.4 (*Partially met*) In a case where the fugitive criminal has waived committal proceedings and where the court is satisfied that the waiver by the fugitive criminal is being made voluntarily and the fugitive criminal fully understands the implications of waiving such a hearing, can make an order by consent for the committal of the fugitive to prison or granting him bail awaiting his surrender to the requesting country (s. 18(1) & (2) of the Extradition Act). However ss. 8-12 of the Extradition Act set out requirements which might complicate the process of extradition, including the request for the surrender of a fugitive believed to be in Botswana being made to the Minister by a diplomatic representative or consular officer of the country making the request (s. 8), and all warrants requesting arrest of the fugitive being endorsed by a magistrate before the apprehension of the fugitive (s. 10), which does not allow requests for formal arrangements to be made between appropriate competent authorities in special circumstances for provisional arrests to be made pending receipt of a formal request and commencement of a formal court process.

Weighting and Conclusion

Botswana does not extradite its own nationals and it does not have measures, upon request of the country seeking extradition, requiring the case of the fugitive to be submitted without undue delay to its competent authorities for the purpose of prosecution of the offence provided in the request. This greatly compromises the extradition regime of Botswana as its fugitive nationals wanted by other countries might regard it as a safe haven. The different threshold for foreign offences to be regarded as predicate offences (although it will be the same conduct recognised for a predicate offence) for ML in Botswana could also affect the dual criminality of extraditable offences. The process of securing a fugitive for extradition purposes might be compromised by some of the complicated requirements under the Extradition Act.

Botswana is rated *partially compliant* with Recommendation 39.

Recommendation 40 – Other forms of international cooperation

In the 1st Round of Mutual Evaluations, Botswana was rated partially compliant with this Recommendation. The main reasons for the rating were that there were no provisions for the DCEC to exchange information with other foreign counterparts; BoB was not able to engage in

international cooperation with foreign supervisors that are not Central Banks; and the Registrar of the Stock Exchange was not able to engage in international cooperation.

Criterion 40.1 (Largely met) As a member of the Southern African Regional Police Chiefs Cooperation Organisation (SARPCCO), the Botswana Police Service provides the widest range of international cooperation relating to ML/TF and other predicate offences both spontaneously and upon request.

The DCEC is able to provide spontaneous information to other anti-corruption bodies through the Commonwealth Association of Anti-Corruption Agencies to which it is a member.

Botswana as a member of the ARINSA Network is able to provide informal regional cooperation with other ARINSA members, and internationally with CARIN members both spontaneously and upon request.

The BURS, through several pieces of legislation is able to provide international cooperation to its counterparts relating to a wide range of issues including on predicate offences.

The FIA has signed 8 MoUs with FIUs in the ESAAMLG Region and it exchanges information on the basis of reciprocity arrangements with other 5 countries on sharing of information. However, the FIA's international cooperation is limited by its non-membership to the Egmont Group of FIUs.

BoB and NBFIRA in terms of the laws establishing them are allowed to share information with foreign counterparts and have also entered into MoUs (see c. 40.12, below) with some of their foreign counterparts to enable sharing of information.

Criterion 40.2 (Partially met) (a) There is no general provision which provides competent authorities with the lawful basis for providing co-operation. However, some of the statutes establishing some of the competent authorities like the FIA (ss. 4(2)(g) & 31(1) of the FI Act), BURS (BURS Exchange of Information Manual), BoB (s. 50 of the BoB Act & s. 43(10) of the Banking Act), and NBFIRA (s. 40(1), (2) of the NBFIRA Act) have specific provisions enabling cooperation. The DIS, can exchange information with foreign counterparts in the SADC Region on the basis of the SADC Protocol on Politics, Defence and Security which was ratified by Botswana on the 21st of September 2001. The BPS can exchange information with counterparts in the SADC Region on the basis of the SARPCCO to which BPS is a member. Other than for the BURS, under the BURS Exchange of Information Manual which provides for the methods of transmission and execution of information requests, there are no specific provisions authorising the other competent authorities to: (b) use the most efficient means to co-operate; (c) requiring the competent authorities to have clear and secure gateways, mechanisms or channels to facilitate and allow for the transmission and execution of requests; (d) to have clear processes for the prioritisation and timely execution of requests; and (e) to have clear processes for safeguarding the information received.

Criterion 40.3 (Partially met) Although, ss. 53 of the Income Tax Act, 73 of the Value Added Tax, 57 & 58 of the Customs and Excise Duty Act and 31(1) of the FI Act provide a legal basis for the BURS

and FIA to enter into multilateral MoUs or sharing of information, the timeframes of negotiating and signing of the bilateral or multi-lateral agreements were not provided by the authorities. However, it does not appear there are any limitations to both BURS and FIA from entering into such agreements with the widest range of foreign counterparts. No information relating to this criterion was provided for the other competent authorities.

