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December 16, 2020

John Berrigan Director General
Financial Stability, Financial Services and Capital Markets Union
European Commission

Dear Sir,

We refer to your letter dated 29th October 2020 which followed our letter of 11th September 2020 issued in response to your letter of 14th August 2020 which informed Vanuatu of European Commission's ("the Commission" or "EC") position to maintain Vanuatu on the EU list of high-risk third countries with regard to anti-money laundering and countering financing of terrorism ("the Listing"), in accordance with the revised EU Methodology for identifying high-risk third countries adopted on 7th May 2020 ("the New methodology") and for the first time sharing the draft preliminary assessment with Vanuatu.

First and foremost, we want to convey Vanuatu's continuing commitment to dialogue and mutual cooperation with the European Commission on the strengthening of the efforts preventing money laundering and terrorist financing crimes. We regret if our response of 11th September 2020 did not meet your expectations of detailed addressing of points, and at the same time we note that the country was given only 4 weeks to prepare a material reply at a very technical level with regard to the benchmarks indicated in the EC's draft assessment, which itself was for the first time only revealed to Vanuatu on 14th August 2020. Such a short timeframe was an impossible task for the substantial comments to be gathered from experts, let alone for the benchmarks to be addressed properly, as would have been the case for any other country, no matter big or small, considering the newness of the EC's Methodology (7th May 2020) and the need to understand its differences from the FATF's approach.

It is to be reminded that the dialogue between Vanuatu and EC regarding this Listing was first established on 7th May 2020, regrettably not by a positive note - i.e. not by so anticipated advance notice from EC on what exact information or actions are needed from Vanuatu in order to assist EC to finish its ongoing assessment of the country, but rather by official *Note Verbale* dated May 7th 2020 declaring the outcome of EC's unilateral assessment to further leave Vanuatu included on EC's deficient countries' list and not giving any clear indications of what exactly is expected in order to avoid that. After the *Note Verbale* the parties managed to arrange a telephone conversation between EC and Vanuatu. The conversation seemed to have gone well, Vanuatu expressed its high - level commitment to comply with EC's requirements and was asking to expressly inform the country on what exactly those are, so that the country could address them in a timely manner. EC assured Vanuatu that it will duly inform Vanuatu in

this regard. This information was only delivered only on 14th August 2020, leaving Vanuatu with a mere 4 weeks to substantially reply.

We hereby are willing to offer our detailed comments addressing the benchmarks described in the draft assessment of EC and are inviting EC to engage in further prompt and constructive discussions with the ultimate goal of agreeing on concrete actions required from both parties in order for Vanuatu's assessment to be completed with mutually satisfactory results and for the country to finally make it out of the Listing which it has been placed on unjustly in our view.

GENERAL COMMENTS REGARDING BENCHMARKS

As you have highlighted in your latest letter, the draft benchmarks take into account information from the OECD Global Tax Forum report from July 2019, and focus on three main areas: (1) the legislative framework of Vanuatu on transparency of beneficial ownership information of legal arrangements, (2) the availability to competent authorities of accurate and timely information on the beneficial ownership of legal persons and arrangements, and (3) the effective implementation by competent authorities of Vanuatu of their powers and procedures for the purposes of combatting money laundering and terrorism financing in particular with regard to transparency of beneficial ownership of legal persons and arrangements.

Vanuatu would like to take note that EC seems to have carried out its assessment of Vanuatu's AML/CTF regime based on indirect third-party sources (third-party assessments) and their interpretations, including the statistics collected back then, when said third party carried out its assessment, rather than evaluating the direct sources such as currently valid legal Acts in Vanuatu, or collecting the currently relevant statistical data. Vanuatu was not approached at any point in time with any request to provide assistance in collecting relevant statistics or give access to relevant legal changes which it would have gladly granted. Nor was it provided the opportunity to supply explanations before the conclusions were made. As it will be substantiated below, this alone has resulted in some flawed premises which lead to incorrect conclusions.

According to the New methodology, the criteria used for assessing third countries' AML/CFT regimes are defined in Article 9 of Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (hereinafter – AMLD)). As it appears from the listed sources and the citations, the main source EC based its assessment on how Vanuatu complies with EU's AMLD rules was OECD taxation working papers and namely Peer Review Report on the Exchange of Information on Request on Vanuatu, 2019 (second round) (hereinafter - Global Forum report on Vanuatu).

