Exchange of Information on Request

HANDBOOK FOR PEER REVIEWS 2016-2020

GLOBAL FORUM ON TRANSPARENCY
AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

OECD

Third Edition

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About the Global Forum

The Global Forum on Transparency and Exchange of Information for Tax Purposes is the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by over 130 jurisdictions which participate in the work of the Global Forum on an equal footing.

The Global Forum is charged with in-depth monitoring and peer review of the implementation of the standards of transparency and exchange of information for tax purposes; being the standard of exchange of information on request (EOIR) and the standard of automatic exchange of information (AEOI). The EOIR standard is primarily reflected in the 2002 OECD Model Agreement on Exchange of Information on Tax Matters and its commentary, and in Article 26 of the OECD Model Tax Convention on Income and on Capital and its commentary, as updated in 2012. The Global has received a mandate from the G20 to monitor and review the implementation of the OECD Standard on AEOI and to assist developing countries in identifying their needs for technical assistance and capacity building in order to participate in and benefit from AEOI.

All members of the Global Forum, as well as jurisdictions identified by the Global Forum as relevant to its work, are being reviewed under the EOIR standard. A first cycle of EOIR reviews took place from 2010 until 2016. The second round of EOIR reviews is scheduled from 2016 until 2020 against an enhanced EOIR standard, embedded in the 2016 EOIR Terms of Reference. The work on AEOI aims at establishment of the monitoring, support and review processes to best ensure the effective implementation of the AEOI standard for an AEOI review of jurisdictions starting from 2020. The ultimate goal of these reviews is to help jurisdictions to effectively implement the international standards of transparency and exchange of information for tax purposes.

All review reports are published once adopted by the Global Forum and they thus represent agreed Global Forum reports.

For more information on the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes, and for copies of the published review reports, please refer to www.oecd.org/tax/transparency.

Acronyms and abbreviations

AEOI	Automatic Exchange of Information
AML/CFT	Anti-Money Laundering/Countering the Financing of Terrorism
CDD	Customer Due Diligence
GF	Global Forum on Transparency and Exchange of Information for Tax Purposes
EOI	Exchange of Information
EOIR	Exchange of Information on Request
FATF	Financial Action Task Force
JAHGA	Joint Ad Hoc Group on Accounts
Multilateral Convention	OECD Convention on Mutual Administrative Assistance in Tax Matters
OECD	Organisation for Economic Co-operation and Development
PRG	Peer Review Group
TIEA	Tax Information Exchange Agreement
WP10	OECD Working Party 10 on Exchange of Information and Tax Compliance
2016 Assessment Criteria Note	Assessment Criteria Note, as approved by the Global Forum on 29-30 October 2015.
2016 Methodology	2016 Methodology for Peer Reviews and Non-Member Reviews, as adopted by the Global Forum at its meeting on 29-30 October 2015
2016 Terms of Reference	Terms of Reference related to Exchange of Information on Request (EOIR), as approved by the Global Forum on 27-28 October 2015.

About this handbook

This handbook is intended to assist the assessment teams and the reviewed jurisdictions that are participating in the Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum) peer reviews and non-member reviews on EOIR under the second round of reviews (2016-20). It provides contextual background information on the Global Forum and the peer review process under the second round of EOIR reviews. It also contains the key documents and authoritative sources that are the basis of the Global Forum's peer review process. Assessors should be familiar with the information and documents contained in this handbook as it will assist in conducting proper and fair assessments. This handbook is also a unique source of information for governments, academics and others interested in transparency and exchange of information for tax purposes.

Background

1. Tax avoidance and tax evasion threaten government revenues throughout the world. Globalisation generates opportunities to increase global wealth but also results in increased risks. With the increase in cross-border flows of capital that come with a global financial system, tax administrations around the world face more and greater challenges to the proper enforcement of their tax laws than ever before. To meet these challenges, tax authorities must increasingly rely on international co-operation based on the implementation of international standards of transparency and effective exchange of information. Better transparency and information exchange for tax purposes are keys to ensuring that corporate and individual taxpayers have no safe haven to hide their income and assets and that they pay the right amount of tax in the right place.

2. The EOIR standard used during the first round of EOIR reviews in 2010 was primarily based on the 2002 Model TIEA and the 2005 version of Article 26 of the Model Tax Convention and Commentary[1]. To ensure a level playing field and to respond to the G20's call to draw on the work of the FATF on beneficial ownership, the Global Forum strengthened its EOIR

1. Paragraph 5 of the ToR.

standard for its second round of review by introducing the FATF concept of beneficial ownership in its assessments, along with other positive changes. The Global Forum adopted the revised Terms of Reference (2016 Terms of Reference) at its annual meeting in Barbados on 28-29 October 2015.

3. The 2016 EOIR Terms of Reference introduces a requirement that beneficial ownership information be available for EOIR purposes in respect of legal persons (e.g. companies, foundations, Anstalt and limited liability partnerships) and legal arrangements (e.g. trusts). The 2016 EOIR Terms of Reference remain based on 2002 Model TIEA, but now refer to the 2012 version of Article 26 of the Model Tax Convention and Commentary, which clarifies, amongst others, that requests on a group of taxpayers not individually identified ("group requests") are covered under Article 26 of the Model Tax Convention, as long as the foreseeable relevance is sufficiently demonstrated. Other improvements have been introduced regarding the coverage of enforcement measures and record retention periods, foreign companies, rights and safeguards, and the completeness and quality of EOI requests and responses.

4. The first round of reviews was a great success with 125 jurisdictions being assessed and a total of more than 250 reports (phase 1, phase 2 or combined) published in the period 2010-16. Final ratings for [X] jurisdictions were adopted. During the first round of reviews, the reports have shown that the volume of requests has grown substantially – by some estimates more than 60 per cent. The use of EOIR is expected to increase following the implementation of AEOI, as AEOI will serve as a detection tool and EOIR will be required to build up cases against non-compliant taxpayers.

The Global Forum's Mandate

5. International tax evasion continues to be high on the agenda of political leaders. The need to tackle cross-border tax evasion is consistently reiterated by G20 leaders' calls, by the OECD and other international organisations. There is now a widespread recognition that all jurisdictions need to implement the international standards of transparency and exchange of information for tax purposes if international tax evasion is to be tackled effectively.

6. Political attention to the Global Forum's work, and the urgency of ensuring that high standards of transparency and exchange of information are in place around the world, made it imperative to review the Global Forum's structure and mandate. The mandate of the Global Forum was renewed for the period 2016-20. Participants agreed that the Global Forum will:

- ensure a rapid and an effective global implementation of the standards of transparency and exchange of information for tax purposes, either on request or automatic (the standards).

- work to achieve its aims by monitoring implementation of the standards, undertaking peer reviews, developing tools and assisting members to implement the standards effectively. Monitoring and peer review processes will be ongoing exercises.

The Global Forum's work is guided by the Steering Group, which includes 18 members. With respect to EOIR, the reports are reviewed by the Peer Review Group (PRG) which includes 30 members. Three to four meetings of the Peer Review Group and the Steering Group take place per year. The work on AEOI is undertaken by the AEOI Group, which is composed of 67 members.

Purpose of the Peer Reviews

Since 2010, the Global Forum has been undertaking a robust, transparent and accelerated process of reviews of the implementation of the EOIR standard. Assessment teams, comprising representatives from Global Forum member jurisdictions, along with members of the Global Forum Secretariat, conduct systematic examinations and assessments of jurisdictions' legal and regulatory frameworks for EOIR and also of the jurisdictions' practical application of their frameworks. The ultimate goal is to help jurisdictions to effectively implement the international EOIR standard.

The effectiveness of the Global Forum reviews relies, in part, on the influence and open dialogue between jurisdictions during the peer review process and also on the public nature of the outcomes of this process. The peer review process involves a mix of formal recommendations in the peer review reports and informal dialogue by the peer jurisdictions, public scrutiny, and the impact on all of the above on domestic public opinion, national administrations and policy makers. This aids understanding of various ways in which the standards can be implemented in domestic systems and stimulates jurisdictions to strengthen their legal and regulatory frameworks, and the effectiveness of their frameworks, in order to meet the EOIR standard.

Purpose of this handbook

This handbook consists of a toolkit for assessors and assessed jurisdictions for the conduct of the evaluation. It includes three core documents elaborated by the Global Forum for conducting the second round of reviews, namely:

- **The 2016 Terms of Reference** draws from the initial Terms of Reference for the first round of reviews, and breaks down the standards into their essential elements and enumerated aspects. The 2016 Terms of Reference are divided into three parts: Part A dealing with

availability of information (ownership information (element A.1), accounting information (element A.2) and banking information (element A.3), Part B dealing with access to the information set out in Part A (element B.1) and the rights and safeguards of the taxpayers (element B.2); and finally Part C dealing with exchange of information (exchange of information mechanisms (element C.1), exchange of information mechanisms with relevant partners (element C.2), confidentiality (element C.3), rights and safeguards of taxpayers and third parties (element C.4) and requesting and providing information in an effective manner (element C.5).

- **The 2016 Methodology for Peer Reviews and Non-Member Reviews** provides detailed guidance on the procedural aspects of the peer reviews. The 2016 Methodology details the peer review process and deals with specific aspects of the review such as the onsite visit or the adoption of the report. It further sets out the procedures applicable to reports for non-members. As the peer review process is an on-going exercise, the 2016 Methodology also includes a revised follow-up procedure. The annexes to the 2016 Methodology include the responsibilities of the various actors of the peer review process (secretariat, assessors, assessed jurisdictions, PRG members and Global Forum members).
- **The 2016 Assessment Criteria Note** establishes a system for assessing the implementation of the EOIR standard. This note has been fundamentally revised for the second round of reviews to take into account the principles stemming from the first round of reviews and to address new assessment challenges, such as the evaluation of the quality of requests made or the jurisdiction's failure to respond to recommendations made.

It should be noted that the schedule of reviews, which is also a core document, is not reproduced in this handbook, as it is updated frequently with new members, accelerated reviews and supplementary reviews. An updated schedule of reviews can be found of the global Forum website: www.oecd.org/tax/transparency/about-the-global-forum/publications/schedule-of-reviews.pdf.

Part I

Key documents for the conduct of the Global Forum's EOIR reviews

2016 Terms of Reference to monitor and review progress towards transparency and exchange of information on request for tax purposes

I. Introduction

1. The Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum) is the largest tax body in the world charged with monitoring tax transparency. It was profoundly restructured in 2009 following a call from the G20 Leaders to ensure a rapid implementation of the standard for exchange of information on request (EOIR) through the establishment of a rigorous and comprehensive peer review process. The Global Forum quickly established a peer review mechanism comprising Terms of Reference, a Methodology and a Schedule of Reviews to undertake that work. Considerable progress has been achieved since 2009 through the conduct of peer reviews of jurisdictions which have assessed 126 jurisdictions' compliance with the international standard of EOIR, as well as through training and technical assistance activities. The G20 leaders have consistently encouraged a rapid implementation of the standard of EOIR and in 2014 adopted a new standard for automatic exchange of information (AEOI). The AEOI standard will be evaluated in accordance with its own dedicated Terms of Reference, Methodology and Schedule of Reviews.

2. At its plenary meeting in Jakarta, in November 2013, the Global Forum agreed that a new round of reviews for compliance with the EOIR standard would be initiated from 2016 following the completion of the initial Schedule of Reviews. On 26-27 October 2014 in Berlin, the Global Forum agreed to extend its mandate to the end of 2020 and adopted a series of proposals to amend the Terms of Reference with a view to adapt them to the evolving international environment in transparency for tax matters. The revised Terms of Reference constitute the basis for the next round of peer reviews starting from 2016 (2016 Terms of Reference), which will monitor and review progress made towards full and effective EOIR since the first round of reviews started in 2010.

3. The hallmarks of a good peer review system are open procedures coupled with a clear statement of the standards against which subjects are being reviewed. The 2016 Terms of Reference describe the EOIR standard and break it down into 10 essential elements to be assessed through the monitoring and peer reviews.

II. The standard of transparency and exchange of information on request for tax purposes

4. The principles of transparency and effective information exchange on request for tax purposes are primarily reflected in the 2002 OECD's Model Agreement on Exchange of Information on Tax Matters (the OECD Model TIEA) and its commentary and in Article 26 of the OECD Model Tax Convention on Income and on Capital ("the OECD Model Tax Convention") and its commentary as updated in 2012 (and approved by the OECD Council on 17 July 2012). The 2012 revision to Article 26 and its commentary aimed at reflecting the international developments in tax transparency since the previous revision in 2005[1]. The standard of EOIR is now virtually universally accepted. All Global Forum members have committed to implement the standard and undergo a peer review to assess its implementation.

5. The standard provides for exchange on request of foreseeably relevant information for the administration or enforcement of the domestic tax laws of a requesting party. Fishing expeditions are not authorised but all foreseeably relevant information must be provided, including bank information and information held by fiduciaries, regardless of the existence of a domestic tax interest or the application of a dual criminality standard. The 2012 revision to Article 26 further developed the interpretation of the standard of "foreseeable relevance", notably spelling out the circumstances in which "group requests" meet the standard of "foreseeable relevance" and when they do not, and adding new examples regarding foreseeable relevance.

6. In addition to the primary authoritative sources of the standard, there are a number of documents which have provided guidance in how the standard should be applied, in particular as regards transparency. For instance, in connection with ensuring the availability of reliable accounting information the Joint Ad Hoc Group on Accounts ("JAHGA")[2] developed guidance on accounting transparency. Other secondary sources include the OECD and

1. United Nations Model Double Taxation Convention between Developed and Developing Countries ("the UN Model Tax Convention") continues to reflect the 2005 version of the OECD Model Tax Convention and its Commentary.
2. The JAHGA was set up in 2003 under the auspices of the Global Forum. For the standards developed by the JAHGA see "Enabling Effective Exchange of

Global Forum Manuals on Exchange of Information (2006 and 2013), the 2004 Guidance notes developed by the Forum on Harmful Tax Practices, and the 2012 Financial Action Task Force (FATF) recommendations and guidance on transparency and beneficial ownership (see Annex 1). In this regard it should be noted that the G20's declaration at the Saint Petersburg Summit stated that "We invite the Global Forum to draw on the work of the FATF with respect to beneficial ownership".[3]

7. Exchange of information for tax purposes is effective when reliable information, foreseeably relevant to the tax requirements of a requesting jurisdiction is available, or can be made available, in a timely manner and there are legal mechanisms that enable the information to be obtained and exchanged.[4] It is helpful, therefore, to conceptualise transparency and exchange of information as embracing three basic components:

- availability of information
- appropriate access to the information, and
- the existence of exchange of information mechanisms

8. In other words, the information must be **available**, the tax authorities must have **access** to the information, and there must be a basis for **exchange**. If any of these elements are missing, information exchange will not be effective.

9. The remainder of this section breaks down the principles of transparency and effective exchange of information into their essential elements. In order for assessors to be able to evaluate whether a jurisdiction has implemented the standard or not, they will have to be in the position to understand each of the key principles and what a jurisdiction must do to satisfy that requirement. The sections are divided as discussed above into availability of information (Part A), access to information (Part B) and finally information exchange (Part C).

A. Availability of information: Essential elements

10. Effective exchange of information requires the availability of reliable information. In particular, it requires that adequate, accurate and up to date information on the identity of the legal and beneficial owners (and the identity of other relevant persons as identified in essential element A.1) of

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Information: Availability Standard and Reliability Standard," (the JAHGA Report).

3. Para. 51 of the G20 Leaders' Declaration, September, 2013.
4. JAHGA Report, para. 1.

relevant entities and arrangements[5] is available to competent authorities in a timely manner, as well as accounting information for these entities and arrangements. In addition, it is crucial for effective exchange of information that banking information is available.

11. Regarding beneficial ownership information applicable under elements A.1 and A.3, it is recognised that the purposes for which the FATF standards have been developed (combatting money-laundering and terrorist financing) are different from the purpose of the standard on EOIR (ensuring effective exchange of information for tax purposes). Hence, in applying and interpreting the FATF materials[6] regarding "beneficial owner", care should be taken that such application and interpretation do not go beyond what is appropriate for the purposes of ensuring effective exchange of information for tax purposes.

12. This Part A of the 2016 Terms of Reference requires jurisdictions to ensure that ownership, identity, accounting and banking information is available. Such information may be kept for tax, anti-money laundering, regulatory, commercial or other reasons. If such information is not kept or the information is not maintained for a reasonable period of time, a jurisdiction's competent authority may not be able to obtain and provide it when requested. Not only should jurisdictions require that this information be maintained but also that it be kept for at least 5 years[7], even in cases where the relevant entity or legal arrangement has ceased to exist. Also, effective enforcement provisions to ensure the availability of information must be in place, including adequate monitoring for non-compliance, as well as sufficiently strong compulsory powers. These aspects are an inherent requirement under each of the elements in Part A.

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5. The term "Relevant Entities and Arrangements" includes: (i) a company, foundation, Anstalt and any similar structure, (ii) a partnership or other body of persons, (iii) a trust or similar arrangement, (iv) a collective investment fund or scheme, (v) any person holding assets in a fiduciary capacity and (vi) any other entity or arrangement deemed relevant in the case of the specific jurisdiction assessed.
6. See Annex 2, letter D.
7. The minimum period of five years applies from the end of the period to which the information (ownership and identity, accounting and banking information) relates in all cases and would generally relate either to a taxable year, a calendar year, or an accounting period. The period to which the information relates depends on the type of rule being applied (e.g. tax law, accounting law), the person subject to the requirement (e.g. a third-party information holder or a taxpayer) and the type of information requested.

A.1 Jurisdictions should ensure that ownership and identity information, including information on legal and beneficial owners[8], for all relevant entities and arrangements is available to their competent authorities.

A.1.1. Jurisdictions[9] should ensure that information is available to their competent authorities that identifies the owners of companies and any bodies corporate.[10] Owners include legal owners and beneficial owners (including, in any case where a legal owner acts on behalf of any other person as a nominee or under a similar arrangement, that other person), as well as persons in an ownership chain.

A.1.2. Where jurisdictions permit the issuance of bearer shares they should have appropriate mechanisms in place that allow the owners of such shares to be identified. One possibility among others is a custodial arrangement with a recognised custodian or other similar arrangement to immobilise such shares.

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8. FATF defines the term "beneficial owner" as the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement. Reference to ultimate ownership or control and ultimate effective control refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.
9. It is the responsibility of the jurisdiction under whose laws companies or bodies corporate are formed to ensure that legal and beneficial ownership information in relation to those entities is available. In addition, where a company or body corporate has a sufficient nexus to another jurisdiction, including being resident there for tax purposes (for example by reason of having its place of effective management or administration there), or, where the concept of residence for tax purposes is not relevant in that other jurisdiction, one possible alternative nexus is that the company has its headquarters there, that other jurisdiction will also have the responsibility of ensuring that legal ownership information is available. Typically, the headquarters of a company would be the place where the majority of the senior management and key functions of the company are located, or in other words, the place from which operations of the company are directed. Finally, where a foreign company has a sufficient nexus then the availability of beneficial ownership information is also required to the extent the company has a relationship with an AML-obligated service provider that is relevant for the purposes of EOIR.
10. OECD Model TIEA Article 5(4) (please note, however, exceptions for publicly-traded companies or public collective investment funds or schemes) and JAHGA Report paragraph 1.

A.1.3. Jurisdictions should ensure that information is available to their competent authorities that identifies the partners in, and the beneficial owners of, any partnership that (i) has income, deductions or credits for tax purposes in the jurisdiction, (ii) carries on business in the jurisdiction or (iii) is a limited partnership formed under the laws of that jurisdiction.[11]

A.1.4. Jurisdictions should take all reasonable measures to ensure that beneficial ownership information[12] is available to their competent authorities in respect of express trusts (i) governed by the laws of that jurisdiction[13], (ii) administered in that jurisdiction, or (iii) in respect of which a trustee is resident in that jurisdiction.[14]

A.1.5. Jurisdictions that allow for the establishment of foundations should ensure that information is available to their competent authorities for foundations formed under those laws to identify the founders, members of the foundation council, and beneficiaries (where applicable), as well any beneficial owners of the foundation or persons with the authority to represent the foundation[15].

A.2 Jurisdictions should ensure that reliable accounting records[16] are kept for all relevant entities and arrangements.

A.2.1. Accounting records should (i) correctly explain all transactions, (ii) enable the financial position of the Entity or Arrangement to be determined with reasonable accuracy at any time and (iii) allow financial statements to be prepared.

11. OECD Model TIEA Article 5(4).
12. Beneficial ownership information includes information on the identity of the settlor, trustee(s), protector (if any), all of the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust.
13. It is not expected that a trust law jurisdiction would be required to enforce such requirements globally on every trust governed by their law. See Assessment Criteria Note, para. 85 as well as FATF Guidance on Transparency and Beneficial Ownership (October 2014) paras. 59-62 for more information.
14. OECD Model TIEA Article 5(4). See also commentary on express trusts in the appendix to the JAHGA Report, para. 6.
15. OECD Model TIEA Article 5(4).
16. See JAHGA Report.

A.2.2. Accounting records should further include underlying documentation, such as invoices, contracts, etc. and should reflect details of (i) all sums of money received and expended and the matters in respect of which the receipt and expenditure takes place; (ii) all sales and purchases and other transactions; and (iii) the assets and liabilities of the relevant entity or arrangement.

A.3 Banking information should be available for all account-holders.

A.3.1. Banking information should include all records pertaining to the accounts as well as to related financial and transactional information[17], including information regarding the legal and beneficial owners of the accounts.

B. Access to bank, ownership, identity and accounting information: Essential elements

13. A variety of information may be needed in a tax enquiry and jurisdictions should have the authority to obtain all such information. This includes information held by banks and other financial institutions as well as information concerning the ownership of companies or the identity of interest holders in other persons or entities, such as partnerships and trusts, as well as accounting information in respect of all such entities.

14. The peer review process shall assess whether the access powers in a given jurisdiction cover the right types of persons and information and whether rights and safeguards are compatible with effective exchange of information.

B.1. Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control[18] of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information).[19]

B.1.1. Competent authorities should have the power to obtain and provide information held by banks, other financial

17. See B.1.

18. In the context of availability of information a person might be said to have possession of records or information if he/she has physical control over it. Control is broader and includes situations where a person has the legal right or authority, or the ability to obtain documents or information in the possession of another person.

19. See, however, section C.4.

institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees, as well as information regarding the legal and beneficial owners of companies, partnerships, trusts, foundations, and other relevant entities including, to the extent that it is held by the jurisdiction's authorities or is within the possession or control of persons within the jurisdiction's territorial jurisdiction, and legal ownership information on all such persons in an ownership chain[20].

B.1.2. Competent authorities should have the power to obtain and provide accounting records for all relevant entities and arrangements.[21]

B.1.3. Competent authorities should use all relevant information-gathering measures to obtain the information requested, notwithstanding that the requested jurisdiction may not need the information for its own tax purposes (e.g. information should be obtained whether or not it relates to a taxpayer that is currently under examination by the requested jurisdiction).

B.1.4. Jurisdictions should have in place effective enforcement provisions to compel the production of information.[22]

B.1.5. Jurisdictions should not decline on the basis of its secrecy provisions (e.g. bank secrecy, corporate secrecy) to respond to a request for information made pursuant to an exchange of information mechanism.

B.2 The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information.

B.2.1. Rights and safeguards should not unduly prevent or delay effective exchange of information.[23] For instance, notification rules should permit exceptions from prior notification (notably, in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the requesting jurisdiction) and time-specific post-exchange notification (e.g. when such notification is likely

20. See OECD Model TIEA Article 5(4).
21. See JAHGA Report paragraphs 6 and 22.
22. See JAHGA Report paragraph 22.
23. See OECD Model TIEA Article 1.

to undermine the chance of success of the investigation conducted by the requesting jurisdiction[24]).

C. Exchanging information: Essential elements

15. Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanism for doing so. The legal authority to exchange information may be derived from bilateral or multilateral mechanisms (e.g. double tax conventions, tax information exchange agreements, the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters) or arise from domestic law. Within particular regional groupings information exchange may take place pursuant to exchange instruments applicable to that grouping (e.g. within the EU, the directives and regulations on mutual assistance). The peer review process shall assess whether the network of information exchange mechanisms that a jurisdiction has is adequate in their particular circumstances.

C.1. Exchange of information mechanisms should provide for effective exchange of information and should:

C.1.1. allow for exchange of information on request where it is foreseeably relevant[25] to the administration and

24. A requested jurisdiction should provide for an exception from time-specific, post-exchange notification in cases where notification is likely to undermine the chance of success of the investigation conducted by the requesting jurisdiction and the requesting jurisdiction has made a request for the application of such an exception on this basis that is founded on reasonable grounds.

25. See Articles 1 and 5(5) OECD Model TIEA and accompanying commentary and paragraphs 5, 5.1 and 5.2 (relating to group requests) of the commentary to Article 26 of the OECD Model Convention. It is incumbent upon the requesting state to demonstrate that the information it seeks is foreseeably relevant to the administration and enforcement of its tax laws. Article 5(5) of the OECD Model TIEA contains a checklist of items that a requesting state should provide in order to demonstrate that the information sought is foreseeably relevant. The addition to paragraph 5 of the Commentary, which was made in the 2012 update, specifies that a request may not be declined in cases where a definite assessment of the pertinence of the information to an ongoing investigation can only be made following the receipt of the information. Paragraph 5.1 specifies that a) in the absence of a name and address, sufficient information is required to identify the taxpayer and b) similarly, that it is not necessarily required that the request includes the name and/or address of the person believed to be in possession of the information. Finally, paragraph 5.2 specifies that, in the case of group requests, the foreseeable relevance of a group request should be sufficiently demonstrated.

enforcement of the domestic tax laws[26] of the requesting jurisdiction.[27]

C.1.2. provide for exchange of information in respect of all persons (e.g. not be restricted to persons who are resident in one of the contracting states for purposes of a treaty or a national of one of the contracting states).

C.1.3. not permit the requested jurisdiction to decline to supply information solely because the information is held by a financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.[28]

C.1.4. provide that information must be exchanged without regard to whether the requested jurisdiction needs the information for its own tax purposes.[29]

C.1.5. not apply dual criminality principles to restrict exchange of information.

C.1.6. provide exchange of information in both civil and criminal tax matters.[30]

C.1.7. allow for the provision of information in specific form requested (including depositions of witnesses and production of authenticated copies of original documents) to the extent possible under the jurisdiction's domestic laws and practices.

C.1.8. be in force; where agreements have been signed, jurisdictions must take all steps necessary to bring them into force expeditiously.

It should also be demonstrated that the requested information would assist in determining compliance by the taxpayers in the group.

26. See paragraph 15 of the Commentary to Article 26 of the OECD Model Convention.
27. See Article 1 of the OECD Model TIEA, paragraph 5.4 of the Revised Commentary (2008) to Article 26 of the UN Model Convention and paragraph 9 of the Commentary to Article 26 of the OECD Model Convention.
28. OECD and UN Model Tax Conventions, Art. 26(5); OECD Model TIEA, Art. 5(4)(a).
29. OECD and UN Model Tax Conventions, Art. 26(4); OECD Model TIEA, Art. 5(2).
30. Article 4(1) (o) of the OECD Model TIEA.

C.1.9. be given effect by the enactment of legislation necessary for the jurisdiction to comply with the terms of the mechanism.[31]

C.2 The jurisdictions' network of information exchange mechanisms should cover all relevant partners.[32]

C.3 The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received.

C.3.1. Information exchange mechanisms should provide that any information received should be treated as confidential and, unless otherwise agreed by the jurisdictions concerned, may be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the exchange of information clause. Such persons or authorities shall use the information only for such purposes unless otherwise agreed between the parties and in accordance with their respective laws[33]. Jurisdictions should ensure that

31. OECD Model TIEA, Art. 10.

32. The standard requires that jurisdictions exchange information with all relevant partners, meaning those partners who are interested in entering into an information exchange arrangement. Jurisdictions are expected to enter into an EOI agreement that conforms to the EOIR standard if requested without insisting on additional conditions. Where the party seeking an EOI mechanism is itself a party to the multilateral Convention on Mutual Administrative Assistance then the requested party would satisfy the requirement of element C.2 by also becoming party to that agreement. However, the standard does not require a jurisdiction to enter a multilateral instrument. Similarly, an exchange of information relationship can be established also based on other types of EOI agreements such as Double Tax Conventions if the conclusion of such an agreement is agreeable by both jurisdictions. Agreements cannot be concluded only with counterparties without economic significance. If it appears that a jurisdiction is refusing to enter into agreements or negotiations with partners, in particular ones that have a reasonable expectation of requiring information from that jurisdiction in order to properly administer and enforce its tax laws, this should be drawn to the attention of the Peer Review Group, as it may indicate a lack of commitment to implement the standard.

33. See Article 8 OECD Model TIEA; Article 26(2), OECD and UN Model Tax Conventions. Information exchanged may be used for other purposes (other than

safeguards are in place to protect the confidentiality of information exchanged.[34]

C.3.2. In addition to information directly provided by the requested to the requesting jurisdiction, jurisdictions should treat as confidential in the same manner as information referred to in C.3.1 all requests for such information, background documents to such requests, and any other document reflecting such information, including communications between the requesting and requested jurisdictions and communications within the tax authorities of either jurisdiction[35].

C.4 The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties.

C.4.1. Requested jurisdictions should not be obliged to provide information which would disclose any trade, business, industrial, commercial or professional secret or information which is the subject of attorney client privilege or information the disclosure of which would be contrary to public policy.[36]

C.5 The jurisdiction should request and provide information under its network of agreements in an effective manner.

C.5.1. Jurisdictions should be able to respond to requests within 90 days of receipt by providing the information requested or providing an update on the status of the request.[37]

C.5.2. Jurisdictions should have appropriate organisational processes and resources in place to ensure quality of requests and quality and timeliness of responses.

C.5.3. Exchange of information assistance should not be subject to unreasonable, disproportionate, or unduly restrictive conditions.

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tax purposes) provided that the written consent is given or it is authorised by the competent authority of the requested jurisdiction.

34. See B.2.
35. See paragraph 11 of the Commentary to Article 26 OECD Model Tax Convention.
36. See OECD and UN Model Tax Conventions Article 26(3)(b) and commentary and OECD Model TIEA Article 7.
37. See Article 5(6)(b) of the OECD Model TIEA.

III. Output of the peer review process

16. All Global Forum members have agreed to be assessed by a peer review for their implementation of the standard of EOIR, as articulated in the 2016 Terms of Reference. In addition, non-members that are relevant to the Global Forum's work are also subject to review. Each jurisdiction is assessed for the implementation of the legal and regulatory framework and the implementation of that framework in practice. The final result is a rating for each of the essential elements and an overall rating. The first round of reviews was conducted in accordance with the Schedule of Reviews first agreed in 2010, and has been completed for nearly all members. The Global Forum has agreed that all members and relevant non-members should be subject to a second round of review starting in 2016, to ensure continued compliance with and implementation of the standard. Where the first round of reviews was generally conducted as separate reviews for Phase 1 and Phase 2, the reviews commencing in 2016 will combine both Phase 1 and Phase 2 into one review. The reviews are conducted in accordance with the 2016 Methodology and Schedule of Reviews. Final review reports are published and reviewed jurisdictions are expected to follow up on any recommendations made.

Annex 1

Sources of the internationally agreed standard on transparency and effective exchange of information for tax purposes on request (the standard)

1. This annex briefly describes the authoritative sources setting out standard on transparency and effective EOIR for tax purposes as well as additional sources that may be useful to assessors, the Peer Review Group and the Global Forum in applying the standard in the monitoring and peer review process. The internationally agreed standard on transparency and effective exchange of information for tax purposes may be divided into a primary authoritative source and a number of complementary sources.

2. The primary authoritative source contains:

- The 2002 Model Agreement on Exchange of Information on Tax Matters and its Commentary ("Model Agreement");
- Article 26 of the OECD Model Tax Convention on Income and on Capital ("Model Tax Convention") and its Commentary, as updated in 2012.[38]

3. This primary authoritative source is complemented by a number of secondary documents which give elements of context for the understanding and interpretation of the standard. These documents have been developed by the relevant OECD bodies or by the Global Forum. Finally, as work on standard-setting and evaluation closely relates to areas covered by other international bodies, and in particular the FATF, the principles developed by the FATF may be taken into consideration to interpret and apply the standard where appropriate.

38. United Nations Model Double Taxation Convention between Developed and Developing Countries ("the UN Model Tax Convention") continues to reflect the 2005 version of the OECD Model Tax Convention and its Commentary.

I. Primary Authoritative Source

A. Model Agreement and Commentary

4. In 2002, the Global Forum created a Working Group on Effective Exchange of Information (the Global Forum Working Group). It included representatives from several OECD countries and Aruba, Bermuda, Bahrain, Cayman Islands, Cyprus, the Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino. The Working Group developed the 2002 Model Agreement which has been used as the basis for the negotiation of over 1600 Tax Information Exchange Agreements (TIEAs).

5. The Model Agreement and Commentary is an authoritative source of the Global Forum standard on transparency and effective EOIR for tax purposes. It addresses the standard for exchange of information in detail including with regard to the obligation to provide all information that is foreseeably relevant to the administration or enforcement of the domestic laws of the contracting parties concerning taxes, the narrow acceptable grounds for declining a request, the format of requests, confidentiality, attorney-client privilege and other matters.

6. The Model Agreement and Commentary also address the scope of information that must be available to be accessed and exchanged. The scope is primarily determined by the foreseeable relevance standard, i.e. all information that is foreseeably relevant to the administration or enforcement of the domestic laws of the contracting parties concerning taxes.

7. In addition to establishing the general foreseeable relevance standard, the Model Agreement and Commentary identify specific types of information that the requested jurisdictions must have the authority to obtain and provide, including bank information and ownership and identity information.

8. The specific examples in the Model Agreement and Commentary are not exhaustive of the scope of information that must be available, accessible and reliable under the foreseeable relevance standard. They do not refer, for example, to accounting information. The scope of accounting information that is foreseeably relevant to the administration or enforcement of the domestic laws of the contracting parties concerning taxes is addressed specifically in the JAHGA paper (see below).

9. The Model Agreement and Commentary contains standard on access to information. For example, it provides that where the required review by the requested party of information in its possession proves inadequate to provide the requested information, it must take all "relevant information gathering measures" in order to be able to provide the requested information.

10. The Model Agreement Commentary recognises that the standard it establishes can be implemented in several ways, including through double taxation agreements. Most double taxation agreements are based on the OECD Model Tax Convention.

B. Article 26 of the Model Tax Conventions and their Commentary

11. The Model Tax Convention is the most widely accepted legal basis for double taxation agreements. More than 3000 bilateral treaties are based on the Model Tax Convention. Article 26 of the Model Tax Convention in turn provides the most widely accepted legal basis for bilateral exchange of information for tax purposes.

12. On 17 July 2012, the OECD approved and published changes to Article 26 of the OECD Model Tax Convention and its Commentary. The previous update was published in 2005, and was also incorporated into the 2008 version of Article 26 of the UN Model Tax Convention. The 2012 amendments to Article 26 reflect recent developments in respect of tax transparency and further elaborated on the interpretation of certain provisions of the Article. On 26-27 October 2014, the Global Forum approved the incorporation of the 2012 update to Article 26 into the terms of reference.

13. Article 26 provides for the same standard as the Model Agreement. Both use the standard of "foreseeable relevance" to define the scope of the obligation to provide information. Both require information exchange to the widest possible extent, but do not allow "fishing expeditions", i.e. speculative requests for information that have no apparent nexus to an open inquiry or investigation.[39]

14. Although Article 26 is generally very similar in approach to the Model Agreement, some aspects of Article 26 are beyond the scope of the standard of EOIR. For example, Article 26 allows for automatic and spontaneous exchange of information which is not included in the standard.

39. The text of Article 26(1) was modified in 2005 to provide for the same basic "foreseeable relevance" standard as under the Model Agreement. The previous version of Article 26 used the standard of "necessary". The Commentary explains that the change from "necessary" to "foreseeably relevant" was not intended to alter the effect of the provision but was made to better express the balance between requiring information exchange to the widest possible extent while excluding fishing expeditions, and to achieve consistency with the Model Agreement. The 2012 update to Article 26(1) further expands on the "foreseeable relevance" standard. See Commentary paras. 4.1 and 5.3.

II. Complementary authoritative sources

A. The Joint Ad Hoc Group on Accounts (JAHGA) Report

15. Accounting information comes under the general foreseeably relevant standard established by the Model Agreement and Article 26 of the Model Tax Convention. However, the source of detailed standards with regard to the requirements for available, accessible and reliable accounting records is the JAHGA Report. Before being approved by the Global Forum in 2005, it was developed jointly by representatives of OECD and non-OECD countries through their co-operation in the JAHGA.[40]

16. The JAHGA Report sets out the standards with regard to requiring the maintenance of reliable accounting records, the necessary accounting record retention period and the accessibility to accounting records.

B. The 2006 OECD and the 2013 Global Forum Manuals on Information Exchange

17. In 2006, the CFA approved a Manual on Information Exchange[41] (the "OECD Manual"). The OECD Manual provides practical assistance to officials dealing with exchange of information for tax purposes and may also be useful in designing or revising national manuals. It was developed with the input of both member and non-member countries of the OECD.

18. In 2013, the Global Forum approved its own Manual on Information Exchange. It has been developed as a guide to the internal processes and procedures within the Exchange of Information Unit of a tax administration, in so far as they concern EOIR and spontaneous exchanges of information.

40. The JAHGA participants consisted of representatives from Antigua and Barbuda, Aruba, Bahamas, Bahrain, Belize, Bermuda, British Virgin Islands, Canada, Cayman Islands, Cook Islands, France, Germany, Gibraltar, Grenada, Guernsey, Ireland, Isle of Man, Italy, Japan, Jersey, Malta, Mauritius, Mexico, Netherlands, Netherlands Antilles, New Zealand, Panama, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Seychelles, Slovak Republic, Spain, Sweden, United Kingdom, and the United States.

41. The Manual is available at: www.oecd.org/document/5/0,3343,en_2649_33767_36647621_1_1_1_1,00.html.

C. The 2004 Guidance Notes developed by the Forum on Harmful Tax Practices

19. In 2004, the Forum on Harmful Tax Practices, a subsidiary body of the CFA, developed guidance notes on the issue of Transparency and Effective Exchange of Information.[42] The Introduction notes that the guidance notes, while providing useful guidance to jurisdictions that have made commitments to transparency and effective exchange of information, should not be understood as expanding the standard to which the jurisdictions had agreed to adhere (§ 13). The notes provide important guidance with regard to standard in the area of the availability of relevant and reliable information, including with regard to the identity of legal and beneficial owners and other persons.

D. FATF recommendations and guidance on transparency and beneficial ownership[43]

20. In addition to tax-specific materials addressed above, it is important to recognise that efforts to improve on transparency and effective exchange of information for tax purposes take place in a broader context. This is particularly the case with regard to the work of FATF relating to issues of domestic institutional measures to provide information, mutual legal assistance, and transparency with regard to information about ownership and the identity of owners and other stakeholders.

21. These are key components of the foreseeably relevant information that jurisdictions must be able to provide under the Global Forum standard. FATF concepts may provide useful guidance and be taken into consideration to interpret and apply the standards where appropriate. In particular, The 2012 FATF standards include a concept of beneficial owner that has been incorporated into elements A.1, A.3 and B.1. To the extent they deal with the concept of beneficial ownership as that concept applies to the standard set out in the terms of reference, the following FATF materials[44] are relevant for carrying out EOIR assessments:

- General Glossary (e.g. definition of "beneficial owner");

42. The guidance notes are available at www.oecd.org/ctp/harmful/30901132.pdf. They were published under the title Consolidated Application Note: Guidance in Applying the 1998 Report to Preferential Tax Regimes, and also addressed a variety of other preferential tax regimes. The notes on transparency and exchange of information are at pp. 9-19.
43. FATF recommendations are available in Part III of this Handbook.
44. International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, the FATF Recommendations, February 2012.

- Recommendation 10 on Customer due diligence and its accompanying interpretative note, in particular, regarding the method of identifying the beneficial ownership of a legal person or arrangement set out in 5(b)(i) and (ii) of Recommendation 10;
- Recommendation 24 on Transparency and beneficial ownership of legal persons and its accompanying interpretative note;
- Recommendation 25 on Transparency and beneficial ownership of legal arrangements and its accompanying interpretative note;
- Methodology for assessing technical compliance with the FATF Recommendations and the Effectiveness of AML/CFT systems (FATF Methodology); and
- Guidance note on Transparency and Beneficial Ownership, issued in October 2014.

22. The above list is not exhaustive; it highlights the areas of the FATF materials that are most directly related to the interpretation and application of the concept of beneficial ownership. Other recommendations or guidance may be relevant depending on the facts and circumstances of a particular case and to the extent that they have a specific connection with the implementation of the standard in the assessed jurisdiction. It is noted that the purpose for which the FATF materials have been produced (combatting money-laundering and terrorist financing) are different from the purpose of the standard on EOIR (ensuring effective exchange of information for tax purposes), and care should be taken to ensure that assessments under the terms of reference do not evaluate issues that are outside the scope of the Global Forum's mandate.

E. Keeping it safe: Global Forum guide on the protection of confidentiality of information exchanged for tax purposes

23. The Global Forum guide on the protection of confidentiality of information exchanged for tax purposes published in 2012 sets out the best practices related to confidentiality and provides practical guidance, including recommendations and a checklist, on how to meet an adequate level of protection while recognising that different tax administrations may have different approaches to ensuring that in practice they achieve the level required for the effective protection of confidentiality.

2016 Methodology for peer reviews and non-member reviews

I. Introduction

1. The Global Forum at its 1-2 September 2009 meeting in Mexico decided to engage in a robust and comprehensive monitoring and peer review process. In order to carry out an in-depth monitoring and peer review of the implementation of the standard of transparency and exchange of information for tax purposes, the Global Forum set up a Peer Review Group (PRG), which developed the detailed terms of reference and the methodology for a robust, transparent and accelerated process.

2. The Terms of Reference for the first round of peer reviews were adopted by the Global Forum in February 2010 (hereafter the 2010 Terms of Reference). They break down the international standard for transparency and exchange of information on request (hereafter EOIR) into ten essential elements which ensure the availability of, the access to, and the exchange of all information foreseeably relevant for tax purposes. The methodology for the first round of peer reviews was also adopted by the Global Forum in February 2010 (hereafter the 2010 Methodology). The 2010 Methodology has been updated twice since its initial adoption in order to provide for a post-Phase 1 and a post-Phase 2 supplementary report procedure in 2011 and 2013 respectively[45].