Criterion 40.4 (Not met) The authorities indicate that other than the Customer Service Standards set by the Government of Botswana which provide for 10 days to respond to communication at minimum and the BURS' Exchange of Information Manual which requires the BURS to provide feedback at 90 days intervals in stages of receipt, interim reply and final reply, there is no system in place for competent authorities to provide feedback to counterparts. Even based on the information provided by the authorities, it is not clear whether the feedback which is being referred to deals with the use of the information or how useful the information would have been to the domestic competent authority which will have made the request. Both the Customer Service Standards and the BURS Exchange of Information Manual were not provided to the assessors to determine what exactly they provide.

Criterion 40.5 (Not met) There is no legal framework or mechanisms to ensure that competent authorities do not place unreasonable or unduly restrictive conditions on the provision of exchange of information or assistance with foreign counterparts or competent authorities.

Criterion 40.6 (Not met) There are no controls and safeguards in place to ensure that information exchanged by competent authorities is used for the purpose for which the information is sought or provided, unless prior authorisation has been given by the requested authority. If MoUs entered into by the competent authorities provide for such controls and safeguards, the competent authorities with such MoUs are not identified nor is it indicated what the MoUs provide.

Criterion 40.7 (Not met) Other than for the FIA, there are no provisions requiring competent authorities to maintain appropriate confidentiality for any request for cooperation and the information exchanged, consistent with both parties obligations concerning privacy and data protection or enabling competent authorities to refuse to provide information if the requesting competent authority cannot protect the information effectively.

Criterion 40.8 (Not met) There are no provisions enabling competent authorities in Botswana to conduct inquiries on behalf of their foreign counterparts and exchange with their foreign counterparts all the information that would be obtainable by them if such inquiries were being carried out domestically.

Exchange of Information between FIUs

Criterion 40.9 (Met) S. 31 of the FI Act provides the FIA with adequate legal basis for providing co-operation on sharing of financial intelligence information with other counterparts and to join the EGDMONT for similar purposes.

Criterion 40.10 (Not Met) There is no requirement for the FIA to provide feedback to its counterparts on assistance received.

Criterion 40.11 (Largely met) S. 4(2)(g) of the FI Act provides the FIA with powers to exchange information with foreign counterparts. Further, s. 31(4) provides for the FIA to exchange all information in its possession when it receives a request from a foreign counterpart subject to the terms of confidentiality agreed between it and the foreign counterpart. However, s. 31(5) provides that where the request concerns information which has been provided to FIA by a supervisory authority, an investigatory authority, a statutory body or government agency, the FIA cannot disclose such information to another party without the consent of the appropriate supervisory authority, investigatory authority, statutory body or government agency.

Exchange of information between financial supervisors

Criterion 40.12 (Partially met) The Bank of Botswana Act (s. 50), the Banking Act (s. 43(10)) and the NBFIRA Act (s. 40 (1-2)) provide for both the BoB and the NBFIRA to exchange information with foreign counterparts. The Banking Act has got no provisions relating to AML/CFT therefore the exchange of information by the BoB does not relate to AML/CFT. NBFIRA Act provides for AML/CFT. The BoB has signed MoUs with Zimbabwe, Namibia, India, South Africa, Zambia and Malawi. NBFIRA has signed MOUs with Mauritius, India, RSA, Angola and Swaziland, respectively and is also a CISNA member (which has 13 other member countries as signatories), therefore a party to the Exchange of Information and Surveillance of Securities, Insurance and Retirement Activities.

Criterion 40.13 (Met) The BoB, NBFIRA and FIA, based on specific provisions of the law are able to share information domestically available to them with foreign counterparts (s. 43 of the Banking Act, s. 40 of the NBFIRA Act, and s. 31 of the FI Act). The three supervisors have entered into MoUs with some of their foreign counterparts to enable exchange of information to the extent provided under the different laws they administer.

Criterion 40.14 (Largely met) FIA and NBFIRA provisions enable exchange of information with foreign counterparts. Although for BoB, the provisions mentioned in c. 40.12 do not provide for exchange of information on AML/CFT, in terms of MoUs, BoB does share AML/CFT information with foreign counterparts which includes regulatory information, prudential information, fit and properness and AML/CFT information. BoB also conducts joint inspections with foreign supervisors where AML/CFT information is shared. However, all supervisory authorities can only

share information of insignificant shareholders as this information is not available from the Registrar of Companies (CIPA).

Criterion 40.15 (Met) The requirement on conducting enquiries on behalf of foreign counterparts or facilitating effective group supervision is provided under s. 43(4) of the Banking Act. And s. 40(d) of NBFIRA Act. Where the law permits, Botswana also uses MoUs to facilitate this requirement.