It is notable that the Global Forum Report on Vanuatu was aimed at assessing a specific topic - the implementation of the standard of transparency and exchange of information on request in Vanuatu. Global Forum is not specialising in AML/CTF assessment, and its said assessment had a specific purpose – to assess the level of international cooperation in terms of information exchange, which is materially different than the purpose of the Commission's assessment of compliance of Vanuatu's AML/CTF regime with EU's AMLD. Obviously, the Global Forum team engaged different methodologies than EC, including in assessing the impact of the shortcomings identified on international cooperation with regard to information exchange. Moreover, it is notable that to the extent where Global Forum has given its views on AML/CTF, it has concluded that *Vanuatu has also done significant reforms on its AML/CFT legislation to provide for the availability of information on beneficial ownership in relevant entities and arrangements and in bank account holders (see below).* Vanuatu has acknowledged the Global Forum's assessment and has already started working on implementing improvements recommended by Global Forum, including in the area of "Availability of ownership information".

Taking into account the different objectives and methodologies of the two assessments, it is somewhat surprising that EC based its whole assessment mostly on the Global Forum's insights and more importantly, conclusions. To be more precise, the Commission in its assessment arrived at exactly the same conclusions that the Global Forum arrived at, and has set exactly the same benchmarks for Vanuatu which are summarized as follows: *Taking into account these elements, the Commission services consider that effective implementation of Vanuatu's regime in ensuring the transparency of beneficial ownership information of legal persons and legal arrangements should be further demonstrated by addressing the abovementioned gaps,* ***in particular the gaps with regard to quality of beneficial ownership information kept by AML obliged professionals and the backlog in registration of BO declarations by International Companies.***

If the Commission thought it necessary to engage in a separate assessment process in addition to the mostly comprehensive one done by FATF and its regional body APG, Vanuatu at least expected it to be independent, based on investigation of direct sources and EC's own evaluations, instead of just quoting the conclusions of third party assessment done by Global Forum (which, again, is neither a recognized AML/CTF regional body nor in any other way has AML/CTF as its main focus area on its agenda).

COMMENTS REGARDING CONCLUSIONS WITH REGARD TO CRITERIA 1.3.

In its assessment EC has concluded that *"Taking into account the latest available information, the Commission services conclude that the technical compliance element is in place but would however need improvements, in particular with regard* ***to the definition of beneficial ownership for trusts and the requirement to identify the beneficiary of foundations (along with a definition issue)****.* ***Altogether, the Commission thus considers that technical shortcomings remain in relation to requirements on transparency of beneficial ownership for legal arrangements****. Additional actions would therefore be needed in this field."*

Firstly, it is notable, that FATF Action Plan included a very similar requirement as this benchmark signified by EC, and it obliged Vanuatu to *amend controls over offshore companies and trust companies to obtain beneficial ownership information at the point of formation and management of offshore companies and trust companies*. This requirement has already been rated as largely compliant by FATF, however EC continues to identify it as a shortcoming.

EC quotes Global Forum Report on Vanuatu and states in its assessment that there is *no clear definition of beneficial owner applicable to trusts. Although Vanuatu's legal framework ensures that identity and beneficial ownership information is required to be collected for trusts in most cases, there is no clear definition of beneficial owner applicable to trusts. Therefore, it is not clear how the concept will be implemented in practice and recommends Vanuatu to ensure that information on beneficial owner(s) of trusts is available in all cases.*

EC further quotes Global Forum in respect to foundations:

Although foundations are required to identify their guardian, councillor, secretary and founder, there is no requirement to identify the beneficiary of the foundation. In addition, the definition of beneficial owner relies on "key persons" and the beneficiary is not part of the key persons, which might not enable to identify the correct beneficial owner.

As it will be demonstrated in detail below, both premises are false (possibly due to the use of outdated information or not fully understanding the applicable Acts of Vanuatu), because the systematic application of Vanuatu's legal acts have actually covered both issues. OECD's Global Forum is not a AML&CTF related

body and had a different purpose in their assessment, thus they might have overlooked specific regulations stemming from AML&CTF related legal acts, but this is not justifiable for EC's assessors conducting the assessment - namely of Vanuatu's AML&CTF regime – to not to look into direct sources.

The legal system and techniques of drafting the laws differ by country. Therefore, it is important when assessing certain country's legal acts to use direct sources (currently valid legal acts instead of third-party opinions) and to have an overall understanding of the hierarchy and inter-applicability of various legal acts constituting the legal system of a particular country. Understandably, in certain cases it is difficult for foreign assessors to have a good understanding without proper guidance from locally practicing experts. It would have been expected that EC would ask for explanations, but regrettably EC have not ever asked Vanuatu to provide its currently valid legal acts, nor have they asked for any explanations as to how they are applied in practice. Assessors simply arrived at the conclusion that it is not clear how the concept will be implemented in practice. If EC had asked, it would have found that the legal requirement to identify UBO's of trusts and similar legal arrangements (which include foundations), has been in place since 2015, it just requires systemic understanding of AML&CTF related legislation.