3. The first round of reviews was conducted via a two-stage process, involving a Phase 1 review, which assessed the legal and regulatory framework for transparency and the exchange of information for tax purposes and a Phase 2 review, which assessed the implementation of the standard in practice. Members that had a lot of experience in exchanging information were subject to "combined" reviews, having both a Phase 1 review and a Phase 2 review at the same time. The determinations and ratings for each of the ten elements as well as the overall rating were guided by the Note on the

45. All references to the 2010 Methodology include these subsequent revisions.

Assessment Criteria (hereafter the 2010 Assessment Note). The first round of reviews was carried out according to a six year schedule which commenced in March 2010 (hereafter the 2010 Schedule) with the final reviews being launched in the last quarter of 2015.

4. At its November 2013 plenary meeting in Jakarta, the Global Forum agreed that another round of peer reviews with respect to EOIR would be initiated following the completion of the existing 2010 Schedule. With the final reviews from the 2010 Schedule to be launched by the last quarter of 2015, the second round of reviews shall commence in 2016 in accordance with the 2016 Schedule of Reviews (hereafter the 2016 Schedule).

5. The 2010 Terms of Reference and 2010 Methodology as developed by the PRG for the first round of reviews form the basis for the 2016 Terms of Reference and 2016 Methodology. In light of the experience gained in carrying out the first round of reviews as well as the revision to the terms of reference, certain aspects of the 2010 Methodology have been substantially amended. The main changes include the fact that all reviews under the second round of reviews will now be carried out as a combined review. The supplementary report procedure has also been modified and other aspects of the Methodology have also been amended in order to reflect the best practices adopted over the course of carrying out the first round of reviews.

6. The 2016 Methodology for Peer Reviews and Non-Member Reviews was adopted by the Global Forum at its meeting on 29-30 October 2015 (the 2016 Methodology) and shall be applicable to all reviews conducted during the 2016 Schedule.

7. There are a number of general objectives and principles that govern the Global Forum monitoring and peer review process:

Effectiveness. The mechanism must be systematic and provide an objective and coherent assessment of whether a jurisdiction has implemented the standard.

Fairness. The mechanism must provide equal treatment for all jurisdictions under review. Peer review of Global Forum members is an exercise among peers that can be frank in their evaluations. Reviews of non-members should be conducted only after a jurisdiction has been given the opportunity to participate in the Global Forum. The review process should provide the jurisdiction with an adequate opportunity to participate in its evaluation by the Global Forum.

Transparency. The mechanism will need to include a process for providing regular information to the public on the Global Forum work and activities and on implementation of the standard. This general responsibility must be balanced against the need to ensure confidentiality of the information in order to facilitate frank evaluation of performance.

Objectivity. The mechanism should rely on objective criteria. Jurisdictions must be assessed against the internationally agreed standard in accordance with an agreed methodology.

Cost-efficiency. The mechanism should be efficient, realistic, concise and not overly burdensome. It is necessary, however, to ensure that monitoring and peer review are effective, since together with the standard, they guarantee the level playing field. A high degree of procedural co-operation is necessary both for effectiveness and cost efficiency.

Co-ordination with other organisations. The mechanism should aim to avoid duplication of effort. Efforts should be made to use and take account of existing resources, including the Global Forum peer review reports and, where appropriate, relevant findings by other international bodies including standard setting bodies such as the FATF[46] that engage in monitoring of performance in related areas. The FATF assessments[47] are a complementary authoritative source of the work of the Global Forum, and in those cases where those assessments have been published prior to the launch of the peer review, they should be carefully examined in the context of the EOIR reviews. In particular, where the facts and circumstances remain similar, the report has been published relatively recently (within 12 months of the launch of the peer review) and where the conclusions are relevant in respect of beneficial ownership for the purposes of the terms of reference, the FATF assessments may be considered to have persuasive value in the conducting of the reviews.

8. The 2016 Methodology sets forth procedures for the peer review of members and the equivalent review of non-members. It identifies the procedures and steps in the peer review process and additional procedures for reviews of non-members.[48]

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46. The reference to FATF assessments includes the assessments carried out for the same purposes by all other FATF regional style bodies, including, Moneyval, GAFI and by the IMF.
47. It is noted that the purpose for which the FATF materials have been produced (combatting money-laundering and terrorist financing) are different from the purpose of the standard on EOIR (ensuring effective exchange of information for tax purposes), and care should be taken to ensure that assessments under the 2016 Terms of Reference do not evaluate issues that are outside the scope of the Global Forum's mandate. See 2016 Terms of Reference, Annex 2.
48. Annex 1 summarises the key responsibilities of each of the participants in the review process. Annex 2 presents Model Assessment Schedules. Annex 3 presents a flowchart summarising the procedure for adoption of a report. Annex 4 sets out the Framework for the attendance of Observers at the PRG meetings. Annex 5 contains the standardised form for the Follow-up report.

9. Generally, over the first round of reviews, all reviews were conducted in two phases. Phase 1 reviewed the legal and regulatory framework for transparency and the exchange of information for tax purposes and Phase 2 reviewed the implementation of the standard in practice. For jurisdictions that had considerable experience in exchanging information on request, a Combined Phase 1-2 review encompassing both review of the legal and regulatory framework (Phase 1) and the implementation of the standard in practice (Phase 2) was carried out.

10. In light of the fact that the majority of Global Forum members have considerable experience with EOI, throughout the course of the second round of reviews, all members will undergo a single EOIR review which will examine both the legal and regulatory framework as well as the implementation of the standard in practice. New members will also undergo one single review covering both the legal and the practical aspects.

11. The 2016 Methodology sets out guidelines to conduct the peer reviews and the monitoring of members and non-members that have been identified as being of interest to the work of the Global Forum. They should be understood as guidelines rather than as rigid rules. The need to conduct fair, effective and transparent reviews should remain of paramount importance in applying the guidelines. However, the 2016 Methodology cannot and does not seek to address every possible contingency. During the first round of reviews, certain aspects of the 2010 Methodology were amended in light of the experience gained in carrying out the reviews. Therefore, while much of the process is well established, the PRG should expect to maintain the same approach in retaining the possibility of future modifications or improvements to the 2016 Methodology to ensure the most efficient and equitable results for all jurisdictions.

II. Peer Reviews

A. Creation of assessment teams, setting dates for evaluations and obtaining input

12. The EOIR Review will be conducted by an assessment team. Assessment teams will usually consist of two expert assessors co-ordinated by one member of the Global Forum Secretariat. Expert assessors will be drawn primarily from PRG members, although Global Forum members outside of the PRG will also be eligible to provide expert assessors.

13. In selecting the expert assessors, who act in their personal capacity during the peer review process, account should be taken of the expertise and background of each assessor, the language of the evaluation, the nature of the legal system (civil law or common law), and the specific characteristics

of the jurisdiction (e.g. size and geographical location). The team of assessors should include at least one member who is familiar with the nature of the legal system of the assessed jurisdiction, as well as one who can provide a different perspective. In selecting the assessment team, care should be taken to avoid any potential or apparent conflict of interest. In the event that a conflict of interest arises, the assessed jurisdiction or its peers are encouraged to communicate this to the Secretariat in order to find an appropriate solution.

14. Expert assessors must be public officials drawn from relevant public authorities and should have substantial relevant experience of transparency and exchange of information for tax purposes, including relevant practical experience. Expert assessors will be provided with a handbook which will include the 2016 Methodology, the 2016 Terms of Reference and related source documents. In particular, expert assessors are encouraged to be thoroughly familiar with the 2016 Terms of Reference and the 2016 Note on Assessment Criteria.

15. The Secretariat will request each Global Forum member to designate a central point of contact to co-ordinate the identification of potential expert assessors to be recommended by the member. The designated central point of contact will be invited to provide the name(s) and qualifications of potential expert assessor(s). Any designated central point of contact may be requested by the Secretariat to provide the name(s) and qualifications of expert assessor(s) that would be available for a particular review within seven days of the request being received. The chair and vice-chairs of the PRG will allocate jurisdictions to provide expert assessors to each of the jurisdictions for review for the upcoming six month period based on the criteria set out in paragraph 13. To the extent practicable, expert assessors should be appointed from different jurisdictions to those that provided the assessors for the first round of review of the assessed jurisdiction.

16. The PRG will be given four days to comment on the proposal of the chair and vice-chairs of the PRG, with these comments to be taken into account to the extent possible. This process will be repeated for subsequent periods. The chair or a vice-chair, as the case may be, will not participate in the allocation of the expert assessors for the assessment of their own jurisdictions.

17. Each expert assessor could participate in parallel in a number of EOIR reviews rather than in only one review. Coverage of multiple jurisdictions would provide each participating expert assessor with a stronger comparative perspective on each jurisdiction, while reducing the number of expert assessors required to incur costs to travel to the meeting.

18. The Secretariat will fix precise dates for the carrying out of the review, consistent with the overall PRG schedule, in consultation with the

assessed jurisdiction and the assessment team. The jurisdiction will advise whether it wishes to conduct the review in English or French, and additional time for translation will be provided for as needed.

Review period and basis of assessment

19. All EOIR reviews shall assess the legal implementation of the standard and its practical implementation. The last date on which changes to the legal and regulatory framework can be considered will be the date that the draft report is first sent to the PRG for written comments (hereafter "cut-off date"). For this purpose, legislation will be considered only if it is in force by the cut-off date. Any signed EOI agreements will be analysed in the report and reflected in the Annex 2 of the draft report ("List of all exchange-of-information mechanisms"). It is noted that very complex legislation may require a longer period for analysis by the assessment team, and in these cases it would be usual for the assessment team to have had access to draft legislation (to the extent allowable under the law of the assessed jurisdiction) so that once the legislation is in force any changes to the report can be easily incorporated prior to the cut-off date.

20. Changes to the legal or regulatory framework that take place after the cut-off date cannot be analysed or considered for the purposes of the EOIR review. However, mention of these changes may be made in the "Recent Developments" section of the report and jurisdictions may wish to mention such changes in the Annex 1 to the report ("Jurisdiction's response to the report"). Changes to the treaty network which occur after the cut-off date may also be reflected in the "Annex 2" of the peer review report until the first reading of the report.

21. The practical implementation of the standard will be assessed over a three year period ending on the last day of the quarter, two quarters prior to the launch date of the review. For example where a review is launched in April of a particular year, the review period will end on the last day of December of the previous year.

22. In cases where there are changes to the exchange of information in practice after the end of the review period, or developments that relate to requests received during the review period, these may be reflected in the report up until the first reading of the report at the PRG meeting. However, in such cases the assessment team must be careful to fully explain its ability to evaluate and assess information provided at a late stage, particularly where this may require cross-checking with partner jurisdictions.

23. In limited circumstances, a jurisdiction may be permitted to update information regarding practice where this can be verified by the assessment team, until the second reading of the draft report by the PRG. This will be the

case where the assessed jurisdiction provides additional information following written comments from the PRG or in response to questions raised during the first reading of the draft report. For example, this is often the case with respect to statistical information.

24. Jurisdictions will be assessed against the 2016 Terms of Reference which shall be applied for the entire three year review period applicable for the EOIR review as set out in paragraph 21.

25. However, in respect of the 2016 Terms of Reference relating to replying to group requests which reflects the revised commentary to Article 26 of the OECD Model Double Tax Convention adopted in 2012 (the revised Art. 26 commentary), the period to be taken into account for review of group requests will vary as follows[49]:

- OECD Member countries, which adopted the revised Art. 26 commentary on 17 July 2012, will be reviewed on the basis of a 3-year period preceding the commencement of the review as determined via the formula set out under paragraph 21.
- For those OECD Members countries and other jurisdictions that adopted the revised Art. 26 commentary, but where legislative changes were required to give effect to the revision (irrespective of whether these legislative changes are applied either prospectively or retrospectively), the period taken into account for the review of group requests will commence from the date of entry into force of these legislative changes in the jurisdiction.
- For non-OECD jurisdictions that are party to the multilateral Convention on Administrative Assistance (hereafter referred to as the MAAC) or for which the MAAC has been extended, the period taken into account for the review of group requests will commence from the date of entry into force of the MAAC in those jurisdictions, unless an earlier commencement date would apply for those jurisdictions that adopted the revised Art. 26 commentary, as referred to above.
- In every case, the 2016 Terms of Reference in respect of replying to group requests will apply to the portion of any review period that is after 31 December 2015.

49. The revised Art. 26 commentary, among other changes, clarified that requests on a group of taxpayers not individually identified (i.e. group requests) are covered under Article 26.

Obtaining input from jurisdictions' peers

26. Important to the process of peer review is the opportunity for other members of the Global Forum to provide their input into understanding the assessed jurisdiction's compliance with the standard. This applies both generally and more specifically to jurisdictions that have an exchange of information (EOI) relationship with the assessed jurisdiction[50]. Accordingly, members of the Global Forum will have an opportunity to provide input into the process of drafting the report by the assessment team.

27. Prior to the commencement of the EOIR review, a questionnaire (the "Peer Questionnaire") will be sent to all Global Forum members. The Peer Questionnaire will have a standard format and will require various inputs on the quality of information exchange. It will elicit information about how active the EOI relationship is, the type of information exchanged, e.g. bank, ownership and accounting information and the timeliness and quality of responses. It will also seek information about the difficulties, if any, that the requesting jurisdiction has faced in obtaining information from the assessed jurisdiction as well as information about positive experiences. The Peer Questionnaire will also request feedback on the completeness and quality of the requests it has received from the jurisdiction under review. Finally, Global Forum members will be asked to provide comments on any issues that have arisen since the adoption of the assessed jurisdiction's latest Global Forum Peer Review report which have impact on EOI during the review period and to indicate any issues that they would like to see raised and discussed during the assessment.

28. Partner jurisdictions should provide their responses to the questionnaire to the Secretariat within 3 weeks. While Peer Questionnaires will be sent to all Global Forum members, there is an increased responsibility on those jurisdictions that have an EOI relationship with the assessed jurisdiction to respond to it. While ensuring that confidentiality is preserved, partner jurisdictions should be specific and provide as much detail as possible to aid the assessment team and assessed jurisdiction in their efforts to analyse and evaluate the difficulties encountered. Issues or concerns previously raised by the assessed jurisdiction with the partner jurisdiction in relation to its

50. In this regard, an EOI relationship should be understood to refer to one that meets the information exchange standard set forth in the Model Agreement on Exchange of Information on Tax Matters and in Article 26 of the OECD Model Tax Convention on Income and on Capital or any other agreement with a partner jurisdiction(s) that provides for the exchange of information.

requests should also be described by the partner jurisdiction[51]. Responses will be made available to the assessment team and to the assessed jurisdiction.

29. The assessment team will analyse the peer input to identify issues and to develop appropriate questions for the assessed jurisdiction to allow it to respond to any concerns. These questions should be sent to the assessed jurisdiction concurrently with the formal issuance of the standard EOIR questionnaire (see below). In assessing responses to the Peer Questionnaire, the assessment team should take into account the nature of the EOI relationship and the degree of detail provided by the partner jurisdiction. Further, the assessment team will also carefully evaluate the views expressed in the input provided by the requesting/requested partner jurisdiction.

30. Documents produced by Global Forum members concerning an assessed jurisdiction (e.g. responses to the questionnaire, proposed questions for the assessed jurisdiction, and responses by the assessed jurisdiction) will be treated as confidential and will not be made publicly available[52].

31. Because peer review is an intergovernmental process, business and civil society groups' participation in the formal evaluation process and in particular, in the evaluation exercise and the discussions in the PRG or Global Forum is not foreseen. The publication of the schedule of upcoming reviews would enable business and civil society groups to provide information or opinions if they so wish. However, as the process works on the basis of a peer review system, the report ultimately reflects the views of the peers of the assessed jurisdiction.

Getting responses from the assessed jurisdiction to the questionnaire

32. From the perspective of the assessed jurisdiction, the first step in the review is the receipt of the EOIR questionnaire from the Secretariat (the EOIR questionnaire). The EOIR questionnaire for the assessed jurisdiction

51. For example, if a partner jurisdiction is aware that the assessed jurisdiction is concerned about a lack of confidentiality or lack of reciprocity on behalf of the partner jurisdiction, it should make such issues known, so that the review may proceed more expeditiously.

52. To ensure appropriate confidentiality with respect to the Peer Questionnaire, prior to circulation of a report to the PRG, a partner jurisdiction that is explicitly or implicitly identified in the text of the draft report will be given the opportunity to review and comment upon any text in the report that explicitly or implicitly identifies that partner jurisdiction. The partner jurisdiction will be given the opportunity to request changes that allow its identity to remain anonymous from the PRG and the public (although not the assessment team or the assessed jurisdiction, which will have seen earlier drafts of the report as well as the peer input).

will have a standard format. It will generally be supplemented by jurisdiction-specific questions. These may include questions regarding specific institutions or procedures in the assessed jurisdiction, issues raised by other Global Forum members (see above) and issues arising from its most recent Global Forum peer review report. At the time of sending the EOIR questionnaire to the jurisdiction, a copy of its most recent Global Forum peer review report (along with a link to the on-line version) and a copy of its responses to the questionnaires as submitted during the first round of reviews will also be sent to the jurisdiction.

33. The EOIR questionnaire will encompass both the legal and regulatory framework and EOIR in practice and will include requests for quantitative data (including statistical information as specified in the EOIR Questionnaire) allowing meaningful review of the treatment of requests and the period between request and response, and qualitative data in order to help assess the reliability and relevance of information provided to the requesting jurisdictions. It will also allow the assessed jurisdiction to comment on the completeness and quality of the requests it has sent to its exchange of information partners.

34. The questionnaire format is designed to facilitate the preparation of a focussed and relevant response. Jurisdictions should provide a detailed description (and analysis where appropriate) of the relevant measures and actions, including appropriate citations from supporting laws or other material.

35. All necessary laws, regulations, guidelines and other relevant documents should be available in the language of the review and the original language (unless otherwise agreed with the assessment team), and both these documents and the responses to the questionnaire should be provided in an electronic format. The time required for translation of documents must be taken into account by the jurisdiction under review. Where English or French is not the native language of the assessed jurisdiction, the process of translation of relevant laws, regulations and other documents should start at an early stage.

36. Documents produced by an assessed jurisdiction during a review (e.g. documents describing a jurisdiction's regime, responses to the questionnaire, or responses to assessors' queries) and by the Secretariat or assessors (e.g. reports from assessors, draft reports, etc.) will be treated as confidential and should not be made publicly available, unless the assessed jurisdiction, the assessment team and the Secretariat consent to their release. In cases where documentation may include information related to the interests of another jurisdiction, consent for their release should also be obtained from that jurisdiction. Strict respect of the confidentiality of the work is a must for the credibility of the process. Any breach of the confidentiality of the process shall be brought to the attention of the PRG Chair and vice-Chairs, who shall decide on the most appropriate action, in consultation with the PRG as appropriate.

37. The assessed jurisdiction should provide its responses to the EOIR questionnaire (and any additional questions) within a maximum of six weeks of receipt of the EOIR questionnaire.

B. The on-site visit

38. On-site visits are an important aspect of the EOIR reviews. They provide the assessed jurisdiction with an opportunity to participate more fully in its evaluation and allow an open, constructive and efficient dialogue between the assessed jurisdiction and the assessment team. Face-to-face dialogue will help avoid misunderstandings and improve the quality of the resulting draft report, and ultimately may avoid the need for an oral discussion at the PRG. It will also focus high level government attention on any existing deficiencies in jurisdiction's practices in the area of transparency and exchange of information. In exceptional cases, where the assessment team considers that an on-site visit would serve no useful purpose, the assessment team should present its views in writing to the members of the PRG. If there is no objection within 1 week and the assessed jurisdiction agrees, then the on-site visit will be dispensed with.

a. Timing

39. Each Global Forum member jurisdiction agrees to allow an on-site visit of approximately two – four days, or longer as appropriate, for the purpose of providing information from a variety of sources concerning its law and practice with regard to the issues covered by the EOIR review. The schedule should provide for the on-site visit taking place after the receipt of the responses to the questionnaire.

b. The agenda for the on-site visit

40. The primary goal of the on-site visit should be to obtain evidence required to evaluate the assessed jurisdiction's overall effectiveness in exchanging requested information. The on-site visit should be carried out in accordance with an agenda programme agreed between the assessed jurisdiction and the assessment team, taking account of the specific requests expressed by the team. The agenda should be finalised by the assessed jurisdiction at least one week before the on-site visit.

41. The focus of the on-site visit will be primarily on the assessed jurisdiction's competent authority and all of the agencies and entities with which it may interact in the process of responding to information requests. Where relevant for assessing the practice of the availability of, access to, or exchange of information, the assessment team may also meet with other government

entities, such as supervisory or regulatory bodies. Further, in cases where non-government entities (such as company service providers) or bodies (for example, associations of self-regulated professions such as the local Bar Association or Chamber of Notaries) have a role in the assessed jurisdiction that impacts directly on the availability of, access to, or exchange of information, assessment teams may also meet with such entities or representatives of such bodies in the course of the on-site visit.

42. The nature of the discussions over the course of all meetings during the on-site visit will depend on the legal and regulatory institutions and policies of the assessed jurisdiction. Discussions should encompass both potential areas of weaknesses and of best practices in all areas covered by the standard, as set forth in the 2016 Terms of Reference. The inability of the assessment team to meet with entities or bodies in the assessed jurisdiction which have a specific role that impacts directly on the availability of, access to, or exchange of information may mean that the assessment team will be unable to conclude positively that the standard is met.

C. Compiling information for the EOIR review

43. The assessment team shall consider comprehensively the legal and regulatory framework of the assessed jurisdiction in order to assess its adequacy for meeting the standard for transparency and exchange of information.

44. In assessing the practice of the jurisdiction, typical areas of investigation that the assessment team would consider include the following:

- The degree to which in practice information is maintained and by whom, including the oversight and enforcement activities applied to those persons who are obliged to maintain information.
- The practical application of the jurisdiction's compulsory powers to obtain information.
- The timeliness of the jurisdiction's responses in relation to different types of requests for information, e.g. bank, ownership and accounting information, and any factors contributing to delays in response times.
- The quality and completeness of EOI requests made by the assessed jurisdiction. EOI partners will provide inputs on the quality of the requests received from the assessed jurisdiction. The assessed jurisdiction will be reviewed for the quality of the requests it has made during its EOIR review and will be based on a common set of questions set out in the EOIR questionnaires, with additional questions based on the particular facts and circumstances including the peer input received.

- The quality and completeness of EOI responses provided by the assessed jurisdiction. EOI partners will provide inputs on the quality of the responses provided by the assessed jurisdiction. The assessed jurisdiction will be reviewed for the quality of the responses it has provided during its EOIR review and will be based on a common set of questions set out in the EOIR questionnaires, with additional questions based on the particular facts and circumstances including the peer input received.
- The comprehensiveness of the jurisdiction's exchange of information programme such as the tools and processes that have been implemented in the jurisdiction for the processing of exchange of information requests (e.g. the use of EOI manuals and EOI databases).
- The adequacy of the organisational structure and resources having regard to the exchange of information demands made on the jurisdiction.
- The practical application of the jurisdiction's rules regarding the confidentiality of information exchanged.

45. In order to engage in the cross-checking that is at the core of the assessment of EOI in practice, the circumstances involved in cases where the exchange of information process was seen as unsatisfactory by partner jurisdictions should be explored. This may require consultation with partner jurisdictions, in particular cases, to understand all of the relevant facts and circumstances for the assessment team to be able to evaluate the issue. Because of the confidentiality of tax information, however, the assessment team will not generally be expected to have access to the actual requests for information and the responses from the requested jurisdiction. It is recognised that the confidentiality of information that identifies a specific taxpayer is a fundamental principle of the standard and jurisdictions' domestic laws.

46. However, in cases where negative feedback has been provided or there are differing accounts of the partners concerning a request or response, the assessed jurisdiction should provide the assessment team with a sufficiently detailed description of the facts and circumstances of the request or response. This should be verified by the assessment team with the requesting/requested jurisdiction. The role of the assessment team in liaising with the two partners in order to reconcile the versions of the request or response should provide a positive effect in itself by facilitating a dialogue between the two partners and resolving the issue. This process may take place any time prior to the cut-off date of the report, but should be commenced as soon as the issue is identified in order to facilitate agreement on the facts.

47. In cases where the assessment team is unable to reconcile the accounts of the two jurisdictions concerning a request and/or response, it may be appropriate for the assessment team to request a redacted copy of the request and/or response (i.e. the original request with all confidential information rendered illegible) to the extent permitted by the domestic laws of both jurisdictions. In such a case, the redacted text must be agreed by both the assessed jurisdiction and the partner jurisdiction to ensure that it does not disclose any confidential information. A jurisdiction may take the view that all parts of the original request are covered by confidentiality rules and should not be disclosed to the assessment team. Where jurisdictions are unable to provide redacted copies of requests or responses, this will not have an impact on the assessment of the assessed jurisdiction. Nevertheless, it is the responsibility of both parties to ensure that the clear factual position of such cases can be presented to the PRG.

D. Completing the draft report for the PRG

48. The EOIR report will be initially drafted after the on-site visit. Following the on-site visit, the Secretariat will prepare the draft report in four to six weeks.

49. The Secretariat will cross-check other Global Forum peer review reports to ensure consistency of evaluation across reports. The initial draft reports on the assessed jurisdictions will be provided to the assessors for review and the assessors will be expected, as much as possible, to independently cross-check the reports against other assessments of the Global Forum in order to ensure consistency across assessments. The assessment team may ask additional questions to the assessed jurisdiction during the course of drafting.

50. The additional steps in finalising a draft report prior to a PRG meeting, and the approximate time that is required for each step, are as follows (see also Annex 2):

i. Expert assessors to provide comments on the draft report to the Secretariat (maximum two weeks).

ii. Secretariat to revise the draft report in light of the assessor comments. Draft report containing the executive summary to be sent to the assessed jurisdiction (maximum one week).

iii. Jurisdiction to provide comments to the Secretariat (maximum six weeks), which are forwarded to the assessors for their views.

iv. Assessment team to review the jurisdiction's comments and decide on the changes that need to be made to the draft report (maximum two weeks).

51. It is important to note that the assessors and the jurisdiction need to respect the timetables, since delays may significantly impact the ability of the PRG to discuss the report in a meaningful way. By agreeing to participate in the review process, the jurisdiction and the assessors undertake to meet the necessary deadlines and to provide full and accurate responses, reports or other material as required under the agreed procedure.

52. The assessment team should endeavour to explain these timetables to the assessed jurisdiction to ensure a timely completion of the draft report. Where, in the view of the assessment team, there is a significant failure to comply with the agreed procedure that may compromise the peer review process of that jurisdiction, the assessment team should refer the matter to the PRG chair and vice-chairs who shall take into consideration the jurisdiction's views and assessment team's explanations and shall take appropriate measures. The following examples illustrate the types of actions that could be taken:

i. Failure by the jurisdiction to provide a timely or sufficiently detailed response to the questionnaire or additional questions in the eyes of the assessment team could lead to the deferral of the review, and the PRG chair may write to the head of delegation or the relevant Minister in the jurisdiction. The PRG is to be advised as to reasons for deferral so that it may consider appropriate action.

ii. Upon a failure by the jurisdiction to provide a timely response to the draft report, the chair may write a letter to the head of delegation or where appropriate, the relevant Minister in the jurisdiction. Where the delay results in a report not being discussed, the PRG is to be advised of the reasons for deferral so that it may consider appropriate action, including with regard to disclosure of the name of the jurisdiction.

53. Throughout the drafting of the report, the assessed jurisdiction and the assessment team should take all reasonable steps to resolve any differences or difficulties. To this end, the assessed jurisdiction is encouraged to provide as much information and material as possible for the assessment team to complete its report. However, the information can only be taken into consideration to the extent that it can be effectively analysed and verified by the assessment team as set out in paragraphs 43 to 47 above.

E. Circulation of the report to the PRG and the PRG meeting

a. Circulation of the report to the PRG for comments

54. The Secretariat will send the draft reports and executive summaries to all PRG members at least seven weeks prior to the PRG meeting and they will be given four weeks to provide comment.

55. There is the possibility for draft reports to be approved by the PRG under a written procedure. When there is agreement between the assessment team and the assessed jurisdiction on the content of the draft report, then the draft report is sent to the PRG for approval by written procedure. If no comments or objections by any PRG member are received within four weeks from circulation of such draft, it is considered to be approved by the PRG.

56. Draft reports that are not approved by written procedure will be discussed orally during the PRG meeting. PRG members making comments or objections should explain clearly the basis for their comments or objections so that the assessment team and the assessed jurisdiction have a proper appreciation of them. A document containing a compilation of all comments or objections on each draft report along with responses by the assessment team ("Table of Comments") will be sent to the PRG members at least seven days prior to the meeting. In the event that there are differences or difficulties between the assessment team and the assessed jurisdiction at the time the report is circulated to the PRG, the assessed jurisdiction may submit comments outlining its concerns or disagreement with the draft report and these comments shall also be included in the Table of Comments.

57. The assessment team, in consultation with the assessed jurisdiction, will address all comments or objections received. The Secretariat will then circulate any amended draft reports including editorial adjustments and substantive comments the assessment team considered appropriate as early as possible and at the latest seven days before the meeting. Outstanding issues will be highlighted by the Secretariat in the Table of Comments which will be submitted to the PRG, along with an amended version of the draft report, including any comments or objections of the assessed jurisdiction documenting the outstanding issues it has with the draft report.

b. PRG meeting

58. The Chair of the PRG, the Secretariat, at least one delegate from each PRG member jurisdiction, representatives from the assessed jurisdiction and all members of the assessment team are expected to attend the PRG meeting. Jurisdictions that have ongoing reviews are permitted to attend as observers one of the two PRG meetings preceding that in which their draft report is scheduled to be examined. Their attendance is governed by the "Framework for the attendance of observers at PRG meetings" (Annex 4). All attendees at the PRG meeting are under a strict duty of confidentiality regarding all matters discussed at the PRG meeting and all draft reports remain strictly confidential until such time as they have been adopted and published by the Global Forum.

59. The procedure for the discussion of a draft report and its executive summary at the PRG meeting will be as follows:

60. During the first reading, the following steps will be taken:

i. Assessment team briefly introduces itself and provides a very brief overview of the report and the review process. This is followed by the opening statement from the assessed jurisdiction. At this stage, the assessed jurisdiction may address any aspects of the draft report including any outstanding issues. However, such references should be at a high level, since there will be an opportunity to discuss these in detail during the reading of the report. Requests for editorial changes should not be discussed orally but provided to the assessment team separately.

ii. The Chair of the PRG then asks the assessment team to present a brief overview of the introduction section of the draft report highlighting issues of significance and any other factors which may impact on the implementation of the international standard (e.g. such as the hierarchy of laws or any recent developments).

iii. The Chair of the PRG then asks the assessment team to present a brief overview of the first element of the draft report focusing on the substantive outstanding issues and the basis for the rating chosen. The assessed jurisdiction may then comment on that element of the draft report. Following this, the Chair opens the floor to the PRG members for questions or requests for clarification on that element of the draft report. As a matter of good practice, delegations should generally not raise comments that they have not previously raised in writing, although it is recognised that circumstances may arise in the course of the PRG discussion which may permit a new comment to be reasonably raised. Should a delegation wish to bring up a new issue, it should, where possible, inform the assessment team and the assessed jurisdiction in advance of the discussion. The first reading of the draft report shall proceed in this manner for each element of the draft report. If there are no requests for changes by the PRG, the Chair will ask the PRG if the determinations and ratings are agreed.

iv. The executive summary is presented by the assessment team at the end of the first reading of the draft report at which time the Chair will also open the floor to the PRG members for questions or requests for clarification on the contents of the executive summary. However, if there remain any ratings or determinations that have not been approved during the first reading, then the executive summary may not be considered during the first reading. In agreeing the wording of the draft report, the PRG should give careful consideration to

the views of the assessment team and the assessed jurisdiction, as well as taking into account the need to ensure consistency between reports.

v. If all sections of the draft report have been approved and no substantive changes to the report have been requested by the PRG, then the chair shall ask if there is any objection to the draft report being approved. If the draft report is approved, the assessed jurisdiction is provided an opportunity to make any final statement it wishes.

61. If the draft report is not approved during the first reading, it shall be revised to address the concerns or questions raised by the PRG. The assessment team, first in consultation with the assessed jurisdiction, will incorporate any amendments agreed by the PRG into the draft. Copies of the revised sections of the draft report will then be circulated as a room document.

62. The second reading will take place at the same PRG meeting in the following manner:

i. Assessment team presents the revised version of the draft report and summarises any changes made to the draft report to reflect the discussions of the first reading.

ii. Assessed jurisdiction has an opportunity to respond to the changes and whether it agrees or disagrees with them.

iii. The PRG then discusses the revisions made after the first reading with a view to approving the revised draft report.

iv. The draft report is approved when consensus of the PRG is reached.

63. Consensus in the context of the approval or adoption of a report means that no one jurisdiction can block the approval of the report.

64. Where the assessed jurisdiction is a PRG member, it will only participate in the discussion of its draft report at the PRG meeting as an assessed jurisdiction. Therefore, a PRG member does not participate in the decision-making on the approval of its own draft report at the PRG meeting. The PRG member can, however raise an objection to its report as a member of the Global Forum when the PRG approved report is sent to the Global Forum for adoption.

65. The approved draft report is a report of the PRG for submission to the Global Forum, and not simply a report by the assessment team.

66. EOIR reports may include an annex (Annex 1) emphasising recent changes made to the assessed jurisdiction's EOI framework or EOI mechanisms or presenting future plans which impact on transparency and exchange of

information for tax purposes. Any legislative changes that take place between the cut-off date and the first reading of the draft report may also be already documented in the "Recent Developments" section of the report. Annex 1 presents the jurisdiction's response to the review report and shall not be deemed to represent the Global Forum's views. The assessed jurisdiction should provide the annex to the Secretariat within one week of the approval of the draft report by the PRG.

67. When consensus is not reached at the PRG meeting, the text of the draft report is not approved. The PRG will task the assessment team in consultation with the assessed jurisdiction to revise the draft report, which will then be dealt with under the procedures set out in section (a) ("Circulation of the report to the PRG") for comments. If the revised draft report is not approved through written procedure, the next PRG meeting will discuss only those issues on which consensus was not reached in the first meeting. The assessed jurisdiction will be invited to participate in this meeting.

68. If approval of the draft report is not obtained after a second discussion in the PRG, it shall be presented to the Steering Group within one week of the second PRG discussion. The Steering Group shall include a discussion of the draft report in the agenda of the next Global Forum meeting.

F. Procedures following the PRG meeting: Review and adoption of the report by the Global Forum

69. When the report has been approved by the PRG, it will be circulated to the Global Forum together with Annex 1 within one week. The Annex 1 may reflect the comments of the assessed jurisdiction on the weaknesses that have been identified and its plans to address them. In case the annex has not been finalised, the text will be circulated to the Global Forum without the annex, which will be circulated when ready, at the latest prior to the adoption of the report. Members of the Global Forum will be invited to adopt the draft report under written procedure. In the absence of any objections within three weeks, the draft report is considered to be adopted. If there are objections, the Steering Group of the Global Forum shall decide whether to refer the draft report back to the PRG for consideration at its next meeting or to include discussion of the draft report in the agenda for the next Global Forum meeting. In these cases, the assessed jurisdiction will have an opportunity to update Annex 1 to reflect substantial changes in the jurisdiction's EOI framework that occurred in the meantime, but not later than two weeks before the next meeting where the draft report will be discussed.

70. The Global Forum shall use an approach to consensus that ensures that no one jurisdiction can block the adoption or publication of a review. Nevertheless, every effort should be made to arrive at a consensus and the

views of the jurisdiction would be fully noted. The discussions and consultations in the Global Forum are open to Global Forum members and observers. Only Global Forum members, however, will take part in the adoption of the draft report.

G. Publication of reports

71. Transparency is an important principle of Global Forum peer reviews. Regular information should be provided to the public on the Global Forum work and on implementation of the standard such as the overall ratings from the EOIR reports as well as the findings regarding individual elements. After each report has been adopted by the Global Forum, it shall be made public by the Secretariat on the Global Forum website. Jurisdictions are encouraged to distribute the reports within the relevant bodies of their own administration to ensure that all parties are informed of the outcome of the report and to raise awareness of EOI in practice within their jurisdiction.

72. In the exceptional circumstance that the Global Forum fails to adopt a report, the public will be provided with an explanation for the absence of a report in order to maintain the credibility of the Global Forum process. The text of the explanation will be in a standard format agreed by the Global Forum and will identify the issue(s) at stake and the jurisdictions that object to the draft report. This text would be circulated to the Steering Group and the jurisdictions concerned two days in advance of putting it on the Global Forum website.

H. Post-EOIR Review: Follow-up reports and Supplementary reviews

73. It is important for the credibility and effectiveness of the peer review process for the Global Forum to follow-up on the progress made by jurisdictions in addressing the recommendations made in the EOIR reports, both from the first and second round of reviews, and to evaluate and publicise significant improvements.

74. The 2010 Methodology (as revised) included procedures for both follow-up and supplementary reviews to re-evaluate determinations and ratings and assisted jurisdictions in rapidly implementing the international standard. Both procedures are maintained for the second round of reviews, but the process has been modified in order to provide for a more efficient and coherent system of follow-up. In addition, a transitional rule has been set out in paragraph 84 to accommodate jurisdictions that would have qualified for a post-Phase 2 supplementary review under the first round of reviews.

Follow-up reports

75. In those cases where the Global Forum has issued a recommendation to a jurisdiction to address a deficiency in its implementation of the standard, it is imperative that the progress made by the jurisdiction in this regard, or the lack thereof, is monitored.

76. Following the publication of its EOIR report, each jurisdiction shall submit a follow-up report via a standardised form (Annex 5) to the Secretariat that indicates, in respect of each in-box[53] recommendation made in its report, whether the recommendation has been fully addressed, is in the process of being addressed, or that it has not been addressed. In each case a short description of the actions taken to address the recommendation should be provided.

77. A jurisdiction may consider that a recommendation has been fully addressed where all actions necessary to correct the deficiency have been definitively completed (e.g. legislative changes have been enacted and are in force, or in cases where a monitoring recommendation has been issued, the jurisdiction reports that it has undertaken the requisite monitoring with positive results). A jurisdiction may consider a recommendation as in the process of being addressed where some actions have been taken to address the recommendation but these have not been completed as yet or further action is still required to fully address the recommendation (for example, draft legislation has been submitted to Parliament for approval or steps have been taken to put in place an EOI Unit). A jurisdiction may consider that a recommendation has not been addressed where no action to address the recommendation has been undertaken. Where a jurisdiction has been recommended to monitor a particular issue then the report should include a description of the manner in which the monitoring is carried out and the results, supported by statistical information where appropriate.

78. The jurisdiction should also indicate in its follow-up report(s) if there are other developments not related to the recommendations made in its report, but that are relevant to the implementation of the standard (for example new legislation allowing for the establishment of a new type of entity, the signing of new EOI agreements or any case law that may be related to or have an impact on EOI in practice).

79. Each jurisdiction must provide its follow-up report on an annual basis no later than 30 June of each year, but is not required to submit a follow-up report fewer than 6 months after the date of publication of its last peer review or EOIR report. Jurisdictions are also not required to submit a follow-up report where its EOIR review is scheduled to be launched within the six months period after June 30 of that year.

53. See 2016 Assessment Criteria Note for guidance on in-text and in-box recommendations.

80. The jurisdiction shall continue to provide follow-up reports for so long as any recommendation remains less than fully addressed. After this time, follow-up reports may be provided on a voluntary basis to report on any relevant developments in the jurisdiction.

81. In order to submit a follow-up report, each jurisdiction shall receive a pre-filled follow-up form from the Secretariat with any outstanding in-box recommendations listed in the form. The jurisdiction will use this form to document the actions taken in respect of these recommendations (if any) and also to document any developments that have an impact on EOI. Jurisdictions are also invited to report any actions taken in regards to in-text recommendations where appropriate.

82. The follow-up report procedure is a self-assessment mechanism. Neither the Secretariat nor the PRG shall examine the basis for the jurisdiction's self-assessment. Therefore, the follow-up report documenting progress by a jurisdiction cannot be interpreted or portrayed in any way as a judgment or validation of the Global Forum. The evaluation of progress can only be achieved through the peer review process.

83. As soon as practicable following the June 30 deadline, the Secretariat will compile the follow-up reports and draft a note for the PRG that describes the overall status of the recommendations and progress made. The note will form the basis of a report on the follow-up of recommendations to be included in the Global Forum's annual report. While the report should generally deal with the status of the recommendations on an aggregate basis, particular reference may be made to individual recommendations where no action has commenced to address the recommendation in more than 3 years.

Transitional rules for follow-up reports from first round of reviews

84. In many cases jurisdictions from the first round of reviews are no longer required to provide follow-up reports as they have already reported that all recommendations have been addressed and the situation in those jurisdictions will be followed up in their EOIR review. Where a jurisdiction reviewed in the first round of reviews still has an obligation to provide a follow-up report, the jurisdiction shall follow the new procedure as outlined above for doing so. To facilitate this process, the Secretariat will identify those jurisdictions that are still required to follow-up from the first round of reviews and shall send a pre-filled follow-up form with any outstanding recommendations listed in the form to the jurisdiction which shall be required to be submitted by 30 June 2016 and thereafter in accordance with the generally applicable provisions. In addition to the recommendations listed in the form, jurisdictions are also invited to report on any action taken in regards to any outstanding in-text recommendations from the first round of reviews.

EOIR Supplementary reviews

85. Where a jurisdiction has made significant improvements by addressing recommendations made by the Global Forum, then the jurisdiction should have the opportunity to have these improvements evaluated by the Global Forum and any determinations or ratings updated accordingly.

Qualifying for an EOIR Supplementary review

86. In order to qualify for an EOIR supplementary review, the assessed jurisdiction must be able to demonstrate that it has taken actions that are likely to result in an upgrade in the rating of an essential element to "compliant" or in an upgrade in its overall rating, as assessed against the 2016 Terms of Reference.

87. In order to ensure that there is a sufficient basis to establish that it is likely that a rating should be upgraded, particularly as regards the practical implementation of any changes, one year should elapse from the adoption of a report before a request for an EOIR supplementary review is submitted to the PRG. Depending on the facts and circumstances, particularly where very serious deficiencies were identified in the EOIR report, it would be a matter for the PRG to consider whether a jurisdiction may only be able to establish that it meets the criterion after more than one year has elapsed.

88. In exceptional circumstances, the PRG may decide that a jurisdiction meets the criterion before a year has elapsed. However, these circumstances should be decided on a case by case basis.