Criterion 40.16 (Partially met) The requirement for prior authorisation from the requested supervisory authority for any dissemination of exchanged, or use of the information for supervisory and non-supervisory purposes is provided under s. 43(4) of the Banking Act. However NBFIRA does not have provisions for this requirement. The supervisory authorities in Botswana have clauses in MoUs with counterparts which cover this requirement.

Exchange of information between law enforcement authorities

Criterion 40.17 (Not met) There is no enabling provision allowing the law enforcement agencies to exchange domestically available information with foreign counterparts for intelligence or investigative purposes relating to ML, associated predicate offences or terrorist financing cases. Although, s. 43(g) of the CTA provides for the Coordinator appointed in terms of this Act to coordinate the sharing of information amongst the investigating authorities regarding investigations of terrorism cases to ensure effective response to counterterrorism, the section does not include coordination of terrorist financing information. It also does not apply to sharing of information with foreign counterparts.

Criterion 40.18 (Not met) There is no enabling provision allowing the law enforcement authorities to use their domestic powers including any available investigative techniques to conduct inquiries and obtain information on behalf of foreign counterparts.

Criterion 40.19 (Not met) The law does not provide any provisions which allow law enforcement to form joint investigative teams to conduct cooperative investigations and when necessary to establish bilateral or multilateral arrangements to enable such joint investigations with foreign counterparts.

Exchange of information between non-counterparts

Criterion 40.20 (Not met) There are no provisions or mechanisms that allow competent authorities in Botswana to exchange information indirectly with foreign non-counterparts.

Weighting and Conclusion

Overall, there are still significant deficiencies relating to R. 40. Most of the competent authorities have got no specific powers to exchange information with foreign counterparts, particularly LEAs with the exception of the BURS. There are no requirements for competent authorities other

than the BURS to provide feedback on information requested from counterparts by the competent authorities. There are limitations to provisions relating to confidentiality of information exchanged, its protection, and use of the information for the purposes it was requested for. The authorities do not have requirements or mechanisms to ensure that competent authorities do not refuse provision of exchange of information based on unreasonable or unduly restrictive conditions. FIA still needs the consent of supervisory authorities, investigatory authorities, statutory bodies or government agencies to disclose information which would have come from them to foreign counterparts. The provisions enabling the BoB to exchange information with other Central Banks are limited in scope as they do not cover exchange of information on AML/CFT. Competent authorities have got no provisions enabling them to exchange information with non-counterparts.

Botswana is rated *partially compliant* with R. 40.

Summary of Technical Compliance – Key Deficiencies

| Compliance with FATF Recommendations | | |
|---|--------|---|
| Recommendation | Rating | Factor(s) underlying the rating |
| 1. Assessing risks & applying a risk-based approach | NC | <ul style="list-style-type: none"> • Most of the criteria under R.1 are not met. Botswana has not finalised its NRA • The ML/TF risks of Botswana are not yet identified, understood and systematically prevented. • There is no allocation of resources according to the authorities' understanding of the identified risks. • There are no requirements for some of the competent authorities to carry ML/TF risk assessments of their sectors, particularly the BURS, CIPA and the NPO sector. |
| 2. National cooperation and coordination | PC | <ul style="list-style-type: none"> • The national AML/CFT policies in Botswana are not informed by identified risks which are regularly reviewed as Botswana is still to finalise its first ML/TF risk assessment. • Although, the NCCFI is designated to advise on AML/CFT policies, the authority is not guided by identified ML/TF risks as they have not been identified. • There are no coordination mechanisms to proliferation of weapons of mass destruction as there is no legal framework dealing with proliferation yet in place. |
| 3. Money laundering offence | PC | <ul style="list-style-type: none"> • The predicate offences of illicit arms trafficking, hostage-taking, and kidnapping are not criminalised, which also negatively affects other Recommendations (20, 31, 39, 40). • The threshold approach to foreign predicate offences which have similar conduct constituting an offence in Botswana limits the scope of such offences in Botswana as it is high compared to the all crimes approach followed for domestic predicate offences. |
| 4. Confiscation and provisional measures | PC | <ul style="list-style-type: none"> • The confiscation of property of corresponding value is only limited to instrumentalities of crime. |