To begin with, Vanuatu's Anti-Money Laundering and Counter-Terrorism Financing Consolidation Edition 2018 Order No. 15 of 2018 (hereinafter - AML&CTF Act) states the obligation for reporting entities to identify their customers, representatives and beneficial owners as stipulated in Part IV Section 12 (2):
(2) A reporting entity must carry out a prescribed identification process on:
(a) a person conducting a transaction; and
(b) a person on whose behalf a transaction is being conducted; and
(c) a beneficial owner,
if the reporting entity has reasonable grounds to believe that the person is undertaking a transaction on behalf of another person.

Part 1, Section 1 defines that "owner" of a person or entity means a person who has a legal entitlement of 25 percent or more of the person or entity by way of ownership of shares or otherwise, and that **"beneficial owner" means a natural person who is the ultimate owner or ultimate controller of a person or entity**. This definition is the baseline in further defining beneficial owners for various different types of entities or legal arrangements.

Customer identification process as well as other rules are in detail prescribed by Anti-Money Laundering and Counter-Terrorism Financing Regulation Order No. 122 of 2014 as amended on January 30th 2015 and October 9th 2015 (hereinafter - Regulation Order) which imperatively lists what information has to be collected depending on the type of the customer to be identified, i.e. separate list is given for natural persons, legal persons and legal arrangements such as trusts and similar. The Regulation order inter alia requires:
(c) For Legal arrangement as customer - a reporting entity must:
(i) collect the following customer information set out in Table
A of Schedule 2; and
(ii) at a minimum collect the following information:
(A) the full business name of the customer; and
(B) the full business address of the customer; and
(C) the type of customer; and

(D) the country in which the customer was established; and
*(E) the **full name and address of each of the trustee** or similar positions of the customer; and*
*(F) the **full name and address of each of the settlor** or similar position, **the protector** (if any) or similar position **and each beneficiaries** (including through a chain of control/ownership) of the customer; and*
(G) the authorization of any person purporting to act for or on behalf of the customer, and the identity of the persons; and
(H) the purpose and intended nature of the business relationship with the reporting entity.
(iii) have understanding on:
(A) the purpose and intended nature of the business relationship with the reporting entity; and
*(B) the customer's **beneficial ownership and control structure**.*

Furthermore, implementing FATF's Action Plan, the Company and Trust Services Providers Act was changed in 2017 to specifically reflect the obligation of CTSPs which provide trust services and clearly list what information is required to be collected in case of trusts, which constitutes namely of:

25B Obligation to obtain certain trust information

(I) A licensee must obtain the following information:
- *(a) the identity of the **settlor** of a trust in respect of which the licensee provides a trust service;*
- *(b) the identity of each **trustee** of the trust;*
- *(c) the identity of the **protector** of the trust;*
- *(d) the identity of each **beneficiary** or class of beneficiaries of the trust;*
- *(e) details of the beneficial owner of the trust;*
- *(f) details of any other person providing a professional service to the trust.*

25E Commission may require certain information or documents relating to a trust

(1) Subject to subsection (2), the Commission may, by notice in writing to a licensee, require the licensee to provide the Commission with information or documents, or both, specified in the notice within the period set out in the notice.
(2) The information or documents must be information or documents that:
(a) are required to be kept by the licensee under this Act; and
(b) relate to a trust in respect of which the licensee provides a trust service.
(3) If a licensee:
(a) refuses or fails to give the Commission the information or documents required by the Commission; or
(b) knowingly or recklessly gives the Commission information or documents that are false or misleading;
the licensee commits an offence punishable upon conviction by the penalty referred to in subsection (4).
(4) The penalty is:
(a) if the licensee is a natural person - a fine not exceeding VT 15 million or imprisonment not exceeding 5 years, or both; or
(b) if the licensee is a body corporate - a fine not exceeding VT 75 million.

It is clear from the above that 1) the legal obligations to collect identifying information on all persons, related to a trust, which include settlor, trustee, protector and beneficiaries, are fully and clearly defined both in AML&CTF related legal acts and in special acts governing the roles of CTSP's, and 2) the Commission has the right to at any time collect any of such information kept and powers to apply

the dissuasive sanctions in case of non-compliance.