Requesting an EOIR Supplementary Review

89. If a jurisdiction is of the opinion that it meets the criterion to qualify for an EOIR supplementary review, then this may be communicated to the Secretariat at any time via submission of a follow-up report by the jurisdiction, including reference to the specific elements that it believes are likely to be upgraded. The jurisdiction should also provide a detailed written report clearly indicating the basis for its request for a supplementary review, along with all relevant supporting materials.

90. Where a jurisdiction submits a follow-up report in order to request a supplementary review, the Secretariat will send the follow-up report and any accompanying materials as submitted by the jurisdiction to the PRG within seven days.

Processing the request for an EOIR supplementary review or an acceleration in EOIR review by the PRG

91. Where a jurisdiction has requested an EOIR supplementary review or an acceleration of its EOIR review (as set out at paragraphs 100-102) PRG members will be invited to provide written input in relation to the changes relating to the specific essential elements that the requesting jurisdiction considers are likely to be upgraded.

92. Once written input has been received, the Secretariat shall prepare a note taking into account all the input submitted and shall formulate a proposal for the approval of the PRG by written procedure as to whether or not the request should be accepted. If the PRG approves the jurisdiction's request by written procedure, the jurisdiction is informed and the EOIR supplementary review or EOIR review, as the case may be, will be launched shortly afterwards at a time agreeable to the assessment team and the assessed jurisdiction.

93. If the jurisdiction's request is not approved via written procedure, then the Secretariat note shall be tabled for discussion at the next PRG meeting. The assessed jurisdiction will be invited to be present at the PRG and to participate during the discussion. If the jurisdiction is not present, then it should be informed in writing of the decision of the PRG.

94. In all cases the decision as to whether or not to launch an EOIR supplementary review or accelerate an EOIR review should take into account the resource constraints of the Secretariat, the PRG and assessment teams and the need to ensure fair and equal treatment of all jurisdictions. The decision as to whether or not to approve a request shall be subject to the same approach to consensus as is applicable to the approval of EOIR reports generally.

95. In considering a request for an EOIR supplementary review, the PRG may decide that an EOIR supplementary review should include an on-site visit (e.g. when the exchange of information process or access powers are substantially amended, or when inputs from peers indicate substantial changes in practice).

96. If the PRG agrees to accelerate an EOIR review then it shall inform the Global Forum of the change to the 2016 Schedule. In those cases where the PRG does not agree to accelerate the EOIR review, the scheduling of the jurisdiction for its EOIR review shall remain unchanged.

EOIR Supplementary Review initiated by PRG

97. There are two circumstances where the PRG may initiate an EOIR supplementary review even though the jurisdiction has not requested one. First, if the PRG becomes aware, either through a jurisdiction's follow-up

report, from another member of the Global Forum or otherwise, that a jurisdiction has back stepped in its legal and regulatory framework, or has put in place practices that may negatively impact the implementation of the international standard, the Chair of the PRG may ask the jurisdiction to report in writing on the situation to the PRG. The PRG shall consider and discuss the report at its next PRG meeting. If the PRG is of the view that the jurisdiction may have back stepped its implementation of the standard, then a supplementary review shall be launched.

98. Secondly, because the follow-up report is a self-assessment mechanism, there is a risk that jurisdictions may overestimate the extent to which they have addressed the Global Forum's recommendations. It can be expected that if a jurisdiction believes that it has addressed all the recommendations from its EOIR report then it would also request a EOIR supplementary review, unless it already has an overall rating of Compliant. In the case where a jurisdiction reports that it has addressed all the recommendations but has not requested a supplementary report, then the jurisdiction should provide to the PRG a detailed written report clearly indicating the improvements it has made.

Post first round of reviews: Supplementary report procedure

99. Paragraphs 100-106 set out the procedures for the scheduling of jurisdictions from the first round of reviews that were blocked from progressing to the Phase 2 review ("blocked jurisdictions") and for jurisdictions from the first round of reviews that may have qualified for a post-Phase 2 supplementary report.

Accelerating a jurisdiction's EOIR review

100. The 2010 Methodology provided for a jurisdiction to request a supplementary review following its Phase 2 review in order for progress to be recognised, provided it fulfils certain conditions for a supplementary review. Under the 2016 Methodology, supplementary reviews are only possible following a jurisdiction's EOIR review that takes place in accordance with the 2016 Schedule.

101. In certain cases in the first round of reviews, jurisdictions that were reviewed later in the 2010 Schedule may not have had the same opportunity to have the improvements that they have made evaluated and recognised by the Global Forum via a post Phase 2 supplementary report. Therefore, to ensure equitable treatment for those jurisdictions, where certain conditions are met, it may instead be possible to accelerate the jurisdiction's EOIR review.

102. In order to advance its EOIR review, a jurisdiction will have to meet the same criterion as is the case for requesting an EOIR supplementary

review as set out in paragraphs 86-88. The request for acceleration of an EOIR review will be considered against the 2016 Terms of Reference. The jurisdiction will have the opportunity to indicate in its follow-up report if it wishes to accelerate its EOIR review, with specific reference to which essential elements are likely to be upgraded or whether it is likely that its overall rating will be upgraded. In this case, the jurisdiction should also provide a detailed written report clearly indicating the basis for its request, along with all relevant supporting materials. The process shall then follow the same steps set out for processing the request for an EOIR supplementary review as set out at paragraphs 91-96.

Process for blocked jurisdictions

103. In the course of the first round of Global Forum peer reviews, an assessed jurisdiction may have been blocked from progressing to its Phase 2 review where it did not have in place elements crucial to achieving an effective exchange of information in practice. In all cases, these jurisdictions are included in the 2016 Schedule and will therefore eventually proceed to an EOIR review and receive ratings in accordance with the normal procedure.

104. Under the 2010 Methodology, a blocked jurisdiction would have had the opportunity to request a supplementary review to enable assessment of changes to its legal and regulatory framework, and, if successful, it would have moved to its Phase 2 review. Under the 2016 Methodology also, at any time following six months from the publication of its Phase 1 report, a blocked jurisdiction is entitled to demonstrate that it has taken sufficient action to address the recommendations made in the Phase 1 report such that it is likely that, if reviewed under the 2010 Terms of Reference, it would have been allowed to move to its Phase 2 review.

105. To this end, the jurisdiction will submit a copy of its follow-up report, along with a detailed report on the action taken by the jurisdiction to address the Phase 1 recommendations. This report will be dealt with by means of the same procedure as applies to requests for an acceleration of an EOIR review. If the PRG agrees that the changes are such that it is likely that the jurisdiction would have moved to a Phase 2 review, then its EOIR review will be accelerated in the 2016 Schedule and launched as soon as possible in order for progress to be quickly recognised. In the event that the PRG does not agree that the jurisdiction would have moved to its Phase 2 review under the 2010 Terms of Reference, the jurisdiction shall remained as a blocked jurisdiction and its placement in the 2016 Schedule for its EOIR review shall remain unchanged.

106. If, after one year from the publication of its Phase 1 report, a blocked jurisdiction has not submitted a request for an acceleration of its EOIR review,

then the jurisdiction will be invited to submit a request within six months. If the PRG concludes that sufficient progress has been made, then its EOIR review will be accelerated. In exceptional cases a blocked jurisdiction may request a deferral of the supplementary report procedure (such as in the case of civil war or natural disasters). On receipt of such a request, the PRG will then decide if this should be permitted and for what length of time it will be deferred. Aside from the exceptional case, if the request is not submitted or the PRG concludes that sufficient progress has not been made, then the jurisdiction will be assigned an overall rating of "non-compliant" by the Global Forum on the basis of its Phase 1 results under the first round of reviews ("Deemed non-compliant"). In such a case, the ten essential elements will not be rated individually. Nevertheless, the scheduling of the jurisdiction for its EOIR review shall remain unchanged. In cases where a jurisdiction has received a "Deemed non-compliant" rating from the first round of reviews and wishes to have progress recognised prior to its scheduled EOIR review, the jurisdiction may request an acceleration of its EOIR review as set out in paragraphs 100-102.

Preparing an EOIR Supplementary Report

107. Although the decision to launch an EOIR supplementary review is based on the improvements to specific essential elements, the EOIR supplementary review itself will cover all aspects of EOIR, and inputs will be sought on all elements from Global Forum members.

108. A supplementary report will be prepared as follows:

- Sufficient time will have to be allocated in order to allow for (i) the PRG time to provide the inputs, consider the request and decide whether an on-site visit is required, and (ii) Global Forum member jurisdictions to complete and return the Peer Questionnaire, which will be circulated once a decision has been taken to launch a review. Where no on-site visit is required the analysis would be completed and the EOIR supplementary report prepared in 12-14 weeks. Where an on-site visit is required the analysis would be completed and the report prepared in 16-18 weeks.
- In the event that the assessment team proposes to revise any of the determinations or ratings, the EOIR supplementary report will include a revised summary of determinations, recommendations and ratings. If a jurisdiction has not corrected all of its deficiencies, the assessment team may propose that a further follow-up procedure be decided.
- The assessment team's draft report is sent to the PRG at least seven weeks prior to the next meeting of the PRG which will consider the draft report, in line with existing approval procedure for peer review reports in paragraphs 55-68.

- The draft EOIR supplementary report approved by the PRG will be immediately submitted to the Global Forum for adoption through written procedure, in accordance with the procedure in paragraphs 69-70.
- The adopted EOIR supplementary report will be made public on the Global Forum website, in accordance with the procedure in paragraphs 71-72, alongside the original EOIR and, where applicable, previous Global Forum Peer Review report. The original EOIR report itself will not be revised since it reflects the situation at a particular time.

109. Given the time that may elapse between the adoption of the EOIR report and the preparation of an EOIR supplementary report, the original expert assessors may no longer be available to prepare the EOIR supplementary report. In the event that an original expert assessor is not available, or no longer qualifies as an expert assessor in paragraph 13-14, the Secretariat will liaise with the central point of contact in the member jurisdiction that provided the expert assessor to identify a successor. In case a successor is not available, then an expert assessor from another jurisdiction may be appointed in accordance with the procedure for appointing expert assessors in set out in paragraphs 15-18.

III. Procedures for reports on non-members

110. EOIR reviews of non-members of the Global Forum will occur in a manner similar to EOIR reviews of members to the greatest extent possible except as otherwise provided hereunder.

A. Selection of non-members for review

111. The purpose of EOIR review of non-members is to prevent jurisdictions from gaining a competitive advantage by refusing to implement the standard or participate in the Global Forum.

112. The PRG should discuss any issues with regard to non-members on a regular basis. It can make a proposal to the Steering Group for approval of the review of a non-member and seek approval of the Global Forum under the written procedure. The PRG should ensure that all Global Forum members are invited to identify appropriate non-members for review.

113. Prior to a review commencing, the non-member jurisdiction should be informed about the possibility of becoming a member of the Global Forum if the jurisdiction commits to implement the standard, accepts to be reviewed and pays the membership fee.

B. Participation of non-members in their review by the Global Forum

114. Non-members who do not seek to become members will generally be given the same opportunity to participate in their EOIR review as Global Forum members, including the opportunity to organise an on-site visit. However, while participation should be encouraged, it is important that the report be prepared using the best available information even if the assessed jurisdiction is not co-operative. Non-members do not participate in the formation of consensus.

115. In the event the invitation to agree to an on-site visit is not accepted or the jurisdiction otherwise fails to co-operate with the review process, the PRG may also consider other appropriate action.

116. The budget of the Global Forum will bear the expenses for the travel and per diem expenses for the members of the Secretariat who are part of assessment teams.

117. The members taking part in the evaluations as assessor jurisdictions will bear the costs of travel and per diem expenses for their experts assigned to assessment teams. To the extent possible, each PRG member should expect to provide expert assessors to participate in up to six to eight peer reviews over the course of the 2016-20 Schedule of reviews, dependent on the size of the PRG member jurisdiction. In order to facilitate a more equal distribution of the workload of the peer review process, all other Global Forum member jurisdictions are also encouraged to provide expert assessors to participate on reviews over the 2016 Schedule.

118. The assessed jurisdiction will bear the cost of replying to the questionnaire, translating all relevant materials as well as interpretation costs and defraying the travel and per diem expenses of experts who attend the PRG and Global Forum meetings to present the jurisdiction's views on the report. The assessed jurisdiction will also bear the costs to organise the on-site visit (other than the travel and per diem expenses for the expert assessors and members of the Secretariat as addressed above).

Annex 1

Key responsibilities of participants in a review

This annex summarises the key responsibilities of participants in the EOIR and EOIR supplementary reviews. As a foreword to the below outlined responsibilities, it is noted that due to the nature of the peer review process, there is a strict duty of confidentiality by all participants whereby any element of the review process should only be disclosed where it is specifically permitted to do so. In the event that participants have concerns or are unsure as to the confidentiality of any aspect of the process, they should seek guidance from the Secretariat.

I. Responsibilities of secretariat

A. **Assessment Schedule:** In accordance with the overall schedule adopted by the Global Forum, the Secretariat establishes, in consultation with the expert assessors and the assessed jurisdiction, a schedule of the steps of each individual review.

B. **Assessment Team**: Secretariat staff co-ordinates the assessment team.

C. **Questionnaire and Additional Questions**: The Secretariat reviews the assessed jurisdiction's most recent review (where applicable), inputs from Global Forum members and additional materials, and where necessary, prepares a list of additional questions to supplement the standard questionnaire(s). Specific questions may also relate to issues arising from an earlier review. The additional questions are sent to the assessed jurisdiction after consultation with the expert assessors.

D. **On-site visit:** in consultation with the expert assessors and the assessed jurisdiction, the Secretariat prepares the agenda.

E. **Preparation of EOIR Report and Supplementary Report**:

119. Pre-PRG Discussion: The Secretariat co-ordinates the drafting of an EOIR report which incorporates the views of the assessment team. It is then provided to the assessed jurisdiction. The Secretariat, in consultation with the

assessment team, makes any appropriate changes in response to comments and corrections submitted by the assessed jurisdiction. The report reflects the comments of the assessed jurisdiction and its plans to address the weaknesses identified.

120. PRG and Global Forum meetings: As part of the assessment team, the Secretariat will have the opportunity to intervene or comment on issues concerning the report.

121. Post-meetings: After the PRG approval of a draft EOIR report, the Secretariat will be responsible for editing and transmitting the draft report to the Global Forum. After the Global Forum's adoption, the Secretariat will be responsible for publishing the report.

II. Responsibilities of assessors

A. **General:** Each jurisdiction that agrees to provide an expert assessor, and each individual expert assessor that accepts such a role, fully accepts all of the obligations relating to such service, including the provision of timely comments, participation in on-site visits, and full attendance at all possible meetings (preparatory, PRG and if necessary Global Forum). Jurisdictions that are not able to carry out their obligations should notify the Secretariat without delay to allow another assessor jurisdiction to be chosen. The PRG shall be notified if the Secretariat is unable to find a substitute expert assessor and will decide on how to proceed. Expert assessors are bound by a confidentiality duty and cannot share documents related to the review they are performing outside the assessment team.

B. **Appointment of Expert Assessors:** The steps below should be followed:

122. Once a Global Forum member has indicated that it is prepared to provide expert assessors, it should designate a central point of contact and, if possible, provide a list of the names and qualifications of potential individual expert assessors. Expert assessors should be public officials drawn from relevant public authorities. Expert assessors should also have relevant practical experience with actual exchange of information for tax purposes. Potential expert assessors receive a handbook compiling the relevant documents.

123. Global Forum members providing expert assessors are informed by the Secretariat, with as much notice as possible, of the decision of the chair and vice-chairs of the PRG about the jurisdictions their expert assessors will be asked to review, and the dates for the reviews.

124. The Global Forum members will inform the Secretariat of any reasons why they consider it would not be appropriate for them to be involved in reviewing one or more of the jurisdictions selected.

125. The assessed jurisdiction will inform the Secretariat of any reasons why it considers that it would not be appropriate for a particular jurisdiction to be part of the assessment team.

126. The Global Forum members providing expert assessors propose, through their central point of contact, which of their individual potential assessors could undertake the review and should supply the name and qualifications of the prospective assessors to the Secretariat within seven days from the receiving of a Secretariat request.

C. **Composition of Assessment Team:** The assessment team which usually consists of two expert assessors as a whole should include experts in areas relevant to the issues presented by a specific jurisdiction's examination, e.g. interpretation of tax treaties, statutes, regulations and practices including in the areas of international exchange of information; accounting and transparency issues; and access to information. The potential assessment team may consult with each other to ensure that there is adequate coverage of relevant issues. Individuals serving as assessors have a duty to assess objectively, in their personal capacity.

D. **Written Review. The Expert assessors:**

127. Work with the Secretariat to develop a list of additional questions to enhance responses already provided for in the questionnaire.

128. Identify issues raised by the assessed jurisdiction's response to the questionnaire and communicate these issues to the Secretariat for inclusion in follow-up questions or incorporation into the draft EOIR report.

129. Work with the Secretariat in the preparation of the draft report.

E**. On-site Visit: Expert** assessors participate in all aspects of the on-site visit, and substantively contribute to the discussions during the on-site meeting with the assessed jurisdiction as well as during the preparatory and debriefing discussions with the Secretariat.

F. **EOIR Supplementary reports:** In the event that a request by the assessed jurisdiction for an EOIR supplementary report is approved, the expert assessors shall then assist in drafting the EOIR supplementary report.

G. **PRG and Global Forum Meetings:** The expert assessors are expected to attend, the PRG meeting to present and discuss the draft report.

III. Responsibilities of the assessed jurisdiction

A. Central Point of Contact: The assessed jurisdiction designates a central point of contact who is responsible for ensuring that communications with the Secretariat are forwarded promptly to the relevant persons in the assessed jurisdiction and for ensuring the confidentiality of the documents related to the review process within the assessed jurisdiction.

B. Questionnaire and Supporting Materials: In accordance with the schedule established by the Secretariat, the assessed jurisdiction submits a written response to the questionnaire and additional questions, as well as supporting materials, including summaries of relevant cases.

130. Although it is preferable that these answers be integrated into a single written response, the assessed jurisdiction should not delay providing a response for that purpose. Further, if the answers to specific questions are not complete by the deadlines set in the assessment schedule, the assessed jurisdiction should submit such answers as are complete and supplement its response as needed.

131. The assessed jurisdiction provides supporting materials, such as laws, regulations, and judicial decisions. It is essential that all materials be provided on a timely basis to allow the assessors and the Secretariat to review them. Supporting materials should be provided in English or French, as well as in the original language unless otherwise agreed with the Secretariat. Where the materials are voluminous, the assessed jurisdiction should discuss with the Secretariat which items should be translated on a priority basis.

132. The assessed jurisdiction also answers any additional follow-up questions, triggered by its answers to the questionnaire.

C. On-site Visit:

133. The assessed jurisdiction provides access to relevant officials as required in the agenda, in consultation with the Secretariat and the assessment team. The names, titles, and responsibilities of each participant are provided to the Secretariat in advance of the on-site visit. The assessed jurisdiction should do its utmost to ensure that the list of participants reflects the proposals of the assessment team.

134. The assessed jurisdiction is responsible for providing a venue for the on-site visit.

135. Although the assessed jurisdiction is not required to make travel arrangements for the assessment team, it may consider negotiating for hotel rooms at a government rate at a location convenient to the venue of the meetings.

136. The language (English or French) in which the assessment will be conducted is agreed upon in advance. The assessed jurisdiction may be required to provide interpretation and translation as deemed necessary by the assessment team.

D. The Draft EOIR Report:

137. The assessed jurisdiction should carefully review the draft EOIR report and submit any corrections or clarifications it deems appropriate, indexed to specific paragraphs of the draft EOIR report. This should not be viewed as an opportunity to rewrite the draft EOIR report.

138. Comments must be submitted within the time limits set in the assessment schedule. To ensure that the PRG receives the draft EOIR report in time to review it prior to the PRG meeting, comments that are submitted late will not be included in the draft EOIR report circulated to the PRG but will be circulated separately.

139. When a draft EOIR report is discussed orally during a PRG meeting, the assessed jurisdiction may present its views.

E. Post-Review:

140. By June 30 of every year, the assessed jurisdiction shall provide a follow-up written report of the steps it has taken or is planning to take to implement the recommendations in the manner prescribed in paragraphs 79-83 above. In addition if, at any time one year after the Global Forum's adoption of an EOIR review, the assessed jurisdiction implements changes that are likely to result in an upgrade in a rating to "compliant" or an upgrade in the overall rating, it can submit a request for an EOIR supplementary report as set out in paragraphs 86-90.

IV. Responsibilities of PRG members and Global Forum members

A. Providing input for all reviews: Global Forum members are invited to indicate any issues they would like to see raised and discussed during the evaluation or issues that may give rise to concerns about back-stepping. In the case of a supplementary EOIR review, this includes input in relation to the changes relating to the essential elements that the requesting jurisdiction considers are likely to be upgraded to compliant or the changes that are likely to result in an upgrade to the overall rating.

B. Questionnaire for EOIR Reviews and EOIR supplementary reports: Global Forum members with an exchange of information relationship with the assessed jurisdiction are invited to fill-in a questionnaire on the quality of information exchange, and to indicate any issues they would like to see raised and discussed during the review. Those jurisdictions that

have a significant exchange of information relationship with the assessed jurisdiction have a particular responsibility to respond to the questionnaire within the assigned deadline. Global Forum members who have filled-in the questionnaire should be ready to answer possible follow-up questions from the assessment team.

C. Comments on Draft Reports: PRG and Global Forum members ensure that a qualified expert(s) reviews the draft reports, and provides, as need be, comments on requests for written approval or adoption. PRG and Global Forum members respect the confidentiality of all documents related to the review process.

D. Follow-up to Reviews: PRG members ensure that a qualified expert(s) reviews the follow-up reports prepared by the assessed jurisdiction and assessment team, and provides comments, objects or raises questions, as need be.

E. Attendance at PRG Meetings: PRG members ensure the attendance of a qualified expert(s) at each PRG meeting. Absences should be notified one week in advance of the meeting. PRG members who fail to attend three successive meetings will be automatically removed from the PRG, and the Global Forum will elect a new member.

Annex 2

EOIR assessment schedule

A. Peer Questionnaire sent to Global Forum members: 3 weeks to respond

B. EOIR Questionnaire sent to Assessed Jurisdiction: 6 weeks to respond

C. On-Site visit: as soon as possible, generally after receipt of completed EOIR Questionnaire

D. Draft report prepared by Secretariat: provided to assessors 4-6 weeks following on-site visit

E. Comments by assessors: 2 weeks following delivery of draft report

F. Finalising draft report and sending to Assessed Jurisdiction: 1 week following comments from assessors

G. Comments from Assessed Jurisdiction on draft report: 6 weeks to respond

H. Finalising draft report: 2 weeks following comments from Assessed Jurisdiction

I. Draft report sent to PRG: minimum 7 weeks prior to the PRG meeting where the draft report is to be discussed

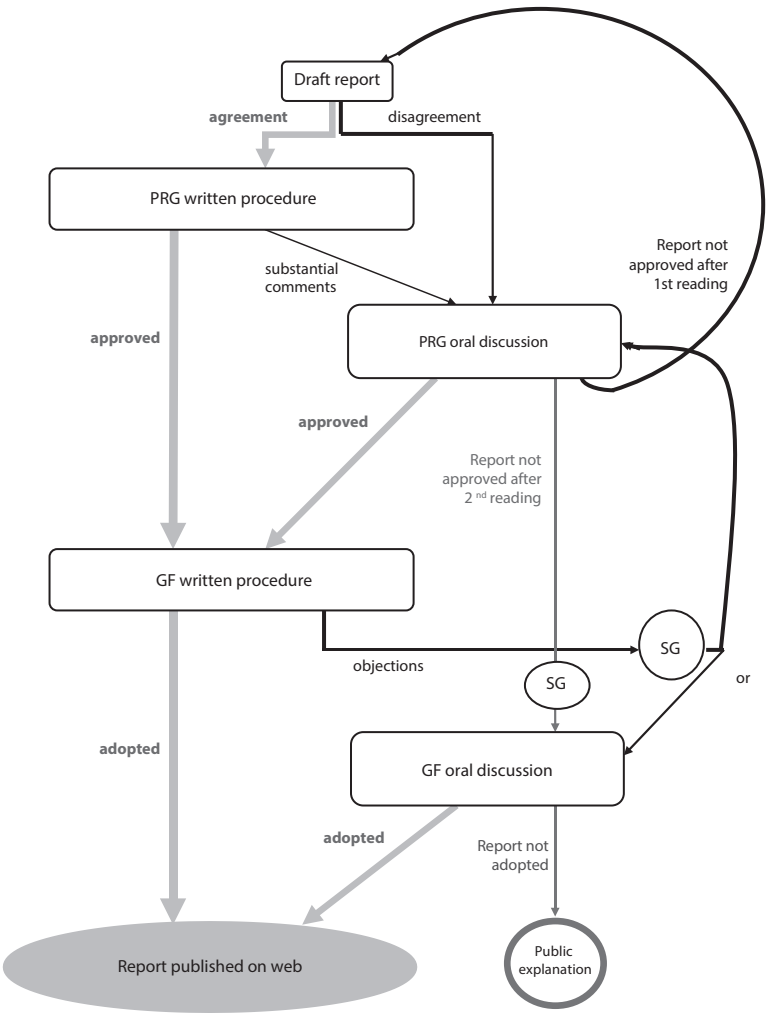
J. Comments by PRG delegates: 4 weeks to respond

K. Revision of draft report by assessment team: 2 weeks following comments by PRG delegates

L. Revised draft report and Table of Comments sent to PRG: minimum 7 days prior to the PRG meeting where the draft report is to be discussed

Annex 3

Chart on the procedure to adopt report



Annex 4

Framework for the attendance of observers at PRG meeting

1. Unless decided otherwise by the PRG, all observers are entitled to attend PRG meetings in their entirety.
2. The draft agenda for the PRG meeting will be circulated in advance to PRG Members only. At the time of distributing the draft agenda, the Secretariat may propose that discussion of certain items be restricted to PRG Members, providing reasons for such proposal.
3. Within one week from the date of circulation of the draft agenda, PRG Members may also propose that certain items be restricted to PRG Members, providing reasons for such proposal. The Secretariat will circulate any such proposal to PRG Members.
4. Should a proposal be made by the Secretariat or a PRG Member to restrict certain items to PRG Members, the PRG Members will be given one week to take a position on this proposal.
5. Proposals to restrict certain items to PRG Members will be adopted by consensus. If no objection to the proposal is received within one week, the proposal will be considered adopted by the PRG. In such case, the relevant agenda items will be marked as "Restricted to PRG Members".
6. All documents for unrestricted items will be made available to observers.
7. *Conditions for the attendance of observers at PRG meetings*
8. Observers attending the PRG meetings do not participate in decision-making in the PRG. They cannot participate in the discussions nor make comments on the PRG documents.
9. Observers shall ensure confidentiality of PRG discussions and documents.

Annex 5

Follow-up report form

Follow-up report:

[Name of jurisdiction]
Overall Rating:
30 June 20[XX]

1. Actions taken in respect of recommendations

Year of report	Element (Phase)	Rating	Underlying factors	Recommendations	Actions taken	Status	Date action completed
						❑ addressed ❑ in the process of being addressed ❑ not addressed	
						❑ addressed ❑ in the process of being addressed ❑ not addressed	

2. New developments impacting Exchange of Information in the jurisdiction

Description of change	Impact for EOI

Have all recommendations been addressed?	❑ **yes** ❑ **no**
Request for a supplementary report/acceleration of EOIR review	❑ yes ❑ no

2016 Note on assessment criteria

Introduction

1. The Global Forum's Terms of Reference as updated for the second round of reviews to begin in 2016 (the 2016 Terms of Reference) are high level requirements that provide clear guideposts for jurisdictions to follow in implementing the international standard for exchange of information on request (EOIR). The G20 leaders have consistently encouraged a rapid implementation of the standard of EOI on Request and in 2014 adopted a new standard for automatic exchange of information (AEOI). The AEOI standard will be evaluated in accordance with its own dedicated Terms of Reference, Methodology and Schedule of Reviews.

2. The Global Forum's core mandate is to assess its members and relevant non-members through peer reviews to ensure a rapid implementation of the standards world-wide. The procedures that apply to these EOIR assessments are contained in the 2016 Methodology for Peer Reviews and Non-Member Reviews (the 2016 Methodology). The EOIR assessment criteria set out in this note provide the general form and content of the outcome of those assessments.

3. A variety of considerations have an impact on the choices made in designing an assessment system, from theoretical and substantive factors to practical concerns inherent in any undertaking of this nature. Consistency is of essence in ensuring the transparency and credibility of the Global Forum's peer review exercise, and the precedents established by the PRG and adopted by the Global Forum are a key component of any future results. Ultimately, the goal is to create a system that can be fairly and efficiently applied and which encourages continuing progress towards effective exchange of information across a broad universe of jurisdictions each having its own unique characteristics.

Background

4. The object of the Global Forum's EOIR peer review process is to promote universal, rapid and consistent implementation of the EOIR standard of transparency and exchange of information. This can be achieved when international tax co-operation allows tax administrations to effectively administer and enforce their tax laws regardless of where their taxpayers choose to locate their assets or organise their affairs.

5. The progress made by a jurisdiction in implementing the EOIR standard, and likewise a failure to make such progress, have been highlighted as part of the Global Forum's EOIR peer review process over the first round of reviews from 2010 to 2015. The Global Forum peer reviews have:

- given recognition to progress that has been made,
- identified areas of weakness and recommended remedial actions so that jurisdictions can improve their legal and regulatory frameworks as well as their exchange of information practices, and
- identified jurisdictions that are not implementing the standards.

6. The outcomes of the first round of peer reviews provide a clear picture of where each reviewed jurisdiction stands in terms of implementation.

7. The second round of peer reviews will continue this work by re-evaluating all Global Forum members and those non-member jurisdictions that are relevant to the work of the Global Forum to assess further progress made in implementing the standard for EOIR, including EOI in practice. Further, this second round of peer reviews will evaluate how jurisdictions have implemented the changes to the EOIR standard incorporated in the 2016 Terms of Reference.

I. Structure of the assessment system

8. In the first round of reviews jurisdictions were subject to two separate phases of peer review – Phase 1 addressing a jurisdiction's legal and regulatory framework and Phase 2 addressing the jurisdiction's practical implementation of the EOIR standard. These peer reviews were generally conducted 1-3 years apart. Some jurisdictions that had an established history of EOIR were subject to combined reviews whereby the Phase 1 and Phase 2 components were assessed at the same time. Other assessed jurisdictions may have been blocked from progressing to the Phase 2 peer review where they did not have in place elements crucial to achieving an effective exchange of information in practice. In these cases an overall rating of Non-Compliant was assigned following a special procedure.

9. Ultimately, all evaluations and ratings must be adopted by the Global Forum. However, responsibility for ensuring a fair and consistent outcome of the reviews as a whole and the application of the rating system in particular will fall to the PRG, which should have an active role in ensuring that similar cases are treated similarly and that real distinctions in the effectiveness of the systems for the exchange of information in different jurisdictions are reflected in the assessments given to each. Of course, the assessment teams will play a crucial role in this regard as they will be charged with preparing the draft report for approval of the PRG.

10. In the second round of peer reviews there will continue to be a separate evaluation of the jurisdiction's legal and regulatory framework on the one hand and an evaluation of the effectiveness of its EOIR in practice on the other hand. However, all jurisdictions will be subject to a single, combined review of both aspects.

Evaluation of a jurisdiction's legal and regulatory framework

11. The purpose of evaluating a jurisdiction's legal and regulatory framework is to determine whether a jurisdiction has put in place the relevant legal and regulatory framework necessary to give effects to each of the essential elements of the 2016 Terms of Reference. Evaluations of the legal and regulatory framework will lead to one of the following determinations in respect of each essential element except element C.5 (*Timeliness and quality of requests and responses)*:

Determinations – Legal and Regulatory Framework
The element is in place (In Place)
The element is in place, but certain aspects of the legal implementation of the element need improvement (Needs Improvement)
The element is not in place (Not in Place)

12. It is not possible to determine whether element C.5 is in place with respect to a jurisdictions legal and regulatory framework, as it involves issues of practice that are dealt with in the evaluation of EOIR in practice.

13. An In Place determination is appropriate where there are no material deficiencies in the jurisdiction's legal and regulatory framework. A material deficiency is one that prevents the implementation of a core aspect of the element. The existence of a small issue that has a very limited impact on the ability of a jurisdiction to implement the standard for a given element may lead to a recommendation for improvement without concluding that the implementation of the element Needs Improvement. (See the section on *Recommendations and the presentation of ratings and determinations* for a

discussion of whether recommendations regarding deficiencies that are not material should be presented "in box" or only "in text".)

14. A legal and regulatory framework Needs Improvement where the deficiency identified relates to a material aspect of the implementation of the element in question. The assessment team and the PRG should consider carefully the scope of the deficiency identified where it is limited or highly circumscribed in a manner such that a determination of In Place may nevertheless be appropriate. Conversely, a determination of In Place would not be appropriate where the scope of the issue goes beyond one or merely certain aspects of the implementation of the element.

15. A determination of Not in Place is appropriate in those circumstances where the deficiency identified is fundamental to the implementation of the standard such that it may widely prevent exchange of information. For example, this may arise in respect of an inability to access bank information or the case of a jurisdiction that does not have in place an agreement with any relevant jurisdiction that provides for exchange of information in tax matters.

Evaluating the effectiveness of EOIR in practice

16. The purpose of the evaluation of EOIR in practice is to see whether the rules established by a jurisdiction's legal framework work in actual requests for the exchange of information in tax matters, or provide for sufficient grounds to function properly in case the jurisdiction eventually receives EOIR requests.

17. While each of the essential elements will be rated based on the adequacy of the legal and regulatory framework in place and its implementation in practice, the ultimate object of the exercise is to evaluate the overall effectiveness in practice of a jurisdiction's system for exchange of information.

18. Deciding on the extent to which a jurisdiction complies with the standard for EOIR and so what rating it should receive is one of the most important and difficult jobs of the assessment teams and the PRG. This task should be approached with the greatest care and consideration for the importance and consequences of the decisions taken, both for the assessed jurisdiction and in terms of the precedent that may be set in each case. In assigning ratings assessment teams and the PRG must decide every individual case on its merits and in the context of the particular facts and circumstances that have been established during the review. It also cannot be ignored that transparency has a dynamic character and so issues that have not attracted much attention in the past, may raise greater concerns in the future.

Rating the individual elements

19. The evaluation of the effectiveness in practice is applied on the basis of a four-tier system:

Rating	Effectiveness of EOIR in practice
Compliant (C)	***The essential element is fully implemented.*** No material deficiencies have been identified and the jurisdictions EOIR practice is effective.
Largely Compliant (LC)	***The essential element is implemented to a large extent.*** At least one material deficiency has been identified which has had, or which is likely to have, limited effect on EOIR in practice or there is insufficient experience with the implementation of the element in practice to support a finding that EOIR is effective in practice.
Partially Compliant (PC)	***The essential element is only partly implemented.*** At least one material deficiency has been identified which has had, or which is likely to have, a significant effect on EOIR in practice.
Non-Compliant (NC)	***The essential element is not implemented.*** At least one material deficiency has been identified which has had, or which is likely to have, a fundamental effect on EOIR in practice.

20. Over the first round of reviews some general principles have been developed through the application of ratings for individual elements and should continue to be observed:

i. The rating should take into account both the evaluation of the legal and regulatory framework (i.e. the determination of the element) and the effectiveness of EOIR in practice.

ii. Where there are no in-box recommendations regarding EOIR in practice, a determination of In Place should generally be determinative and lead to a rating of Compliant for a particular element.

iii. Where a determination of In Place is accompanied by in-box recommendations regarding EOIR in practice, then the rating will depend on the seriousness of the recommendations.

iv. In the absence of any Phase 2 in-box recommendation, an element which had been determined *Not in Place* will generally be rated as *Non-Compliant* – a rating of *Partially Compliant* would only be justified where there is positive evidence that effective exchange of information was nonetheless occurring despite the particular legal and regulatory framework issues identified.

v. An element determined as Needs Improvement would not be expected to lead to a rating of Non-Compliant where there are no in-box recommendations regarding major gaps in practical implementation.

vi. In assigning ratings (particularly in relation to element C.5) attention must be paid to the nature, complexity and scale of information requests made or received by the jurisdiction.

21. A wide variety of cases are covered in existing reports, and while the exercise should in no way become a mechanical or automatic exercise, consistency is a critical aspect of the ratings system and of the credibility of the Global Forum generally. In coming to their conclusions, assessment teams and the PRG should also be guided by the precedents provided by previously published reports where there are relevant comparisons to be made. The precedents may relate to particular fact patterns that occur in more than one jurisdiction or to similar deficiencies in the legal framework. Where such similarities occur, it is incumbent in particular upon the assessment team and the PRG to consider the appropriate precedents when agreeing to the rating and whether these precedents should be applied or if there are other considerations in the instant case that lead to a different conclusion.

22. A Compliant rating indicates that the element is fully implemented with regard to the jurisdiction's legal and regulatory framework and that framework is effective in practice. This does not demand perfection, but there should be no material deficiencies identified. Small deficiencies that do not affect the core of the element's subject matter therefore do not preclude a Compliant rating. Illustrations of such cases arose in the first round of reviews, including the absence or ambiguity of clear rules in respect of obligations placed on non-professional trustees or nominees. However, care should be taken in evaluating the cumulative effect of more than one such deficiency.

23. In this context, a material deficiency would be considered one that directly relates to key aspects of implementing the particular element, such as the failure to require the maintenance of ownership information for a particular type of company or the inability to obtain certain types of information. In some cases, this failure may be mitigated by the fact that it only applies in respect of a smaller sub-set of the companies or only to the obtaining of information in very specific, limited circumstances, and the facts and practice indicate that the deficiency does not, and is not likely to, impede effective exchange of information.

24. A Largely Compliant rating indicates that there is a material deficiency but the scope and impact of the issue has been, or is likely to be, limited in practice. In this context, the appreciation of how likely it is that a deficiency will have an impact on EOI in practice should not be based on

purely speculative grounds, but rather on the facts of the case and the scope of the issue. As noted above, where an element is determined to be Needs Improvement, then the deficiencies identified should be considered material and the highest rating that should be given is Largely Compliant. This is the case even where no deficiencies in practice are identified. Where the element is "in place", but a material deficiency is identified in practice then it should only have limited impact on effective EOIR if the rating is to be Largely Compliant.

25. A Largely Compliant rating is also appropriate in some cases where the implementation of the element in practice cannot be evaluated due to the lack of evidence on which to base a conclusion. This is particularly relevant with respect to element C.5, which merely assesses the practical aspects of effective EOIR. This means that even though no concrete deficiency is identified, there is a lack of experience with the implementation of the element or key aspects of the element that are necessary in order to have confidence that the element is Compliant. However, where the lack of experience only relates to a smaller part of the implementation of any particular element then a Compliant rating may still be appropriate.

26. The question of how limited the materiality of the deficiency must be in order to justify a Largely Compliant rating versus a Partially Compliant rating is a difficult one. Where the material deficiency covers a large portion or all of the key aspects of the element or the effect of the material deficiency on EOIR in practice has been significant, then the element should not be considered as Largely Compliant.

27. A Partially Compliant rating indicates that at least one material deficiency has been identified which is likely to have, or which has had, significant effect on EOIR in practice. This requires an examination of both the nature of the deficiency (either of the legal or regulatory framework or in practice) and its actual or potential impact on EOIR. A deficiency can be considered likely to have a significant effect on EOIR in practice where it affects the key aspects of the element. In the first round of reviews Partially Compliant ratings were issued, for example, under element B.2 where the jurisdiction's law did not provide for any exception to notification even in the absence of any deficiencies identified in practice. The rationale for this result was that the key aspect of implementing element B.2 is to ensure the existence of such an exception, and so it is impossible to conclude that the element is "largely" compliant despite its absence. The effect of a deficiency on EOIR in practice can be considered significant where it affects, or is likely to affect, a large number of cases or impacts a key aspect of the implementation of the element.

28. A rating of Non-Compliant is reserved for those circumstances where at least one material deficiency has been identified, which has had, or is

likely to have, a fundamental effect on EOIR in practice. The effect on EOIR in practice is considered fundamental where it covers most or all of the key aspects of the element (for example, the inability to access bank information for EOIR purposes). Generally, if an element is Not in Place as regards the legal and regulatory framework then this can be said to fundamentally impair the implementation of the element. As noted above, in this case a rating of Partially Compliant would only be justified where there is positive evidence that effective exchange of information was nonetheless occurring despite the severe deficiency in the legal and regulatory framework identified.

Overall rating

29. The issuance of an overall rating achieves both the recognition of progress by jurisdictions toward the level playing field and the identification of jurisdictions that are not in step with the international consensus. The general considerations mentioned above apply equally in the case of the overall rating. In addition, it should be recognised that the overall rating does not diminish the progress and success jurisdictions achieve in implementing the standard of EOIR in respect of individual elements.

30. The same four-tier system has been adopted for the overall rating. This should be based on the global consideration of the jurisdiction's compliance with the individual essential elements, as illustrated by the individual ratings. In particular, the assessment team and the PRG should have regard to the specific recommendations made and the factors underlying the specific deficiencies identified, and their impact on the jurisdiction's overall effectiveness of EOI in practice.

31. Some general guidance was developed in the course of assigning ratings during the first round of reviews:

i. Where the ratings for individual elements are all Compliant this should lead to an overall Compliant rating.

ii. Where one or more elements are rated as Non-Compliant it is expected that the overall rating would not be Compliant.

iii. Where two or more elements are Largely Compliant, then generally the overall rating would not be higher than Largely Compliant.

iv. Where three or more elements are Partially Compliant then generally the overall rating would not be higher than Partially Compliant.

32. The assessment teams and the PRG should also give consideration to the relative importance of the various essential elements bearing in mind that, during the first round of reviews, having combinations of two or more of the elements A.1/A.2/B.1/C.1/C.2 Not in Place generally led to jurisdictions not

proceeding to Phase 2. Given that the objective of the exercise is to evaluate the overall effectiveness in practice of a jurisdiction's system for exchange of information, essential element C.5 is also important in terms of assigning the overall rating but, as already indicated careful attention must be paid to the nature, complexity and scale of information requests made to the jurisdiction.

33. These principles reflect the approach taken in the first round of reviews in respect of the 2010 ToR. This may be helpful framework within which to assign ratings during the second round of reviews. But it should be noted that this guidance was never considered to constitute inflexible rules and that in specific cases, different results may be appropriate.

34. The general approach to assignment of ratings which has developed over the course of the first round of reviews is a valuable foundation. But ultimately the overall rating must be based on a global consideration of a jurisdiction's compliance with the individual essential elements, and cannot be a purely mechanical exercise. This will require careful judgment, taking into account all the circumstances in the case at hand as well as the relevant precedents and impact of the identified deficiencies more widely. While it is important for assessment teams and the PRG to be flexible, it is equally important for the Global Forum's credibility that flexibility does not entail situations where similarly situated jurisdictions are treated dissimilarly. The PRG should work through the second round of reviews to internally assess the consistency of its decisions.