Compliance with FATF Recommendations

| Recommendation | Rating | Factor(s) underlying the rating |
|---|--------|--|
| | | <ul style="list-style-type: none"> There are no provisions of the law providing for taking of steps that can prevent or void actions that prejudice Botswana's ability to freeze or seize or recover property that is subject to confiscation. |
| 5. Terrorist financing offence | NC | <ul style="list-style-type: none"> The offence of carrying out any other act with the intention to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act as provided under Article 2(1)(b) of the TF Convention is not criminalised. Commission of a TF offence by an individual terrorist is not criminalised. The provision that for a TF offence to be committed, it should not be a requirement that the funds provided be linked to a specific terrorist act(s) is not provided. The ancillary offences of participating as an accomplice in a TF offence and contribution to the commission of one or more TF offence(s) or attempted offence(s) by a group of persons acting with common purpose are not criminalised. The sanctions provided for the offence of TF do not include sanctions for legal persons and are not proportionate. |
| 6. Targeted financial sanctions related to terrorism & TF | NC | <ul style="list-style-type: none"> Botswana has got no legal framework which enables implementation of targeted financial sanctions related to terrorism and TF. The authorities in coming up with the regulations to implement provisions of either CTA or PICA, which will enable implementation of the UNSCRs, should properly streamline which provisions apply to the implementation of UNSCRs and those which apply to the criminal processes of the offence of ML and other serious offences. |

Compliance with FATF Recommendations

| Recommendation | Rating | Factor(s) underlying the rating |
|--|--------|--|
| | | <ul style="list-style-type: none"> The term “funds” should be defined so that it meets the requirements of the TF Convention and the definition provided under the FATF Glossary in terms of scope |
| 7. Targeted financial sanctions related to proliferation | NC | <ul style="list-style-type: none"> Botswana does not have a legal framework which provides for the implementation of targeted financial sanctions related to proliferation financing |
| 8. Non-profit organisations | NC | <ul style="list-style-type: none"> All the measures regulating the activities of NPOs in Botswana under the Societies Act are not for purposes of dealing with the possible exposure of the NPO sector to abuse for TF activities and identification of which NPOs are at risk to be exposed to TF and the kind of measures which can be taken to mitigate the TF risks faced by such NPOs. The requirements under the Societies Act are not currently being used by the Registrar of Societies to assist the Office to understand the possible exposure of the sector to the TF risk. No awareness is being done on TF risks the NPO sector might be exposed to. |
| 9. Financial institution secrecy laws | NC | <ul style="list-style-type: none"> Access to information in possession of the banks about their clients due to provisions of s. 43 of the Banking Act is not easily accessible to other competent authorities (other than the DCEC). It is therefore not possible for the FIA and other competent authorities (other than the DCEC) to exchange information which they do not have because access to it is restricted. |
| 10. Customer due diligence | | <ul style="list-style-type: none"> The legal and regulatory requirements in relation to application of CDD measures on business relationships and transactions have major deficiencies particularly due to insufficient requirements on CDD. |

Compliance with FATF Recommendations

| Recommendation | Rating | Factor(s) underlying the rating |
|--------------------------------|--------|---|
| | | <ul style="list-style-type: none"> • There are no requirements for FIs to apply CDD measures when establishing a business relationship or conducting transactions with a legal person or arrangements. • There is no requirement for FIs to identify and verify the identity of beneficial owners. • There are no requirements prohibiting FIs from keeping anonymous accounts, or accounts in obviously fictitious names. • FIs are not required to apply CDD measures on business relationships and transactions on a risk-based approach to allow for application of reduced or enhanced due diligence measures. |
| 11.Record keeping | NC | <ul style="list-style-type: none"> • The legal framework does not contain a provision requiring financial institutions to keep all records obtained through CDD measures, account files and business correspondence and results of any analysis undertaken for at least five years after the termination of a business relationship. • There is no obligation to verify documents obtained relating to legal persons, legal arrangements and beneficial owners • Difficult to have sufficient information which will facilitate reconstruction of transactions to provide evidence for prosecution of a criminal activity due to lack of requirements to obtain information on beneficial ownership relating to legal persons and other forms of legal arrangements other than trusts. • There is no specific legal provision which obliges financial institutions to provide documents swiftly to domestic competent authorities |
| 12.Politically exposed persons | NC | <ul style="list-style-type: none"> • Botswana has no legal framework dealing with obligations which apply to PEPs. |
| 13.Correspondent banking | NC | <ul style="list-style-type: none"> • Botswana does not have legal or regulatory requirements dealing with correspondent banking. |