A foundation within the meaning of the Foundation Act No. 38 of 2009 of Vanuatu with its later amendments (as consolidated by Foundation Consolidation Edition 2018 Order No. 68 of 2018) is itself an obliged person under AML&CTF Act (Part I, Section 2 (g), as well as is its founder (according to the said Act, *a person who acts for a founder or a foundation must hold a CTSP licence)*. Therefore, in addition to what is obligatory according to the said Foundation Act, the AML&CTF Act and legal acts governing the duties of CTSP's define the obligations to collect, record, keep and upon request provide all the respective information with regard to the foundation, including its beneficial owners.

It is important to understand how different roles, defined in the Foundation Act, interplay with the definition of beneficial owner as defined in AML&CTF Act. The Foundation Act stipulates various specific roles, all of which are defined as key persons of the foundation, i.e. founder, guardian, councillor and secretary. It is therefore clear, that all listed key persons are deemed beneficial owners of the foundation in terms of the AML&CTF Act, as even the definition suggests them having a **key role in controlling the foundation** (as is also clear from other rights that the Foundation Act gives to these roles). Furthermore, the Foundation Act introduces another important role – beneficiary of foundation, which means a person designated as a beneficiary under the charter or bylaws of a foundation. The law provides that a foundation must manage its assets in accordance with its charter, its bylaws and this Act **for the benefit of its beneficiaries**, therefore it is made clear that beneficiaries of foundations also fall under the definition of beneficial owners in terms of the AML&CTF Act.

Another important definition in the Foundation Act is the definition of beneficial owner of a key person: *A ''beneficial owner'' of a key person is a natural person who ultimately controls the key person*. This definition does not contradict the definition of beneficial owner as defined in the AML&CTF Act, as it is specific to foundations and only defines cases where the person in a key role (founder, councillor or else) may be just a nominee and not the real decision taking (controlling) person, thus not the real beneficial owner in terms of the AML&CTF Act. In case such beneficial owners of key persons become evident or known, in accordance with the definition, these beneficial owners of key persons would also be considered beneficial owners of the foundation in terms of the AML&CTF Act in addition to the roles listed above.

As a result of systematically applying the abovementioned legal requirements, in the case of foundations it is considered that the beneficial owner definition includes all the persons holding any of the above-listed roles with regards to the foundation (founder, guardian, councillor, secretary, beneficiaries and beneficial owners of key persons) because any of these roles may allow for the person to be ultimate owner or ultimate controller of a foundation. As a result, these persons are to be identified, verified, their information needs to be kept in records and other obligations have to be taken towards them to the same extent as to any other type of beneficial owners of the customer.

Therefore, EC's conclusion that foundations are not required to collect information on beneficiaries of the foundations, is not correct.

It is notable, that the list of beneficiaries in cases of trusts and foundations according to EU AMLD is almost identical and includes (c) in the case of legal entities such as foundations, and legal arrangements similar to trusts, the natural person(s) holding equivalent or similar positions to those

referred to in point (b) where (b) refers exactly to trusts (as is also the case in Vanuatu). AMLD lists all the same persons in the case of trusts: *(i) the settlor; (ii) the trustee(s); (iii) the protector, if any; (iv) the beneficiaries, or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates; (v) any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means.*

Therefore, it is clear that the end result of the regulations established in the above quoted legal acts of Vanuatu is the same as of AMLD, in practice the same roles and persons are identified for foundations, trusts and similar legal arrangements, as they are under the EU's AMLD and the same rules further apply with regard to the collected information. Thus, there are no differences in identifying beneficial owners of trusts and foundations compared to the way that Directive approaches it, at least not material ones. The only difference may be in legal technicalities describing the process – AMLD expressly includes these persons in beneficial owner definition, while Vanuatu's beneficial owner definition in main legal acts is short and broad, and the details are set in implementing legal acts, requiring to take the same actions towards these persons as are required to be taken towards beneficial owners in AMLD (i.e. identify, verify, keep record, provide information on them to authorities etc.), therefore the ultimate goal of transparency of beneficial owners of trusts and foundations is reached in both cases equally efficiently. The abovementioned regulations have been in force for several years now (CTSPs Act since 2017, Foundation Act since 2018), therefore there was plenty of time for implementation in practice, just the assessors did not take the opportunity to ask and clarify how this regulation is perceived by Vanuatu.

It is notable, that even the comment from FATF's follow-up report quoted in the assessment is no longer accurate, namely *on accessibility of information, there is a requirement for a trustee to provide the Commission with BO info relating to a trust, but not with other competent authorities (it would be* for the Commission *to further share with other competent authorities*. The valid AML&CTF Act allows the FIU Director to request information on BO from all obligated persons, which include TSCP's, foundations or any unlicensed trustees[1] (for instance, in the case of a family trust) therefore, FIU does not need to get this information from the Commission. Thus it is another example how crucial it is at the time of every assessment to evaluate all currently valid and relevant information from direct sources rather than third party assessments.