Recommendations and the presentation of ratings and determinations

35. Where a review finds deficiencies in the implementation of the essential elements, either as regards a jurisdiction's legal and regulatory framework or its practice, then clear recommendations are to be made to address the deficiency. Each recommendation made is to be accompanied by a general description of the factor underlying the recommendation.

36. The recommendations are to be set out in a clearly identifiable box, which is split between (i) the assessment of the implementation of the element in the legal and regulatory framework and (ii) the assessment of the implementation of EOIR in Practice. The box concerning the legal and regulatory framework contains the recommendations, and the factors underlying them, concerning the adequacy of the jurisdiction's legal and regulatory framework and the determination assigned to the element (In Place, Needs Improvement or Not in Place). The box regarding EOIR in practice likewise contains the recommendations and underlying factors concerning the practical implementation of the jurisdiction's legal and regulatory framework and the rating assigned for the essential element (Compliant, Largely Compliant, Partially Compliant and Non-Compliant).

37. It is important that the recommendation be clear and precise, so that it is clear what action the jurisdiction needs to take in order to remedy the deficiency identified. In particular, recommendations should be carefully drafted to ensure they do not recommend actions that go beyond the specific deficiencies identified. In addition, recommendations should be not too prescriptive, recognising that it is within the jurisdiction's own sovereign determination to choose the manner in which it implements the standard.

38. Recommendations and their underlying factors should be displayed prominently and distinctly within the report.

39. The following is an example of how determinations, ratings, recommendations and the factors underlying the recommendations should be displayed:

	Underlying Factor	**Recommendation**
Deficiencies Identified in the Implementation of the legal and regulatory framework	Example: Information concerning trusts and partnerships is only required to be maintained in certain circumstances.	Example: [Jurisdiction] should ensure that information for all relevant partnerships and trusts is required to be maintained.
Determination: Needs Improvement		

	Underlying Factor	**Recommendation**
Deficiencies Identified in the Implementation of EOIR in Practice	Example: The system of oversight and enforcement of obligations to maintain ownership information for limited companies has only recently been implemented.	Example: [Jurisdiction] should monitor the effectiveness of the oversight and enforcement system to ensure that it is effective.
Rating: Largely Compliant		

40. The assessment team or the PRG may identify issues that have not had and are unlikely in the current circumstances to have more than a negligible impact on EOIR in practice. Nevertheless, there may be a concern that the circumstances may change and the relevance of the issue may increase. In these cases, a recommendation may be made; however, such recommendations should not be placed in the same box as more substantive recommendations. Rather, these recommendations can be mentioned in the text of the report. However, in order to ensure that the Global Forum does not lose sight of these "in text" recommendations, they should be listed in an annex to the EOIR report for ease of reference.

II. Guidance in addressing some structural and horizontal issues

41. This section provides guidance to the assessment teams and the PRG in how the evaluation system should be applied to individual reviews in light of issues that have arisen in the first round of reviews or have been identified in the context of revising the 2016 Terms of Reference for the second round of reviews. Some are of a structural nature, such as whether there should be transitional rules with respect to the evaluation of the new terms of reference or whether the outcomes of previous reviews should be re-examined. Others identify areas where achieving horizontal consistency in the assessment of essential elements requires particular guidance, such as whether certain deficiencies should be counted more than once under different elements or when monitoring recommendations may be removed. The list of issues identified below is not exhaustive and the guidance contained here may be further developed or supplemented as the PRG considers reports during the second round of reviews.

Transitional rules with respect to the evaluation of the new terms of reference

42. The 2016 Terms of Reference include a number of changes that are newly evaluated in the second round of reviews. The Global Forum agreed that these should generally apply to all jurisdictions equally over a three year review period, regardless of whether the review period covers years that pre-date the changes to the terms of reference. The one exception is for the changes to the standard in respect of group requests, where a specific transition rule is provided (see 2016 Methodology, paragraph 25).

43. Two issues arise in connection with the changes to the 2016 Terms of Reference. First, for some of the early reviews in the second round, a jurisdiction may not have implemented the standard for a portion of the review period and this may have had an impact on EOIR in practice. While such a deficiency is relevant and may be significant, the impact that this will have on the rating for the relevant element will depend on the facts and circumstances. In particular, assessment teams and the PRG should consider the following factors:

- Whether the legal and regulatory framework has been brought into line with the new requirement under the terms of reference,
- Whether measures have been introduced to ensure that any changes to the legal and regulatory framework are implemented in practice,
- The relative significance of the deficiencies in practice.

44. Where a jurisdiction was unable, in a proportionally small number of cases, to meet the additional requirements of the 2016 Terms of Reference

during a period when the 2010 Terms of Reference were applicable, but has since changed its laws to conform with the changes and has taken steps to ensure that its practices will be effective, then the element may still be rated Compliant depending on the circumstances. However, where there was an impact on EOIR in practice and changes have not been introduced to meet the EOIR standard, then this should generally be considered significant and therefore impact the rating for the element.

45. A separate issue relates to the evaluation of deficiencies with respect to changes introduced in the 2016 Terms of Reference to ensure that evaluations in the early reviews in the second round do not set the bar either too high or too low. In the first round of reviews this issue was addressed by delaying the allocation of ratings only once a representative subset of reviews had been completed. However, in that case the evaluation of the terms of reference was a completely new exercise without any precedent to follow.

46. In the second round of reviews the issue is much more limited (i.e. to changes in the terms of reference) and assessment teams and the PRG may rely on the experience gained in the first round of reviews generally. Awaiting a representative subset of reviews would not be practical. Nevertheless, the Secretariat will take efforts to ensure that the first meeting of the PRG at which ratings are finalised for the second round of reviews is structured in a manner that allows PRG delegates the opportunity to consider the evaluations of changes to the terms of reference in a horizontal, comparative manner. Specifically, the Secretariat will make efforts to ensure that:

- The reports considered during the meeting represent a cross-section of Global Forum members (in this regard the PRG should consider whether the first ratings should only be finalised when the reviews of at least 10-14 jurisdictions can be considered at the same time),
- Provide a clear presentation of the approach taken in evaluating compliance with the changes set out in the 2016 Terms of Reference, including the criteria used to determine whether the standard has been implemented and for judging its impact on the evaluation, and
- Provide PRG delegates the opportunity to consider the evaluations in each report before agreeing the outcome in any of them.

Revisiting the outcomes of previous reviews

47. During the first round of reviews a jurisdiction's legal and regulatory framework was generally evaluated first in a Phase 1 review and then followed by a subsequent evaluation of its effectiveness in practice through a stand-alone Phase 2 review. The practice adopted by the Global Forum in the stand-alone Phase 2 reviews was generally not to revisit the Phase 1 outcome

where no change to the legal and regulatory framework had occurred and no practical issues had arisen. This was in part dictated by the need to ensure consistency between the minority of jurisdictions which underwent combined Phase 1 and Phase 2 reviews and the majority of jurisdictions where each phase was separately assessed. Generally, there was a further assessment only where there had been a clear error or omission in the Phase 1 analysis or in circumstances where practical experience had revealed a significant legal and regulatory gap not identified in the Phase 1 analysis.

48. The rationale for this approach will no longer apply where virtually all jurisdictions are being reviewed again and each will have a combined review of both their legal and regulatory frameworks and also the effectiveness of their EOIR in practice. For this second round of reviews, assessment teams and the PRG are free to revisit any issue relating to the legal framework, but the focus should be on issues that have had a clear impact in practice. In this respect, in cases where the Phase 1 recommendation has not been addressed by the jurisdiction since the last review, the assessment team and the PRG should take into consideration the impact of such deficiency in practice. The effects of the deficiency in practice should be reflected in the report, even if there is no change made to the Phase 1 recommendation. For example, one possibility available to the assessment team is to update the underlying factors to the Phase 1 recommendation to reflect the impact of the deficiency in practice.

Jurisdiction's failure to respond to recommendations made

49. The mandate of the Global Forum is to ensure a rapid implementation of the standard for EOIR. Accordingly, one criteria of assessment has always been that the rating should take into account the manner in which Phase 1 recommendations have been addressed. This was expressly recognised in the previous 2010 Note on Assessment Criteria ("application of the rating system"). In the second round of reviews jurisdictions will have had ample opportunity to address any recommendations made during the first round of reviews. It is expected that these recommendations will be acted upon. Where these recommendations have not been addressed then the assessment team and the PRG should judge what impact this should have on the rating for the element, which will depend on the scope of the deficiency and on how this has affected EOIR in practice.

Monitoring recommendations

50. In the course of the first round of reviews, recommendations for jurisdictions were made to "monitor" the implementation of laws or practices where there has been insufficient experience for the PRG to evaluate them

fully. Where the law or practice was considered significant in relation to EOIR, then this type of recommendation generally led to a rating of Largely Compliant. There are several aspects to monitoring recommendations that assessment teams and the PRG will need to consider in the second round of reviews, such as when to introduce a monitoring recommendation, and how jurisdictions can address monitoring recommendations.

When to introduce monitoring recommendations

51. Monitoring recommendations should be included only in specific circumstances and jurisdictions should have a clear indication of when the recommendation has been addressed. There are two main areas where such recommendations should be made: (i) when a jurisdiction has introduced new legal provisions or administrative practices which have not been sufficiently tested in practice and (ii) when existing laws, resources or practices have not been sufficiently used for EOIR purposes, for example when a jurisdiction has received and processed few or no EOIR requests at the time of its assessment.

Monitoring recommendations for new laws or practices

52. Where a new law or practice has been introduced very late or after the end of the review period, then it is generally not possible for the assessment team or the PRG to evaluate its effectiveness. However, each case must be evaluated on its own merits, and there may be factors present in an individual case that provide a level of comfort as to how effective a law or practice may be. An assessment team may find that it is unable to judge the likely effectiveness of a new statute that creates obligations that were never before present in the legal framework. A monitoring recommendation would be appropriate in these circumstances.

53. On the other hand, the amendment to an existing law, which is within an established legal framework that has been demonstrated to function adequately, and which is administered and applied in the same manner as that framework generally, may not raise similar concerns. In those circumstances, the assessment team and the PRG may be satisfied that any uncertainty as to its functioning in the future is not a significant deficiency.

Monitoring recommendations when existing laws, resources or practices have not been sufficiently used for EOIR purposes

54. Where an established law or practice has not been tested during the review period, then assessment teams and the PRG should be cautious in according a Compliant rating. In particular, this may occur in respect

of element C.5 if the jurisdiction has received no requests or only a small number of requests (fewer than 5) in the review period. This may occur also in respect of other elements, such as element B.1 if access powers have not been applied during the period (perhaps due also to a low number of requests).

55. Where there is a lack of experience, a monitoring recommendation should generally be made. If the law or practice is considered material in relation to the implementation of the particular element then the recommendation should have an impact on the rating for the element.

How jurisdictions can satisfy a monitoring recommendation

56. As noted, recommendations should be crafted in a way that makes it clear what action the jurisdiction needs to take in order to remedy the deficiency identified. Therefore, where a jurisdiction has been recommended to "monitor" a particular situation due to a lack of experience the jurisdiction should be able to know when the results of such monitoring would enable it to consider that the deficiency should no longer be considered significant and the rating would likely to be judged Compliant.

57. As the review period is three years it should generally be considered sufficient that a monitoring period of around 12 to 18 months should provide enough of a basis to evaluate the adequacy of the legal framework or practice. This is an estimate, and would have to be specifically addressed in each case. The time period in a particular case will depend on the facts and circumstances. This includes the relevant practice following the review period, as it may be that a jurisdiction has a great deal of experience in a short time. Another factor may be the timing considerations inherent in the jurisdiction's legal or regulatory framework.

58. If, at the end of this period, the jurisdiction is able to demonstrate that the law or practice functions well and compliance has been adequate, then, absent any adverse factors to the contrary, this should provide enough comfort that the issue should not be considered significant enough to impact the determination or rating for the element. The jurisdiction's follow-up report should include a description of the period and manner in which the monitoring has been carried out and the results, supported by statistical information where appropriate.

59. With respect to monitoring recommendations made during the first round of reviews where there is a lack of experience there are two possibilities. Ideally, the subsequent period of review would show relevant experience sufficient for the assessment team and PRG to evaluate the adequacy of the law or practice.

60. However, it is beyond a jurisdiction's power to control the number of requests that it receives or the number of appeals its taxpayers make. During the first round of reviews many jurisdictions had only recently put in place their organisational structures and powers for EOIR, and indeed in many cases their networks of EOIR mechanisms may have only recently come into force. Therefore, the lack of experience may not in all cases have been predictive of their EOIR activity in the future, and, even where no particular deficiency was identified, a monitoring recommendation and a "largely compliant" rating were appropriate.

61. Where there continues to be no experience to evaluate (e.g. the jurisdiction continues to receive few or no requests), then this may indicate that the demand on this jurisdiction is very low, and the practical capacity of the jurisdiction's EOIR system should be evaluated accordingly. In such cases, and where appropriate, it should be open to the assessment team and the PRG to consider that a lack of experience does not necessarily preclude a Compliant rating. In these cases, a recommendation in the text to monitor the situation may be appropriate.

Double-counting of deficiencies in different elements

62. The 2016 Terms of Reference contain some duplication, particularly between access powers and EOIR mechanisms. This is because the powers to execute treaty obligations must generally be implemented in domestic law.

63. With respect to the analysis of a jurisdiction's legal framework, the failure to implement laws to give effect to treaty obligations gives rise to issues under both areas, recognising that the recommendation (and therefore the remedial action) may be the same in both cases. Under the first round of reviews this situation arose in a number of cases with respect to access to bank information or the existence of a domestic tax interest. In these circumstances, a recommendation is made under both elements B.1 and C.1 and the determinations in C.1 would be impacted in proportion to the seriousness of the deficiency identified in B.1.

64. In evaluating EOIR in practice, however, this approach in elements B.1 and C.1 should not lead inexorably to a finding that there are practical problems under both elements.

65. With respect to the analysis of all elements, in some cases, deficiencies in practice relate to more than one essential element, but this will depend on the facts of each particular case.

66. If there are distinct aspects to one problem then these should each be dealt with as appropriate. If accessing a particular type of information is subject to a lengthy and dilatory process within the EOIR unit and is also subject

to obstacles when attempting to access the information held by third parties, then these two issues should be evaluated separately under both elements C.5 and B.1. On the other hand, if the timeliness of exchanging information is due solely to problems related to accessing the information, then there should not be an adverse consequence in respect of element C.5. The fact that the exchange is slow may be noted under element C.5 and a cross-reference provided to the analysis of the issue under element B.1.

The use of statistics as a measure of compliance

67. Statistical information can be an important indicator of EOIR performance. In particular, statistics may demonstrate the timeliness of a jurisdiction's responses to requests and the volume of enforcement actions undertaken to ensure compliance with obligations to maintain information. However, the 2016 Terms of Reference do not require the maintenance of statistics in any particular form. Moreover, statistics cannot tell the whole story, and so too great a reliance on them may lead to either too harsh or too positive a conclusion. For example, general statistics on timeliness do not distinguish between relatively straight forward requests for information, such as confirmation of an address, as compared with much more complex requests, such as detailed transfer pricing information (the issue of complex requests is dealt with separately below). It is also noted that jurisdictions may not all maintain statistics in the same format and manner and therefore caution should be used when drawing comparisons between jurisdictions based on statistical information. Nevertheless jurisdictions will be expected to keep general statistics on timeliness of responses to request in the format of the table which was used fairly consistently in the first round of reviews.

68. Assessment teams and the PRG should use caution when interpreting statistics. In particular, statistics should be used to support a more general, substantive analysis of how the standard is being implemented, and not as a conclusion on their own. Moreover, they should be reliable and relevant to the analysis carried out in the review and should support the conclusion being drawn.

69. Conversely, the absence of statistics in a particular form should not lead to a negative conclusion on its own. Where other evidence relevant to the implementation of the standard is positive, and no other negative factors are present, a jurisdiction should not be penalised for not maintaining statistics in a particular form to support that result.

70. It should be noted, however, that the failure to maintain or provide any statistics at all may be a factor in determining how adequate the jurisdiction's performance is in relation to the implementation of a given element. For example, this may arise where a jurisdiction asserts that all holders of a type

of information are subject to oversight every 3 years to evaluate their compliance with their obligations, but is unable to provide any statistics at all that substantiate the extent to which this has been done. In this circumstance, and absent any other support for the assertion made, the assessment team and the PRG should be cautious in accepting the assertion made.

71. The statistics provided by an assessed jurisdiction during a review will be treated as confidential and should not be made publicly available unless the assessed jurisdiction consents to their release. In cases where statistics may include information disclosing information on the practices of another jurisdiction (i.e. main EOIR partners), consent for their release should also be obtained from that jurisdiction. It should be noted that even where statistics are not released publicly, this information should be provided to the PRG so that it can properly evaluate the issues. Strict respect of the confidentiality of the information provided during the peer review process is a cornerstone of the credibility and integrity of the work of the Global Forum.

Evaluation of the requests made

72. The 2016 Terms of Reference require jurisdictions to ensure quality of requests. It should be noted that the standard does not require a jurisdiction to make requests for information, and a given jurisdiction may have no need for information to administer its domestic laws (for example, if the jurisdiction does not impose income tax). Consequently, the fact that a jurisdiction has not made any requests for information should not lead to any adverse conclusion. In those cases where a jurisdiction has made requests, careful attention must be paid to the nature and complexity of the outgoing requests as well as the volume of requests made and the scale of information being requested.

73. Guidance on preparing and sending a request, including tools to assist competent authorities' in making requests such as request templates, is included in the 2006 OECD EOI Manual. In terms of judging the quality of requests it should be noted that certain bodies have also developed tools to assist competent authorities' in making requests. For example, the OECD's WP10 and the EU have produced templates that itemise the information required in a request for information. The appropriate use of these templates should promote effective exchange of information.

Complexity of requests

74. EOI requests may be complex for a variety of aspects; e.g. size of the information requested, number of persons concerned by the EOI request, type of information requested and period for which the requested information relates. It is unlikely however that a precise definition of a complex case

could be developed given the variety of types of requests which are possible and the variety of facts and circumstances which can arise in different cases. Based on the explanations given in the context of the first round of reviews, complex cases will commonly involve information not routinely available or accessible and may involve specific audits or investigations in order to obtain it. It must be stressed, however, that this would not cover cases where the request is of a routine nature (e.g. for account transaction information in respect of an identified bank account) notwithstanding that it involves the exercise of domestic access powers in relation to external parties.

75. Once the assessment team has identified the occurrence of complex requests, the weight of these requests on the EOIR organisation should be considered, since complex requests are generally more time-consuming to address than regular requests and may often give rise to requests for clarification all of which must be taken into account. This complexity may have consequences on the EOIR activities of the assessed jurisdiction, which would not be linked to structural issues in the EOIR organisation.

Relevant taxes

76. Article 26 in the OECD and UN Model Tax Conventions (DTC), Article 3 of the model Tax Information Exchange Agreement (TIEA) and Article 2 of the Convention on Mutual Administrative Assistance in Tax Matters all allow for the coverage of direct and indirect taxes. At a minimum the Model DTC and the Convention on Mutual Administrative Assistance in Tax Matters will cover direct taxes and all of the instruments allow for the exclusion of indirect taxes.

77. Recognising that the authoritative instruments are primarily aimed at exchange of information in respect of direct taxes, it was the consistent practice in the last round of reviews not to include an examination of exchange of information for indirect tax requests within the scope of the reports. Indeed if indirect taxes were included within their scope this would have implications beyond the statistics for requests satisfactorily answered in element C.5, but would also extend to a consideration of the adequacy of the relevant access powers in Part B of the reports in respect of indirect taxes. In element C.5 there would also need to be an in depth review of the organisation resources in place for handling requests for indirect taxes and in many jurisdictions this unit may be entirely separate from the EOIR unit in the tax administration dealing with direct taxes.

78. For the reason stated above the practice of confining reviews to EOIR in respect of direct taxes should be continued in the next round of reviews. Nevertheless, there may be circumstances where practices in respect of other taxes are relevant for the evaluation of exchange of information in direct

tax matters. For example, during the last round of reviews, there have been cases where this approach was used to demonstrate some EOI experience in jurisdictions where direct tax cases were limited or absent, or to evaluate the resources of the EOI unit.

Reasonable measures to ensure information on trusts

79. The 2010 Terms of Reference included a footnote 10 to element A.1.4, which had called for the Global Forum to re-examine, in light of the experience gained by jurisdictions in the context of the peer reviews, the "reasonable measures" that jurisdictions should take to ensure that trust ownership information is available under element A.1.4 and decide, before the end of Phase 1, if further clarifications are required to ensure an effective exchange of information. Peer review reports in the first round of reviews have noted that it is conceivable that a trust could be created under the laws of a jurisdiction, but that trust has no other connection with that jurisdiction. In that event, there may be no information about the trust available in that jurisdiction. The work done in this respect concluded that what would constitute "reasonable measures" in the context of ToR A.1.4 should be assessed in the context of a jurisdiction's individual circumstances, taking a comprehensive look at the variety of measures that apply. Where common law is used as the basis for determining that information is available, this should be adequately described and backed up through applicable case law.

Weight given to peer comments

80. The assessment team and the PRG should assess carefully complaints from a single peer to ensure that such cases are balanced with all relevant factors. Proper communication between the assessment team and both the requested and the requesting jurisdiction should be facilitated to draw a complete factual picture of the issue, mutually agreed by all parties (see paragraph [47] of the 2016 Methodology.)

81. The assessment team should identify whether the issue raised by the peer constitute anomalous or one-off problems or a systemic issue. In other words, a single problem that arises in connection with one peer may be an isolated case or may be evidence of a more general problem.

82. In case the said peer is the most important EOIR partner of the assessed jurisdiction, the issue should be considered in light of the overall EOIR context between the two EOIR partners (for example, other statistics could be considered, such as the volume and the timeliness and completeness of other requests and responses made to that partner).

Part II

Main sources of the internationally agreed standard

The 2002 Model Agreement on Exchange of Information on Tax Matters and its Commentary

I. Introduction

1. The purpose of this Agreement is to promote international co-operation in tax matters through exchange of information.

2. The Agreement was developed by the OECD Global Forum Working Group on Effective Exchange of Information ("the Working Group"). The Working Group consisted of representatives from OECD Member countries as well as delegates from Aruba, Bermuda, Bahrain, Cayman Islands, Cyprus, Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino.

3. The Agreement grew out of the work undertaken by the OECD to address harmful tax practices. See the 1998 OECD Report "*Harmful Tax Competition: An Emerging Global Issue*" (the "1998 Report"). The 1998 Report identified "the lack of effective exchange of information" as one of the key criteria in determining harmful tax practices. The mandate of the Working Group was to develop a legal instrument that could be used to establish effective exchange of information. The Agreement represents the standard of effective exchange of information for the purposes of the OECD's initiative on harmful tax practices.

4. This Agreement is not a binding instrument but contains two models for bilateral agreements drawn up in the light of the commitments undertaken by the OECD and the committed jurisdictions. In this context, it is important that financial centres throughout the world meet the standards of tax information exchange set out in this document. As many economies as possible should be encouraged to co-operate in this important endeavour. It is not in the interest of participating economies that the implementation of the standard contained in the Agreement should lead to the migration of business to economies that do not co-operate in the exchange of information. To avoid this result requires measures to defend the integrity of tax systems against the impact of a lack of co-operation in tax information exchange matters.

The OECD members and committed jurisdictions have to engage in an ongoing dialogue to work towards implementation of the standard. An adequate framework will be jointly established by the OECD and the committed jurisdictions for this purpose particularly since such a framework would help to achieve a level playing field where no party is unfairly disadvantaged.

5. The Agreement is presented as both a multilateral instrument and a model for bilateral treaties or agreements. The multilateral instrument is not a "multilateral" agreement in the traditional sense. Instead, it provides the basis for an integrated bundle of bilateral treaties. A Party to the multilateral Agreement would only be bound by the Agreement vis-à-vis the specific parties with which it agrees to be bound. Thus, a party wishing to be bound by the multilateral Agreement must specify in its instrument of ratification, approval or acceptance the party or parties vis-à-vis which it wishes to be so bound. The Agreement then enters into force, and creates rights and obligations, only as between those parties that have mutually identified each other in their instruments of ratification, approval or acceptance that have been deposited with the depositary of the Agreement. The bilateral version is intended to serve as a model for bilateral exchange of information agreements. As such, modifications to the text may be agreed in bilateral agreements to implement the standard set in the model.

6. As mentioned above, the Agreement is intended to establish the standard of what constitutes effective exchange of information for the purposes of the OECD's initiative on harmful tax practices. However, the purpose of the Agreement is not to prescribe a specific format for how this standard should be achieved. Thus, the Agreement in either of its forms is only one of several ways in which the standard can be implemented. Other instruments, including double taxation agreements, may also be used provided both parties agree to do so, given that other instruments are usually wider in scope.

7. For each Article in the Agreement there is a detailed commentary intended to illustrate or interpret its provisions. The relevance of the Commentary for the interpretation of the Agreement is determined by principles of international law. In the bilateral context, parties wishing to ensure that the Commentary is an authoritative interpretation might insert a specific reference to the Commentary in the text of the exchange instrument, for instance in the provision equivalent to Article 4, paragraph 2.

II. Text of the agreement

MULTILATERAL VERSION	BILATERAL VERSION
The Parties to this Agreement, desiring to facilitate the exchange of information with respect to taxes have agreed as follows:	The government of _____ and the government of _____, desiring to facilitate the exchange of information with respect to taxes have agreed as follows:

Article 1

Object and Scope of the Agreement

The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information.

Article 2

Jurisdiction

A Requested Party is not obligated to provide information which is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction.

Article 3

Taxes Covered

MULTILATERAL VERSION	BILATERAL VERSION
1. This Agreement shall apply: a) to the following taxes imposed by or on behalf of a Contracting Party: i) taxes on income or profits; ii) taxes on capital; iii) taxes on net wealth; iv) estate, inheritance or gift taxes; b) to the taxes in categories referred to in subparagraph a) above, which are imposed by or on behalf of political sub-divisions or local authorities of the Contracting Parties if listed in the instrument of ratification, acceptance or approval.	1. The taxes which are the subject of this Agreement are: a) in country A, _____; b) in country B, _____
2. The Contracting Parties, in their instruments of ratification, acceptance or approval, may agree that the Agreement shall also apply to indirect taxes.	2. This Agreement shall also apply to any identical taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes. This Agreement shall also apply to any substantially similar taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes if the competent authorities of the Contracting Parties so agree. Furthermore, the taxes covered may be expanded or modified by mutual agreement of the Contracting Parties in the form of an exchange of letters. The competent authorities of the Contracting Parties shall notify each other of any substantial changes to the taxation and related information gathering measures covered by the Agreement.

MULTILATERAL VERSION	BILATERAL VERSION
3. This Agreement shall also apply to any identical taxes imposed after the date of entry into force of the Agreement in addition to or in place of the existing taxes. This Agreement shall also apply to any substantially similar taxes imposed after the date of entry into force of the Agreement in addition to or in place of the existing taxes if the competent authorities of the Contracting Parties so agree. Furthermore, the taxes covered may be expanded or modified by mutual agreement of the Contracting Parties in the form of an exchange of letters. The competent authorities of the Contracting Parties shall notify each other of any substantial changes to the taxation and related information gathering measures covered by the Agreement.	

Article 4

Definitions

MULTILATERAL VERSION	BILATERAL VERSION
1. For the purposes of this Agreement, unless otherwise defined:	
a) the term "Contracting Party" means any party that has deposited an instrument of ratification, acceptance or approval with the depositary;	a) the term "Contracting Party" means country A or country B as the context requires;
b) the term "competent authority" means the authorities designated by a Contracting Party in its instrument of acceptance, ratification or approval;	b) the term "competent authority" means i) in the case of Country A, _____; ii) in the case of Country B, _____;

c) the term "person" includes an individual, a company and any other body of persons;

d) the term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;

e) the term "publicly traded company" means any company whose principal class of shares is listed on a recognised stock exchange provided its listed shares can be readily purchased or sold by the public. Shares can be purchased or sold "by the public" if the purchase or sale of shares is not implicitly or explicitly restricted to a limited group of investors;

f) the term "principal class of shares" means the class or classes of shares representing a majority of the voting power and value of the company;

g) the term "recognised stock exchange" means any stock exchange agreed upon by the competent authorities of the Contracting Parties;

h) the term "collective investment fund or scheme" means any pooled investment vehicle, irrespective of legal form. The term "public collective investment fund or scheme" means any collective investment fund or scheme provided the units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed by the public. Units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed "by the public" if the purchase, sale or redemption is not implicitly or explicitly restricted to a limited group of investors;

i) the term "tax" means any tax to which the Agreement applies;

j) the term "applicant Party" means the Contracting Party requesting information;

k) the term "requested Party" means the Contracting Party requested to provide information;

l) the term "information gathering measures" means laws and administrative or judicial procedures that enable a Contracting Party to obtain and provide the requested information;

m) the term "information" means any fact, statement or record in any form whatever;

n) the term "depositary" means the Secretary-General of the Organisation for Economic Co-operation and Development;

This paragraph would not be necessary.

o) the term "criminal tax matters" means tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the applicant Party;

p) the term " criminal laws" means all criminal laws designated as such under domestic law irrespective of whether contained in the tax laws, the criminal code or other statutes.

2. As regards the application of this Agreement at any time by a Contracting Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Party, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party.

Article 5

Exchange of Information Upon Request

1. The competent authority of the requested Party shall provide upon request information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party.

2. If the information in the possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, that Party shall use all relevant information gathering measures to provide the applicant Party with the information requested, notwithstanding that the requested Party may not need such information for its own tax purposes.

3. If specifically requested by the competent authority of an applicant Party, the competent authority of the requested Party shall provide information under this Article, to the extent allowable under its domestic laws, in the form of depositions of witnesses and authenticated copies of original records.

4. Each Contracting Party shall ensure that its competent authorities for the purposes specified in Article 1 of the Agreement, have the authority to obtain and provide upon request:

a) information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees;

b) information regarding the ownership of companies, partnerships, trusts, foundations, "Anstalten" and other persons, including, within the constraints of Article 2, ownership information on all such persons in an ownership chain; in the case of trusts, information on settlors, trustees and beneficiaries; and in the case of foundations, information on founders, members of the foundation council and beneficiaries. Further, this Agreement does not create an obligation on the Contracting Parties to obtain or provide ownership information with respect to publicly traded companies or public collective investment funds or schemes unless such information can be obtained without giving rise to disproportionate difficulties.

5. The competent authority of the applicant Party shall provide the following information to the competent authority of the requested Party when making a request for information under the Agreement to demonstrate the foreseeable relevance of the information to the request:

a) the identity of the person under examination or investigation;

b) a statement of the information sought including its nature and the form in which the applicant Party wishes to receive the information from the requested Party;

c) the tax purpose for which the information is sought;

d) grounds for believing that the information requested is held in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party;

e) to the extent known, the name and address of any person believed to be in possession of the requested information;

f) a statement that the request is in conformity with the law and administrative practices of the applicant Party, that if the requested information was within the jurisdiction of the applicant Party then the competent authority of the applicant Party would be able to obtain the information under the laws of the applicant Party or in the normal course of administrative practice and that it is in conformity with this Agreement;

g) a statement that the applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

6. The competent authority of the requested Party shall forward the requested information as promptly as possible to the applicant Party. To ensure a prompt response, the competent authority of the requested Party shall:

a) Confirm receipt of a request in writing to the competent authority of the applicant Party and shall notify the competent authority of the applicant Party of deficiencies in the request, if any, within 60 days of the receipt of the request.

b) If the competent authority of the requested Party has been unable to obtain and provide the information within 90 days of receipt of the request, including if it encounters obstacles in furnishing the information or it refuses to furnish the information, it shall immediately inform the applicant Party, explaining the reason for its inability, the nature of the obstacles or the reasons for its refusal.

Article 6

Tax Examinations Abroad

MULTILATERAL VERSION	BILATERAL VERSION
1. A Contracting Party may allow representatives of the competent authority of another Contracting Party to enter the territory of the first-mentioned Party to interview individuals and examine records with the written consent of the persons concerned. The competent authority of the second-mentioned Party shall notify the competent authority of the first-mentioned Party of the time and place of the meeting with the individuals concerned.	1. A Contracting Party may allow representatives of the competent authority of the other Contracting Party to enter the territory of the first-mentioned Party to interview individuals and examine records with the written consent of the persons concerned. The competent authority of the second-mentioned Party shall notify the competent authority of the first-mentioned Party of the time and place of the meeting with the individuals concerned.
2. At the request of the competent authority of a Contracting Party, the competent authority of another Contracting Party may allow representatives of the competent authority of the first-mentioned Party to be present at the appropriate part of a tax examination in the second-mentioned Party.	2. At the request of the competent authority of one Contracting Party, the competent authority of the other Contracting Party may allow representatives of the competent authority of the first-mentioned Party to be present at the appropriate part of a tax examination in the second-mentioned Party.

MULTILATERAL VERSION	BILATERAL VERSION
3. If the request referred to in paragraph 2 is acceded to, the competent authority of the Contracting Party conducting the examination shall, as soon as possible, notify the competent authority of the other Party about the time and place of the examination, the authority or official designated to carry out the examination and the procedures and conditions required by the first-mentioned Party for the conduct of the examination. All decisions with respect to the conduct of the tax examination shall be made by the Party conducting the examination.	3. If the request referred to in paragraph 2 is acceded to, the competent authority of the Contracting Party conducting the examination shall, as soon as possible, notify the competent authority of the other Party about the time and place of the examination, the authority or official designated to carry out the examination and the procedures and conditions required by the first-mentioned Party for the conduct of the examination. All decisions with respect to the conduct of the tax examination shall be made by the Party conducting the examination.

Article 7

Possibility of Declining a Request

1. The requested Party shall not be required to obtain or provide information that the applicant Party would not be able to obtain under its own laws for purposes of the administration or enforcement of its own tax laws. The competent authority of the requested Party may decline to assist where the request is not made in conformity with this Agreement.

2. The provisions of this Agreement shall not impose on a Contracting Party the obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Notwithstanding the foregoing, information of the type referred to in Article 5, paragraph 4 shall not be treated as such a secret or trade process merely because it meets the criteria in that paragraph.

3. The provisions of this Agreement shall not impose on a Contracting Party the obligation to obtain or provide information, which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:

   a) produced for the purposes of seeking or providing legal advice or

   b) produced for the purposes of use in existing or contemplated legal proceedings.

4. The requested Party may decline a request for information if the disclosure of the information would be contrary to public policy (ordre public).

5. A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed.

6. The requested Party may decline a request for information if the information is requested by the applicant Party to administer or enforce a provision of the tax law of the applicant Party, or any requirement connected therewith, which discriminates against a national of the requested Party as compared with a national of the applicant Party in the same circumstances.

Article 8

Confidentiality

Any information received by a Contracting Party under this Agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the requested Party.

Article 9

Costs

Incidence of costs incurred in providing assistance shall be agreed by the Contracting Parties.

Article 10

Implementation Legislation

The Contracting Parties shall enact any legislation necessary to comply with, and give effect to, the terms of the Agreement.

Article 11

Language

Requests for assistance and answers thereto shall be drawn up in English, French or any other language agreed bilaterally between the competent authorities of the Contracting Parties under Article 13.

This article may not be required.

Article 12

Other international agreements or arrangements

The possibilities of assistance provided by this Agreement do not limit, nor are they limited by, those contained in existing international agreements or other arrangements between the Contracting Parties which relate to co-operation in tax matters.

This article may not be required

Article 13

Mutual Agreement Procedure

1. Where difficulties or doubts arise between two or more Contracting Parties regarding the implementation or interpretation of the Agreement, the competent authorities of those Contracting Parties shall endeavour to resolve the matter by mutual agreement.

1. Where difficulties or doubts arise between the Contracting Parties regarding the implementation or interpretation of the Agreement, the competent authorities shall endeavour to resolve the matter by mutual agreement.

2. In addition to the agreements referred to in paragraph 1, the competent authorities of two or more Contracting Parties may mutually agree: a) on the procedures to be used under Articles 5 and 6; b) on the language to be used in making and responding to requests in accordance with Article 11.	2. In addition to the agreements referred to in paragraph 1, the competent authorities of the Contracting Parties may mutually agree on the procedures to be used under Articles 5 and 6.

3. The competent authorities of the Contracting Parties may communicate with each other directly for purposes of reaching agreement under this Article.

4. Any agreement between the competent authorities of two or more Contracting Parties shall be effective only between those Contracting Parties.	*4. The paragraph would not be necessary.*

5. The Contracting Parties may also agree on other forms of dispute resolution.

Article 14

Depositary's functions

1. The depositary shall notify all Contracting Parties of: a) the deposit of any instrument of ratification, acceptance or approval of this Agreement; b) any date of entry into force of this Agreement in accordance with the provisions of Article 15; c) any notification of termination of this Agreement; d) any other act or notification relating to this Agreement.	*The article would be unnecessary*

2. At the request of one or more of the competent authorities of the Contracting Parties, the depositary may convene a meeting of the competent authorities or their representatives, to discuss significant matters related to interpretation or implementation of the Agreement.

Article 15
Entry into Force

1. This Agreement is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be submitted to the depositary of this Agreement.

1. This Agreement is subject to ratification, acceptance or approval by the Contracting Parties, in accordance with their respective laws. Instruments of ratification, acceptance or approval shall be exchanged as soon as possible.

2. Each Contracting Party shall specify in its instrument of ratification, acceptance or approval vis-à-vis which other party it wishes to be bound by this Agreement. The Agreement shall enter into force only between Contracting Parties that specify each other in their respective instruments of ratification, acceptance or approval.

2. This Agreement shall enter into force on 1 January 2004 with respect to exchange of information for criminal tax matters. The Agreement shall enter into force on 1 January 2006 with respect to all other matters covered in Article 1.

3. This Agreement shall enter into force on 1 January 2004 with respect to exchange of information for criminal tax matters. The Agreement shall enter into force on 1 January 2006 with respect to all other matters covered in Article 1.

3. The provisions of this Agreement shall have effect:

- with respect to criminal tax matters for taxable periods beginning on or after 1 January 2004 or, where there is no taxable period, for all charges to tax arising on or after 1 January 2004;

For each party depositing an instrument after such entry into force, the Agreement shall enter into force on the 30th day following the deposit of both instruments.

4. Unless an earlier date is agreed by the Contracting Parties, the provisions of this Agreement shall have effect

- with respect to criminal tax matters for tax able periods beginning on or after 1 January 2004 or, where there is no taxable period, for all charges to tax arising on or after 1 January 2004;
- with respect to all other matters described in Article 1 for all taxable periods beginning on or after January 1 2006 or, where there is no taxable period, for all charges to tax arising on or after 1 January 2006.

In cases addressed in the third sentence of paragraph 3, the Agreement shall take effect for all taxable periods beginning on or after the sixtieth day following entry into force, or where there is no taxable period for all charges to tax arising on or after the sixtieth day following entry into force.

- with respect to all other matters described in Article 1 for all taxable periods beginning on or after January 1 2006 or, where there is no taxable period, for all charges to tax arising on or after 1 January 2006.

Article 16

Termination	Termination
1. Any Contracting Party may terminate this Agreement vis-à-vis any other Contracting Party by serving a notice of termination either through diplomatic channels or by letter to the competent authority of the other Contracting Party. A copy shall be provided to the depositary of the Agreement.	1.Either Contracting Party may terminate the Agreement by serving a notice of termination either through diplomatic channels or by letter to the competent authority of the other Contracting Party.
2. Such termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the depositary.	2. Such termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of notice of termination by the other Contracting Party.
3. Any Contracting Party that terminates the Agreement shall remain bound by the provisions of Article 8 with respect to any information obtained under the Agreement.	3. A Contracting Party that terminates the Agreement shall remain bound by the provisions of Article 8 with respect to any information obtained under the Agreement.
	In witness whereof, the undersigned, being duly authorised thereto, have signed the Agreement.

III. Commentary

Title and Preamble

1. The preamble sets out the general objective of the Agreement. The objective of the Agreement is to facilitate exchange of information between the parties to the Agreement. The multilateral and the bilateral versions of the preamble are identical except that the multilateral version refers to the signatories of the Agreement as "Parties" and the bilateral version refers to the signatories as the "Government of _____." The formulation "Government of _____" in the bilateral context is used for illustrative purposes only and countries are free to use other wording in accordance with their domestic requirements or practice.

Article 1 (Object and Scope of Agreement)

2. Article 1 defines the scope of the Agreement, which is the provision of assistance in tax matters through exchange of information that will assist the Contracting Parties to administer and enforce their tax laws.

3. The Agreement is limited to exchange of information that is foreseeably relevant to the administration and enforcement of the laws of the applicant Party concerning the taxes covered by the Agreement. The standard of foreseeable relevance is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting Parties are not at liberty to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. Parties that choose to enter into bilateral agreements based on the Agreement may agree to an alternative formulation of this standard, provided that such alternative formulation is consistent with the scope of the Agreement.

4. The Agreement uses the standard of foreseeable relevance in order to ensure that information requests may not be declined in cases where a definite assessment of the pertinence of the information to an on-going investigation can only be made following the receipt of the information. The standard of foreseeable relevance is also used in the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters.

5. The last sentence of Article 1 ensures that procedural rights existing in the requested Party will continue to apply to the extent they do not unduly prevent or delay effective exchange of information. Such rights may include, depending on the circumstances, a right of notification, a right to challenge the exchange of information following notification or rights to challenge information gathering measures taken by the requested Party. Such procedural rights and safeguards also include any rights secured to persons that may flow from relevant international agreements on human rights and the expression "unduly prevent or delay" indicates that such rights may take precedence over the Agreement.

6. Article 1 strikes a balance between rights granted to persons in the requested Party and the need for effective exchange of information. Article 1 provides that rights and safeguards are not overridden simply because they could, in certain circumstances, operate to prevent or delay effective exchange of information. However, Article 1 obliges the requested Party to ensure that any such rights and safeguards are not applied in a manner that unduly prevents or delays effective exchange of information. For instance, a bona fide procedural safeguard in the requested Party may delay a response to an information request. However, such a delay should not be considered

as "unduly preventing or delaying " effective exchange of information unless the delay is such that it calls into question the usefulness of the information exchange agreement for the applicant Party. Another example may concern notification requirements. A requested Party whose laws require prior notification is obliged to ensure that its notification requirements are not applied in a manner that, in the particular circumstances of the request, would frustrate the efforts of the party seeking the information. For instance, notification rules should permit exceptions from prior notification (e.g. in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the applicant Party). To avoid future difficulties or misunderstandings in the implementation of an agreement, the Contracting Parties should consider discussing these issues in detail during negotiations and in the course of implementing the agreement in order to ensure that information requested under the agreement can be obtained as expeditiously as possible while ensuring adequate protection of taxpayers' rights.