Compliance with FATF Recommendations

| Recommendation | Rating | Factor(s) underlying the rating |
|---|--------|---|
| 14. Money or value transfer services | NC | <ul style="list-style-type: none"> • There are requirements registration/licensing of natural and legal persons providing money or value transfer services (excluding registered/licensed financial institutions authorised to perform MVTS) in Botswana. • There are no laws requiring monitoring of all natural and legal persons providing MVTS including their agents for AML/CFT compliance. • There are no sanctions for natural and legal persons providing MVTS without a license or registration. |
| 15. New technologies | NC | <ul style="list-style-type: none"> • FIs are not required to apply AML/CFT requirements on financial services provided through new technologies platforms. • There is no requirement for financial institutions to undertake risk assessments prior to the launch or use of new or pre-existing products, practices and technologies. • Financial institutions are not required to take appropriate measures to mitigate risks relating to new technologies |
| 16. Wire transfers | NC | <ul style="list-style-type: none"> • Other than reports of wire/electronic transfer transactions (including name of originator) above P 10,000 being required to be made to FIA, FIs are not required to ensure that all cross-border wire transfers carry the name of originator. All the other requirements of R. 16 are not met. |
| 17. Reliance on third parties | N/A | <ul style="list-style-type: none"> • Botswana's financial institutions are not permitted to use and do not use third party financial institutions to undertake CDD on their behalf. |
| 18. Internal controls and foreign branches and subsidiaries | PC | <ul style="list-style-type: none"> • The requirements for FIs to implement programmes against ML/TF are largely consistent with criterion 18.1 but there is no requirement for the programmes to have regard to the ML/TF risks and the size of the business. • Financial groups are not required to implement group-wide programs against ML/TF risks to all branches and subsidiaries of the financial group. |

Compliance with FATF Recommendations

| Recommendation | Rating | Factor(s) underlying the rating |
|--|--------|--|
| | | <ul style="list-style-type: none"> There are no requirements for FIs to ensure that their foreign branches and majority-owned subsidiaries apply AML/CFT measures which are consistent with the home country requirements, where the requirements of the host country are less strict. |
| 19.Higher-risk countries | NC | <ul style="list-style-type: none"> The legal framework does not require application of enhanced due diligence to business relationships and transactions with natural and legal persons from countries for which this is called for by the FATF. Botswana does not apply countermeasures proportionate to ML/TF risks when called upon to do so by the FATF or independently of any call by the FATF to do so. There is no mechanism in place to ensure that financial institutions are advised of concerns about the weaknesses in the AML/CFT systems of other countries. |
| 20.Reporting of suspicious transaction | PC | <ul style="list-style-type: none"> The period allowed for submission of a suspicious transaction report falls short of the required urgency. Certain transactions have been exempted without a proper ML/TF risk assessment being carried out, transactions between a bank and Bank of Botswana, a bank and another bank, and a bank and a non-bank institution. Provisions of s. 43 of the Banking Act may also inhibit compliance of banks with the reporting obligations. |
| 21.Tipping-off and confidentiality | NC | <ul style="list-style-type: none"> The provisions of s. 43 of the Banking Act are in conflict with the requirements of s. 26 of the FI Act and there is no overriding provision in the FI Act to the provisions in Banking Act. The provision on tipping off is only limited to the person involved in reporting an STR. |

Compliance with FATF Recommendations

| Recommendation | Rating | Factor(s) underlying the rating |
|---|--------|---|
| 22.DNFBPs: Customer due diligence | NC | <ul style="list-style-type: none"> • The AML/CFT legal framework covering obligations of DNFBPs in relation to CDD and record keeping, are deficient as they do not meet most of the criteria under R. 10. • The legal framework does not extend to PEPs. • Introduction of new technologies is not regulated and there are no requirements to carry out an ML/TF risk assessment before introducing the new technology related products or services. |
| 23.DNFBPs: Other measures | PC | <ul style="list-style-type: none"> • Limitations relating to preventative measures on suspicious transaction reporting, internal controls, tipping off and legal immunity set out in the FI Act, also apply to DNFBPs • Tipping off obligations are limited to persons involved in handling an STR. • The legal framework does not cover obligations in relation to high risk countries. • The legal framework does not provide for the application of countermeasures proportionate to the risks when called to do so by the FATF and independently of any call by the FATF. • There is no mechanism for DNFBPs in Botswana to be advised of concerns about weaknesses in the AML/CFT systems of other countries. |
| 24.Transparency and beneficial ownership of legal persons | NC | <ul style="list-style-type: none"> • There are no mechanisms to obtain information on beneficial ownership, or to ensure that it is available at a specified location, or that it can be determined in a timely manner by a competent authority. • No measures have been put in place to ensure that bearer securities are not misused for ML/TF. • No mechanisms have been put in place that nominee shares and directors are not misused for ML/TF. • The sanctions provided are not proportionate and dissuasive. |