Irrespective of the argumentation provided above, since the issue of beneficial ownership definition has been brought up both by Global Forum and EC, to avoid differing interpretations and to show Vanuatu's commitment to take action where required to address any remaining issues (benchmarks), Vanuatu is willing to discuss the above detailed aspects with EC experts and should EC not agree with the above argumentation as sufficient to remove the said benchmark altogether, Vanuatu is expressing its high-level commitment to ensure that the benchmark shall be addressed in the manner acceptable to EC within a reasonable timeframe (allowing the change of legal acts, if

[1] *45B. Director may require reporting entities to provide information about the beneficial owners of customers*
(1) The Director may, by notice in writing, to a reporting entity require the reporting entity to provide the Director with information specified in the notice, being information about the beneficial owner of a customer of the reporting entity that the reporting entity is required to collect under Part 4 of this Act and the Regulations.
"Director" means the Director of the Financial Intelligence Unit appointed under section 7.

required).

COMMENTS REGARDING CONCLUSIONS WITH REGARD TO CRITERIA 1.4.

In relation to criteria 1.4. EC concludes that *more recent information sources raise doubts as to the effectiveness of the measures in place in Vanuatu and their ability to ensure that adequate, accurate and up-to date beneficial ownership information is available in practice.* The Commission again quotes the issues identified by Global Forum:

- In relation to company and trust service providers, over the last four years, there seems to be deficiencies in the quality of the beneficial ownership information kept by AML obliged professionals, although they are the main source of beneficial ownership information in Vanuatu;

- Very limited supervision was so far conducted on the international companies' obligation to keep beneficial ownership details and on the obligation to report that information to the VFSC;

- Finally, available sanctions were not consistently applied by all relevant authorities in cases of non-compliance.

Further quote from Global Forum concludes that *only limited supervision was conducted on the international companies' obligation to keep BO details and on the obligation to report that information to the VFSC. No supervision took place on the new obligation for local companies to report to the VFSC BO information since the new rules have only recently been adopted, and the reporting obligation for directors of local companies under AML has still to be put in place. In practice, approximately half of all the BO declarations by International Companies reported are not yet registered by the VFSC. Although the FIU imposed some sanctions for non-compliance, sanctions were not consistently applied by all relevant authorities in cases of non-compliance."*

The Commission then arrives at the conclusion, *that taking into account these elements, the Commission services consider that effective implementation of Vanuatu's regime in ensuring the transparency of beneficial ownership information of legal persons and legal arrangements should be further demonstrated by addressing the abovementioned gaps, in particular the gaps with regard to quality of beneficial ownership information kept by AML obliged professionals and the backlog in registration of BO declarations by International Companies.*

With regard to this Benchmark, **Vanuatu expresses its high-level commitment to further ensure continuous supervision efforts to ensure quality of beneficial ownership information kept by AML obliged entities and to address the backlog in registration of BO declarations by International Companies. VFSC shall continue its supervision efforts going forward and shall apply dissuasive sanctions in cases of non-compliance.**

COMMENTS REGARDING CONCLUSIONS WITH REGARD TO CRITERIA 3.4.

In relation to criteria 3.4 Commission again quotes the issues identified by Global Forum Report, namely that *only limited supervision was conducted on the international companies' obligation to keep BO details and on the obligation to report that information to the VFSC. No supervision took place on the new obligation for local companies to report to the VFSC BO information since the new rules have only recently been adopted, and the reporting obligation for directors of local companies under AML has still to be put in place. In practice, approximately half of all the BO declarations by International Companies reported are not yet registered by the VFSC.*

The Commission then arrives at the conclusion that *taking into account the abovementioned elements, consider*

that the powers of and procedures of Vanuatu's competent authorities for the purposes of combatting money laundering and terrorist financing are generally implemented in a sufficiently effective manner. However, considering the crucial element of beneficial ownership transparency, the Commission Services consider that Vanuatu should continue efforts to demonstrate that all remaining issues identified by the Global Forum report in this field are addressed, in particular with regard to the limited supervision conducted so far over international companies' obligation to keep beneficial ownership details and on the obligation to report that information to the VFSC; and to the lack of supervision conducted so far on the new obligation for local companies to report to the VFSC BO information.

With regard to this Benchmark, Vanuatu expresses its high-level commitment to further ensure continuous supervision efforts to ensure quality of beneficial ownership information kept by AML obliged entities and to address the backlog in registration of BO declarations by International Companies. To demonstrate its commitment, Vanuatu's VFSC has already issued the official requests for CTSPs and ICs with the reminder to provide the BO information and as a next step shall collect sample checks to verify the quality of information collected. VFSC shall continue its supervision efforts going forward and shall apply dissuasive sanctions in cases of non-compliance.