Article 2 (Jurisdiction)

7. Article 2 addresses the jurisdictional scope of the Agreement. It clarifies that a requested Party is not obligated to provide information which is neither held by its authorities nor is in the possession or control of persons within its territorial jurisdiction. The requested Party's obligation to provide information is not, however, restricted by the residence or the nationality of the person to whom the information relates or by the residence or the nationality of the person in control or possession of the information requested. The term "possession or control" should be construed broadly and the term "authorities" should be interpreted to include all government agencies. Of course, a requested Party would nevertheless be under no obligation to provide information held by an "authority" if the circumstances described in Article 7 (Possibility of Declining a Request) were met.

Article 3 (Taxes Covered)

Paragraph 1

8. Article 3 is intended to identify the taxes with respect to which the Contracting Parties agree to exchange information in accordance with the provisions of the Agreement. Article 3 appears in two versions: a multilateral version and a bilateral version. The multilateral Agreement applies to taxes on income or profits, taxes on capital, taxes on net wealth, and estate, inheritance or gift taxes. "Taxes on income or profits" includes taxes on gains from the alienation of movable or immovable property. The multilateral

Agreement, in sub-paragraph b), further permits the inclusion of taxes imposed by or on behalf of political sub-divisions or local authorities. Such taxes are covered by the Agreement only if they are listed in the instrument of ratification, approval or acceptance.

9. Bilateral agreements will cover, at a minimum, the same four categories of direct taxes (i.e. taxes on income or profits, taxes on capital, taxes on net wealth, and estate, inheritance or gift taxes) unless both parties agree to waive one or more of them. A Contracting Party may decide to omit any or all of the four categories of direct taxes from its list of taxes to be covered but it would nevertheless be obligated to respond to requests for information with respect to the taxes listed by the other Contracting Party (assuming the request otherwise satisfies the terms of the Agreement). The Contracting Parties may also agree to cover taxes other than the four categories of direct taxes. For example, Contracting Party A may list all four direct taxes and Contracting Party B may list only indirect taxes. Such an outcome is likely where the two Contracting Parties have substantially different tax regimes.

Paragraph 2

10. Paragraph 2 of the multilateral version provides that the Contracting Parties may agree to extend the Agreement to cover indirect taxes. This possible extension is consistent with Article 26 of the OECD Model Convention on Income and on Capital, which now covers "taxes of every kind and description." There is no equivalent to paragraph 2 in the bilateral version because the issue can be addressed under paragraph 1. Any agreement to extend the Agreement to cover indirect taxes should be notified to the depositary. Paragraph 2 of the bilateral version is discussed below together with paragraph 3 of the multilateral version.

Paragraph 3

11. Paragraph 3 of the multilateral version and paragraph 2 of the bilateral version address "identical taxes", "substantially similar taxes" and further contain a rule on the expansion or modification of the taxes covered by the Agreement. The Agreement applies automatically to all "identical taxes". The Agreement applies to "substantially similar taxes" if the competent authorities so agree. Finally, the taxes covered by the Agreement can be expanded or modified if the Contracting Parties so agree.

12. The only difference between paragraph 3 of the multilateral version and paragraph 2 of the bilateral version is that the former refers to the date of entry into force whereas the later refers to the date of signature. The multilateral version refers to entry into force because in the multilateral context there might be no official signing of the Agreement between the Contracting Parties.

13. In the multilateral context the first sentence of paragraph 3 is of a declaratory nature only. The multilateral version lists the taxes by general type. Any tax imposed after the date of signature or entry into force of the Agreement that is of such a type is already covered by operation of paragraph 1. The same holds true in the bilateral context, if the Contracting Parties choose to identify the taxes by general type. Certain Contracting Parties, however, may wish to identify the taxes to which the Agreement applies by specific name (e.g. the Income Tax Act of 1999). In these cases, the first sentence makes sure that the Agreement also applies to taxes that are identical to the taxes specifically identified.

14. The meaning of "identical" should be construed very broadly. For instance, any replacement tax of an existing tax that does not change the nature of the tax should be considered an "identical" tax. Contracting Parties seeking to avoid any uncertainty regarding the interpretation of "identical" versus "substantially similar" may wish to delete the second sentence and to include substantially similar taxes within the first sentence.

Article 4 (Definitions)

Paragraph 1

15. Article 4 contains the definitions of terms for purposes of the Agreement. Article 4, paragraph 1, sub-paragraph a) defines the term "Contracting Party". Sub-paragraph b) defines the term "competent authority." The definition recognises that in some Contracting Parties the execution of the Agreement may not fall exclusively within the competence of the highest tax authorities and that some matters may be reserved or may be delegated to other authorities. The definition enables each Contracting Party to designate one or more authorities as being competent to execute the Agreement. While the definition provides the Contracting Parties with the possibility of designating more than one competent authority (for instance, where Contracting Parties agree to cover both direct and indirect taxes), it is customary practice to have only one competent authority per Contracting Party.

16. Sub-paragraph c) defines the meaning of "person" for purposes of the Agreement. The definition of the term "person" given in sub-paragraph c) is intended to be very broad. The definition explicitly mentions an individual, a company and any other body of persons. However, the use of the word "includes" makes clear that the Agreement also covers any other organisational structures such as trusts, foundations, "Anstalten", partnerships as well as collective investment funds or schemes.

17. Foundations, "Anstalten" and similar arrangements are covered by this Agreement irrespective of whether or not they are treated as an "entity that is treated as a body corporate for tax purposes" under sub-paragraph d).

18. Trusts are also covered by this Agreement. Thus, competent authorities of the Contracting Parties must have the authority to obtain and provide information on trusts (such as the identity of settlors, beneficiaries or trustees) irrespective of the classification of trusts under their domestic laws.

19. The main example of a "body of persons" is the partnership. In addition to partnerships, the term "body of persons" also covers less commonly used organisational structures such as unincorporated associations.

20. In most cases, applying the definition should not raise significant issues of interpretation. However, when applying the definition to less commonly used organisational structures, interpretation may prove more difficult. In these cases, particular attention must be given to the context of the Agreement. *Cf. Article 4, paragraph 2*. The key operational article that uses the term "person" is Article 5, paragraph 4, sub-paragraph b), which provides that a Contracting Party must have the authority to obtain and provide ownership information for all "persons" within the constraints of Article 2. Too narrow an interpretation may jeopardise the object and purposes of the Agreement by potentially excluding certain entities or other organisational structures from this obligation simply as a result of certain corporate or other legal features. Therefore, the aim is to cover all possible organisational structures.

21. For instance an "estate" is recognised as a distinct entity under the laws of certain countries. An "estate" typically denotes property held under the provisions of a will by a fiduciary (and under the direction of a court) whose duty it is to preserve and protect such property for distribution to the beneficiaries. Similarly a legal system might recognise an organisational structure that is substantially similar to a trust or foundation but may refer to it by a different name. The standard of Article 4, paragraph 2 makes clear that where these arrangements exist under the applicable law they constitute "persons" under the definition of sub-paragraph c).

22. Sub-paragraph d) provides the definition of company and is identical to Article 3, paragraph 1 sub-paragraph b) of the OECD Model Convention on Income and on Capital.

23. Sub-paragraphs e) through h) define "publicly traded company" and " collective investment fund or scheme". Both terms are used in Article 5 paragraph 4, sub-paragraph b). Sub-paragraphs e) through g) contain the definition of publicly traded company and sub-paragraph h) addresses collective investment funds or schemes.

24. For reasons of simplicity the definitions do not require a minimum percentage of interests traded (e.g. 5 percent of all outstanding shares of a publicly listed company) but somewhat more broadly require that equity interests must be "readily" available for sale, purchase or redemption. The fact that a collective investment fund or scheme may operate in the form of a publicly traded company should not raise any issues because the definitions for both publicly traded company and collective investment fund or scheme are essentially identical.

25. Sub-paragraph e) provides that a "publicly traded company" is any company whose principal class of shares is listed on a recognised stock exchange and whose listed shares can be readily sold or purchased by the public. The term "principal class of shares" is defined in sub-paragraph f). The definition ensures that companies that only list a minority interest do not qualify as publicly traded companies. A publicly traded company can only be a company that lists shares representing both a majority of the voting rights and a majority of the value of the company.

26. The term "recognised stock exchange" is defined in sub-paragraph g) as any stock exchange agreed upon by the competent authorities. One criterion competent authorities might consider in this context is whether the listing rules, including the wider regulatory environment, of any given stock exchange contain sufficient safeguards against private limited companies posing as publicly listed companies. Competent authorities might further explore whether there are any regulatory or other requirements for the disclosure of substantial interests in any publicly listed company.

27. The term "by the public" is defined in the second sentence of sub-paragraph e). The definition seeks to ensure that share ownership is not restricted to a limited group of investors. Examples of cases in which the purchase or sale of shares is restricted to a limited group of investors would include the following situations: shares can only be sold to existing shareholders, shares are only offered to members of a family or to related group companies, shares can only be bought by members of an investment club, a partnership or other association.

28. Restrictions on the free transferability of shares that are imposed by operation of law or by a regulatory authority or are conditional or contingent upon market related events are not restrictions that limit the purchase or sale of shares to a "limited group of investors". By way of example, a restriction on the free transferability of shares of a corporate entity that is triggered by attempts by a group of investors or non-investors to obtain control of a company is not a restriction that limits the purchase or sale of shares to a "limited group of investors".

29. The insertion of "readily" reflects the fact that where shares do not change hands to any relevant degree the rationale for the special mention of

publicly traded companies in Article 5, paragraph 4, sub-paragraph b) does not apply. Thus, for a publicly traded company to meet this standard, more than a negligible portion of its listed shares must actually be traded.

30. Sub-paragraph h) defines a collective investment fund or scheme as any pooled investment vehicle irrespective of legal form. The definition includes collective investment funds or schemes structured as companies, partnerships, trusts as well as purely contractual arrangements. Sub-paragraph h) then defines "public collective investment funds or schemes" as any collective investment fund or scheme where the interests in the vehicle can be readily purchased, sold, or redeemed by the public. The terms "readily" and "by the public" have the same meaning that they have in connection with the definition of publicly traded companies.

31. Sub-paragraphs i, j) and k) are self-explanatory.

32. Sub-paragraph l) defines "information gathering measures." Each Contracting Party determines the form of such powers and the manner in which they are implemented under its internal law. Information gathering measures typically include requiring the presentation of records for examination, gaining direct access to records, making copies of such records and interviewing persons having knowledge, possession, control or custody of pertinent information. Information gathering measures will typically focus on obtaining the requested information and will in most cases not themselves address the provision of the information to the applicant Party.

33. Sub-paragraph m) defines "information". The definition is very broad and includes any fact, statement or record in any form whatever. "Record" includes (but is not limited to): an account, an agreement, a book, a chart, a table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a telegram and a voucher. The term "record' is not limited to information maintained in paper form but includes information maintained in electronic form.

34. Sub-paragraph n) of the multilateral version provides that the depositary of the Agreement is the Secretary General of the OECD.

35. Sub-paragraph o) defines criminal tax matters. Criminal tax matters are defined as all tax matters involving intentional conduct, which is liable to prosecution under the criminal laws of the applicant Party. Criminal law provisions based on non-intentional conduct (e.g. provisions that involve strict or absolute liability) do not constitute criminal tax matters for purposes of the Agreement. A tax matter involves "intentional conduct" if the pertinent criminal law provision requires an element of intent. Sub-paragraph o) does not create an obligation on the part of the applicant Party to prove to the requested Party an element of intent in connection with the actual conduct under investigation.

36. Typical categories of conduct that constitute tax crimes include the wilful failure to file a tax return within the prescribed time period; wilful omission or concealment of sums subject to tax; making false or incomplete statements to the tax or other authorities of facts which obstruct the collection of tax; deliberate omissions of entries in books and records; deliberate inclusion of false or incorrect entries in books and records; interposition for the purposes of causing all or part of the wealth of another person to escape tax; or consenting or acquiescing to an offence. Tax crimes, like other crimes, are punished through fines, incarceration or both.

37. Sub-paragraph p) defines the term "criminal laws" used in sub-paragraph o). It makes clear that criminal laws include criminal law provisions contained in a tax code or any other statute enacted by the applicant Party. It further clarifies that criminal laws are only such laws that are designated as such under domestic law and do not include provisions that might be deemed of a criminal nature for other purposes such as for purposes of applying relevant human rights or other international conventions.

Paragraph 2

38. This paragraph establishes a general rule of interpretation for terms used in the Agreement but not defined therein. The paragraph is similar to that contained in the OECD Model Convention on Income and on Capital. It provides that any term used, but not defined, in the Agreement will be given the meaning it has under the law of the Contracting Party applying the Agreement unless the context requires otherwise. Contracting Parties may agree to allow the competent authorities to use the Mutual Agreement Procedure provided for in Article 13 to agree the meaning of such an undefined term. However, the ability to do so may depend on constitutional or other limitations. In cases in which the laws of the Contracting Party applying the Agreement provide several meanings, any meaning given to the term under the applicable tax laws will prevail over any meaning that is given to the term under any other laws. The last part of the sentence is, of course, operational only where the Contracting Party applying the Agreement imposes taxes and therefore has "applicable tax laws."

Article 5 (Exchange of Information Upon Request)

Paragraph 1

39. Paragraph 1 provides the general rule that the competent authority of the requested Party must provide information upon request for the purposes referred to in Article 1. The paragraph makes clear that the Agreement only covers exchange of information upon request (i.e. when the information

requested relates to a particular examination, inquiry or investigation) and does not cover automatic or spontaneous exchange of information. However, Contracting Parties may wish to consider expanding their co-operation in matters of information exchange for tax purposes by covering automatic and spontaneous exchanges and simultaneous tax examinations.

40. The reference in the first sentence to Article 1 of the Agreement confirms that information must be exchanged for both civil and criminal tax matters. The second sentence of paragraph 1 makes clear that information in connection with criminal tax matters must be exchanged irrespective of whether or not the conduct being investigated would also constitute a crime under the laws of the requested Party.

Paragraph 2

41. Paragraph 2 is intended to clarify that, in responding to a request, a Contracting Party will have to take action to obtain the information requested and cannot rely solely on the information in the possession of its competent authority. Reference is made to information "in its possession" rather than "available in the tax files" because some Contracting Parties do not have tax files because they do not impose direct taxes.

42. Upon receipt of an information request the competent authority of the requested Party must first review whether it has all the information necessary to respond to a request. If the information in its own possession proves inadequate, it must take "all relevant information gathering measures" to provide the applicant Party with the information requested. The term "information gathering measures" is defined in Article 4, paragraph 1, sub-paragraph l). An information gathering measure is "relevant" if it is capable of obtaining the information requested by the applicant Party. The requested Party determines which information gathering measures are relevant in a particular case.

43. Paragraph 2 further provides that information must be exchanged without regard to whether the requested Party needs the information for its own tax purposes. This rule is needed because a tax interest requirement might defeat effective exchange of information, for instance, in cases where the requested Party does not impose an income tax or the request relates to an entity not subject to taxation within the requested Party.

Paragraph 3

44. Paragraph 3 includes a provision intended to require the provision of information in a format specifically requested by a Contracting Party to satisfy its evidentiary or other legal requirements to the extent allowable under the laws of the requested Party. Such forms may include depositions

of witnesses and authenticated copies of original records. Under paragraph 3, the requested Party may decline to provide the information in the specific form requested if such form is not allowable under its laws. A refusal to provide the information in the format requested does not affect the obligation to provide the information.

45. If requested by the applicant Party, authenticated copies of unedited original records should be provided to the applicant Party. However, a requested Party may need to edit information unrelated to the request if the provision of such information would be contrary to its laws. Furthermore, in some countries authentication of documents might require translation in a language other than the language of the original record. Where such issues may arise, Contracting Parties should consider discussing these issues in detail during discussions prior to the conclusion of this Agreement.

Paragraph 4

46. Paragraph 4, sub-paragraph a), by referring explicitly to persons that may enjoy certain privilege rights under domestic law, makes clear that such rights can not form the basis for declining a request unless otherwise provided in Article 7. For instance, the inclusion of a reference to bank information in paragraph 4, sub-paragraph a) rules out that bank secrecy could be considered a part of public policy (ordre public). Similarly, paragraph 4, sub-paragraph a) together with Article 7, paragraph 2 makes clear that information that does not otherwise constitute a trade, business, industrial, commercial or professional secret or trade process does not become such a secret simply because it is held by one of the persons mentioned.

47. Sub-paragraph a) should not be taken to suggest that a competent authority is obliged only to have the authority to obtain and provide information from the persons mentioned. Sub-paragraph a) does not limit the obligation imposed by Article 5, paragraph 1.

48. Sub-paragraph a) mentions information held by banks and other financial institutions. In accordance with the Report *Improving Access to Bank Information for Tax Purposes* (OECD 2000), access to information held by banks or other financial institutions may be by direct means or indirectly through a judicial or administrative process. As stated in the report, the procedure for indirect access should not be so burdensome and time-consuming as to act as an impediment to access to bank information. Typically, requested bank information includes account, financial, and transactional information as well as information on the identity or legal structure of account holders and parties to financial transactions.

49. Paragraph 4, sub-paragraph a) further mentions information held by persons acting in an agency or fiduciary capacity, including nominees and

trustees. A person is generally said to act in a "fiduciary capacity" when the business which he transacts, or the money or property, which he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating confidence and trust on the one part and good faith on the other part. The term "agency" is very broad and includes all forms of corporate service providers (e.g. company formation agents, trust companies, registered agents, lawyers).

50. Sub-paragraph b) requires that the competent authorities of the Contracting Parties must have the authority to obtain and provide ownership information. The purpose of the sub-paragraph is not to develop a common "all purpose" definition of ownership among Contracting Parties, but to specify the types of information that a Contracting Party may legitimately expect to receive in response to a request for ownership information so that it may apply its own tax laws, including its domestic definition of beneficial ownership.

51. In connection with companies and partnerships, the legal and beneficial owner of the shares or partnership assets will usually be the same person. However, in some cases the legal ownership position may be subject to a nominee or similar arrangement. Where the legal owner acts on behalf of another person as a nominee or under a similar arrangement, such other person, rather than the legal owner, may be the beneficial owner. Thus the starting point for the ownership analysis is legal ownership of shares or partnership interests and all Contracting Parties must be able to obtain and provide information on legal ownership. Partnership interests include all forms of partnership interests: general or limited or capital or profits. However, in certain cases, legal ownership may be no more than a starting point. For example, in any case where the legal owner acts on behalf of any other person as a nominee or under a similar arrangement, the Contracting Parties should have the authority to obtain and provide information about that other person who may be the beneficial owner in addition to information about the legal owner. An example of a nominee is a nominee shareholding arrangement where the legal title-holder that also appears as the shareholder of record acts as an agent for another person. Within the constraints of Article 2 of the Agreement, the requested Party must have the authority to provide information about the persons in an ownership chain.

52. In connection with trusts and foundations, sub-paragraph b) provides specifically the type of identity information the Contracting Parties should have the authority to obtain and provide. This is not limited to ownership information. The same rules should also be applied to persons that are substantially similar to trusts or foundations such as the "Anstalt." Therefore, a Contracting Party should have, for example, the authority to obtain and provide information on the identity of the settlor and the beneficiaries and persons who are in a position to direct how assets of the trust or foundation are to be dealt with.

53. Certain trusts, foundations, "Anstalten" or similar arrangements, may not have any identified group of persons as beneficiaries but rather may support a general cause. Therefore, ownership information should be read to include only identifiable persons. The term "foundation council" should be interpreted very broadly to include any person or body of persons managing the foundation as well as persons who are in a position to direct how assets of the trust or foundation are to be dealt with.

54. Most organisational structures will be classified as a company, a partnership, a trust, a foundation or a person similar to a trust or foundation. However, there might be entities or structures for which ownership information might be legitimately requested but that do not fall into any of these categories. For instance, a structure might, as a matter of law, be of a purely contractual nature. In these cases, the Contracting Parties should have the authority to obtain and provide information about any person with a right to share in the income or gain of the structure or in the proceeds from any sale or liquidation.

55. Sub-paragraph b) also provides that a requested Party must have the authority to obtain and provide ownership information for all persons in an ownership chain provided, as is set out in Article 2, the information is held by the authorities of the requested State or is in the possession or control of persons who are within the territorial jurisdiction of the requested Party. This language ensures that the applicant Party need not submit separate information requests for each level of a chain of companies or other persons. For instance, assume company A is a wholly-owned subsidiary of company B and both companies are incorporated under the laws of Party C, a Contracting Party of the Agreement. If Party D, also a Contracting Party, requests ownership information on company A and specifies in the request that it also seeks ownership information on any person in A's chain of ownership, Party C in its response to the request must provide ownership information for both company A and B.

56. The second sentence of sub-paragraph b) provides that in the case of publicly traded companies and public collective investment funds or schemes, the competent authorities need only provide ownership information that the requested Party can obtain without disproportionate difficulties. Information can be obtained only with "disproportionate difficulties" if the identification of owners, while theoretically possible, would involve excessive costs or resources. Because such difficulties might easily arise in connection with publicly traded companies and public collective investment funds or schemes where a true public market for ownership interests exists, it was felt that such a clarification was particularly warranted. At the same time it is recognised that where a true public market for ownership interests exists there is less of a risk that such vehicles will be used for tax evasion or other non-compliance

with the tax law. The definitions of publicly traded companies and public collective investment funds or schemes are contained in Article 4, paragraph 1, sub-paragraphs e) through h).

Paragraph 5

57. Paragraph 5 lists the information that the applicant Party must provide to the requested Party in order to demonstrate the foreseeable relevance of the information requested to the administration or enforcement of the applicant Party's tax laws. While paragraph 5 contains important procedural requirements that are intended to ensure that fishing expeditions do not occur, subparagraphs a) through g) nevertheless need to be interpreted liberally in order not to frustrate effective exchange of information. The following paragraphs give some examples to illustrate the application of the requirements in certain situations.

58. Example 1 (sub-paragraph (a))

> Where a Party is asking for account information but the identity of the accountholder(s) is unknown, sub-paragraph (a) may be satisfied by supplying the account number or similar identifying information.

59. Example 2 (sub-paragraph (d)) ("is held")

> A taxpayer of Country A withdraws all funds from his bank account and is handed a large amount of cash. He visits one bank in both country B and C, and then returns to Country A without the cash. In connection with a subsequent investigation of the taxpayer, the competent authority of Country A sends a request to Country B and to Country C for information regarding bank accounts that may have been opened by the taxpayer at one or both of the banks he visited. Under such circumstances, the competent authority of Country A has grounds to believe that the information is held in Country B or is in the possession or control of a person subject to the jurisdiction of Country B. It also has grounds to believe the same with respect to Country C. Country B (or C) can not decline the request on the basis that Country A has failed to establish that the information "is" in Country B (or C), because it is equally likely that the information is in the other country.

60. Example 3 (sub-paragraph (d))

> A similar situation may arise where a person under investigation by Country X may or may not have fled Country Y and his bank account there may or may not have been closed. As long as

country X is able to connect the person to Country Y, Country Y may not refuse the request on the ground that Country X does not have grounds for believing that the requested information "is" held in Country Y. Country X may legitimately expect Country Y to make an inquiry into the matter, and if a bank account is found, to provide the requested information.

61. Sub-paragraph d) provides that the applicant Party shall inform the requested Party of the grounds for believing that the information is held in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party. The term "held in the requested Party" includes information held by any government agency or authority of the requested Party.

62. Sub-paragraph f) needs to be read in conjunction with Article 7, paragraph 1. In particular, see paragraph 77 of the Commentary on Article 7. The statement required under sub-paragraph f) covers three elements: first, that the request is in conformity with the law and administrative practices of the applicant Party; second that the information requested would be obtainable under the laws or in the normal course of administration of the applicant Party if the information were within the jurisdiction of the applicant Party; and third that the information request is in conformity with the Agreement. The "normal course of administrative practice" may include special investigations or special examinations of the business accounts kept by the taxpayer or other persons, provided that the tax authorities of the applicant Party would make similar investigations or examinations if the information were within their jurisdiction.

63. Sub-paragraph g) is explained by the fact that, depending on the tax system of the requested Party, a request for information may place an extra burden on the administrative machinery of the requested Party. Therefore, a request should only be contemplated if an applicant Party has no convenient means to obtain the information available within its own jurisdiction. In as far as other means are still available in the applicant Party, the statement prescribed in sub-paragraph g) should explain that these would give rise to disproportionate difficulties. In this last case an element of proportionality plays a role. It should be easier for the requested Party to obtain the information sought after, than for the applicant Party. For example, obtaining information from one supplier in the requested Party may lead to the same information as seeking information from a large number of buyers in the applicant Party.

64. It is in the applicant Party's own interest to provide as much information as possible in order to facilitate the prompt response by the requested Party. Hence, incomplete information requests should be rare. The requested Party may ask for additional information but a request for additional information should not delay a response to an information request that complies with

the rules of paragraph 5. For possibilities of declining a request, see Article 7 and the accompanying Commentary.

Paragraph 6

65. Paragraph 6 sets out procedures for handling requests to ensure prompt responses. The 90 day period set out in subparagraph b) may be extended if required, for instance, by the volume of information requested or the need to authenticate numerous documents. If the competent authority of the requested Party is unable to provide the information within the 90 day period it should immediately notify the competent authority of the applicant Party. The notification should specify the reasons for not having provided the information within the 90 day period (or extended period). Reasons for not having provided the information include, a situation where a judicial or administrative process required to obtain the information has not yet been completed. The notification may usefully contain an estimate of the time still needed to comply with the request. Finally, paragraph 6 encourages the requested Party to react as promptly as possible and, for instance, where appropriate and practical, even before the time limits established under sub-paragraphs a) and b) have expired.

Article 6 (Tax Examinations Abroad)

Paragraph 1

66. Paragraph 1 provides that a Contracting Party may allow representatives of the applicant Party to enter the territory of the requested Party to interview individuals and to examine records with the written consent of the persons concerned. The decision of whether to allow such examinations and if so on what terms, lies exclusively in the hands of the requested Party. For instance, the requested Party may determine that a representative of the requested Party is present at some or all such interviews or examinations. This provision enables officials of the applicant Party to participate directly in gathering information in the requested Party but only with the permission of the requested Party and the consent of the persons concerned. Officials of the applicant Party would have no authority to compel disclosure of any information in those circumstances. Given that many jurisdictions and smaller countries have limited resources with which to respond to requests, this provision can be a useful alternative to the use of their own resources to gather information. While retaining full control of the process, the requested Party is freed from the cost and resource implications that it may otherwise face. Country experience suggests that tax examinations abroad can benefit both the applicant and the requested Party. Taxpayers could be interested in such a procedure because, it might spare them the burden of having to make copies of voluminous records to respond to a request.

Paragraph 2

67. Paragraph 2 authorises, but does not require, the requested Party to permit the presence of foreign tax officials to be present during a tax examination initiated by the requested Party in its jurisdiction, for example, for purposes of obtaining the requested information. The decision of whether to allow the foreign representatives to be present lies exclusively within the hands of the competent authority of the requested Party. It is understood that this type of assistance should not be requested unless the competent authority of the applicant Party is convinced that the presence of its representatives at the examination in the requested Party will contribute to a considerable extent to the solution of a domestic tax case. Furthermore, requests for such assistance should not be made in minor cases. This does not necessarily imply that large amounts of tax have to be involved in the particular case. Other justifications for such a request may be the fact that the matter is of prime importance for the solution of other domestic tax cases or that the foreign examination is to be regarded as part of an examination on a large scale embracing domestic enterprises and residents.

68. The applicant Party should set out the motive for the request as thoroughly as possible. The request should include a clear description of the domestic tax case to which the request relates. It should also indicate the special reasons why the physical presence of a representative of the competent authority is important. If the competent authority of the applicant Party wishes the examination to be conducted in a specific manner or at a specified time, such wishes should be stated in the request.

69. The representatives of the competent authority of the applicant Party may be present only for the appropriate part of the tax examination. The authorities of the requested Party will ensure that this requirement is fulfilled by virtue of the exclusive authority they exercise in respect of the conduct of the examination.

Paragraph 3

70. Paragraph 3 sets out the procedures to be followed if a request under paragraph 2 has been granted. All decisions on how the examination is to be carried out will be taken by the authority or the official of the requested Party in charge of the examination.

Article 7 (Possibility of Declining a Request)

71. The purpose of this Article is to identify the situations in which a requested Party is not required to supply information in response to a request. If the conditions for any of the grounds for declining a request under

Article 7 are met, the requested Party is given discretion to refuse to provide the information but it should carefully weigh the interests of the applicant Party with the pertinent reasons for declining the request. However, if the requested Party does provide the information the person concerned cannot allege an infraction of the rules on secrecy. In the event that the requested Party declines a request for information it shall inform the applicant Party of the grounds for its decision at the earliest opportunity.

Paragraph 1

72. The first sentence of paragraph 1 makes clear that a requested Party is not required to obtain and provide information that the applicant Party would not be able to obtain under similar circumstances under its own laws for purposes of the administration or enforcement of its own tax laws.

73. This rule is intended to prevent the applicant Party from circumventing its domestic law limitations by requesting information from the other Contracting Party thus making use of greater powers than it possesses under its own laws. For instance, most countries recognise under their domestic laws that information cannot be obtained from a person to the extent such person can claim the privilege against self-incrimination. A requested Party may, therefore, decline a request if the applicant Party would have been precluded by its own self-incrimination rules from obtaining the information under similar circumstances.

74. In practice, however, the privilege against self-incrimination should have little, if any, application in connection with most information requests. The privilege against self-incrimination is personal and cannot be claimed by an individual who himself is not at risk of criminal prosecution. The overwhelming majority of information requests seek to obtain information from third parties such as banks, intermediaries or the other party to a contract and not from the individual under investigation. Furthermore, the privilege against self-incrimination generally does not attach to persons other than natural persons.

75. The second sentence of paragraph 1 provides that a requested Party may decline a request for information in cases where the request is not made in conformity with the Agreement.

76. Both the first and the second sentence of paragraph 1 raise the question of how the statements provided by the applicant Party under Article 5, paragraph 5, sub-paragraph f) relate to the grounds for declining a request under Article 7, paragraph 1. The provision of the respective statements should generally be sufficient to establish that no reasons for declining a request under Article 7, paragraph 1 exist. However, a requested Party that has received statements to this effect may still decline the request if it has grounds for believing that the statements are clearly inaccurate.

77. Where a requested Party, in reliance on such statements, provides information to the applicant Party it remains within the framework of this Agreement. A requested Party is under no obligation to research or verify the statements provided by the applicant Party. The responsibility for the accuracy of the statement lies with the applicant Party.

Paragraph 2

78. The first sentence of paragraph 2 provides that a Contracting Party is not obliged to provide information which would disclose any trade, business, industrial, commercial or professional secret or trade process.

79. Most information requests will not raise issues of trade, business or other secrets. For instance, information requested in connection with a person engaged only in passive investment activities is unlikely to contain any trade, business, industrial or commercial or professional secret because such person is not conducting any trade, business, industrial or commercial or professional activity.

80. Financial information, including books and records, does not generally constitute a trade, business or other secret. However, in certain limited cases the disclosure of financial information might reveal a trade business or other secret. For instance, a requested Party may decline a request for information on certain purchase records where the disclosure of such information would reveal the proprietary formula of a product.

81. Paragraph 2 has its main application where the provision of information in response to a request would reveal protected intellectual property created by the holder of the information or a third person. For instance, a bank might hold a pending patent application for safe keeping or a trade process might be described in a loan application. In these cases the requested Party may decline any portion of a request for information that would reveal information protected by patent, copyright or other intellectual property laws.

82. The second sentence of paragraph 2 makes clear that the Agreement overrides any domestic laws or practices that may treat information as a trade, business, industrial, commercial or professional secret or trade process merely because it is held by a person identified in Article 5, paragraph 4, sub-paragraph a) or merely because it is ownership information. Thus, in connection with information held by banks, financial institutions etc., the Agreement overrides domestic laws or practices that treat the information as a trade or other secret when in the hands of such person but would not afford such protection when in the hands of another person, for instance, the taxpayer under investigation. In connection with ownership information, the Agreement makes clear that information requests cannot be declined merely because domestic laws or practices may treat such ownership information as a trade or other secret.

83. Before invoking this provision, a requested Party should carefully weigh the interests of the person protected by its laws with the interests of the applicant Party. In its deliberations the requested Party should also take into account the confidentiality rules of Article 8.

Paragraph 3

84. A Contracting Party may decline a request if the information requested is protected by the attorney-client privilege as defined in paragraph 3. However, where the equivalent privilege under the domestic law of the requested Party is narrower than the definition contained in paragraph 3 (e.g. the law of the requested Party does not recognise a privilege in tax matters, or it does not recognise a privilege in criminal tax matters) a requested Party may not decline a request unless it can base its refusal to provide the information on Article 7, paragraph 1.

85. Under paragraph 3 the attorney-client privilege attaches to any information that constitutes (1) "confidential communication," between (2) "a client and an attorney, solicitor or other admitted legal representative," if such communication (3) "is produced for the purposes of seeking or providing legal advice" or (4) is "produced for the purposes of use in existing or contemplated legal proceedings."

86. Communication is "confidential" if the client can reasonably have expected the communication to be kept secret. For instance, communications made in the presence of third parties that are neither staff nor otherwise agents of the attorney are not confidential communications. Similarly, communications made to the attorney by the client with the instruction to share them with such third parties are not confidential communications.

87. The communications must be between a client and an attorney, solicitor or other admitted legal representative. Thus, the attorney-client privilege applies only if the attorney, solicitor or other legal representative is admitted to practice law. Communications with persons of legal training but not admitted to practice law are not protected under the attorney-client privilege rules.

88. Communications between a client and an attorney, solicitor or other admitted legal representative are only privileged if, and to the extent that, the attorney, solicitor or other legal representative acts in his or her capacity as an attorney, solicitor or other legal representative. For instance, to the extent that an attorney acts as a nominee shareholder, a trustee, a settlor, a company director or under a power of attorney to represent the company in its business affairs, he can not claim the attorney-client privilege with respect to any information resulting from and relating to any such activity.

89. Sub-paragraph a) requires that the communications be "produced for the purposes of seeking or providing legal advice." The attorney-client privilege covers communications by both client and attorney provided the communications are produced for purposes of either seeking or providing legal advice. Because the communication must be produced for the purposes of seeking or providing legal advice, the privilege does not attach to documents or records delivered to an attorney in an attempt to protect such documents or records from disclosure. Also, information on the identity of a person, such as a director or beneficial owner of a company, is typically not covered by the privilege.

90. Sub-paragraph b) addresses the case where the attorney does not act in an advisory function but has been engaged to act as a representative in legal proceedings, both at the administrative and the judicial level. Sub-paragraph b) requires that the communications must be produced for the purposes of use in existing or contemplated legal proceedings. It covers communications both by the client and the attorney provided the communications have been produced for use in existing or contemplated legal proceedings.

Paragraph 4

91. Paragraph 4 stipulates that Contracting Parties do not have to supply information the disclosure of which would be contrary to public policy (ordre public). "Public policy" and its French equivalent "ordre public" refer to information which concerns the vital interests of the Party itself. This exception can only be invoked in extreme cases. For instance, a case of public policy would arise if a tax investigation in the applicant Party were motivated by political or racial persecution. Reasons of public policy might also be invoked where the information constitutes a state secret, for instance sensitive information held by secret services the disclosure of which would be contrary to the vital interests of the requested Party. Thus, issues of public policy should rarely arise in the context of requests for information that otherwise fall within the scope of this Agreement.

Paragraph 5

92. Paragraph 5 clarifies that an information request must not be refused on the basis that the tax claim to which it relates is disputed.

Paragraph 6

93. In the exceptional circumstances in which this issue may arise, paragraph 6 allows the requested Party to decline a request where the information requested by the applicant Party would be used to administer or enforce tax

laws of the applicant Party, or any requirements connected therewith, which discriminate against nationals of the requested Party. Paragraph 6 is intended to ensure that the Agreement does not result in discrimination between nationals of the requested Party and identically placed nationals of the applicant Party. Nationals are not identically placed where an applicant state national is a resident of that state while a requested state national is not. Thus, paragraph 6 does not apply to cases where tax rules differ only on the basis of residence. The person's nationality as such should not lay the taxpayer open to any inequality of treatment. This applies both to procedural matters (differences between the safeguards or remedies available to the taxpayer, for example) and to substantive matters, such as the rate of tax applicable.

Article 8 (Confidentiality)

94. Ensuring that adequate protection is provided to information received from another Contracting Party is essential to any exchange of information instrument relating to tax matters. Exchange of information for tax matters must always be coupled with stringent safeguards to ensure that the information is used only for the purposes specified in Article 1 of the Agreement. Respect for the confidentiality of information is necessary to protect the legitimate interests of taxpayers. Mutual assistance between competent authorities is only feasible if each is assured that the other will treat with proper confidence the information, which it obtains in the course of their co-operation. The Contracting Parties must have such safeguards in place. Some Contracting Parties may prefer to use the term "secret", rather than the term "confidential" in this Article. The terms are considered synonymous and interchangeable for purposes of this Article and Contracting Parties are free to use either term.

95. The first sentence provides that any information received pursuant to this Agreement by a Contracting Party must be treated as confidential. Information may be received by both the applicant Party and the requested Party (see Article 5 paragraph 5).

96. The information may be disclosed only to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes covered by the Agreement. This means that the information may also be communicated to the taxpayer, his proxy or to a witness. The Agreement only permits but does not require disclosure of the information to the taxpayer. In fact, there may be cases in which information is given in confidence to the requested Party and the source of the information may have a legitimate interest in not disclosing it to the taxpayer. The competent authorities concerned should

discuss such cases with a view to finding a mutually acceptable mechanism for addressing them. The competent authorities of the applicant Party need no authorisation, consent or other form of approval for the provision of the information received to any of the persons or authorities identified. The references to "public court proceedings" and to "judicial decisions"' in this paragraph extend to include proceedings and decisions which, while not formally being "judicial", are of a similar character. An example would be an administrative tribunal reaching decisions on tax matters that may be binding or may be appealed to a court or a further tribunal.

97. The third sentence precludes disclosure by the applicant Party of the information to a third Party unless express written consent is given by the Contracting Party that supplied the information. The request for consent to pass on the information to a third party is not to be considered as a normal request for information for the purposes of this Agreement.

Article 9 (Costs)

98. Article 9 allows the Contracting Parties to agree upon rules regarding the costs of obtaining and providing information in response to a request. In general, costs that would be incurred in the ordinary course of administering the domestic tax laws of the requested State would normally be expected to be borne by the requested State when such costs are incurred for purposes of responding to a request for information. Such costs would normally cover routine tasks such as obtaining and providing copies of documents.

99. Flexibility is likely to be required in determining the incidence of costs to take into account factors such as the likely flow of information requests between the Contracting Parties, whether both Parties have income tax administrations, the capacity of each Party to obtain and provide information, and the volume of information involved. A variety of methods may be used to allocate costs between the Contracting Parties. For example, a determination of which Party will bear the costs could be agreed to on a case by case base. Alternatively, the competent authorities may wish to establish a scale of fees for the processing of requests that would take into account the amount of work involved in responding to a request. The Agreement allows for the Contracting Parties or the competent authorities, if so delegated, to agree upon the rules, because it is difficult to take into account the particular circumstances of each Party.

Article 10 (Implementing Legislation)

100. Article 10 establishes the requirement for Contracting Parties to enact any legislation necessary to comply with the terms of the Agreement. Article 10 obliges the Contracting Parties to enact any necessary legislation with effect as of the date specified in Article 15. Implicitly, Article 10 also obliges Contracting Parties to refrain from introducing any new legislation contrary to their obligations under this Agreement.

Article 11 (Language)

101. Article 11 provides the competent authorities of the Contracting Parties with the flexibility to agree on the language(s) that will be used in making and responding to requests, with English and French as options where no other language is chosen. This article may not be necessary in the bilateral context.

Article 12 (Other International Agreements or Arrangements)

102. Article 12 is intended to ensure that the applicant Party is able to use the international instrument it deems most appropriate for obtaining the necessary information. This article may not be required in the bilateral context.

Article 13 (Mutual Agreement Procedure)

Paragraph 1

103. This Article institutes a mutual agreement procedure for resolving difficulties arising out of the implementation or interpretation of the Agreement. Under this provision, the competent authorities, within their powers under domestic law, can complete or clarify the meaning of a term in order to obviate any difficulty.

104. Mutual agreements resolving general difficulties of interpretation or application are binding on administrations as long as the competent authorities do not agree to modify or rescind the mutual agreement.

Paragraph 2

105. Paragraph 2 identifies other specific types of agreements that may be reached between competent authorities, in addition to those referred to in paragraph 1.

Paragraph 3

106. Paragraph 3 determines how the competent authorities may consult for the purposes of reaching a mutual agreement. It provides that the competent authorities may communicate with each other directly. Thus, it would not be necessary to go through diplomatic channels. The competent authorities may communicate with each other by letter, facsimile transmission, telephone, direct meetings, or any other convenient means for purposes of reaching a mutual agreement.

Paragraph 4

107. Paragraph 4 of the multilateral version clarifies that agreements reached between the competent authorities of two or more Contracting Parties would not in any way bind the competent authorities of Contracting Parties that were not parties to the particular agreement. The result is self-evident in the bilateral context and no corresponding provision has been included.

Paragraph 5

108. Paragraph 5 provides that the Contracting Parties may agree to other forms of dispute resolution. For instance, Contracting Parties may stipulate that under certain circumstances, e.g. the failure of resolving a matter through a mutual agreement procedure, a matter may be referred to arbitration.

Article 14 (Depositary's Functions)

109. Article 14 of the multilateral version discusses the functions of the depositary. There is no corresponding provision in the bilateral context.

Article 15 (Entry into Force)

Paragraph 1

110. Paragraph 1 of the bilateral version contains standard language used in bilateral treaties. The provision is similar to Article 29, paragraph 1 of the OECD Model Convention on Income and on Capital.

Paragraph 2

111. Paragraph 2 of the multilateral version provides that the Agreement will enter into force only between those Contracting Parties that have mutually stated their intention to be bound vis-à-vis the other Contracting Party. There is no corresponding provision in the bilateral context.