Compliance with FATF Recommendations

| Recommendation | Rating | Factor(s) underlying the rating |
|---|--------|---|
| 25. Transparency and beneficial ownership of legal arrangements | NC | <ul style="list-style-type: none"> • Botswana does not have any legal framework or other mechanisms requiring trustees of any express trust to obtain and hold adequate, accurate, and current information on the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and other natural person exercising ultimate effective control over the trust. • The absence of a requirement to have all trusts registered also prevents the authorities from monitoring whether all the above information is being obtained by trustees and the Deeds Registry Office, to ensure that such information is obtained upon registration of the trust. • FIs are not required to obtain and maintain information on beneficial ownership and control of trusts when establishing a business relationship or conducting an occasional transaction. • There are no specific provisions enabling access by foreign competent authorities to basic information held by the Deeds Registry, exchanging domestically available information on trusts and use by competent authorities of their domestic investigative powers to obtain beneficial ownership information on behalf of foreign counterparts. • Trustees have no obligation to disclose their status to FIs and DNFBPs. |
| 26. Regulation and supervision of financial institutions | NC | <ul style="list-style-type: none"> • MVTS and savings and credit societies are not subjected to licensing or registration requirements. • The legal or regulatory requirements or measures to prevent criminals or their associates from holding (or being beneficial owners) of significant interest and management function in financial institutions are inadequate. • Botswana has not adopted AML/CFT risk-based supervision. |
| 27. Powers of supervisors | LC | <ul style="list-style-type: none"> • Botswana has powers to supervise and ensure compliance with the FI Act. |

Compliance with FATF Recommendations

| Recommendation | Rating | Factor(s) underlying the rating |
|--|--------|---|
| | | <ul style="list-style-type: none"> • There are no restrictions or conditions which may impede onsite inspections including production of documents. • The FI Act does not provide criminal sanctions against serious violations of the FI Act. • Most fines only apply to the financial institutions, leaving out their directors and senior management. |
| 28.Regulation and supervision of DNFBPs | NC | <ul style="list-style-type: none"> • With the exception of casinos, there are no provisions enabling competent authorities to take legal and regulatory measures to prevent criminals or their associates from holding a significant or controlling interest or from operating a DNFBP. • Supervision is not yet undertaken for compliance with AML/CFT requirements. • Authorities have not carried out a risk assessment of the DNFBP sector to inform development and implementation of AML/CFT risk-based supervision. |
| 29.Financial intelligence units | NC | <ul style="list-style-type: none"> • The FIA is adequately independent to carry out its operational functions. • The FIA is not the central agency for the receipt of disclosures in respect of the banks as explained under c. 29.2. • Obtaining of additional information from the banks by the FIA is constrained by s. 43(1) of the Banking Act. • The FIA does not conduct strategic analysis. • The FIA has not applied for EGMONT membership |
| 30.Responsibilities of law enforcement and investigative authorities | PC | <ul style="list-style-type: none"> • The CECA does not define what fiscal or revenue laws are and it cannot be conclusively said they include money laundering. • Powers to conduct parallel financial investigations are only assumed based on the general powers both the DCEC and BPS have to investigate crime. |

Compliance with FATF Recommendations

| Recommendation | Rating | Factor(s) underlying the rating |
|--|--------|---|
| | | <ul style="list-style-type: none"> There are no specific provisions designating one or more competent authorities to expeditiously identify, trace, and initiate freezing and seizing of property that is or may become, subject to confiscation, or suspected to be proceeds of crime. |
| 31.Powers of law enforcement and investigative authorities | PC | <ul style="list-style-type: none"> The powers that law enforcement and investigative authorities have are limited in scope as they do not extend to recording of witness statements, carrying out undercover operations, and asking for all relevant information held by the FIU. Applications for production orders are not explicitly provided for as <i>ex parte</i> applications, which might defeat the whole objective of making such applications |
| 32.Cash couriers | PC | <ul style="list-style-type: none"> The declaration system does not include BNIs. Offences committed and sanctions provided are only limited to violations of the Customs and Excise Duty Act which does not cover ML, or TF, or any other predicate offences outside this Act. S. 124(5) of the CEDA is also limited in its application as a customs officer has got no powers to directly use the section without being requested to do so by either the police or authority responsible for administering a particular Act. Customs officers have no specific direct powers in terms of CEDA to detain goods where there is suspicion of ML or TF or any other predicate offences outside the CEDA. |
| 33.Statistics | NC | <ul style="list-style-type: none"> Botswana still does not have the appropriate legal and institutional frameworks to enable the authorities to maintain comprehensive statistics on STRs received and disseminated, ML/TF investigations done and convicted cases, confiscations, types of court applications handled and the types of MLA requests handled. |
| 34.Guidance and feedback | PC | <ul style="list-style-type: none"> With the exception of NBFIRA, all supervisory authorities have not yet provided any meaningful |