COMMENTS REGARDING CONCLUSIONS WITH REGARD TO CRITERIA 3.5.

The Commission services consider that Vanuatu's authorities generally demonstrate the existence of dissuasive, proportionate and effective sanctions. However, the Commission takes into account other relevant information and noted in this respect that the OECD Global Forum on transparency and exchange of information for tax purposes (GF) downgraded Vanuatu's transparency rating from Largely Compliant to Partially Compliant in a peer review report published in July 2019; noting notably that "available sanctions were not consistently applied by all relevant authorities in cases of non-compliance" (GF report, para 51, p. 30).

On this basis, the Commission services consider that Vanuatu should further demonstrate that authorities put in place dissuasive, ***proportionate and effective sanctions in case of violation of AML/CFT obligations*** *by the financial and DNFBPs sectors, in particular with regard to transparency of beneficial ownership information.*
With regard to this Benchmark, Vanuatu expresses its commitment to further ensure continuous supervision efforts and that proportionate and effective sanctions in case of violation of AML/CFT obligations are applied to responsible persons. The competent authorities shall ensure that non-compliance is not tolerated.

ADDITIONAL COMMENTS WITH REGARDS TO THE FLAWS IN THE LISTING PROCESS

As confirmed by European Commission (hereinafter – EC or Commission) in its assessment document draft provided to Vanuatu on 14th August, 2020, Vanuatu has been listed as a jurisdiction presenting strategic deficiencies in its AML/CTF Delegated Regulation (EU) 1675/2016. EC further writes in its assessment document that *the inclusion has been justified by the strategic deficiencies that have been identified by the FATF based on the mutual evaluation report of Vanuatu*.

Vanuatu was blacklisted back in 2016 automatically by EC, without being provided with any information on the reasons why or any other communication on this issue. The country remained listed for 4 subsequent years, all the while not informed of what is expected from it in order to be de-listed by EC. In comparison, FATF kept up a constant dialogue with Vanuatu over those years as a result of which Vanuatu has agreed to the specific Action Plan with FATF and has followed through. After a two-year-long legal and financial reform program. which took place in Vanuatu under close monitoring by Asia / Pacific Group (APG) and FATF, Vanuatu was finally de-listed by FATF back in June 2018. Nevertheless, EC has not reflected this material change in circumstances regarding Vanuatu's AML/CTF regime and has not since updated its own list, even though initial listing of Vanuatu was indeed a result of FATF's assessment. So, the EC's *justification* for inclusion of Vanuatu on the deficient countries

list is not valid since June 2018. However, no removal from EC's list occurred and no communication regarding the reasons for such an unfavorable decision were given to Vanuatu until August 14th, 2020.

Needless to say how grave the consequences of such an unjustified delay in the Commission's de-listing are, and how much harm it has created so far to the small and financially struggling country's international reputation, financial situation and overall wellbeing. Being blacklisted by the EU greatly limits Vanuatu's ability to engage in successful business relationships with international partners, which are essential for Vanuatu's growth and financial inclusion.

Vanuatu is aware that EC was already on its way to remove Vanuatu from its blacklist based on its own assessment back in February 2019, which was made under the Commission's own methodology for identifying high risk third countries (methodology of June 2018). This assessment was formalized adopting Delegated Regulation of 13th February 2019 identifying third-country jurisdictions pursuant to Article 9 of Directive (EU) 2015/849 - the updated blacklist which had Vanuatu removed. Sadly, this particular Delegated Regulation was not endorsed by European Council and Parliament for reasons not related to Vanuatu. The Council stated procedural grounds, as *not established in a transparent and resilient process that actively incentivizes affected countries to take decisive action while also* ***respecting their right to be heard***, the European Parliament subsequently called on the Commission to ensure *a transparent process with clear and concrete benchmarks for countries which commit to undergo reforms* ***so as to avoid being listed***. Although it appears that the Parliament had good intentions, its rejection of the updated list sadly meant no positive outcome for Vanuatu – with the update failing to enter into force, it was left blacklisted, not heard and not given a chance to take any action because it was never made clear to Vanuatu what exactly it is that is expected from it in order to be removed from this list. It appears that at that time, EC did not know either – FATF delisting had already happened, new assessment (if any) conducted by EC before February 2019 was clearly favourable to the country based on the recommendation to de-list Vanuatu, but real delisting never eventuated.