Paragraph 3

112. Paragraph 3 differentiates between exchange of information in criminal tax matters and exchange of information in all other tax matters. With regard to criminal tax matters the Agreement will enter into force on January 1, 2004. Of course, where Contracting Parties already have in place a mechanism (e.g. a mutual legal assistance treaty) that allows information exchange on criminal tax matters consistent with the standard described in this Agreement, the January 1, 2004 date would not be relevant. See Article 12 of the Agreement and paragraph 5 of the introduction. With regard to all other matters the Agreement will enter into force on January 1, 2006. The multilateral version also provides a special rule for parties that subsequently want to make use of the Agreement. In such a case the Agreement will come into force on the 30th day after deposit of both instruments. Consistent with paragraph 2, the Agreement enters into force only between two Contracting Parties that mutually indicate their desire to be bound vis-à-vis another Contracting Party. Thus, both parties must deposit an instrument unless one of the parties has already indicated its desire to be bound vis-à-vis the other party in an earlier instrument. The 30-day period commences when both instruments have been deposited.

Paragraph 4

113. Paragraph 4 contains the rules on the effective dates of the Agreement. The rules are identical for both the multilateral and the bilateral version. Contracting Parties are free to agree on an earlier effective date.

114. The rules of paragraph 4 do not preclude an applicant Party from requesting information that precedes the effective date of the Agreement provided it relates to a taxable period or chargeable event following the effective date. A requested Party, however, is not in violation of this Agreement if it is unable to obtain information predating the effective date of the Agreement on the grounds that the information was not required to be maintained at the time and is not available at the time of the request.

Article 16 (Termination)

115. Paragraphs 1 and 2 address issues concerning termination. The fact that the multilateral version speaks of "termination" rather than denunciation reflects the nature of the multilateral version as more of a bundle of identical bilateral treaties rather than a "true" multilateral agreement.

116. Paragraph 3 ensures that the obligations created under Article 8 survive the termination of the Agreement.

Update to Article 26 of the OECD Model Tax Convention and its Commentary

Approved by the OECD Council on 17 July 2012

[The changes to the existing text of the OECD Model Tax Convention and its Commentary appear in ~~strikethrough~~ for deletions and ***bold italics*** for additions]

Article 26

Exchange of information

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. ***Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under***

the laws of both States and the competent authority of the supplying State authorises such use.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

a. to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

b. to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

c. to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

Commentary on Article 26 concerning the exchange of information

I. Preliminary remarks

1. There are good grounds for including in a convention for the avoidance of double taxation provisions concerning co-operation between the tax administrations of the two Contracting States. In the first place it appears to be desirable to give administrative assistance for the purpose of ascertaining facts in relation to which the rules of the convention are to be applied. Moreover, in view of the increasing internationalisation of economic

relations, the Contracting States have a growing interest in the reciprocal supply of information on the basis of which domestic taxation laws have to be administered, even if there is no question of the application of any particular article of the Convention.

2. Therefore the present Article embodies the rules under which information may be exchanged to the widest possible extent, with a view to laying the proper basis for the implementation of the domestic tax laws of the Contracting States and for the application of specific provisions of the Convention. The text of the Article makes it clear that the exchange of information is not restricted by Articles 1 and 2, so that the information may include particulars about non-residents and may relate to the administration or enforcement of taxes not referred to in Article 2.

3. The matter of administrative assistance for the purpose of tax collection is dealt with in Article 27, ***but exchanges of information for the purpose of tax collection are governed by Article 26 (see paragraph 5 of the Commentary on Article 27). Similarly, mutual agreement procedures are dealt with in Article 25, but exchanges of information for the purposes of a mutual agreement procedure are governed by Article 26 (see paragraph 4 of the Commentary on Article 25).***

4. In 2002, the Committee on Fiscal Affairs undertook a comprehensive review of Article 26 to ensure that it reflects current country practices. That review also took into account recent developments such as the Model Agreement on Exchange of Information on Tax Matters[54] developed by the OECD Global Forum Working Group on Effective Exchange of Information and the ideal standard of access to bank information as described in the report "Improving Access to Bank Information for Tax Purposes".[55]2 As a result, several changes to both the text of the Article and the Commentary were made in 2005.

4.1. Many of the changes that were then made to the Article were not intended to alter its substance, but instead were made to remove doubts as to its proper interpretation. For instance, the change from "necessary" to "foreseeably relevant" and the insertion of the words "to the administration or enforcement" in paragraph 1 were made to achieve consistency with the Model Agreement on Exchange of Information on Tax Matters and were not intended to alter the effect of the provision. ~~New p~~***P***aragraph 4 was added to incorporate into the text of the Article the general understanding previously expressed in the Commentary (~~cf.~~ ***see*** paragraph 19.6). ~~New p~~***P***aragraph 5 was added to reflect ~~current~~ practices among the vast majority of OECD member countries (~~cf.~~ ***see*** paragraph 19.10). The insertion of the words "or the

~~54. Available on www.oecd.org/taxation.~~

55. OECD, Paris, 2000. ~~Available on www.oecd.org/taxation.~~

oversight of the above" into ~~new~~ paragraph 2, on the other hand, constitute***d***~~s~~ a reversal of the previous rule.

4.2. The Commentary ***was*** also ~~has been~~ expanded considerably. This expansion in part reflect***ed***~~s~~ the addition of ~~new~~ paragraphs 4 and 5 to the Article. Other changes were made to the Commentary to take into account ~~recent~~ developments and ~~current~~ country practices and more generally to remove doubts as to the proper interpretation of the Article.

4.3. The Article and the Commentary were further modified in 2012 to take into account recent developments and to further elaborate on the interpretation of certain provisions of this Article. Paragraph 2 of the Article was amended to allow the competent authorities to use information received for other purposes provided such use is allowed under the laws of both States and the competent authority of the supplying State authorises such use. This was previously included as an optional provision in paragraph 12.3 of the Commentary.

4.4. The Commentary was expanded to develop the interpretation of the standard of "foreseeable relevance" and the term "fishing expeditions" through the addition of: general clarifications (see paragraph 5), language in respect of the identification of the taxpayer under examination or investigation (see paragraph 5.1), language in respect of requests in relation to a group of taxpayers (see paragraph 5.2) and new examples (see paragraphs 8(e)-8(h) and 8.1). The Commentary further provides for an optional default standard of time limits within which the information is required to be provided unless a different agreement has been made by the competent authorities (see paragraphs 10.4-10.6) and that in accordance with the principle of reciprocity, if a Contracting State applies under paragraph 5 measures not normally foreseen in its domestic law or practice, such as to access and exchange bank information, that State is equally entitled to request similar information from the other Contracting State (see paragraph 15). Other clarifications were added in paragraphs 3, 5.3, 6, 11, 12, 12.3, 12.4, 16, 16.1 and 19.7.

II. Commentary on the provisions of the Article

Paragraph 1

5. The main rule concerning the exchange of information is contained in the first sentence of the paragraph. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant to secure the correct application of the provisions of the Convention or of the domestic laws of the Contracting States concerning taxes of every kind and

description imposed in these States even if, in the latter case, a particular Article of the Convention need not be applied. The standard of "foreseeable relevance" is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. ***In the context of information exchange upon request, the standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial. A request may therefore not be declined in cases where a definite assessment of the pertinence of the information to an ongoing investigation can only be made following the receipt of the information. The competent authorities should consult in situations in which the content of the request, the circumstances that led to the request, or the foreseeable relevance of requested information are not clear to the requested State. However, once the requesting State has provided an explanation as to the foreseeable relevance of the requested information, the requested State may not decline a request or withhold requested information because it believes that the information lacks relevance to the underlying investigation or examination. Where the requested State becomes aware of facts that call into question whether part of the information requested is foreseeably relevant, the competent authorities should consult and the requested State may ask the requesting State to clarify foreseeable relevance in the light of those facts. At the same time, paragraph 1 does not obligate the requested State to provide information in response to requests that are "fishing expeditions",*** i.e. ***speculative requests that have no apparent nexus to an open inquiry or investigation.***

5.1. As is the case under the Model Agreement on Exchange of Information on Tax Matters[56] ***a request for information does not constitute a fishing expedition solely because it does not provide the name or address (or both) of the taxpayer under examination or investigation. The same holds true where names are spelt differently or information on names and addresses is presented using a different format. However, in cases in which the requesting State does not provide the name or address (or both) of the taxpayer under examination or investigation, the requesting State must include other information sufficient to identify the taxpayer. Similarly, paragraph 1 does not necessarily require the request to include the name and/or address of the person believed to be in possession of the information. In fact, the question of how specific a request has to be with respect to such person is typically an issue falling within the scope of subparagraphs a) and b) of paragraph 3 of Article 26.***

56. ***See Paragraph 58 of its Commentary.***

5.2. The standard of "foreseeable relevance" can be met both in cases dealing with one taxpayer (whether identified by name or otherwise) or several taxpayers (whether identified by name or otherwise). Where a Contracting State undertakes an investigation into a particular group of taxpayers in accordance with its laws, any request related to the investigation will typically serve "the administration or enforcement" of its domestic tax laws and thus comply with the requirements of paragraph 1, provided it meets the standard of "foreseeable relevance". However, where the request relates to a group of taxpayers not individually identified, it will often be more difficult to establish that the request is not a fishing expedition, as the requesting State cannot point to an ongoing investigation into the affairs of a particular taxpayer which in most cases would by itself dispel the notion of the request being random or speculative. In such cases it is therefore necessary that the requesting State provide a detailed description of the group and the specific facts and circumstances that have led to the request, an explanation of the applicable law and why there is reason to believe that the taxpayers in the group for whom information is requested have been non-compliant with that law supported by a clear factual basis. It further requires a showing that the requested information would assist in determining compliance by the taxpayers in the group. As illustrated in example (h) of paragraph 8, in the case of a group request a third party will usually, although not necessarily, have actively contributed to the non-compliance of the taxpayers in the group, in which case such circumstance should also be described in the request. Furthermore, and as illustrated in example (a) of paragraph 8.1, a group request that merely describes the provision of financial services to non-residents and mentions the possibility of non-compliance by the non-resident customers does not meet the standard of foreseeable relevance.

5.3. Contracting States may agree to an alternative formulation of ~~this~~ ***the*** standard ***of foreseeable relevance*** that is consistent with the scope of the Article ***and is therefore understood to require an effective exchange of information*** (e.g. by replacing, "***is*** foreseeably relevant" with "***is*** necessary", ~~or~~ "***is*** relevant" ***or "may be relevant"***). The scope of exchange of information covers all tax matters without prejudice to the general rules and legal provisions governing the rights of defendants and witnesses in judicial proceedings. Exchange of information for criminal tax matters can also be based on bilateral or multilateral treaties on mutual legal assistance (to the extent they also apply to tax crimes). In order to keep the exchange of information within the framework of the Convention, a limitation to the exchange of information is set so that information should be given only insofar as the taxation under the domestic taxation laws concerned is not contrary to the Convention.

5.1 ~~.~~ ***4*** The information covered by paragraph 1 is not limited to taxpayer-specific information. The competent authorities may also exchange other sensitive information related to tax administration and compliance improvement, for example risk analysis techniques or tax avoidance or evasion schemes.

5.2 ~~.~~ ***5*** The possibilities of assistance provided by the Article do not limit, nor are they limited by, those contained in existing international agreements or other arrangements between the Contracting States which relate to co-operation in tax matters. Since the exchange of information concerning the application of custom duties has a legal basis in other international instruments, the provisions of these more specialised instruments will generally prevail and the exchange of information concerning custom duties will not, in practice, be governed by the Article.

6. The following examples ~~may~~ **seek to** clarify the principle***s*** dealt with in paragraph***s*** 5***, 5.1 and 5.2*** above. In **the** ~~all such cases~~ ***examples mentioned in paragraphs 7 and 8*** information can be exchanged under paragraph 1 ***of Article 26. In the*** examples ***mentioned in paragraph 8.1, and assuming no further information is provided, the Contracting States are not obligated to provide information in response to a request for information. The examples are for illustrative purposes only. They should be read in the light of the overarching purpose of Article 26 not to restrict the scope of exchange of information but to allow information exchange "to the widest possible extent".***

7. Application of the Convention

a. When applying Article 12, State A where the beneficiary is resident asks State B where the payer is resident, for information concerning the amount of royalty transmitted.

b. Conversely, in order to grant the exemption provided for in Article 12, State B asks State A whether the recipient of the amounts paid is in fact a resident of the last-mentioned State and the beneficial owner of the royalties.

c. Similarly, information may be needed with a view to the proper allocation of taxable profits between associated companies in different States or the adjustment of the profits shown in the accounts of a permanent establishment in one State and in the accounts of the head office in the other State (Articles 7, 9, 23 A and 23 B).

d. Information may be needed for the purposes of applying Article 25.

e. When applying Articles 15 and 23 A, State A, where the employee is resident, informs State B, where the employment is exercised for more than 183 days, of the amount exempted from taxation in State A.

8. Implementation of the domestic laws

a. A company in State A supplies goods to an independent company in State B. State A wishes to know from State B what price the company in State B paid for the goods with a view to a correct application of the provisions of its domestic laws.

b. A company in State A sells goods through a company in State C (possibly a low-tax country) to a company in State B. The companies may or may not be associated. There is no convention between State A and State C, nor between State B and State C. Under the convention between A and B, State A, with a view to ensuring the correct application of the provisions of its domestic laws to the profits made by the company situated in its territory, asks State B what price the company in State B paid for the goods.

c. State A, for the purpose of taxing a company situated in its territory, asks State B, under the convention between A and B, for information about the prices charged by a company in State B, or a group of companies in State B with which the company in State A has no business contacts in order to enable it to check the prices charged by the company in State A by direct comparison (e.g. prices charged by a company or a group of companies in a dominant position). It should be borne in mind that the exchange of information in this case might be a difficult and delicate matter owing in particular to the provisions of subparagraph *c*) of paragraph 3 relating to business and other secrets.

d. State A, for the purpose of verifying VAT input tax credits claimed by a company situated in its territory for services performed by a company resident in State B, requests confirmation that the cost of services was properly entered into the books and records of the company in State B.

e. ***The tax authorities of State A conduct a tax investigation into the affairs of Mr. X. Based on this investigation the tax authorities have indications that Mr. X holds one or several undeclared bank accounts with Bank B in State B. However, State A has experienced that, in order to avoid detection, it is not unlikely that the bank accounts may be held in the name of relatives of the beneficial owner. State A therefore requests information on all accounts with Bank B of which Mr. X is the beneficial owner and all accounts held in the names of his spouse E and his children K and L.***

f. ***State A has obtained information on all transactions involving foreign credit cards carried out in its territory in a certain year.***

State A has processed the data and launched an investigation that identified all credit card numbers where the frequency and pattern of transactions and the type of use over the course of that year suggest that the cardholders were tax residents of State A. State A cannot obtain the names by using regular sources of information available under its internal taxation procedure, as the pertinent information is not in the possession or control of persons within its jurisdiction. The credit card numbers identify an issuer of such cards to be Bank B in State B. Based on an open inquiry or investigation, State A sends a request for information to State B, asking for the name, address and date of birth of the holders of the particular cards identified during its investigation and any other person that has signatory authority over those cards. State A supplies the relevant individual credit card numbers and further provides the above information to demonstrate the foreseeable relevance of the requested information to its investigation and more generally to the administration and enforcement of its tax law.

g. ***Company A, resident of State A, is owned by foreign unlisted Company B, resident of State B. The tax authorities of State A suspect that managers X, Y and Z of Company A directly or indirectly own Company B. If that were the case, the dividends received by Company B from Company A would be taxable in their hands as resident shareholders under country A's controlled foreign company rules. The suspicion is based on information provided to State A's tax authorities by a former employee of Company A. When confronted with the allegations, the three managers of Company A deny having any ownership interest in Company B. The State A tax authorities have exhausted all domestic means of obtaining ownership information on Company B. State A now requests from State B information on whether X, Y and Z are shareholders of Company B. Furthermore, considering that ownership in such cases is often held through, for example, shell companies and nominee shareholders it requests information from State B on whether X, Y and Z indirectly hold an ownership interest in Company B. If State B is unable to determine whether X, Y or Z holds such an indirect interest, information is requested on the shareholder(s) so that it can continue its investigations.*** [57]

57. ***For cases where State B becomes aware of facts that call into question whether part of the shareholder information is foreseeably relevant, the competent authorities should consult and State B may ask State A to clarify foreseeable relevance in light of those facts, as discussed in paragraph 5.***

h. ***Financial service provider B is established in State B. The tax authorities of State A have discovered that B is marketing a financial product to State A residents using misleading information suggesting that the product eliminates the State A income tax liability on the income accumulated within the product. The product requires that an account be opened with B through which the investment is made. State A's tax authorities have issued a taxpayer alert, warning all taxpayers about the product and clarifying that it does not achieve the suggested tax effect and that income generated by the product must be reported. Nevertheless, B continues to market the product on its website, and State A has evidence that it also markets the product through a network of advisors. State A has already discovered several resident taxpayers that have invested in the product, all of whom had failed to report the income generated by their investments. State A has exhausted its domestic means of obtaining information on the identity of its residents that have invested in the product. State A requests information from the competent authority of State B on all State A residents that (i) have an account with B and (ii) have invested in the financial product. In the request, State A provides the above information, including details of the financial product and the status of its investigation.***

8.1 Situations where Contracting States are not obligated to provide information in response to a request for information, assuming no further information is provided

a. ***Bank B is a bank established in State B. State A taxes its residents on the basis of their worldwide income. The competent authority of State A requests that the competent authority of State B provide the names, date and place of birth, and account balances (including information on any financial assets held in such accounts) of residents of State A that have an account with, hold signatory authority over, or a beneficial interest in an account with Bank B in State B. The request states that Bank B is known to have a large group of foreign account holders but does not contain any additional information.***

b. ***Company B is a company established in State B. State A requests the names of all shareholders in Company B resident of State A and information on all dividend payments made to such shareholders. The requesting State A points out that Company B has significant business activity in State A and is therefore likely to have shareholders resident of State A. The request further states that it is well known that taxpayers often fail to disclose foreign source income or assets.***

9. The rule laid down in paragraph 1 allows information to be exchanged in three different ways:

a. on request, with a special case in mind, it being understood that the regular sources of information available under the internal taxation procedure should be relied upon in the first place before a request for information is made to the other State;

b. automatically, for example when information about one or various categories of income having their source in one Contracting State and received in the other Contracting State is transmitted systematically to the other State**;** ***see*** ~~(cf.~~ the ~~OECD Council~~ Recommendation***s of the OECD Council*** ~~C(81)39, dated 5 May 1981, entitled "Recommendation of the Council concerning a standardised form for automatic exchanges of information under international tax agreements", the OECD Council Recommendation~~ C(92)50, dated 23 July 1992, ~~entitled "~~***(****Recommendation of the Council concerning a standard magnetic format for automatic exchange of tax information****)***", ~~the OECD Council~~ ***C(97)29/FINAL, dated 13 March 1997 (****Recommendation on the use of Tax Identification Numbers in an international context****)*** C(97)29/FINAL dated 13 March 1997, the OECD Council ~~Recommendation,~~ C(97)30/FINAL**,** dated 10 July 1997 ~~entitled "~~***(****Recommendation of the Council of the OECD on the Use of the Revised Standard Magnetic Format for Automatic Exchange of Information****")*** and ~~the OECD Council~~ ***C(2001)28/FINAL, dated 22 March 2001 (****Recommendation on the use of the OECD Model Memorandum of Understanding on Automatic Exchange of Information for Tax Purposes*** ~~**C(2001)28/FINAL**~~***)***;[58]

c. spontaneously, for example in the case of a State having acquired through certain investigations, information which it supposes to be of interest to the other State.

9.1. These three forms of exchange (on request, automatic and spontaneous) may also be combined. It should also be stressed that the Article does not restrict the possibilities of exchanging information to these methods and that the Contracting States may use other techniques to obtain information which may be relevant to both Contracting States such as simultaneous examinations, tax examinations abroad and industry-wide exchange of information. These techniques are fully described in the publication "Tax Information Exchange between OECD Member Countries: A Survey of Current Practices"[59] and can be summarised as follows:

~~58. OECD Recommendations are available on www.oecd.org/taxation.~~

59. OECD, Paris, 1994.

- a simultaneous examination is an arrangement between two or more parties to examine simultaneously each in its own territory, the tax affairs of (a) taxpayer(s) in which they have a common or related interest, with a view of exchanging any relevant information which they so obtain (see the OECD Council Recommendation C(92)81, dated 23 July 1992, on an OECD Model agreement for the undertaking of simultaneous examinations);
- a tax examination abroad allows for the possibility to obtain information through the presence of representatives of the competent authority of the requesting Contracting State. To the extent allowed by its domestic law, a Contracting State may permit authorised representatives of the other Contracting State to enter the first Contracting State to interview individuals or examine a person's books and records – or to be present at such interviews or examinations carried out by the tax authorities of the first Contracting State – in accordance with procedures mutually agreed upon by the competent authorities. Such a request might arise, for example, where the taxpayer in a Contracting State is permitted to keep records in the other Contracting State. This type of assistance is granted on a reciprocal basis. Countries' laws and practices differ as to the scope of rights granted to foreign tax officials. For instance, there are States where a foreign tax official will be prevented from any active participation in an investigation or examination on the territory of a country; there are also States where such participation is only possible with the taxpayer's consent. The Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters specifically addresses tax examinations abroad in its Article 9;
- an industry-wide exchange of information is the exchange of tax information especially concerning a whole economic sector (e.g. the oil or pharmaceutical industry, the banking sector, etc.) and not taxpayers in particular.

10. The manner in which the exchange of information agreed to in the Convention will finally be effected can be decided upon by the competent authorities of the Contracting States. For example, Contracting States may wish to use electronic or other communication and information technologies, including appropriate security systems, to improve the timeliness and quality of exchanges of information. Contracting States which are required, according to their law, to observe data protection laws, may wish to include provisions in their bilateral conventions concerning the protection of personal data exchanged. Data protection concerns the rights and fundamental freedoms of an individual, and in particular, the right to privacy, with regard to automatic processing of personal data. See, for example, the Council of

Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981.[60]

10.1. Before 2000, the paragraph only authorised the exchange of information, and the use of the information exchanged, in relation to the taxes covered by the Convention under the general rules of Article 2. As drafted, the paragraph did not oblige the requested State to comply with a request for information concerning the imposition of a sales tax as such a tax was not covered by the Convention. The paragraph was then amended so as to apply to the exchange of information concerning any tax imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, and to allow the use of the information exchanged for purposes of the application of all such taxes. Some Contracting States may not, however, be in a position to exchange information, or to use the information obtained from a treaty partner, in relation to taxes that are not covered by the Convention under the general rules of Article 2. Such States are free to restrict the scope of paragraph 1 of the Article to the taxes covered by the Convention.

10.2. In some cases, a Contracting State may need to receive information in a particular form to satisfy its evidentiary or other legal requirements. Such forms may include depositions of witnesses and authenticated copies of original records. Contracting States should endeavour as far as possible to accommodate such requests. Under paragraph 3, the requested State may decline to provide the information in the specific form requested if, for instance, the requested form is not known or permitted under its law or administrative practice. A refusal to provide the information in the form requested does not affect the obligation to provide the information.

10.3. Nothing in the Convention prevents the application of the provisions of the Article to the exchange of information that existed prior to the entry into force of the Convention, as long as the assistance with respect to this information is provided after the Convention has entered into force and the provisions of the Article have become effective. Contracting States may find it useful, however, to clarify the extent to which the provisions of the Article are applicable to such information, in particular when the provisions of that convention will have effect with respect to taxes arising or levied from a certain time.

10.4. Contracting States may wish to improve the speediness and timeliness of exchange of information under this Article by agreeing on time limits for the provision of information. Contracting States may do so by adding the following language to the Article:

> ***"6. The competent authorities of the Contracting States may agree on time limits for the provision of information under this***

60. See http://conventions.coe.int.

Article. In the absence of such an agreement, the information shall be supplied as quickly as possible and, except where the delay is due to legal impediments, within the following time limits:

(a) Where the tax authorities of the requested Contracting State are already in possession of the requested information, such information shall be supplied to the competent authority of the other Contracting State within two months of the receipt of the information request;

(b) Where the tax authorities of the requested Contracting State are not already in the possession of the requested information, such information shall be supplied to the competent authority of the other Contracting State within six months of the receipt of the information request.

Provided that the other conditions of this Article are met, information shall be considered to have been exchanged in accordance with the provisions of this Article even if it is supplied after these time limits."

10.5. The provisions (a) and (b) in optional paragraph 6, referenced in paragraph 10.4, set a default standard for time limits that would apply where the competent authorities have not made a different agreement on longer or shorter time limits. The default standard time limits are two months from the receipt of the information request if the requested information is already in the possession of the tax authorities of the requested Contracting State and six months in all other cases. Notwithstanding the default standard time limits or time limits otherwise agreed, competent authorities may come to different agreements on a case-by-case basis, for example, when they both agree more time is appropriate. This may arise where the request is complex in nature. In such a case, the competent authority of a requesting Contracting State should not unreasonably deny a request by the competent authority of a requested Contracting State for more time. If a requested Contracting State is unable to supply the requested information within the prescribed time limit because of legal impediments (for example, because of ongoing litigation regarding a taxpayer's challenge to the validity of the request or ongoing litigation regarding a domestic notification procedure of the type described in paragraph 14.1), it would not be in violation of the time limits.

10.6. The last sentence in optional paragraph 6, referenced in paragraph 10.4, which provides, "Provided that the other conditions of this

Article are met, information shall be considered to have been exchanged in accordance with the provisions of this Article even if it is supplied after these time limits." makes it clear that no objection to the use or admissibility of information exchanged under this Article can be based on the fact that the information was exchanged after the time limits agreed to by the competent authorities or the default time limits provided for in the paragraph.

Paragraph 2

11. Reciprocal assistance between tax administrations is feasible only if each administration is assured that the other administration will treat with proper confidence the information which it will receive in the course of their co-operation. The confidentiality rules of paragraph 2 apply to all types of information received under paragraph 1, including both information provided in a request and information transmitted in response to a request. ***Hence, the confidentiality rules cover, for instance, competent authority letters, including the letter requesting information. At the same time, it is understood that the requested State can disclose the minimum information contained in a competent authority letter (but not the letter itself) necessary for the requested State to be able to obtain or provide the requested information to the requesting State, without frustrating the efforts of the requesting State. If, however, court proceedings or the like under the domestic laws of the requested State necessitate the disclosure of the competent authority letter itself, the competent authority of the requested State may disclose such a letter unless the requesting State otherwise specifies.*** The maintenance of secrecy in the receiving Contracting State is a matter of domestic laws. It is therefore provided in paragraph 2 that information communicated under the provisions of the Convention shall be treated as secret in the receiving State in the same manner as information obtained under the domestic laws of that State. Sanctions for the violation of such secrecy in that State will be governed by the administrative and penal laws of that State. ***In situations in which the requested State determines that the requesting State does not comply with its duties regarding the confidentiality of the information exchanged under this Article, the requested State may suspend assistance under this Article until such time as proper assurance is given by the requesting State that those duties will indeed be respected. If necessary, the competent authorities may enter into specific arrangements or memoranda of understanding regarding the confidentiality of the information exchanged under this Article.***

12. ***Subject to paragraphs 12.3 and 12.4***, the information obtained may be disclosed only to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, the determination

of appeals in relation to the taxes with respect to which information may be exchanged according to the first sentence of paragraph 1, or the oversight of the above. This means that the information may also be communicated to the taxpayer, his proxy or to the witnesses. This also means that information can be disclosed to governmental or judicial authorities charged with deciding whether such information should be released to the taxpayer, his proxy or to the witnesses. The information received by a Contracting State may be used by such persons or authorities only for the purposes mentioned in paragraph 2. Furthermore, information covered by paragraph 1, whether taxpayer-specific or not, should not be disclosed to persons or authorities not mentioned in paragraph 2, regardless of domestic information disclosure laws such as freedom of information or other legislation that allows greater access to governmental documents.

12.1. Information can also be disclosed to oversight bodies. Such oversight bodies include authorities that supervise tax administration and enforcement authorities as part of the general administration of the Government of a Contracting State. In their bilateral negotiations, however, Contracting States may depart from this principle and agree to exclude the disclosure of information to such supervisory bodies.

12.2. The information received by a Contracting State may not be disclosed to a third country unless there is an express provision in the bilateral treaty between the Contracting States allowing such disclosure.

12.3. ~~Similarly, if the information appears to be of value to the receiving State for other purposes than those referred to in paragraph 12, that State may not use the information for such other purposes but it must resort to means specifically designed for those purposes (e.g. in case of a non-fiscal crime, to a treaty concerning judicial assistance).~~ ***Information exchanged for tax purposes may be of value to the receiving State for purposes in addition to those referred to in the first and second sentences of paragraph 2 of Article 26. The last sentence of paragraph 2 therefore allows the Contracting States to share information received for tax purposes provided two conditions are met: first, the information may be used for other purposes under the laws of both States and, second, the competent authority of the supplying State authorises such use.*** ~~However, Contracting States may wish to~~ ***It*** allow***s*** the sharing of tax information by ***the*** tax authorities ***of the receiving State*** with other law enforcement agencies and judicial authorities ***in that State*** on certain high priority matters (e.g. to combat money laundering, corruption, terrorism financing). ***When a receiving State desires to use the information for an additional purpose (***i.e. ***non-tax purpose), the receiving State should specify to the supplying State the other purpose for which it wishes to use the information and confirm that the receiving State can use the information for such other purpose under its laws. Where the***

supplying State is in a position to do so, having regard to, amongst others, international agreements or other arrangements between the Contracting States relating to mutual assistance between other law enforcement agencies and judicial authorities, the competent authority of the supplying State would generally be expected to authorise such use for other purposes if the information can be used for similar purposes in the supplying State. Law enforcement agencies and judicial authorities receiving information under the last sentence of paragraph 2 must treat that information as confidential consistent with the principles of paragraph 2. ~~Contracting States wishing to broaden the purposes for which they may use information exchanged under this Article may do so by adding the following text to the end of paragraph 2:~~

~~Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.~~

12.4. It is recognised that Contracting States may wish to achieve the overall objective inherent in the last sentence of paragraph 2 in other ways and they may do so by replacing the last sentence of paragraph 2 with the following text:

> ***"The competent authority of the Contracting State that receives information under the provisions of this Article may, with the written consent of the Contracting State that provided the information, also make available that information to be used for other purposes allowed under the provisions of a mutual legal assistance treaty in force between the Contracting States that allows for the exchange of tax information."***

13. As stated in paragraph 12, the information obtained can be communicated to the persons and authorities mentioned and on the basis of the ~~last~~ ***third*** sentence of paragraph 2 of the Article can be disclosed by them in court sessions held in public or in decisions which reveal the name of the taxpayer. Once information is used in public court proceedings or in court decisions and thus rendered public, it is clear that from that moment such information can be quoted from the court files or decisions for other purposes even as possible evidence. But this does not mean that the persons and authorities mentioned in paragraph 2 are allowed to provide on request additional information received. If either or both of the Contracting States object to the information being made public by courts in this way, or, once the information has been made public in this way, to the information being used for other purposes, because this is not the normal procedure under their domestic laws, they should state this expressly in their convention.

Paragraph 3

14. This paragraph contains certain limitations to the main rule in favour of the requested State. In the first place, the paragraph contains the clarification that a Contracting State is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the other Contracting State. However, internal provisions concerning tax secrecy should not be interpreted as constituting an obstacle to the exchange of information under the present Article. As mentioned above, the authorities of the requesting State are obliged to observe secrecy with regard to information received under this Article.

14.1. Some countries' laws include procedures for notifying the person who provided the information and/or the taxpayer that is subject to the enquiry prior to the supply of information. Such notification procedures may be an important aspect of the rights provided under domestic law. They can help prevent mistakes (e.g. in cases of mistaken identity) and facilitate exchange (by allowing taxpayers who are notified to co-operate voluntarily with the tax authorities in the requesting State). Notification procedures should not, however, be applied in a manner that, in the particular circumstances of the request, would frustrate the efforts of the requesting State. In other words, they should not prevent or unduly delay effective exchange of information. For instance, notification procedures should permit exceptions from prior notification, e.g. in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the requesting State. A Contracting State that under its domestic law is required to notify the person who provided the information and/or the taxpayer that an exchange of information is proposed should inform its treaty partners in writing that it has this requirement and what the consequences are for its obligations in relation to mutual assistance. Such information should be provided to the other Contracting State when a convention is concluded and thereafter whenever the relevant rules are modified.

15. Furthermore, the requested State does not need to go so far as to carry out administrative measures that are not permitted under the laws or practice of the requesting State or to supply items of information that are not obtainable under the laws or in the normal course of administration of the requesting State. It follows that a Contracting State cannot take advantage of the information system of the other Contracting State if it is wider than its own system. Thus, a State may refuse to provide information where the requesting State would be precluded by law from obtaining or providing the information or where the requesting State's administrative practices (e.g. failure to provide sufficient administrative resources) result in a lack of reciprocity. However, it is recognised that too rigorous an application of

the principle of reciprocity could frustrate effective exchange of information and that reciprocity should be interpreted in a broad and pragmatic manner. Different countries will necessarily have different mechanisms for obtaining and providing information. Variations in practices and procedures should not be used as a basis for denying a request unless the effect of these variations would be to limit in a significant way the requesting State's overall ability to obtain and provide the information if the requesting State itself received a legitimate request from the requested State. ***It is worth noting that if a Contracting State applies, under paragraph 5, measures not normally foreseen in its domestic law or practice, such as to access and exchange bank information, that State is equally entitled to request similar information from the other Contracting State. This would be fully in line with the principle of reciprocity which underlies subparagraphs a) and b) of paragraph 3.***

15.1. The principle of reciprocity has no application where the legal system or administrative practice of only one country provides for a specific procedure. For instance, a country requested to provide information could not point to the absence of a ruling regime in the country requesting information and decline to provide information on a ruling it has granted, based on a reciprocity argument. Of course, where the requested information itself is not obtainable under the laws or in the normal course of the administrative practice of the requesting State, a requested State may decline such a request.

15.2. Most countries recognise under their domestic laws that information cannot be obtained from a person to the extent that such person can claim the privilege against self-incrimination. A requested State may, therefore, decline to provide information if the requesting State would have been precluded by its own self-incrimination rules from obtaining the information under similar circumstances. In practice, however, the privilege against self-incrimination should have little, if any, application in connection with most information requests. The privilege against self-incrimination is personal and cannot be claimed by an individual who himself is not at risk of criminal prosecution. The overwhelming majority of information requests seek to obtain information from third parties such as banks, intermediaries or the other party to a contract and not from the individual under investigation. Furthermore, the privilege against self-incrimination generally does not attach to persons other than natural persons.

16. Information is deemed to be obtainable in the normal course of administration if it is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons, provided that the tax authorities would make similar investigations or examinations for their own purposes. ***The***

paragraph assumes, of course, that tax authorities have the powers and resources necessary to facilitate effective information exchange. For instance, assume that a Contracting State requests information in connection with an investigation into the tax affairs of a particular taxpayer and specifies in the request that the information might be held by one of a few service providers identified in the request and established in the other Contracting State. In this case, the requested State would be expected to be able to obtain and provide such information to the extent that such information is held by one of the service providers identified in the request. In responding to a request the requested State should be guided by the overarching purpose of Article 26 which is to permit information exchange "to the widest possible extent" and may consider the importance of the requested information to the requesting State in relation to the administrative burden for the requested State.

16.1. Subparagraphs 3 a) and b) do not permit the requested State to decline a request where paragraph 4 or 5 applies. Paragraph 5 would apply, for instance, in situations in which the requested State's inability to obtain the information was specifically related to the fact that the requested information was believed to be held by a bank or other financial institution. Thus, the application of paragraph 5 includes situations in which the tax authorities' information gathering powers with respect to information held by banks and other financial institutions are subject to different requirements than those that are generally applicable with respect to information held by persons other than banks or other financial institutions. This would, for example, be the case where the tax authorities can only exercise their information gathering powers with respect to information held by banks and other financial institutions in instances where specific information on the taxpayer under examination or investigation is available. This would also be the case where, for example, the use of information gathering measures with respect to information held by banks and other financial institutions requires a higher probability that the information requested is held by the person believed to be in possession of the requested information than the degree of probability required for the use of information gathering measures with respect to information believed to be held by persons other than banks or financial institutions.

17. The requested State is at liberty to refuse to give information in the cases referred to in the paragraphs above. However if it does give the requested information, it remains within the framework of the agreement on the exchange of information which is laid down in the Convention; consequently it cannot be objected that this State has failed to observe the obligation to secrecy.

18. If the structure of the information systems of two Contracting States is very different, the conditions under subparagraphs *a*) and *b*) of paragraph 3 will lead to the result that the Contracting States exchange very little information or perhaps none at all. In such a case, the Contracting States may find it appropriate to broaden the scope of the exchange of information.

18.1. Unless otherwise agreed to by the Contracting States, it can be assumed that the requested information could be obtained by the requesting State in a similar situation if that State has not indicated to the contrary.

19. In addition to the limitations referred to above, subparagraph *c*) of paragraph 3 contains a reservation concerning the disclosure of certain secret information. Secrets mentioned in this subparagraph should not be taken in too wide a sense. Before invoking this provision, a Contracting State should carefully weigh if the interests of the taxpayer really justify its application. Otherwise it is clear that too wide an interpretation would in many cases render ineffective the exchange of information provided for in the Convention. The observations made in paragraph 17 above apply here as well. The requested State in protecting the interests of its taxpayers is given a certain discretion to refuse the requested information, but if it does supply the information deliberately the taxpayer cannot allege an infraction of the rules of secrecy.

19.1. In its deliberations regarding the application of secrecy rules, the Contracting State should also take into account the confidentiality rules of paragraph 2 of the Article. The domestic laws and practices of the requesting State together with the obligations imposed under paragraph 2, may ensure that the information cannot be used for the types of unauthorised purposes against which the trade or other secrecy rules are intended to protect. Thus, a Contracting State may decide to supply the information where it finds that there is no reasonable basis for assuming that a taxpayer involved may suffer any adverse consequences incompatible with information exchange.

19.2. In most cases of information exchange no issue of trade, business or other secret will arise. A trade or business secret is generally understood to mean facts and circumstances that are of considerable economic importance and that can be exploited practically and the unauthorised use of which may lead to serious damage (e.g. may lead to severe financial hardship). The determination, assessment or collection of taxes as such could not be considered to result in serious damage. Financial information, including books and records, does not by its nature constitute a trade, business or other secret. In certain limited cases, however, the disclosure of financial information might reveal a trade, business or other secret. For instance, a request for information on certain purchase records may raise such an issue if the disclosure of such information revealed the proprietary formula used in the manufacture of a product. The protection of such information may also extend to information

in the possession of third persons. For instance, a bank might hold a pending patent application for safe keeping or a secret trade process or formula might be described in a loan application or in a contract held by a bank. In such circumstances, details of the trade, business or other secret should be excised from the documents and the remaining financial information exchanged accordingly.

19.3. A requested State may decline to disclose information relating to confidential communications between attorneys, solicitors or other admitted legal representatives in their role as such and their clients to the extent that the communications are protected from disclosure under domestic law. However, the scope of protection afforded to such confidential communications should be narrowly defined. Such protection does not attach to documents or records delivered to an attorney, solicitor or other admitted legal representative in an attempt to protect such documents or records from disclosure required by law. Also, information on the identity of a person such as a director or beneficial owner of a company is typically not protected as a confidential communication. Whilst the scope of protection afforded to confidential communications might differ among states, it should not be overly broad so as to hamper effective exchange of information.

Communications between attorneys, solicitors or other admitted legal representatives and their clients are only confidential if, and to the extent that, such representatives act in their capacity as attorneys, solicitors or other admitted legal representatives and not in a different capacity, such as nominee shareholders, trustees, settlors, company directors or under a power of attorney to represent a company in its business affairs. An assertion that information is protected as a confidential communication between an attorney, solicitor or other admitted legal representative and its client should be adjudicated exclusively in the Contracting State under the laws of which it arises. Thus, it is not intended that the courts of the requested State should adjudicate claims based on the laws of the requesting State.

19.4. Contracting States wishing to refer expressly to the protection afforded to confidential communications between a client and an attorney, solicitor or other admitted legal representative may do so by adding the following text at the end of paragraph 3:

> "*d*) to obtain or provide information which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:
>
> (*i*) produced for the purposes of seeking or providing legal advice or
>
> (*ii*) produced for the purposes of use in existing or contemplated legal proceedings."

19.5. Paragraph 3 also includes a limitation with regard to information which concerns the vital interests of the State itself. To this end, it is stipulated that Contracting States do not have to supply information the disclosure of which would be contrary to public policy (*ordre public*). However, this limitation should only become relevant in extreme cases. For instance, such a case could arise if a tax investigation in the requesting State were motivated by political, racial, or religious persecution. The limitation may also be invoked where the information constitutes a state secret, for instance sensitive information held by secret services the disclosure of which would be contrary to the vital interests of the requested State. Thus, issues of public policy (*ordre public*) rarely arise in the context of information exchange between treaty partners.

Paragraph 4

19.6. Paragraph 4 was added in 2005 to deal explicitly with the obligation to exchange information in situations where the requested information is not needed by the requested State for domestic tax purposes. Prior to the addition of paragraph 4 this obligation was not expressly stated in the Article, but was clearly evidenced by the practices followed by Member countries which showed that, when collecting information requested by a treaty partner, Contracting States often use the special examining or investigative powers provided by their laws for purposes of levying their domestic taxes even though they do not themselves need the information for these purposes. This principle is also stated in the report "Improving Access to Bank Information for Tax Purposes".[61]

19.7. According to paragraph 4, Contracting States must use their information gathering measures, even though invoked solely to provide information to the other Contracting State ***and irrespective of whether the information could still be gathered or used for domestic tax purposes in the requested Contracting State. Thus, for instance, any restrictions on the ability of a requested Contracting State to obtain information from a person for domestic tax purposes at the time of a request (for example, because of the expiration of a statute of limitations under the requested State's domestic law or the prior completion of an audit) must not restrict its ability to use its information gathering measures for information exchange purposes.*** The term "information gathering measures" means laws and administrative or judicial procedures that enable a Contracting State to obtain and provide the requested information. ***Paragraph 4 does not oblige a requested Contracting State to provide information in circumstances where it has attempted to obtain the requested information but finds that the***

61. OECD, Paris, 2000 (at paragraph 21 b).

information no longer exists following the expiration of a domestic record retention period. However, where the requested information is still available notwithstanding the expiration of such retention period, the requested State cannot decline to exchange the information available. Contracting States should ensure that reliable accounting records are kept for five years or more.