Compliance with FATF Recommendations

| Recommendation | Rating | Factor(s) underlying the rating |
|------------------------------|--------|--|
| | | <p>guidance and feedback to their supervised entities.</p> <ul style="list-style-type: none"> • FIA’s guidelines should be enhanced to provide for more guidance on ML/TF risk assessment and detection of STRs, more specifically the implementation of the goAML system by reporting entities. • Guidance is also required to assist the supervisors, especially the DNFBP sector supervisors to understand their supervisory roles. • Requirements to issue guidance are adequately provided for but inconsistent with the guidelines which have been provided by the supervising authorities. |
| 35.Sanctions | NC | <ul style="list-style-type: none"> • Botswana’s current legal framework does not provide for sanctions for violations of R. 6 and R. 8 as the legal framework to implement these Recommendations is not yet in place. • Sanctions on preventive measures provided in the FI Act do not cover violations by directors and senior management of reporting entities and some of the sanctions are not dissuasive, effective and proportionate. |
| 36.International instruments | PC | <ul style="list-style-type: none"> • The provisions of the TF Convention have not been fully domesticated. • The lack of criminalisation of some of the predicate offences to ML and of an individual terrorist, and the confusion created by not defining the term “funds” and its interchangeable use with the term “property” relating to TF offences create major deficiencies to the AML/CFT system of Botswana. |
| 37.Mutual legal assistance | LC | <ul style="list-style-type: none"> • Botswana does not have enabling provisions for competent authorities to use the same powers they have to carry out domestic investigations and apply them to investigations relating to foreign requests for MLA. |

Compliance with FATF Recommendations

| Recommendation | Rating | Factor(s) underlying the rating |
|---|--------|--|
| | | <ul style="list-style-type: none"> • There are no requirements to maintain the confidentiality of MLA requests received by the authorities and the information contained in them in order to retain the integrity of the investigation or nature of inquiry. • Lack of dual criminality can be used to decline a requests for MLA |
| 38.Mutual legal assistance: freezing and confiscation | PC | <ul style="list-style-type: none"> • The MACMA does not provide for MLA on requests relating to instrumentalities intended to be used in committing a crime and property of corresponding value. • The term “property” used in the Act is not defined to understand what it covers. • There are no provisions authorising MLA requests on the basis of non-conviction based confiscation proceedings. • Sharing of confiscated property with other countries is not provided for. |
| 39.Extradition | PC | <ul style="list-style-type: none"> • Botswana does not extradite its own nationals and it does not have measures, upon request by the country seeking the extradition, requiring the case of the fugitive to be submitted without undue delay to its competent authorities for the purpose of prosecution of the offence provided in the request. • Although, dual criminality is adequately provided for under the Extradition Act, the different threshold for foreign offences to be regarded as predicate offences (although it will be the same conduct) for ML in Botswana could also affect the dual criminality of extraditable offences. • The complicated process of lodging an extradition request and lack of flexibility of competent authority to competent authority arrangements to make a provisional arrest pending receipt of a formal request/warrant and court hearing, may compromise extradition requests. |

Compliance with FATF Recommendations

| Recommendation | Rating | Factor(s) underlying the rating |
|--|--------|---|
| 40. Other forms of international cooperation | PC | <ul style="list-style-type: none"> • Most of the competent authorities have got no specific powers to exchange information with foreign counterparts. • There are no requirements for competent authorities other than the BURS to provide feedback on information requested from counterparts by the competent authorities. • There are limitations to provisions relating to confidentiality of information exchanged, its protection, and use of the information for the purposes it is requested for. • The authorities do not have requirements or mechanisms to ensure that competent authorities do not refuse provision of exchange of information based on unreasonable or unduly restrictive conditions. • FIA still needs the consent of supervisory authorities, investigatory authorities, statutory bodies or government agencies to disclose information which would have come from them to foreign counterparts. • The provisions enabling the BoB to exchange information with other Central Banks are limited in scope as they do not cover exchange of information on AML/CFT. • Competent authorities have got no provisions enabling them to exchange information with non-counterparts |

Annex 2

Designated categories of offences means:

| Offence | Act Section continued | Sentence provided |
|--|---|--|
| Participation in an organized criminal group | Section 392 of the Penal Code, Cap 08.01 | Maximum of seven years imprisonment |
| Racketeering | None | |
| Trafficking in human beings | Section 9 of Anti Human Trafficking Act | Fine not exceeding P500000.00 or maximum imprisonment of 25 years |
| Migrant smuggling | Section 11(3) of Anti-Human Trafficking Act | Fine not exceeding P100000.00 or 15 years imprisonment |
| Sexual exploitation | Section 141 of Penal Code | Minimum of 10 years imprisonment |
| Sexual exploitation of children of | (1) Section 57 of Children's Act Cap 28.04 (2) (2) Section 16(1)(b) of the Cyber Crime Act | (1) Fine minimum of P20000, maximum of P50000. Minimum imprisonment term of 2 years. (2) Minimum Sentence P40000, Maximum fine not exceeding P100, 000 and imprisonment term not exceeding 2 years. |
| Attempted Rape | Section 143 of Penal Code | Minimum 5 years imprisonment. Maximum life imprisonment |
| Abduction of person for immoral purposes | Section 144 of the Penal Code | Imprisonment term not exceeding 7 years |
| Abduction of person under 16 years | Section 145 of the Penal Code | 3 years imprisonment up to |
| Indecent Assault | Section 146 of the Penal Code | Imprisonment term not exceeding 7 years |
| Defilement of person under 16 years | Section 147 of the Penal Code | Minimum 10 years imprisonment |
| Defilement of idiots | Section 148 of the Penal Code | Imprisonment for a term not exceeding 14 years |
| Illicit trafficking in narcotic drugs | None | |
| Psychotropic substances | Drugs and related Substances Act Cap 63.04 | Sentence, imprisonment minimum 10 years and to a fine of not less than P15000.00 |
| Illicit arms trafficking | None | |

| Offence | Act Section continued | Sentence provided |
|---|---|---|
| Illicit trafficking in stolen and other goods | 320 of the penal code | Maximum of 7 years imprisonment |
| Corruption | S24-32 of Corruption & Economic Crime Act Cap 08.05 | Maximum imprisonment term of 10 years or fine maximum fine of P500000 |
| Bribery | Section 99 of Penal Code | Maximum of 3 years imprisonment |
| Fraud/Obtaining by false pretences | S 308 of Penal Code | Maximum of 7 years imprisonment |
| Counterfeiting currency | Section 360 and 362 of Penal Code | Imprisonment for life |
| Counterfeiting | Section 376 (1) of Penal Code | Maximum of 2 year imprisonment |
| Piracy of products | Section 31 of Copy of Rights and Neighbouring Act Cap 68.02 | Maximum of P200000.00 maximum of 10 years imprisonment |
| Environmental crime | Section 9(5) of Environmental Assessment Act Cap 65.07 | Fine maximum P1000000 or 15 years imprisonment |
| Murder | Section 202 of Penal Code | Death, if no extenuating circumstances exit |
| Grievous bodily injury | Section 230 of Penal Code | Minimum of 7 years and maximum of 14 years imprisonment |
| Kidnaping | Section 253 of Penal Code | Maximum of 7 years imprisonment |
| Illegal restraint | None | |
| Hostage taking | None | |
| Robbery | Section 291 and 292 of Penal Code | Maximum of 20 years imprisonment for ordinary robbery but minimum of 10 years for armed robbery |
| Theft | Section 271 of the Penal Code | 3 years imprisonment |
| Stealing Wills | Section 272 of the Penal Code | Imprisonment term not exceeding 10 years |
| Stealing Postal Matter | Section 273 of the Penal Code | Imprisonment term not exceeding 10 years |
| Stealing Stock | Section 274 of the Penal Code | Imprisonment term not exceeding 10 years |
| Stealing from the person : Stealing goods in transit | Section 275 of the Penal Code | Imprisonment term not exceeding 1 years |

| Offence | Act Section continued | Sentence provided |
|--|--|---|
| Stealing in the Public Service | Section 276 of the Penal Code | Imprisonment term not exceeding 7 years |
| Stealing by Servant/Clerk | Section 277 of the Penal Code | Imprisonment term not exceeding 7 years |
| Stealing by Directors of officers of companies | Section 278 of the Penal Code | Imprisonment term not exceeding 7 years |
| Stealing by Agents | Section 279 of the Penal Code | Imprisonment term not exceeding 7 years |
| Stealing by Tenant of lodgers | Section 280 of the Penal Code | Imprisonment term not exceeding 7 years |
| Smuggling in relation to customs | Section 90(1) of Customs and Excise Act | Maximum fine P20000 or maximum imprisonment term of 5 years |
| Smuggling in relation excise duties and taxes | Section 90 (1) of Customs and Excise Act Cap 50.01 | Maximum fine of 20000 or imprisonment term of 5 years |
| Tax crimes | Section 122(2) of the Income Tax Act Cap 52.01 | 1 month imprisonment |
| Direct taxes | Section 123(1) of the Income Tax Act | P4000 fine or 2 years imprisonment |
| Indirect taxes | Section 128 of the Income Tax Act | P4000 fine or 2 years imprisonment |
| Extortion | Section 296 of Penal Code | Maximum of 14 years imprisonment |
| Forgery | Section 344 of Penal Code | Maximum of 3 years imprisonment |
| Piracy | Section 62 of Penal Code | Life imprisonment |
| Insider Trading or Market manipulation | Section 70 of Botswana Stock Exchange Act No. 11 of 1994 | Liable to a fine of 25000 or five years imprisonment |