OBSERVATION ON COMMISSION'S APPROACH CONTRADICTING ITS OWN METHODOLOGY

After listing Vanuatu in 2016, EC had plenty of opportunity to engage in dialogue with the country or at least with FATF, in order to include any additional benchmarks which EC thought were needed in FATF's developed Action Plan for the country to address, but failed to do so. To this day, Vanuatu has not heard any justification as to why EC thought that the FATF Action Plan was not sufficient, and any reasons why FATF's thorough assessment and the substantial progress confirmed at the time of de-listing in June 2018 was not adequate enough for EC to follow it and do the same.

The methodology in accordance with which EC was assessing Vanuatu was not known to Vanuatu until May 7th 2020. Surprisingly, the New methodology was published on the same May 7th 2020, at the same time as the Note Verbale was delivered to Vanuatu. It remains unclear for the country how the assessment of Vanuatu was carried out based on New methodology (the draft assessment refers to it), which was not even established nor valid at the time the assessment of the country was being performed. By not knowing the methodology nor the criteria which Vanuatu was accused as not meeting in the draft assessment (and the later Note Verbale), Vanuatu had no chance whatsoever to act on any of the alleged issues.

It is notable that the decisions and actions of EC with respect to Vanuatu in many cases contradict EC's own Methodology for identifying high-risk third countries under Directive (EU) 2015/849 published on May 7th, 2020 (hereinafter - New methodology).

The New methodology starts by expressing the main aims and principles of the whole listing process and clearly states, that ***listing of countries will be used as a last resort. The Commission aims to have a dialogue with the countries subject to listing, in view of helping to ensure that the jurisdictions concerned remove identified deficiencies before an eventual listing.***

The New methodology further states, that *for countries de-listed by the FATF, the Commission services will assess whether the FATF Action Plans for a delisting are sufficiently comprehensive also in view of an EU delisting. <…> Once the FATF Action Plan is approved, the Commission services will assess whether it is sufficiently comprehensive in view of the EU delisting criteria and specific EU requirements, in particular on ensuring transparency of beneficial ownership information. Only when this is not the case, further mitigating measures ("EU Benchmarks") would be developed to "top-up" the existing FATF Action Plan (see 4.8.1. Exit criteria). This requirement* ***will apply only in justified cases where the FATF Action Plan cannot be deemed sufficient*** *in view of the EU delisting criteria. <…> The Commission will aim at limiting such cases of* ***"top up" EU Benchmarks to exceptional situations*** *where the concerns expressed by the Commission could not be taken into account by the FATF Action Plans. <…>*

The New methodology also clearly defines, that *the Commission services will assess 1) the level of threats from an EU perspective as well as 2) the level of deficiency, if any, in the different building blocks.* As it will be explained in detail further in this letter, the controversy of some of the identified benchmarks (because some of them were made based on outdated statistics and misinterpreting of relevant legal acts), and the weight and impact of the remaining ones does not in any way allow for conclusion that the Vanuatu's situation is *exceptional* in terms of ML&TF risk and that concerns of the Commission could not and have not been addressed in FATF's Action Plan. When assessing the inherent risks the alleged shortcomings in Vanuatu's regime pose, the miniscule size of Vanuatu's offshore center, let alone foundation and trusts sector, to which most of benchmarks are related to, must have been taken into account, and furthermore the significance of the remaining risk must have been assessed in light of the whole country's AML&CTF framework, which were assessed as largely compliant both by FATF and EC.

Vanuatu is of the opinion that EC had no material reason to not follow the FATF's assessment results and conclusions and the whole separate assessment situation and the given top-up benchmarks are not actually justified taking into account their overall impact and importance. Furthermore, the decision to leave the country in the deficient countries' list is also unjustifiable because in accordance with New methodology, only countries with substantial deficiencies should be on that list. As explained, neither level of threat nor volume of deficiencies in case of Vanuatu allow for the conclusion that they pose significant risk.

To add to the above, Step 4 *Engagement with third countries prior to the conclusion of the Commission's assessment* indicated in the New methodology was not duly implemented in the case of Vanuatu and as a result the country was put in a significantly unfavorable position compared with other assessed countries.

The New methodology says that the approach defined in it *would promote international efforts, foster consistency with the review carried out under the ICRG process and, at the same time, it would ensure that third countries* ***focus their attention on priority measures****. Such synergies between the FATF and the EU process will be facilitated by the fact that the timing of the FATF ICRG Observation Period – and the EU observation period for implementing EU Benchmarks will coincide in terms of duration (i.e., 12 months period – as described below under point 4.4.2). These synergies should also* ***alleviate possible concerns about capacity constraints that some third countries may have****.* Needless to say, that Vanuatu as a small and undeveloped country has huge capacity restraints to meet various standards imposed on it by the international community, adding on top of that, the recent losses suffered due to cyclone and continuing health and economic recession that the worldwide COVID – 19 crisis brought onto the already struggling country, the EC's decision to nevertheless

deviate from FATF opinion and put forward additional Benchmarks (which are only justifiable in exceptional cases) and pressuring the country to treat them as a priority in these times of crisis, at the very least seems unjust and unfair and does not support mutual cooperation principles the EC declares to be following.