19.8. The second sentence of paragraph 4 makes clear that the obligation contained in paragraph 4 is subject to the limitations of paragraph 3 but also provides that such limitations cannot be construed to form the basis for declining to supply information where a country's laws or practices include a domestic tax interest requirement. Thus, whilst a requested State cannot invoke paragraph 3 and argue that under its domestic laws or practices it only supplies information in which it has an interest for its own tax purposes, it may, for instance, decline to supply the information to the extent that the provision of the information would disclose a trade secret.

19.9. For many countries the combination of paragraph 4 and their domestic law provide a sufficient basis for using their information gathering measures to obtain the requested information even in the absence of a domestic tax interest in the information. Other countries, however, may wish to clarify expressly in the convention that Contracting States must ensure that their competent authorities have the necessary powers to do so. Contracting States wishing to clarify this point may replace paragraph 4 with the following text:

> "4. In order to effectuate the exchange of information as provided in paragraph 1, each Contracting State shall take the necessary measures, including legislation, rule-making, or administrative arrangements, to ensure that its competent authority has sufficient powers under its domestic law to obtain information for the exchange of information regardless of whether that Contracting State may need such information for its own tax purposes."

Paragraph 5

19.10. Paragraph 1 imposes a positive obligation on a Contracting State to exchange all types of information. Paragraph 5 is intended to ensure that the limitations of paragraph 3 cannot be used to prevent the exchange of information held by banks, other financial institutions, nominees, agents and fiduciaries as well as ownership information. Whilst paragraph 5, which was added in 2005, represents a change in the structure of the Article, it should not be interpreted as suggesting that the previous version of the Article did not authorise the exchange of such information. The vast majority of OECD member countries already exchanged such information under the previous version of the Article and the addition of paragraph 5 merely reflects current practice.

19.11. Paragraph 5 stipulates that a Contracting State shall not decline to supply information to a treaty partner solely because the information is held by a bank or other financial institution. Thus, paragraph 5 overrides paragraph 3 to the extent that paragraph 3 would otherwise permit a requested Contracting State to decline to supply information on grounds of bank secrecy. The addition of this paragraph to the Article reflects the international trend in this area as reflected in the Model Agreement on Exchange of Information on Tax Matters[62] and as described in the report "Improving Access to Bank Information for Tax Purposes".[63] In accordance with that report, access to information held by banks or other financial institutions may be by direct means or indirectly through a judicial or administrative process. The procedure for indirect access should not be so burdensome and time-consuming as to act as an impediment to access to bank information.

19.12. Paragraph 5 also provides that a Contracting State shall not decline to supply information solely because the information is held by persons acting in an agency or fiduciary capacity. For instance, if a Contracting State had a law under which all information held by a fiduciary was treated as a "professional secret" merely because it was held by a fiduciary, such State could not use such law as a basis for declining to provide the information to the other Contracting State. A person is generally said to act in a "fiduciary capacity" when the business which the person transacts, or the money or property which the person handles, is not its own or for its own benefit, but for the benefit of another person as to whom the fiduciary stands in a relation implying and necessitating confidence and trust on the one part and good faith on the other part, such as a trustee. The term "agency" is very broad and includes all forms of corporate service providers (e.g. company formation agents, trust companies, registered agents, lawyers).

19.13. Finally, paragraph 5 states that a Contracting State shall not decline to supply information solely because it relates to an ownership interest in a person, including companies and partnerships, foundations or similar organisational structures. Information requests cannot be declined merely because domestic laws or practices may treat ownership information as a trade or other secret.

19.14. Paragraph 5 does not preclude a Contracting State from invoking paragraph 3 to refuse to supply information held by a bank, financial institution, a person acting in an agency or fiduciary capacity or information relating to ownership interests. However, such refusal must be based on reasons unrelated to the person's status as a bank, financial institution, agent, fiduciary or nominee, or the fact that the information relates to ownership interests. For

62. ~~Available on www.oecd.org/taxation~~.
63. OECD, Paris, 2000.

instance, a legal representative acting for a client may be acting in an agency capacity but for any information protected as a confidential communication between attorneys, solicitors or other admitted legal representatives and their clients, paragraph 3 continues to provide a possible basis for declining to supply the information.

19.15. The following examples illustrate the application of paragraph 5:

a. Company X owns a majority of the stock in a subsidiary company Y, and both companies are incorporated under the laws of State A. State B is conducting a tax examination of business operations of company Y in State B. In the course of this examination the question of both direct and indirect ownership in company Y becomes relevant and State B makes a request to State A for ownership information of any person in company Y's chain of ownership. In its reply State A should provide to State B ownership information for both company X and Y.

b. An individual subject to tax in State A maintains a bank account with Bank B in State B. State A is examining the income tax return of the individual and makes a request to State B for all bank account income and asset information held by Bank B in order to determine whether there were deposits of untaxed earned income. State B should provide the requested bank information to State A.

Observation on the Commentary

20. [Deleted]

21. In connection with paragraph 15.1, *Greece* wishes to clarify that according to Article 28 of the Greek Constitution international tax treaties are applied under the terms of reciprocity.

Enabling effective exchange of information: Availability and Reliability Standard

The Joint Ad Hoc Group on Accounts (JAHGA) Report

A. Introduction

1. Exchange of information for tax purposes is effective when reliable information, foreseeably relevant to the tax requirements of a requesting jurisdiction is available, or can be made available, in a timely manner and there are legal mechanisms that enable the information to be obtained and exchanged. This requires clear rules regarding the maintenance of accounting records and access to such records.

2. There are a number of ways in which the availability of, and access to, accounting records can be ensured. This paper concentrates on the outcome of ensuring access to and the availability of reliable and foreseeably relevant information.

3. The paper has been developed jointly by OECD and non-OECD countries[64] (the "Participating Partners") through their co-operation in the Global Forum Joint Ad Hoc Group on Accounts ("JAHGA"). The JAHGA participants consisted of representatives from: Antigua and Barbuda, Aruba, The Bahamas, Bahrain, Belize, Bermuda, British Virgin Islands, Canada, Cayman Islands, Cook Islands, France, Germany, Gibraltar, Grenada, Guernsey, Ireland, Isle of Man, Italy, Japan, Jersey, Malta, Mauritius, Mexico, Netherlands, Netherlands Antilles, New Zealand, Panama, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Seychelles, Slovak Republic, Spain, Sweden, United Kingdom and the United States.

64. Reference in this document to "countries" should be taken to apply equally to "territories" or "jurisdictions.".

4. The delegates of the Participating Partners developed this paper with the understanding that they were on a common ground and with the common aim of fostering a transparent and well regulated global financial system based on common standards, which seeks the participation of all countries that offer themselves as responsible jurisdictions in a global economy.

5. The paper is built upon the idea that the rules and standards implemented by all Participating Partners must ensure effective exchange of information. The mechanisms must therefore be simple, reliable and equitable.

6. Moreover, no rule or standard should result in creating a competitive advantage for one type of entity or arrangement over another. The paper therefore seeks to apply to all entities and arrangements relevant to this exercise and any reference to the term "Relevant Entities and Arrangements" in this paper is meant to include (i) a company, foundation, Anstalt and any similar structure, (ii) a partnership[65] or other body of persons, (iii) a trust[66] or similar arrangement, (iv) a collective investment fund or scheme,[67] and (v) any person holding assets in a fiduciary capacity (e.g. an executor in case of an estate).

B. The Availability and Reliability Standard

I. Maintenance of reliable accounting records

7. Reliable accounting records should be kept for all Relevant Entities and Arrangements. To be reliable, accounting records should:

a. correctly explain the transactions of the Relevant Entity or Arrangement;

b. enable the financial position of the Relevant Entity or Arrangement to be determined with reasonable accuracy at any time; and

c. allow financial statements[68] to be prepared (whether or not there is an obligation to prepare financial statements).

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65. The Annex provides an explanatory note on partnerships.
66. The Annex provides an explanatory note on trusts.
67. The term "collective investment fund or scheme" means any pooled investment vehicle irrespective of legal form. See Article 4, paragraph 1, sub-paragraph h) Model Agreement on Exchange of Information on Tax Matters.
68. For purposes of this paper the term "financial statements" comprises:
    - a statement recording the assets and liabilities of a Relevant Entity or Arrangement at a point in time,
    - a statement or statements recording the receipts, payments and other transactions undertaken by a Relevant Entity or Arrangement,
    - such notes as may be necessary to give a reasonable understanding of the statements referred to above.

8. To be reliable, accounting records should include underlying documentation, such as invoices, contracts, etc. and should reflect details of

a. all sums of money received and expended and the matters in respect of which the receipt and expenditure takes place;

b. all sales and purchases and other transactions; and

c. the assets and liabilities of the Relevant Entity or Arrangement.

9. The extent of accounting records will depend upon the complexity and scale of the activity of the Relevant Entity or Arrangement but shall in any case be sufficient for the preparation of financial statements.[69]

10. In the case of a company, it is the responsibility of the country or territory of incorporation to oblige the company to keep reliable accounting records. This means in particular that this country or territory must have the necessary powers to require the company to produce its accounting records. Notwithstanding the responsibility of the country of incorporation of a company to be able to obtain accounting records, a requesting partner may, for example, also address a request to the country or territory of effective management or administration. In case it receives such a request, the country of effective management or administration must respond directly to the requesting country.

11. In the case of a foundation or Anstalt and any similar structure, it is the responsibility of the country under the laws of which such entity is created to oblige the entity to maintain accounting records. Notwithstanding the responsibility of the country or territory of formation, a requesting partner may, for example, also address a request to the country of effective management.

12. In the case of trusts and partnerships, the governing trust, partnership or other applicable law should result in record keeping requirements and countries should have the power to obtain that information. However, in certain jurisdictions record keeping requirements may not exist in relation to certain types of trusts, such as implied and constructive trusts, which are not used in commercial applications. The principles outlined in this paragraph should also apply to estates and other situations where persons hold assets in a fiduciary capacity.

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69. In many cases, Relevant Entities and Arrangements prepare financial statements and in more complex cases financial statements may be an important element in explaining the transactions of a Relevant Entity or Arrangement. Where financial statements exist and are requested by another country, they should be accessible to the requested country's authorities within a reasonable period of time. See also Section IV, below.

13. The principles applicable to collective investment funds or schemes generally follow their legal classification. Thus, for instance, the rules on companies apply to any collective investment fund or scheme operated in the legal form of a company. Furthermore, as collective investment funds are typically regulated, the jurisdiction that regulates the fund will generally require that accounting records are kept.

II. Accounting record retention period

14. Accounting records need to be kept for a minimum period that should be equal to the period established in this area by the Financial Action Task Force. This period is currently five years. A five-year period represents a minimum period and longer periods are, of course, also acceptable.

III. Ensuring the maintenance of reliable accounting records

15. Countries should have in place a system or structure that ensures that accounting records, consistent with the standards set out in the first three paragraphs of B.I (Maintenance of reliable accounting records), are kept. There are different ways in which this objective can be achieved. Countries should consider which system is most effective and appropriate in the context of their particular circumstances and the discussion below is intended to give examples of possible approaches without trying to be exhaustive. The design of the system and its composition are for each country to decide. Note that some of the approaches described below may not be sufficient on their own and may need to be combined with others to achieve the intended objective.

16. *Governing Law (including company law, partnership law, trust law) and Commercial Law*. For instance, the governing law may require the maintenance of reliable accounting records and provide for effective sanctions where this requirement is not met. Such sanctions may include effective penalties imposed on the Relevant Entity or Arrangement and persons responsible for its actions (e.g. directors, trustees, partners) and may, where possible and appropriate, include striking off an entity from a company or similar registry.

17. The applicable law may further require the preparation of financial statements and may require a person such as a company director to attest that the financial statements provide a full and fair picture of the affairs of the Relevant Entity or Arrangements. The law may further require that the financial statements be audited. Furthermore, financial statements may have to be filed with a governmental authority or the law may require the filing of a statement to the effect that complete and reliable accounting records are being maintained and can be inspected upon request. Filing of incorrect information would typically trigger significant penalties or other sanctions.

Such mechanisms either implicitly or explicitly assist in ensuring that reliable accounting records exist and enhance the integrity and credibility of the information.

18. *Financial Regulatory Law, Anti-money Laundering Law or other Regulatory Law*. Financial regulatory law may impose the obligation to keep reliable accounting records on all regulated entities and a failure to comply with such obligation may trigger significant penalties such as monetary fines and a possible withdrawal of the authorisation to conduct the financial business in question. Furthermore, anti-money laundering rules typically require the retention of transactional records by all persons covered by the legislation or implementing regulations and violations of these obligations trigger a range of penalties which may include criminal law consequences.

19. The keeping of reliable accounting records may also result from the regulation of company and trust service providers. For instance, a company and trust service provider acting as a trustee or company director or manager may be required to keep adequate and orderly accounting records for all trust or company transactions. A screening process focused on the integrity and competence of persons wishing to perform company and trust services along with adequate ongoing supervision of their activities, significant monetary fines for rule violations and the possibility that a license may be withdrawn could be effective ways of ensuring that reliable accounting records are kept.

20. *Tax Law*. Tax laws will typically require that taxpayers keep reliable accounting records. Tax laws contain a range of sanctions in cases where reliable accounting records are not kept (e.g. interest charges, monetary penalties, assessment on the basis of an estimated tax, possible criminal consequences).

21. *Effective Self-executing Mechanisms*. In certain cases the maintenance of reliable accounting records may also be helped through the respective interests of the parties involved. For example, in the area of collective investment funds, commercial realities may be such that, in practice, a fund would not be able to attract and retain investor funds if it did not have in place a system to ensure the maintenance of reliable accounting records.

IV. Access to accounting records

22. Where accounting records are requested by another party they should be accessible to the requested country's authorities within a reasonable period of time. In particular, the requested country's authorities should have the power to obtain accounting records from any person within their jurisdiction who has possession of, or has control of, or has the ability to obtain, such information. This also means that a requested country should have effective enforcement provisions, including effective sanctions for non-compliance (e.g. sanctions for

any person who, following notification, refuses to supply information, destroys documents in his possession or transfers them beyond his control). The particular design of enforcement provisions will often be influenced by the approach chosen to ensure that reliable accounting records are kept.[70]

23. This obligation does not necessarily entail a requirement to keep accounting records onshore. However, where accounting records are permitted to be kept offshore, countries should have a system in place that permits their authorities to gain access to such records in a timely fashion.

Appendix to the final JAHGA paper
Explanatory note on trusts

1. Definitions of a trust are to be found in the domestic trust law of those jurisdictions where such laws exist. Alternatively the definition can be taken from the Hague Convention on the Recognition of Trusts.

2. As an example of a definition incorporated in a trust law, the following is taken from the Trusts (Guernsey) Law, 1989, which mirrors the definition in the Jersey (Trusts) Law, 1984:

> "A trust exists if a person (a "trustee") holds or has vested in him, or is deemed to hold or have vested in him, property which does not form, or which has ceased to form, part of his own estate —
>
> a. for the benefit of another person (a "beneficiary"), whether or not yet ascertained or in existence;
>
> b. for any purpose which is not for the benefit only of the trustee."

The Hague Convention on the Law Applicable to Trusts and their Recognition (1985) provides as follows in Article II —

3. "For the purposes of this Convention, the term "trust" refers to legal relationships created …. by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose".

4. The definition of a trust whether included in domestic law or in the Hague Convention normally embraces a wide range of types of trust.

5. It is important to remember that a trust is not a legal entity, it is a relationship between juridical persons – settlor, trustee, beneficiary.

70. The principles outlined in this paragraph should also apply to the ability of countries to obtain financial statements, where financial statements exist.

Express Trusts

6. These are trusts created voluntarily and intentionally, either orally or in writing —

- inter-vivos by the settlor executing an act or instrument of settlement made between the settlor and the trustees under which the settlor transfers assets to the trustees to hold subject to the terms of the trusts set out therein;
- inter-vivos by the settlor transferring assets to the trustees and the trustees executing a declaration of trust (to which the settlor is not a party) whereby the trustees acknowledge that they hold the assets subject to the terms of the trusts set out in the instrument; or
- on death by the Will of the testator taking effect, whereby the testator's executors are directed to transfer all or part of the testator's estate to trustees (who may be the executors) to hold subject to the trusts set out in the Will.

7. The following are forms of express trusts. Within any trust, different elements of the following may be found.

(a) Bare/Simple Trust

A bare trust is one in which each beneficiary has an immediate and absolute right to both capital and income.

(b) Discretionary Trust

This is a form of trust where the interests of the beneficiaries are not fixed but depend upon the exercise by the trustee of some discretionary powers in their favour. As such it is the most flexible of all trusts.

(c) Interest in Possession Trust

This is a trust where a particular beneficiary (the "life tenant") has a right to receive all the income arising from the trust fund during his life time. The trustee will usually also have a power to apply capital to the life tenant. Often there are successive life interests in favour of an individual and his spouse. On the death of the life tenant the remainder of the trust fund is often held on discretionary trusts for the other beneficiaries.

(d) Fixed Trust

A trust where the interests of beneficiaries are fixed. The trustees will have control over the management of the assets but the interests of the beneficiaries are defined in and by the trust instrument. Typically such a trust may

provide an income which is paid, say, to the wife of the settlor and capital to the children on her death.

(e) Accumulation and Maintenance Trust

This form of trust is usually created for the children or grand-children of the settlor, where the trustees have powers during the minority of each beneficiary to pay income in a way beneficial for the upbringing or education of the beneficiary, and to accumulate income not so applied. On attaining a certain age each beneficiary will become entitled to a particular share of the trust fund.

(f) Protective Trust

A trust where the interest of a beneficiary may be reduced or terminated, for example on the happening of events (a common scenario may be if the beneficiary attempts to alienate or dispose of his interest in income or capital).

(g) Employee Share/Options Trusts

Trusts established by institutions in favour of their employees.

(h) Pension Fund Trusts

Trusts established to provide pensions for employees and their dependants.

(i) Charitable Trust

A trust established purely for charitable purposes. In this case there needs to be an enforcer.

(j) Purpose Trust

A trust established for one or more specific purposes. There are no named or ascertainable beneficiaries and there is commonly an enforcer to enforce the terms of the purpose trust.

(k) Commercial Trusts

The major applications include —

- unit trusts;
- debenture trusts for bond holders;
- securitisation trusts for balance sheet reconstructions;
- client account trusts for lawyers and other providers of professional services, separate from the provider's own assets;
- retention fund trusts, pending completion of contracted work.

Implied Trusts

8. A trust can also arise from an oral declaration or by conduct and may be deemed by the Court to have been created in certain circumstances. On account of their very nature there are no formal requirements for those trusts. Usually the existence of such trusts is only recognised as a result of legal action.

Resulting Trusts

9. Both express and implied trusts require an intention for their creation. A resulting trust arises where the intention is absent and yet the legal title to property is transferred from one person to another. By way of example, where X transfers £100 to Y at the same time as executing an Express Trust in respect of £80, only the balance of £20 is held on a Resulting Trust to be retransferred back to X. In this situation, in the absence of intention, the beneficial ownership remains with the Transferor.

Constructive Trusts

10. Constructive Trusts are those Trusts that arise in circumstances in which it would be unconscionable or inequitable for a person holding the property to keep it for his own use and benefit absolutely. A constructive trust can arise in a number of differing scenarios covering a broad spectrum of activity. The proceeds of criminal activity can be traced into the hands of the recipient's bankers who, once alerted, would hold them as constructive trustee on behalf of those to whom they actually belong.

11. Trusts may also be classified according to why they are created and may include —

- private trusts – made for the benefit of specific private individuals, or a class thereof;
- public trusts – made for the benefit of the public at large, or a section of the public – for example a charitable trust established to relieve poverty, to advance education or to promote religion;
- purpose trusts (see above).

12. This brief, and limited, description of trusts shows that the concept encompasses a wide variety of arrangements. Essential to them all is that legal ownership and control is passed from the settlor to the trustee.

Explanatory note on partnerships

Partnerships exist under the laws of many jurisdictions. While definitions vary among jurisdictions, a common characteristic is that a partnership is an association of two or more persons, formed by agreement to jointly pursue a common objective.

In many common law jurisdictions an essential element of a partnership is that the "common objective" must consist of the carrying on of a business for profit. For instance, Section 1 of the UK Partnership Act 1890 defines a partnership as "the relation which subsists between persons carrying on a business in common with a view of profit." Identical definitions are found in the laws of Australia, Bermuda, Canada, Ireland and many other jurisdictions that have followed UK legal principles. Very similarly, under the U.S. Uniform Partnership Act[71] a partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit."

In many civil law countries, such as Germany or Spain, partnerships may be formed to pursue a common objective either of a business or a non-business nature and a profit motive is not a necessary prerequisite.

The laws of many jurisdictions distinguish between general partnerships and limited partnerships. The most noteworthy features of a general partnership are that all its partners have unlimited liability for the financial obligations of the partnership and that all partners have the right to participate in the management of the partnership. In contrast, the limited partners of a limited partnership do not have unlimited liability for the financial obligations of the partnership and they do not have a statutory right to manage the affairs of the partnership. The liability of limited partners for the obligations of the partnership is limited to the amount of their capital contribution required under the terms of the partnership agreement and the applicable law. Furthermore, limited partnerships must have at least one general partner with unlimited liability.

71. Uniform Partnership Act, Sec. 6(1); Revised Uniform Partnership Act, Sec. 101(4).

The laws of many jurisdictions also recognise other types of partnerships. One such type is the limited liability partnership. A limited liability partnership is a hybrid of a general and a limited partnership. It typically allows participation in the management of the partnerships by all partners but limits the liability of the partners for financial obligations of the partnership. The limited liability partnership itself is liable for all its debts and obligations and its liability is limited to its own funds. The partners are shielded from all liabilities, other than liabilities arising from their own acts.

Part III

FATF Recommendations and guidance on transparency and beneficial ownership

The FATF documents below are listed in Annex 1 to the 2016 Terms of Reference as considered relevant for the work of the Global Forum.

- Recommendation 10 on Customer due diligence and its interpretative note, in particular regarding the method of identifying the beneficial ownership of a legal person or arrangement set out in Recommendation 10(5)(b)(i) and (ii), as published in the FATF Recommendations (first published in February 2012, and subsequently updated October 2015);
- Recommendation 24 on Transparency and beneficial ownership of legal persons and its interpretative note, as published in the FATF Recommendations;
- Recommendation 25 on Transparency and beneficial ownership of legal arrangements and its interpretative note, as published in the FATF Recommendations;
- Immediate Outcome 5 on Legal persons and legal arrangements, and the criteria for assessing technical compliance with Recommendations 10, 24 and 25, as published in the Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems (first published in February 2013, and subsequently updated October 2015); and
- Guidance on Transparency and Beneficial Ownership (October 2014).

Note: Whereas the Global Forum considers the documents as at the dates mentioned in the list above, it should be noted that the work of the FATF continues to evolve and updated versions of these documents can be found on the FATF website at: http://www.fatf-gafi.org/.

Extracts from: FATF (2012) *The FATF Recommendations – International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, updated October 2015, FATF, Paris, www.fatf-gafi.org/recommendations

CUSTOMER DUE DILIGENCE AND RECORD-KEEPING

RECOMMENDATION 10. CUSTOMER DUE DILIGENCE

Financial institutions should be prohibited from keeping anonymous accounts or accounts in obviously fictitious names.

Financial institutions should be required to undertake customer due diligence (CDD) measures when:

(i) establishing business relations;

(ii) carrying out occasional transactions: (i) above the applicable designated threshold (USD/EUR 15,000); or (ii) that are wire transfers in the circumstances covered by the Interpretive Note to Recommendation 16;

(iii) there is a suspicion of money laundering or terrorist financing; or

(iv) the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.

The principle that financial institutions should conduct CDD should be set out in law. Each country may determine how it imposes specific CDD obligations, either through law or enforceable means.

The CDD measures to be taken are as follows:

(a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information.

(b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership and control structure of the customer.

(c) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship.

(d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.

Financial institutions should be required to apply each of the CDD measures under (a) to (d) above, but should determine the extent of such measures using a risk-based approach (RBA) in accordance with the Interpretive Notes to this Recommendation and to Recommendation 1.

Financial institutions should be required to verify the identity of the customer and beneficial owner before or during the course of establishing a business relationship or conducting transactions for occasional customers. Countries may permit financial institutions to complete the verification as soon as reasonably practicable following the establishment of the relationship, where the money laundering and terrorist financing risks are effectively managed and where this is essential not to interrupt the normal conduct of business.

Where the financial institution is unable to comply with the applicable requirements under paragraphs (a) to (d) above (subject to appropriate modification of the extent of the measures on a risk-based approach), it should be required not to open the account, commence business relations or perform the transaction; or should be required to terminate the business relationship; and should consider making a suspicious transactions report in relation to the customer.

These requirements should apply to all new customers, although financial institutions should also apply this Recommendation to existing customers on the basis of materiality and risk, and should conduct due diligence on such existing relationships at appropriate times.

INTERPRETIVE NOTE TO RECOMMENDATION 10 (CUSTOMER DUE DILIGENCE)

A. CUSTOMER DUE DILIGENCE AND TIPPING-OFF

1. If, during the establishment or course of the customer relationship, or when conducting occasional transactions, a financial institution suspects that transactions relate to money laundering or terrorist financing, then the institution should:

   (a) normally seek to identify and verify the identity[72] of the customer and the beneficial owner, whether permanent or occasional, and irrespective of any exemption or any designated threshold that might otherwise apply; and

   (b) make a suspicious transaction report (STR) to the financial intelligence unit (FIU), in accordance with Recommendation 20.

2. Recommendation 21 prohibits financial institutions, their directors, officers and employees from disclosing the fact that an STR or related information is being reported to the FIU. A risk exists that customers could be unintentionally tipped off when the financial institution is seeking to perform its customer due diligence (CDD) obligations in these circumstances. The customer's awareness of a possible STR or investigation could compromise future efforts to investigate the suspected money laundering or terrorist financing operation.

3. Therefore, if financial institutions form a suspicion that transactions relate to money laundering or terrorist financing, they should take into account the risk of tipping-off when performing the CDD process. If the institution reasonably believes that performing the CDD process will tip-off the customer or potential customer, it may choose not to pursue that process, and should file an STR. Institutions should ensure that their employees are aware of, and sensitive to, these issues when conducting CDD.

B. CDD – PERSONS ACTING ON BEHALF OF A CUSTOMER

4. When performing elements (a) and (b) of the CDD measures specified under Recommendation 10, financial institutions should also be required to verify that any person purporting to act on behalf of the customer is so authorised, and should identify and verify the identity of that person.

72. Reliable, independent source documents, data or information will hereafter be referred to as "identification data."

C. CDD FOR LEGAL PERSONS AND ARRANGEMENTS

5. When performing CDD measures in relation to customers that are legal persons or legal arrangements[73], financial institutions should be required to identify and verify the identity of the customer, and understand the nature of its business, and its ownership and control structure. The purpose of the requirements set out in (a) and (b) below, regarding the identification and verification of the customer and the beneficial owner, is twofold: first, to prevent the unlawful use of legal persons and arrangements, by gaining a sufficient understanding of the customer to be able to properly assess the potential money laundering and terrorist financing risks associated with the business relationship; and, second, to take appropriate steps to mitigate the risks. As two aspects of one process, these requirements are likely to interact and complement each other naturally. In this context, financial institutions should be required to:

   (a) Identify the customer and verify its identity. The type of information that would normally be needed to perform this function would be:

      (i) Name, legal form and proof of existence – verification could be obtained, for example, through a certificate of incorporation, a certificate of good standing, a partnership agreement, a deed of trust, or other documentation from a reliable independent source proving the name, form and current existence of the customer.

      (ii) The powers that regulate and bind the legal person or arrangement (e.g. the memorandum and articles of association of a company), as well as the names of the relevant persons having a senior management position in the legal person or arrangement (e.g. senior managing directors in a company, trustee(s) of a trust).

      (iii) The address of the registered office, and, if different, a principal place of business.

73. In these Recommendations references to legal arrangements such as trusts (or other similar arrangements) being the customer of a financial institution or DNFBP or carrying out a transaction, refers to situations where a natural or legal person that is the trustee establishes the business relationship or carries out the transaction on the behalf of the beneficiaries or according to the terms of the trust. The normal CDD requirements for customers that are natural or legal persons would continue to apply, including paragraph 4 of INR.10, but the additional requirements regarding the trust and the beneficial owners of the trust (as defined) would also apply.

(b) Identify the beneficial owners of the customer and take reasonable measures[74] to verify the identity of such persons, through the following information:

(i) For legal persons[75]:

(i.i) The identity of the natural persons (if any – as ownership interests can be so diversified that there are no natural persons (whether acting alone or together) exercising control of the legal person or arrangement through ownership) who ultimately have a controlling ownership interest[76] in a legal person; and

(i.ii) to the extent that there is doubt under (i.i) as to whether the person(s) with the controlling ownership interest are the beneficial owner(s) or where no natural person exerts control through ownership interests, the identity of the natural persons (if any) exercising control of the legal person or arrangement through other means.

(i.iii) Where no natural person is identified under (i.i) or (i.ii) above, financial institutions should identify and take reasonable measures to verify the identity of the relevant natural person who holds the position of senior managing official.

(ii) For legal arrangements:

(ii.i) Trusts – the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries[77], and any other natural person exercising

74. In determining the reasonableness of the identity verification measures, regard should be had to the money laundering and terrorist financing risks posed by the customer and the business relationship.

75. Measures (i.i) to (i.iii) are not alternative options, but are cascading measures, with each to be used where the previous measure has been applied and has not identified a beneficial owner.

76. A controlling ownership interest depends on the ownership structure of the company. It may be based on a threshold, e.g. any person owning more than a certain percentage of the company (e.g. 25%).

77. For beneficiary(ies) of trusts that are designated by characteristics or by class, financial institutions should obtain sufficient information concerning the beneficiary to satisfy the financial institution that it will be able to establish the identity of the beneficiary at the time of the payout or when the beneficiary intends to exercise vested rights.

ultimate effective control over the trust (including through a chain of control/ownership);

(ii.ii) Other types of legal arrangements – the identity of persons in equivalent or similar positions.

Where the customer or the owner of the controlling interest is a company listed on a stock exchange and subject to disclosure requirements (either by stock exchange rules or through law or enforceable means) which impose requirements to ensure adequate transparency of beneficial ownership, or is a majority-owned subsidiary of such a company, it is not necessary to identify and verify the identity of any shareholder or beneficial owner of such companies.

The relevant identification data may be obtained from a public register, from the customer or from other reliable sources.

D. CDD FOR BENEFICIARIES OF LIFE INSURANCE POLICIES

6. For life or other investment-related insurance business, financial institutions should, in addition to the CDD measures required for the customer and the beneficial owner, conduct the following CDD measures on the beneficiary(ies) of life insurance and other investment related insurance policies, as soon as the beneficiary(ies) are identified/designated:

   (a) For beneficiary(ies) that are identified as specifically named natural or legal persons or legal arrangements – taking the name of the person;

   (b) For beneficiary(ies) that are designated by characteristics or by class (e.g. spouse or children at the time that the insured event occurs) or by other means (e.g. under a will) – obtaining sufficient information concerning the beneficiary to satisfy the financial institution that it will be able to establish the identity of the beneficiary at the time of the payout.

   The information collected under (a) and/or (b) should be recorded and maintained in accordance with the provisions of Recommendation 11.

7. For both the cases referred to in 6(a) and (b) above, the verification of the identity of the beneficiary(ies) should occur at the time of the payout.

8. The beneficiary of a life insurance policy should be included as a relevant risk factor by the financial institution in determining whether

enhanced CDD measures are applicable. If the financial institution determines that a beneficiary who is a legal person or a legal arrangement presents a higher risk, then the enhanced CDD measures should include reasonable measures to identify and verify the identity of the beneficial owner of the beneficiary, at the time of payout.

9. Where a financial institution is unable to comply with paragraphs 6 to 8 above, it should consider making a suspicious transaction report.

E. RELIANCE ON IDENTIFICATION AND VERIFICATION ALREADY PERFORMED

10. The CDD measures set out in Recommendation 10 do not imply that financial institutions have to repeatedly identify and verify the identity of each customer every time that a customer conducts a transaction. An institution is entitled to rely on the identification and verification steps that it has already undertaken, unless it has doubts about the veracity of that information. Examples of situations that might lead an institution to have such doubts could be where there is a suspicion of money laundering in relation to that customer, or where there is a material change in the way that the customer's account is operated, which is not consistent with the customer's business profile.

F. TIMING OF VERIFICATION

11. Examples of the types of circumstances (in addition to those referred to above for beneficiaries of life insurance policies) where it would be permissible for verification to be completed after the establishment of the business relationship, because it would be essential not to interrupt the normal conduct of business, include:

- Non face-to-face business.
- Securities transactions. In the securities industry, companies and intermediaries may be required to perform transactions very rapidly, according to the market conditions at the time the customer is contacting them, and the performance of the transaction may be required before verification of identity is completed.

12. Financial institutions will also need to adopt risk management procedures with respect to the conditions under which a customer may utilise the business relationship prior to verification. These procedures should include a set of measures, such as a limitation of the number, types and/or amount of transactions that can be performed and the monitoring of large or complex transactions being carried out outside the expected norms for that type of relationship.

G. EXISTING CUSTOMERS

13. Financial institutions should be required to apply CDD measures to existing customers[78] on the basis of materiality and risk, and to conduct due diligence on such existing relationships at appropriate times, taking into account whether and when CDD measures have previously been undertaken and the adequacy of data obtained.

H. RISK BASED APPROACH[79]

14. The examples below are not mandatory elements of the FATF Standards, and are included for guidance only. The examples are not intended to be comprehensive, and although they are considered to be helpful indicators, they may not be relevant in all circumstances.

Higher risks

15. There are circumstances where the risk of money laundering or terrorist financing is higher, and enhanced CDD measures have to be taken. When assessing the money laundering and terrorist financing risks relating to types of customers, countries or geographic areas, and particular products, services, transactions or delivery channels, examples of potentially higher-risk situations (in addition to those set out in Recommendations 12 to 16) include the following:

(a) Customer risk factors:

- The business relationship is conducted in unusual circumstances (e.g. significant unexplained geographic distance between the financial institution and the customer).
- Non-resident customers.
- Legal persons or arrangements that are personal asset-holding vehicles.
- Companies that have nominee shareholders or shares in bearer form.
- Business that are cash-intensive.

78. Existing customers as at the date that the national requirements are brought into force.
79. The RBA does not apply to the circumstances when CDD should be required but may be used to determine the extent of such measures.

- The ownership structure of the company appears unusual or excessively complex given the nature of the company's business.

(b) Country or geographic risk factors:[80]

- Countries identified by credible sources, such as mutual evaluation or detailed assessment reports or published follow-up reports, as not having adequate AML/CFT systems.
- Countries subject to sanctions, embargos or similar measures issued by, for example, the United Nations.
- Countries identified by credible sources as having significant levels of corruption or other criminal activity.
- Countries or geographic areas identified by credible sources as providing funding or support for terrorist activities, or that have designated terrorist organisations operating within their country.

(c) Product, service, transaction or delivery channel risk factors:

- Private banking.
- Anonymous transactions (which may include cash).
- Non-face-to-face business relationships or transactions.
- Payment received from unknown or un-associated third parties

Lower risks

16. There are circumstances where the risk of money laundering or terrorist financing may be lower. In such circumstances, and provided there has been an adequate analysis of the risk by the country or by the financial institution, it could be reasonable for a country to allow its financial institutions to apply simplified CDD measures.

17. When assessing the money laundering and terrorist financing risks relating to types of customers, countries or geographic areas, and particular products, services, transactions or delivery channels, examples of potentially lower risk situations include the following:

80. Under Recommendation 19 it is mandatory for countries to require financial institutions to apply enhanced due diligence when the FATF calls for such measures to be introduced.

(a) Customer risk factors:

- Financial institutions and DNFBPs – where they are subject to requirements to combat money laundering and terrorist financing consistent with the FATF Recommendations, have effectively implemented those requirements, and are effectively supervised or monitored in accordance with the Recommendations to ensure compliance with those requirements.
- Public companies listed on a stock exchange and subject to disclosure requirements (either by stock exchange rules or through law or enforceable means), which impose requirements to ensure adequate transparency of beneficial ownership.
- Public administrations or enterprises.

(b) Product, service, transaction or delivery channel risk factors:

- Life insurance policies where the premium is low (e.g. an annual premium of less than USD/EUR 1,000 or a single premium of less than USD/EUR 2,500).
- Insurance policies for pension schemes if there is no early surrender option and the policy cannot be used as collateral.
- A pension, superannuation or similar scheme that provides retirement benefits to employees, where contributions are made by way of deduction from wages, and the scheme rules do not permit the assignment of a member's interest under the scheme.
- Financial products or services that provide appropriately defined and limited services to certain types of customers, so as to increase access for financial inclusion purposes.

(c) Country risk factors:

- Countries identified by credible sources, such as mutual evaluation or detailed assessment reports, as having effective AML/CFT systems.
- Countries identified by credible sources as having a low level of corruption or other criminal activity.

In making a risk assessment, countries or financial institutions could, when appropriate, also take into account possible variations in money laundering and terrorist financing risk between different regions or areas within a country.

18. Having a lower money laundering and terrorist financing risk for identification and verification purposes does not automatically mean that the same customer is lower risk for all types of CDD measures, in particular for ongoing monitoring of transactions.

Risk variables

19. When assessing the money laundering and terrorist financing risks relating to types of customers, countries or geographic areas, and particular products, services, transactions or delivery channels risk, a financial institution should take into account risk variables relating to those risk categories. These variables, either singly or in combination, may increase or decrease the potential risk posed, thus impacting the appropriate level of CDD measures. Examples of such variables include:

- The purpose of an account or relationship.
- The level of assets to be deposited by a customer or the size of transactions undertaken.
- The regularity or duration of the business relationship.

Enhanced CDD measures

20. Financial institutions should examine, as far as reasonably possible, the background and purpose of all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or lawful purpose. Where the risks of money laundering or terrorist financing are higher, financial institutions should be required to conduct enhanced CDD measures, consistent with the risks identified. In particular, they should increase the degree and nature of monitoring of the business relationship, in order to determine whether those transactions or activities appear unusual or suspicious. Examples of enhanced CDD measures that could be applied for higher-risk business relationships include:

- Obtaining additional information on the customer (e.g. occupation, volume of assets, information available through public databases, internet, etc.), and updating more regularly the identification data of customer and beneficial owner.
- Obtaining additional information on the intended nature of the business relationship.
- Obtaining information on the source of funds or source of wealth of the customer.

- Obtaining information on the reasons for intended or performed transactions.
- Obtaining the approval of senior management to commence or continue the business relationship.
- Conducting enhanced monitoring of the business relationship, by increasing the number and timing of controls applied, and selecting patterns of transactions that need further examination.
- Requiring the first payment to be carried out through an account in the customer's name with a bank subject to similar CDD standards.

Simplified CDD measures

21. Where the risks of money laundering or terrorist financing are lower, financial institutions could be allowed to conduct simplified CDD measures, which should take into account the nature of the lower risk. The simplified measures should be commensurate with the lower risk factors (e.g. the simplified measures could relate only to customer acceptance measures or to aspects of ongoing monitoring). Examples of possible measures are:

- Verifying the identity of the customer and the beneficial owner after the establishment of the business relationship (e.g. if account transactions rise above a defined monetary threshold).
- Reducing the frequency of customer identification updates.
- Reducing the degree of on-going monitoring and scrutinising transactions, based on a reasonable monetary threshold.
- Not collecting specific information or carrying out specific measures to understand the purpose and intended nature of the business relationship, but inferring the purpose and nature from the type of transactions or business relationship established.

Simplified CDD measures are not acceptable whenever there is a suspicion of money laundering or terrorist financing, or where specific higher-risk scenarios apply.

Thresholds

22. The designated threshold for occasional transactions under Recommendation 10 is USD/EUR 15,000. Financial transactions above the designated threshold include situations where the transaction is carried out in a single operation or in several operations that appear to be linked.

Ongoing due diligence

23. Financial institutions should be required to ensure that documents, data or information collected under the CDD process is kept up-to-date and relevant by undertaking reviews of existing records, particularly for higher-risk categories of customers.

RECOMMENDATION 24. TRANSPARENCY AND BENEFICIAL OWNERSHIP OF LEGAL PERSONS

Countries should take measures to prevent the misuse of legal persons for money laundering or terrorist financing. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries that have legal persons that are able to issue bearer shares or bearer share warrants, or which allow nominee shareholders or nominee directors, should take effective measures to ensure that they are not misused for money laundering or terrorist financing. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22.

INTERPRETIVE NOTE TO RECOMMENDATION 24 (TRANSPARENCY AND BENEFICIAL OWNERSHIP OF LEGAL PERSONS)

1. Competent authorities should be able to obtain, or have access in a timely fashion to, adequate, accurate and current information on the beneficial ownership and control of companies and other legal persons (beneficial ownership information[81]) that are created[82] in the country. Countries may choose the mechanisms they rely on to achieve this objective, although they should also comply with the minimum requirements set out below. It is also very likely that countries will need to utilise a combination of mechanisms to achieve the objective.

2. As part of the process of ensuring that there is adequate transparency regarding legal persons, countries should have mechanisms that:

   (a) identify and describe the different types, forms and basic features of legal persons in the country.

81. Beneficial ownership information for legal persons is the information referred to in the interpretive note to Recommendation 10, paragraph 5(b)(i). Controlling shareholders as referred to in, paragraph 5(b)(i) of the interpretive note to Recommendation 10 may be based on a threshold, e.g. any persons owning more than a certain percentage of the company (e.g. 25%).

82. References to creating a legal person, include incorporation of companies or any other mechanism that is used.

(b) identify and describe the processes for: (i) the creation of those legal persons; and (ii) the obtaining and recording of basic and beneficial ownership information;

(c) make the above information publicly available; and

(d) assess the money laundering and terrorist financing risks associated with different types of legal persons created in the country.

A. BASIC INFORMATION

3. In order to determine who the beneficial owners of a company are, competent authorities will require certain basic information about the company, which, at a minimum, would include information about the legal ownership and control structure of the company. This would include information about the status and powers of the company, its shareholders and its directors.

4. All companies created in a country should be registered in a company registry.[83] Whichever combination of mechanisms is used to obtain and record beneficial ownership information (see section B), there is a set of basic information on a company that needs to be obtained and recorded by the company[84] as a necessary prerequisite. The minimum basic information to be obtained and recorded by a company should be:

(a) company name, proof of incorporation, legal form and status, the address of the registered office, basic regulating powers (e.g. memorandum & articles of association), a list of directors; and

(b) a register of its shareholders or members, containing the names of the shareholders and members and number of shares held by each shareholder[85] and categories of shares (including the nature of the associated voting rights).