Lastly, the EC's own New methodology says that *the Commission will apply transitional arrangements with regard to countries, which are already in FATF Observation period and where this observation period is already advanced. In such cases, the FATF observation period will end before the standard 12 months to be granted by the Commission.* ***Countries in that situation will be informed as soon as possible regarding the need to apply EU benchmarks****, if necessary. <…> the Commission services – in collaboration with the EEAS –* ***would engage with the third country in order to discuss preliminary findings*** *where concerns in the country's AML/CFT regime have been found.* ***If after this exchange there are grounds for concerns, the Commission would communicate the EU Benchmarks to the concerned third country*** *and seek to receive from the third country concerned a high-level political commitment in order to implement them.* ***The EU benchmark would be communicated as early as possible****, and in principle no later than the beginning of the ICRG Observation Period.* ***In this way, the third country would know at an early stage (i.e., at the start of the FATF Observation Period) what is considered as necessary to avoid listing by the EU and would have a chance to address the relevant deficiencies during its FATF Observation Period alongside with the deficiencies that it needs to address to avoid listing by the FATF.***

Therefore, again, in contrary to the EC's own New methodology, Vanuatu was given no information on preliminary findings before issuing benchmarks, nor time or possibility to address the issued benchmarks, not back in the earlier years that Vanuatu was included on the blacklist, nor now when taking the new decision to leave the country on the blacklist. If cited EC's methodology had been followed, Vanuatu would have been given much earlier indication on the concerns as to shortcomings and sufficient time (at least 12 months) to address the benchmarks. In reality however, the country was informed of the benchmarks **long after** it was listed and way **too late to be able to do anything about it to be de-listed, as the decision by EC to leave Vanuatu on the list seems to have already been taken** (Vanuatu was left on the list of deficient countries published on May 7th 2020). This unequal treatment and unilateral decision indicated no intention to even allow the country to address the benchmarks, which raises questions regarding the real intentions of EC towards Vanuatu.

EC's own methodology requires to use the blacklisting only as last resort if after having given indications on shortcomings and time to address benchmarks, the country does not act. In the case of Vanuatu, listing came first and indications with benchmarks followed with huge delays afterwards. If a sound AML&CTF regime in Vanuatu really is a priority of EC, then Vanuatu wants to believe that this, even though late, communication of benchmarks in the draft assessment is to be understood not as a final decision taken, but rather **as indication of preliminary findings** and Vanuatu will be given adequate time to address them. In the meantime, Vanuatu should be left off the blacklist based on all factual situations (de-listing of FATF, expressed high level commitment to further address the EC's benchmarks within a reasonable time) and there are no grounds for EC to believe that the benchmarks will not be addressed or that there are other reasons why the listing is inevitable.

CONCLUDING REMARKS

Despite the above expressed open comments and opinion, **Vanuatu is determined to maintain political dialogue and further cooperate with EC** in order to resolve this unpleasant situation with its Listing. Vanuatu's government is committed to address the benchmarks within a reasonable timeframe (for example 12-months) irrespective of their significance to the effectiveness of the whole AML&CTF regime of Vanuatu, or threat level to EU. Vanuatu expects this to be welcomed by EC as a further sign of commitment to cooperation in the field of AML&CTF efforts and hopes that this will allow EC to re-consider de-listing Vanuatu immediately.

Based on the above detailed argumentation, **Vanuatu kindly asks EC to amend its assessment to reflect the current factual situation and dismiss the irrelevant Benchmarks (as defined above). Vanuatu further kindly requests EC to take into account the immaterial nature of the remaining issues identified by EC's assessment, and on the basis of the high-level commitment expressed by Vanuatu to accept that the deficiencies remaining (if any), are not substantial nor strategic and therefore to take the decision to not include Vanuatu into the EC's high-risk third countries list under Directive (EU) 2015/849, and remove Vanuatu from the list ASAP.**

Vanuatu remains committed to working closely with the Commission in this important area of combating money laundering and terrorist financing.
Yours Sincerely

Dr Gregoire Nimbtik
Director General & Chairman of the AML&CTF National Committee
Ministry of Prime Minister