5. The company registry should record all the basic information set out in paragraph 4(a) above.

83. "Company registry" refers to a register in the country of companies incorporated or licensed in that country and normally maintained by or for the incorporating authority. It does not refer to information held by or for the company itself.

84. The information can be recorded by the company itself or by a third person under the company's responsibility.

85. This is applicable to the nominal owner of all registered shares.

6. The company should maintain the basic information set out in paragraph 4(b) within the country, either at its registered office or at another location notified to the company registry. However, if the company or company registry holds beneficial ownership information within the country, then the register of shareholders need not be in the country, provided that the company can provide this information promptly on request.

B. BENEFICIAL OWNERSHIP INFORMATION

7. Countries should ensure that either: (a) information on the beneficial ownership of a company is obtained by that company and available at a specified location in their country; or (b) there are mechanisms in place so that the beneficial ownership of a company can be determined in a timely manner by a competent authority.

8. In order to meet the requirements in paragraph 7, countries should use one or more of the following mechanisms:

   (a) Requiring companies or company registries to obtain and hold up-to-date information on the companies' beneficial ownership;

   (b) Requiring companies to take reasonable measures[86] to obtain and hold up-to-date information on the companies' beneficial ownership;

   (c) Using existing information, including: (i) information obtained by financial institutions and/or DNFBPs, in accordance with Recommendations 10 and 22[87]; (ii) information held by other competent authorities on the legal and beneficial ownership of companies (e.g. company registries, tax authorities or financial or other regulators); (iii) information held by the company as required above in Section A; and (iv) available information on companies listed on a stock exchange, where disclosure requirements (either by stock exchange rules or through law or enforceable means) impose requirements to ensure adequate transparency of beneficial ownership.

9. Regardless of which of the above mechanisms are used, countries should ensure that companies cooperate with competent authorities to

86. Measures taken should be proportionate to the level of risk or complexity induced by the ownership structure of the company or the nature of the controlling shareholders.

87. Countries should be able to determine in a timely manner whether a company has an account with a financial institution within the country.

the fullest extent possible in determining the beneficial owner. This should include:

(a) Requiring that one or more natural persons resident in the country is authorised by the company[88], and accountable to competent authorities, for providing all basic information and available beneficial ownership information, and giving further assistance to the authorities; and/or

(b) Requiring that a DNFBP in the country is authorised by the company, and accountable to competent authorities, for providing all basic information and available beneficial ownership information, and giving further assistance to the authorities; and/or

(c) Other comparable measures, specifically identified by the country, which can effectively ensure cooperation.

10. All the persons, authorities and entities mentioned above, and the company itself (or its administrators, liquidators or other persons involved in the dissolution of the company), should maintain the information and records referred to for at least five years after the date on which the company is dissolved or otherwise ceases to exist, or five years after the date on which the company ceases to be a customer of the professional intermediary or the financial institution.

C. TIMELY ACCESS TO CURRENT AND ACCURATE INFORMATION

11. Countries should have mechanisms that ensure that basic information, including information provided to the company registry, is accurate and updated on a timely basis. Countries should require that any available information referred to in paragraph 7 is accurate and is kept as current and up-to-date as possible, and the information should be updated within a reasonable period following any change.

12. Competent authorities, and in particular law enforcement authorities, should have all the powers necessary to be able to obtain timely access to the basic and beneficial ownership information held by the relevant parties.

13. Countries should require their company registry to facilitate timely access by financial institutions, DNFBPs and other countries' competent authorities to the public information they hold, and, at a minimum to the information referred to in paragraph 4(a) above. Countries should also

88. Members of the company's board or senior management may not require specific authorisation by the company.

consider facilitating timely access by financial institutions and DNFBPs to information referred to in paragraph 4(b) above.

D. OBSTACLES TO TRANSPARENCY

14. Countries should take measures to prevent the misuse of bearer shares and bearer share warrants, for example by applying one or more of the following mechanisms: (a) prohibiting them; (b) converting them into registered shares or share warrants (for example through dematerialisation); (c) immobilising them by requiring them to be held with a regulated financial institution or professional intermediary; or (d) requiring shareholders with a controlling interest to notify the company, and the company to record their identity.

15. Countries should take measures to prevent the misuse of nominee shares and nominee directors, for example by applying one or more of the following mechanisms: (a) requiring nominee shareholders and directors to disclose the identity of their nominator to the company and to any relevant registry, and for this information to be included in the relevant register; or (b) requiring nominee shareholders and directors to be licensed, for their nominee status to be recorded in company registries, and for them to maintain information identifying their nominator, and make this information available to the competent authorities upon request.

E. OTHER LEGAL PERSONS

16. In relation to foundations, Anstalt, and limited liability partnerships, countries should take similar measures and impose similar requirements, as those required for companies, taking into account their different forms and structures.

17. As regards other types of legal persons, countries should take into account the different forms and structures of those other legal persons, and the levels of money laundering and terrorist financing risks associated with each type of legal person, with a view to achieving appropriate levels of transparency. At a minimum, countries should ensure that similar types of basic information should be recorded and kept accurate and current by such legal persons, and that such information is accessible in a timely way by competent authorities. Countries should review the money laundering and terrorist financing risks associated with such other legal persons, and, based on the level of risk, determine the measures that should be taken to ensure that competent authorities have timely access to adequate, accurate and current beneficial ownership information for such legal persons.

F. LIABILITY AND SANCTIONS

18. There should be a clearly stated responsibility to comply with the requirements in this Interpretive Note, as well as liability and effective, proportionate and dissuasive sanctions, as appropriate for any legal or natural person that fails to properly comply with the requirements.

G. INTERNATIONAL COOPERATION

19. Countries should rapidly, constructively and effectively provide international cooperation in relation to basic and beneficial ownership information, on the basis set out in Recommendations 37 and 40. This should include (a) facilitating access by foreign competent authorities to basic information held by company registries; (b) exchanging information on shareholders; and (c) using their powers, in accordance with their domestic law, to obtain beneficial ownership information on behalf of foreign counterparts. Countries should monitor the quality of assistance they receive from other countries in response to requests for basic and beneficial ownership information or requests for assistance in locating beneficial owners residing abroad.

RECOMMENDATION 25. TRANSPARENCY AND BENEFICIAL OWNERSHIP OF LEGAL ARRANGEMENTS

Countries should take measures to prevent the misuse of legal arrangements for money laundering or terrorist financing. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries, that can be obtained or accessed in a timely fashion by competent authorities. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22.

INTERPRETIVE NOTE TO RECOMMENDATION 25 (TRANSPARENCY AND BENEFICIAL OWNERSHIP OF LEGAL ARRANGEMENTS)

1. Countries should require trustees of any express trust governed under their law to obtain and hold adequate, accurate, and current beneficial ownership information regarding the trust. This should include 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. Countries should also require trustees of any trust governed under their law to hold basic information on other regulated agents of, and service providers to, the trust, including investment advisors or managers, accountants, and tax advisors.

2. All countries should take measures to ensure that trustees disclose their status to financial institutions and DNFBPs when, as a trustee, forming a business relationship or carrying out an occasional transaction above the threshold. Trustees should not be prevented by law or enforceable means from providing competent authorities with any information relating to the trust[89]; or from providing financial institutions and DNFBPs, upon request, with information on the beneficial ownership and the assets of the trust to be held or managed under the terms of the business relationship.

3. Countries are encouraged to ensure that other relevant authorities, persons and entities hold information on all trusts with which they

89. Domestic competent authorities or the relevant competent authorities of another country pursuant to an appropriate international cooperation request.

have a relationship. Potential sources of information on trusts, trustees, and trust assets are:

(a) Registries (e.g. a central registry of trusts or trust assets), or asset registries for land, property, vehicles, shares or other assets.

(b) Other competent authorities that hold information on trusts and trustees (e.g. tax authorities which collect information on assets and income relating to trusts).

(c) Other agents and service providers to the trust, including investment advisors or managers, lawyers, or trust and company service providers.

4. Competent authorities, and in particular law enforcement authorities, should have all the powers necessary to obtain timely access to the information held by trustees and other parties, in particular information held by financial institutions and DNFBPs on: (a) the beneficial ownership; (b) the residence of the trustee; and (c) any assets held or managed by the financial institution or DNFBP, in relation to any trustees with which they have a business relationship, or for which they undertake an occasional transaction.

5. Professional trustees should be required to maintain the information referred to in paragraph 1 for at least five years after their involvement with the trust ceases. Countries are encouraged to require non-professional trustees and the other authorities, persons and entities mentioned in paragraph 3 above to maintain the information for at least five years.

6. Countries should require that any information held pursuant to paragraph 1 above should be kept accurate and be as current and up-to-date as possible, and the information should be updated within a reasonable period following any change.

7. Countries should consider measures to facilitate access to any information on trusts that is held by the other authorities, persons and entities referred to in paragraph 3, by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22.

8. In the context of this Recommendation, countries are not required to give legal recognition to trusts. Countries need not include the requirements of paragraphs 1, 2 and 6 in legislation, provided that appropriate obligations to such effect exist for trustees (e.g. through common law or case law).

Other Legal Arrangements

9. As regards other types of legal arrangement with a similar structure or function, countries should take similar measures to those required for trusts, with a view to achieving similar levels of transparency. At a minimum, countries should ensure that information similar to that specified above in respect of trusts should be recorded and kept accurate and current, and that such information is accessible in a timely way by competent authorities.

International Cooperation

10. Countries should rapidly, constructively and effectively provide international cooperation in relation to information, including beneficial ownership information, on trusts and other legal arrangements on the basis set out in Recommendations 37 and 40. This should include (a) facilitating access by foreign competent authorities to any information held by registries or other domestic authorities; (b) exchanging domestically available information on the trusts or other legal arrangement; and (c using their competent authorities' powers, in accordance with domestic law, in order to obtain beneficial ownership information on behalf of foreign counterparts.

Liability and Sanctions

11. Countries should ensure that there are clear responsibilities to comply with the requirements in this Interpretive Note; and that trustees are either legally liable for any failure to perform the duties relevant to meeting the obligations in paragraphs 1, 2, 6 and (where applicable) 5; or that there are effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, for failing to comply.[90] Countries should ensure that there are effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, for failing to grant to competent authorities timely access to information regarding the trust referred to in paragraphs 1 and 5.

90. This does not affect the requirements for effective, proportionate, and dissuasive sanctions for failure to comply with requirements elsewhere in the Recommendations.

Extracts from: FATF (2013) *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems*, updated February 2016, FATF, Paris, www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf

Immediate Outcome 5	Legal persons and arrangements are prevented from misuse for money laundering or terrorist financing, and information on their beneficial ownership is available to competent authorities without impediments.

Characteristics of an effective system:

Measures are in place to:

- prevent legal persons and arrangements from being used for criminal purposes;
- make legal persons and arrangements sufficiently transparent; and
- ensure that accurate and up-to-date basic and beneficial ownership information is available on a timely basis.

Basic information is available publicly, and beneficial ownership information is available to competent authorities. Persons who breach these measures are subject to effective, proportionate and dissuasive sanctions. This results in legal persons and arrangements being unattractive for criminals to misuse for money laundering and terrorist financing.

This outcome relates primarily to Recommendations 24 and 25, and also elements of Recommendations 1, 10, 37 and 40.

Note to Assessors:

Assessors should also consider the relevant findings in relation to the level of international co-operation which competent authorities are participating in when assessing this Immediate Outcome. This would involve considering the extent to which competent authorities seek and are able to provide the appropriate assistance in relation to identifying and exchanging information (including beneficial ownership information) for legal persons and arrangements.

Core Issues to be considered in determining if the Outcome is being achieved

5.1. To what extent is the information on the creation and types of legal persons and arrangements in the country available publicly?

5.2. How well do the relevant competent authorities identify, assess and understand the vulnerabilities, and the extent to which legal persons created in the country can be, or are being misused for ML/TF?

5.3. How well has the country implemented measures to prevent the misuse of legal persons and arrangements for ML/TF purposes?

5.4. To what extent can relevant competent authorities obtain adequate, accurate and current basic and beneficial ownership information on all types of legal persons created in the country, in a timely manner?

5.5. To what extent can relevant competent authorities obtain adequate, accurate and current beneficial ownership information on legal arrangements, in a timely manner?

5.6. To what extent are effective, proportionate and dissuasive sanctions applied against persons who do not comply with the information requirements?

a) Examples of Information that could support the conclusions on Core Issues

1. Contextual information on the types, forms and basic features of legal persons and arrangements in the jurisdiction.

2. Experiences of law enforcement and other relevant competent authorities (e.g. *level of sanctions imposed for breach of the information requirements; where and how basic and beneficial ownership information (including information on the settlor, trustee(s), protector and beneficiaries) is obtained; information used in supporting investigation*).

3. Typologies and examples of the misuse of legal persons and arrangements (e.g. *frequency with which criminal investigations find evidence of the country's legal persons and arrangements being used for ML/TF; legal persons misused for illegal activities dismantled or struck-off).*

4. Sources of basic and beneficial ownership information (e.g. *types of public information available to financial institutions and DNFBPs; types of information held in the company registry or by the company*).

5. Information on the role played by "gatekeepers" (e.g. *company service providers, accountants, legal professionals*) in the formation and administration of legal persons and arrangements.

6. Other information (e.g. *information on existence of legal arrangements; responses (positive and negative) to requests for basic or beneficial ownership information received from other countries; information on the monitoring of quality of assistance*).

b) Examples of Specific Factors that could support the conclusions on Core Issues

7. What are the measures taken to enhance the transparency of legal persons (including dealing with bearer shares and share warrants, and nominee shareholders and directors) and arrangements?

8. How do relevant authorities ensure that accurate and up-to-date basic and beneficial ownership information on legal persons is maintained? Is the presence and accuracy of information monitored, tested/certified or verified?

9. To what extent is the time taken for legal persons to register changes to the required basic and beneficial ownership information adequate to ensure that the information is accurate and up to date? Where applicable, to what extent are similar changes in legal arrangements registered in a timely manner?

10. To what extent can financial institutions and DNFBPs obtain accurate and up-to-date basic and beneficial ownership information on legal persons and arrangements? What is the extent of information that trustees disclose to financial institutions and DNFBPs?

11. Do the relevant authorities have adequate resources to implement the measures adequately?

FATF Guidance on Transparency and Beneficial Ownership (October 2014)

TABLE OF CONTENTS

TABLE OF ACRONYMS

AML/CFT	Anti-Money Laundering / Countering the Financing of Terrorism (also used for *Combating the Financing of Terrorism*)
ACWG	Anti-Corruption Working Group
BO	Beneficial Ownership
CDD	Customer Due Diligence
CEO	Chief Executive Officer
CFATF	Caribbean Financial Action Task Force
CFO	Chief Financial Officer
CFT	Counter-Terrorist Financing
DNFBP	Designated Non-Financial Business or Profession
FATF	Financial Action Task Force
FI	Financial Institution
FIU	Financial Intelligence Unit
IO	Immediate Outcome
IN	Interpretive Note
ML	Money Laundering
NPO	Non-Profit Organisation
OECD	Organisation for Economic Co-operation and Development
PDG	Policy Development Group
R.	Recommendation
STaR	Stolen Asset Recovery Initiative

TCSP	Trust or Company Service Providers
TF	Terrorist Financing
UNODC	World Bank and United Nations Office of Drugs and Crime

GUIDANCE ON TRANSPARENCY AND BENEFICIAL OWNERSHIP (RECOMMENDATIONS 24 & 25)

I. INTRODUCTION

1. Corporate vehicles[91]—such as companies, trusts, foundations, partnerships, and other types of legal persons and arrangements—conduct a wide variety of commercial and entrepreneurial activities. However, despite the essential and legitimate role that corporate vehicles play in the global economy, under certain conditions, they have been misused for illicit purposes, including money laundering (ML), bribery and corruption, insider dealings, tax fraud, terrorist financing (TF), and other illegal activities. This is because, for criminals trying to circumvent anti-money laundering (AML) and counter-terrorist financing (CFT) measures, corporate vehicles are an attractive way to disguise and convert the proceeds of crime before introducing them into the financial system.

2. The misuse of corporate vehicles could be significantly reduced if information regarding both the legal owner and the beneficial owner, the source of the corporate vehicle's assets, and its activities were readily available to the authorities.[92] Legal and beneficial ownership information can assist law enforcement and other competent authorities by identifying those natural persons who may be responsible for the underlying activity of concern, or who may have relevant information to further an investigation. This allows the authorities to "follow the money" in financial investigations involving suspect accounts/assets held by corporate vehicles. In particular, beneficial ownership information[93] can also help locate a given person's assets within a jurisdiction.

91. This paper uses the term corporate vehicles to mean *legal persons* and *legal arrangements*, as defined in the glossary of the *FATF Recommendations*.
92. FATF (2006), and FATF & CFATF (2010).
93. The term *beneficial owner* is defined in chapters IV, and the terms *beneficial ownership information* are defined with respect to legal persons and legal arrangements in chapters V and VI respectively.

However, countries face significant challenges when implementing measures to ensure the timely availability of accurate beneficial owner information. This is particularly challenging when it involves legal persons and legal arrangements spread across multiple jurisdictions.

3. The Financial Action Task Force (FATF) has established standards on transparency, so as to deter and prevent the misuse of corporate vehicles. The FATF Recommendations require countries[94] to ensure that adequate, accurate and timely information on the beneficial ownership of corporate vehicles is available and can be accessed by the competent authorities in a timely fashion. To the extent that such information is made available,[95] it may help financial institutions (FIs) and designated non-financial businesses and professions (DNFBPs) to implement the customer due diligence (CDD) requirements on corporate vehicles including to identify the beneficial owner, identify and manage ML/TF risks, and implement AML/CFT controls based on those risks (including suspicious activity reporting and sanctions requirements). The availability of such information, however, does not exempt FIs and DNFBPs from their other obligations under Recommendations 10 and 22. They should, in any case, not rely exclusively on such information. Concern over the misuse of corporate vehicles led the FATF to strengthen and clarify the standards on transparency.[96] While the high-level policy objectives remain unchanged, further detail was included in the standards to ensure that the mechanisms for implementation are understandable. The revision of the standards was intended to provide clarity to countries on how to achieve effective implementation.

4. Other international bodies are also taking concrete action to promote the transparency of corporate vehicles. For example, in 2013 G8 countries endorsed core principles on beneficial ownership, consistent with the FATF standards, and published action plans setting out the steps they will take to enhance transparency.[97] As well, the G20 Leaders publicly encouraged all countries to tackle the risks raised by opacity of corporate vehicles, and committed to leading by example in their implementation of the FATF

94. All references in this guidance paper to country or countries apply equally to territories or jurisdictions.

95. The Interpretive Note to Recommendation 24 at paragraph 13 requires countries to consider facilitating timely access by FIs and DNFBPs to a company's register of its shareholders or members, containing the names of the shareholders and members and number of shares held by each shareholder and categories of shares (including the nature of the associated voting rights).

96. The FATF Standards comprises the FATF Recommendations and Interpretive Notes, which were revised in February 2012 and have been endorsed by more than190 countries across the globe.

97. G8 Leaders Communiqué from the 2013 Lough Erne Summit.

standards on beneficial ownership, which are also relevant for tax purposes.[98] In addition, the OECD Working Group on Bribery considers in its monitoring reports whether lack of access to information about the beneficial ownership of legal persons is an obstacle to the effective enforcement of the offence of bribing a foreign public official.[99]

5. The purpose of the FATF standards on transparency and beneficial ownership is to prevent the misuse of corporate vehicles for money laundering or terrorist financing. However, it is recognised that these FATF standards support the efforts to prevent and detect other designated categories of offences such as tax crimes and corruption. In this respect, the measures that countries implement to enhance transparency in line with the FATF Recommendations may provide a platform to more effectively address serious concerns such as corruption, as well as to meet other international standards.[100]

6. Implementation of the FATF Recommendations on transparency and beneficial ownership has proved challenging.[101] Consequently, the FATF has developed this guidance paper to assist countries in their implementation of Recommendations 24 and 25, as well as Recommendation 1 as it relates to understanding the ML/FT risks of legal persons and legal arrangements. The audience of this guidance is primarily policy makers and practitioners in national authorities and the purpose is to assist them to identify, design and implement appropriate measures to prevent the misuse of corporate vehicles in line with the FATF standards. The guidance also explains the connection between CDD measures and specific transparency measures, and it may be useful to financial institutions and DNFBPs in their implementation of AML/CFT preventive measures. This guidance paper covers:

a) An overview of how corporate vehicles can be misused and the challenges for countries in implementing measures to prevent such abuse (Section II)

98. G20 Leaders' Declaration (St. Petersburg Summit, 6 September 2013), and the G20 Communiqué from the Meeting of G20 Finance Ministers & Central Bank Governors (Moscow, 19-20 July 2013).

99. Monitoring reports on implementation of the *OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions* by its Parties can be found at: www.oecd.org/daf/anti-bribery/countryreports-ontheimplementationoftheoecdanti-briberyconvention.htm.

100. Such as the *United Nations Convention Against Corruption (UNCAC),* the *Criminal Law Convention on Corruption,* and the *OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions.*

101. See the results of the mutual evaluation reports of FATF and FATF-style regional bodies (FSRBs).

b) The definition of beneficial owner (Section III)

c) Guidance to countries on effective mechanisms to combat the misuse of legal persons and legal arrangements (Section IV)

d) Guidance to countries on implementing measures to enhance the transparency of legal persons (Section V)

e) Guidance to countries on implementing measures to enhance the transparency of legal arrangements (Section VI)

f) The relationship between standards on transparency and beneficial ownership (Recommendations 24 & 25), and other Recommendations (CDD requirements (Recommendations 10/22 and wire transfers (Recommendation 16)) (Section VII)

g) Access to information by competent authorities (Section VIII), and

h) Guidance on international cooperation involving beneficial ownership information (Section IX).

7. This guidance is non-binding and does not override the purview of national authorities. It is intended to complement existing FATF guidance and other ongoing work[102] by building upon the available research, including relevant FATF typologies reports, and the experiences of countries. It also takes into account work being undertaken by other international bodies which are focusing on ensuring the transparency of corporate vehicles.

102. In particular, FATF is developing guidance on the implementation of a risk-based approach for financial institutions and DNFBPs, including trust and company service providers, which, when complete, will complement this paper.

II. THE MISUSE OF LEGAL PERSONS AND ARRANGEMENTS

8. A number of important studies by the FATF,[103] and the World Bank and United Nations Office of Drugs and Crime's (UNODC) Stolen Asset Recovery Initiative (StAR)[104] have explored the misuse of corporate vehicles for illicit purposes, including ML/TF. In general, the lack of adequate, accurate and timely beneficial ownership information facilitates ML/TF by disguising:

- the **identity** of known or suspected criminals,
- the true **purpose** of an account or property held by a corporate vehicle, and/or
- the **source or use** of funds or property associated with a corporate vehicle.

9. For example, beneficial ownership information can be obscured through the use of:

a) **shell companies**[105] (which can be established with various forms of ownership structure), especially in cases where there is foreign ownership which is spread across jurisdictions

b) **complex ownership and control structures** involving many layers of shares registered in the name of other legal persons

c) **bearer shares** and **bearer share warrants**

d) **unrestricted use of legal persons as directors**

e) **formal nominee shareholders and directors** where the identity of the nominator is undisclosed

103. FATF (2006) and FATF & CFATF (2010).

104. *The Puppet Masters* report was published in 2011 by the World Bank / UNODC StAR. This comprehensive report examined over 150 cases of large scale corruption and found that most cases of large-scale corruption involve the use of one or more corporate vehicles to conceal beneficial ownership. The report examines the use of legal structures to hide stolen assets, outlines in detail how corporate vehicles can be used to facilitate corruption, identifies significant challenges that countries face when seeking to implement measures to prevent corporate vehicles being misused in corruption schemes, and provides recommendations to countries on how to address these challenges.

105. For the purpose of this paper, shell companies are considered to be companies that are incorporated that have no significant operations or related assets.

f) **informal nominee shareholders and directors**, such as close associates and family, and

g) **trusts and other legal arrangements** which enable a separation of legal ownership and beneficial ownership of assets.

h) **use of intermediaries in forming legal persons**, including professional intermediaries.

10. These problems are greatly exacerbated when different aspects of a corporate vehicle implicate numerous countries. Criminals often create, administer, control, own, and financially operate corporate vehicles from different countries, thereby preventing competent authorities in any one jurisdiction from obtaining all relevant information about a corporate vehicle which is subject to an investigation into ML/TF, or associated predicate offences such as corruption or tax crimes. Generally, corporate vehicles can be created with ease in multiple countries, with ready access to the international financial system, and with beneficial owners and trust or company service providers (TCSPs) or other relevant professional advisors residing outside the jurisdiction where the corporate vehicle was created. Multi-jurisdictional structures (structures consisting of a series of corporate entities and trusts created in different countries) can be particularly difficult to trace when transactions between related entities that appear legitimate are used to launder criminal proceeds. In such instances, delays in obtaining the international cooperation needed to follow the money trail ultimately frustrate or undermine the investigation.

11. Companies with certain characteristics may present higher ML/TF risks. These include company structures that promote complexity and increase the difficulty for authorities to obtain accurate beneficial ownership information (e.g. shell companies and bearer shares) when conducting investigations involving corporate vehicles suspected of misuse.

12. Trusts can also be used to conceal the control of assets, including the proceeds of crime. For example, a trust may be created in one jurisdiction and used in another to hold assets across jurisdictions to disguise the origins of criminal proceeds. It may be used to enhance anonymity by completely disconnecting the beneficial owner from the names of the other parties including the trustee, settlor, protector or beneficiary.

13. The lack of access to beneficial ownership information of corporate vehicles by law enforcement and other competent authorities is a significant impediment, for example when such information is not held by any party. The availability of beneficial ownership information assists competent authorities by identifying those natural persons who may be responsible for the underlying activity of concern or who have information to further the investigation. This makes corporate vehicles less attractive for criminals.

Financial institutions and DNFBPs also play an important role by obtaining beneficial ownership information which helps prevent the misuse of corporate vehicles in the financial system. However, countries face significant challenges when implementing measures to ensure the availability of accurate beneficial owner information. In many countries, information on the beneficial owner (in addition to the legal owner) of a corporate vehicle is not available as it is not collected and sufficiently verified at the time the corporate vehicle is created, nor at any stage throughout its existence. This frustrates the efforts of, law enforcement and other competent authorities to 'follow the money' in financial investigations that involve a corporate vehicles.

14. In practice, sophisticated schemes to launder the proceeds of crime often use a range of different corporate vehicles rather than just a single corporate vehicle. The same underlying principles for transparency apply to both legal persons and legal arrangements. However, the way in which measures are implemented can differ due to the particularities of the various corporate vehicles and therefore this paper will separate the guidance relating to the transparency of legal persons and that relating to legal arrangements.

III. THE DEFINITION OF BENEFICIAL OWNER

Box 1. **Definition of 'beneficial owner' from the Glossary to the *FATF Recommendations***

Beneficial owner refers to the natural person(s) who ultimately[50] *owns or controls a customer*[51] *and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.*

[50] Reference to "ultimately owns or controls" and "ultimate effective control" refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.

[51] This definition should also apply to beneficial owner or a beneficiary under a life or other investment linked insurance policy.

Note: Footnote reference numbers from the Glossary to the *FATF Recommendations*.

LEGAL PERSONS

15. The FATF definition of beneficial owner in the context of legal persons must be distinguished from the concepts of legal ownership and control.[106] On the one hand, legal ownership means the natural or legal persons who, according to the respective jurisdiction´s legal provisions, own the legal person. On the other hand, control refers to the ability of taking relevant decisions within the legal person and impose those resolutions, which can be acquired by several means (for example, by owning a controlling a block of shares). However, an essential element of the FATF definition of beneficial owner is that it extends beyond legal ownership and control to consider the notion of ultimate (actual) ownership and control. In other words, the FATF definition focuses on the natural (not legal) persons who actually own and take advantage of capital or assets of the legal person; as well as on those who really exert effective control over it (whether or not they occupy formal positions within that legal person), rather than just the (natural or legal) persons who are legally (on paper) entitled to do so. For example, if a company is legally owned by a second company (according to its corporate registration information), the beneficial owners are actually the natural persons who are behind that second company or ultimate holding company in the chain of ownership and who are controlling it. Likewise, persons listed in the corporate registration information as holding controlling positions within the company, but who are actually acting on behalf of someone

106. Interpretive Note to Recommendation 24 at paragraph 3.

else, cannot be considered beneficial owners because they are ultimately being used by someone else to exercise effective control over the company.

16. Another essential element to the FATF definition of beneficial owner is that it includes natural persons on whose behalf a transaction is being conducted, even where that person does not have actual or legal ownership or control over the customer. This reflects the distinction in customer due diligence (CDD) in Recommendation 10 which focuses on customer relationships and the occasional customer. This element of the FATF definition of beneficial owner focuses on individuals that are central to a transaction being conducted even where the transaction has been deliberately structured to avoid control or ownership of the customer but to retain the benefit of the transaction.

17. The beneficial ownership information that should be collected and maintained on legal persons is outlined further below in Section V.

LEGAL ARRANGEMENTS

18. The FATF definition of beneficial owner also applies in the context of legal arrangements, meaning the natural person(s), at the end of the chain, who ultimately owns or controls the legal arrangement, including those persons who exercise ultimate effective control over the legal arrangement, and/or the natural person(s) on whose behalf a transaction is being conducted. However, in this context, the specific characteristics of legal arrangements make it more complicated to identify the beneficial owner(s) in practice. For example, in a trust, the legal title and control of an asset are separated from the equitable interests in the asset. This means that different persons might own, benefit from, and control the trust, depending on the applicable trust law and the provisions of the document establishing the trust (for example, the trust deed). In some countries, trust law allows for the settlor and beneficiary (and sometimes even the trustee) to be the same person. Trust deeds also vary and may contain provisions that impact where ultimate control over the trust assets lies, including clauses under which the settlor reserves certain powers (such as the power to revoke the trust and have the trust assets returned). This may assist in determining the beneficial ownership of a trust and its related parties. Further guidance on how to manage this in practice is set out below in Section VI.

19. The beneficial ownership information that should be collected and maintained on legal arrangements is outlined further below in Section VI.

IV. EFFECTIVE MECHANISMS TO COMBAT THE MISUSE OF LEGAL PERSONS AND ARRANGEMENTS

Box 2. **Recommendation 24 – Transparency and beneficial ownership of legal persons**

Countries should take measures to prevent the misuse of legal persons for money laundering or terrorist financing. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries that have legal persons that are able to issue bearer shares or bearer share warrants, or which allow nominee shareholders or nominee directors, should take effective measures to ensure that they are not misused for money laundering or terrorist financing. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22.

20. The purpose of this guidance is to assist countries with the implementation of Recommendations 24 and 25.

Box 3. **Recommendation 25 – Transparency and beneficial ownership of legal arrangements**

Countries should take measures to prevent the misuse of legal arrangements for money laundering or terrorist financing. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries, that can be obtained or accessed in a timely fashion by competent authorities. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22.

21. In February 2013, the FATF agreed to a methodology for the assessment of a country's technical compliance with the *FATF Recommendations* and for reviewing the level of effectiveness of a country's AML/CFT

system.[107] For the purpose of the assessment, effectiveness is the extent to which financial systems and economies are protected from the threats of money laundering and the financing of terrorism and proliferation. The FATF assesses effectiveness primarily on the basis of eleven Immediate Outcomes. This includes an assessment of Immediate Outcome 5 (IO.5) on legal persons and arrangements. IO.5 and the characteristics of an effective system are as follows:

Box 4. **Immediate Outcome 5**

Legal persons and legal arrangements are prevented from misuse for money laundering or terrorist financing, and information on their beneficial ownership is available to competent authorities without impediments.

Characteristics of an effective system

Measures are in place to:

- prevent legal persons and legal arrangements from being used for criminal purposes;
- make legal persons and legal arrangements sufficiently transparent; and
- ensure that accurate and up-to-date basic and beneficial ownership information is available on a timely basis.

Basic information is available publicly, and beneficial ownership information is available to competent authorities. Persons who breach these measures are subject to effective, proportionate and dissuasive sanctions. This results in legal persons and legal arrangements being unattractive for criminals to misuse for money laundering and terrorist financing.

22. Compliance with Recommendations 24 and 25 is intrinsically linked with the effectiveness of the measures assessed in Immediate Outcome 5 to prevent the misuse of legal persons and arrangements for ML/TF. Recommendations 24 and 25 require countries to ensure that competent authorities have timely access to adequate, accurate and up-to-date beneficial ownership information. As a result, measures to implement Recommendations 24 and 25 are fundamental to implement an effective system. Given the links between the Recommendations and effectiveness, this guidance is designed to assist countries to implement Recommendations 24 and 25 in a way that achieves effectiveness.

107. FATF (2013a).

V. ENHANCING THE TRANSPARENCY OF LEGAL PERSONS (R.24)

23. Countries should take measures to prevent the misuse of legal persons for ML/TF by ensuring that legal persons are sufficiently transparent, in line with Recommendation 24 and its Interpretive Note. The fundamental principle is that countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. This section outlines the key issues for consideration for the implementation of Recommendation 24 and provides guidance for countries in this respect.

DEFINITION OF "LEGAL PERSONS"

24. Recommendation 24 applies broadly to "legal persons" meaning any entities, other than natural persons, that can establish a permanent customer relationship with a financial institution or otherwise own property. This can include companies, bodies corporate, foundations, anstalt, partnerships, or associations and other relevantly similar entities that have legal personality.[108] This can include non-profit organisations (NPOs) that can take a variety of forms which vary between jurisdictions, such as foundations, associations or cooperative societies.

SCOPE OF RECOMMENDATION 24

25. Much of Recommendation 24 speaks of how to apply comprehensive AML/CFT measures to companies. However, this does not mean that other types of legal persons are not covered. Recommendation 24 specifically requires countries to apply similar measures as those required for companies to foundations, anstalt, and limited liability partnerships, taking into account the specificities of their different forms and structures.[109]

26. For any other type of legal person that may exist in the country, the specific measures to be taken should be determined on the basis of a risk-based approach. In particular countries should review the ML/TF risks associated with these other types of legal person, take into account their different forms and structures and, based on the level of risk, determine measures that will achieve appropriate levels of transparency. At a minimum, these other types of legal persons should record and keep accurate and current similar types of basic information as required for companies, and the competent authorities should have timely access to such information. Additionally, competent

108. Glossary to the *FATF Recommendations*.
109. Interpretive Note to Recommendation 24, par. 16.

authorities should have timely access to adequate, accurate and timely beneficial ownership information for these other types of legal person.[110]

UNDERSTANDING THE RISK ASSOCIATED WITH LEGAL PERSONS

27. As a starting point, countries must understand the legal persons that exist in their jurisdiction and the associated risks. Specifically, countries should have mechanisms to:

a) identify and describe the different types, forms and basic features of legal persons in the country

b) identify and describe the processes for: (i) creating those legal persons; and (ii) obtaining and recording basic and beneficial ownership information on those legal persons

c) make the above information publicly available, and

d) assess the ML/TF risks associated with the different types of legal persons.[111]

28. Countries should conduct a comprehensive risk assessment of legal persons, and this should form part of the broader assessment of the ML/TF risks in the country.[112] This should include consideration of the relevant legal and regulatory contextual issues particular to the country. As part of the risk assessment, countries are recommended to review cases in which corporate vehicles are being misused for criminal purposes for the purpose of identifying typologies which indicate higher risk. This risk assessment should not only consider the domestic threats and vulnerabilities associated with legal persons incorporated under the laws of the jurisdiction, but should also consider international threats and vulnerabilities associated with legal persons incorporated in another jurisdiction yet administered in the home jurisdiction and bank accounts of domicile, particularly when jurisdictions with weak AML/CFT controls are involved. When assessing the risks associated with different types of legal persons, tries should also consider assessing the risks of specific jurisdictions, and types of service providers.[113]

110. Interpretive Note to Recommendation 24, par. 17.
111. Interpretive Note to Recommendation 24 at paragraph 2.
112. Under Recommendation 1, countries are required to identify, assess and understand the ML/TF risks. See the FATF (2012).
113. World Bank / UNODC StAR report (2011), p. 66.

BASIC OWNERSHIP INFORMATION

Company registries

29. The Interpretive Note to Recommendation 24 requires countries to ensure, as a necessary prerequisite, that basic information on companies is obtained and recorded by the company registry. This should include the following:[114]

- the company name, proof of incorporation, legal form and status, the address of the registered office, basic regulating powers (for example, memorandum and articles of association), and a list of directors

30. This information held by the company registry should be made publicly available.[115]

Companies

31. Companies should be required to obtain and record basic information which should include the following:[116]

a) the company name, proof of incorporation, legal form and status, the address of the registered office, basic regulating powers (for example, memorandum and articles of association), a list of directors, and

b) a register of their shareholders or members, containing the number of shares held by each shareholder and categories of shares (including the nature of the associated voting rights). This can be recorded by the company itself or by a third person under the company's responsibility, and the information should be maintained within the country at a location notified to the company registry. However, if the company or company registry holds beneficial ownership information within the country, then the register of shareholders need not be in the country, provided that the company can provide this information promptly on request.

114. Interpretive Note to Recommendation 24, par. 5.
115. Interpretive Note to Recommendation 24, par. 13.
116. Interpretive Note to Recommendation 24, par. 4.

BENEFICIAL OWNERSHIP INFORMATION

32. The fundamental requirement of Recommendation 24 is that countries should ensure that there is adequate, accurate and timely information available on the beneficial ownership of all legal persons, and that their authorities can access this information in a timely manner.[117] Beneficial ownership information of legal persons should be determined as follows:

1. **Step 1** (a) The identity of the natural persons (if any, as ownership interests can be so diversified that there are no natural persons, whether acting alone or together, who exercise control of the legal person through ownership) who ultimately have a controlling ownership interest in a legal person, and

2. (b) to the extent that there is doubt as to whether the persons with the controlling ownership interest are the beneficial owners, or where no natural person exerts control through ownership interests, the identity of the natural persons (if any) exercising control of the legal person through other means.

3. **Step 2** Where no natural person is identified under (a) or (b) above, financial institutions should identify and take reasonable measures to verify the identity of the relevant natural person who holds the position of senior managing official.[118]

33. The following are some examples of natural persons who could be considered as beneficial owners on the basis that they are the ultimate owners/controllers of the legal person, either through their ownership interests, through positions held within the legal person or through other means:

Natural persons who may control the legal person through ownership interests

a) **The natural person(s) who directly or indirectly holds a minimum percentage of ownership interest in the legal person (the threshold approach)**. For example, Recommendation 24 allows the determination of the controlling shareholders of a company based on a threshold (for example, any persons owning

117. Interpretive Note to Recommendation 24, par. 1.
118. Interpretive Note to Recommendation 10, par. 5(b)(i).

more than a certain percentage of the company, such as 25%).[119] The *FATF Recommendations* do not specify what threshold may be appropriate. In determining an appropriate minimum threshold, countries should consider the level of ML/TF risk identified for the various types of legal persons or minimum ownership thresholds established for particular legal persons pursuant to commercial or administrative law. The ownership interest approach suggests that it is likely that there could be more than one beneficial owner (for example, with a threshold of more than 25%, there could be a maximum of three beneficial owners). In any case, a percentage shareholding or ownership interest should be considered as a key evidential factor among others to be taken into account. It is also important to highlight that this approach includes the notion of indirect control which may extend beyond formal ownership or could be through a chain of corporate vehicles. Ultimately, countries should implement the concept of ownership interest that is sufficiently clear, practical, workable and enforceable for the full range of legal persons administered in a country.

b) **Shareholders who exercise control alone or together with other shareholders, including through any contract, understanding, relationship, intermediary or tiered entity (a majority interest approach)**. It is also important to highlight that this approach includes the notion of indirect control which may extend beyond legal (direct) ownership or could be through a chain of corporate vehicles and through nominees. This indirect control could be identified through various means, as shareholder's agreement, exercise of dominant influence or power to appoint senior management. Shareholders may thus collaborate to increase the level of control by a person through formal or informal agreements, or through the use of nominee shareholders. Countries will need to consider various types of ownership interests and the possibilities that exist within their country, including voting or economic rights. Other issues worth considering are whether the company has issued convertible stock or has any outstanding debt that is convertible into voting equity.

119. Interpretive Note to Recommendation 24, par. 1.

Natural persons who may control the legal person through other means

c) **The natural person(s) who exerts control of a legal person through other means** such as personal connections to persons in positions described above or that possess ownership.

d) **The natural person(s) who exerts control without ownership** by participating in the financing of the enterprise, or because of close and intimate family relationships, historical or contractual associations, or if a company defaults on certain payments. Furthermore, control may be presumed even if control is never actually exercised, such as using, enjoying or benefiting from the assets owned by the legal person.

Natural persons who may exercise control through positions held within a legal person

e) **The natural person(s) responsible for strategic decisions that fundamentally affect the business practices or general direction of the legal person**. Depending on the legal person and the country's laws, directors may or may not take an active role in exercising control over the affairs of the entity, but identification of the directors may still provide useful information. However, information on directors may be of limited value if a country allows for nominee directors acting on behalf of unidentified interests.

f) **The natural person(s) who exercises executive control over the daily or regular affairs of the legal person through a senior management position**, such as a chief executive officer (CEO), chief financial officer (CFO), managing or executive director, or president. The natural person(s) who has significant authority over a legal person's financial relationships (including with financial institutions that hold accounts on behalf of a legal person) and the ongoing financial affairs of the legal person.

OTHER MEASURES TO ENHANCING TRANSPARENCY

34. Recommendation 24 also requires countries to implement the following fundamental requirements to enhance the transparency of legal persons:

a) *Keep information accurate and up to date:* Basic and beneficial ownership information on all legal persons (including information provided to a company registry) should be accurate and updated

on a timely basis.[120] This requirement may be explained in two parts. First, this information should be current and accurate at the time the legal person is created. Second, over time, the information must be kept accurate, and as current as possible meaning that, when changes occur, the information is updated promptly.

b) *Have sanctions for failing to comply:* Countries should ensure that any legal or natural person failing to comply with the requirements of Recommendation 24 is subject to liability and effective, proportionate and dissuasive sanctions, as appropriate.[121] The application of sanctions is outlined further below in the section on mechanisms for obtaining beneficial ownership information.

c) *Implement measures to overcome specific obstacles to the transparency of companies:* Countries must also take specific measures to prevent the misuse of other mechanisms that are frequently used to disguise ownership of companies, including bearer shares,[122] bearer share warrants, nominee shares and nominee directors.[123] Recommendation 24 gives countries some flexibility to choose which measures to implement, given their particular circumstances.[124]

35. The Interpretive Note to Recommendation 24 requires countries to take measures to prevent the misuse of bearer shares and bearer share warrants, for example, by applying one or more of the following mechanisms:[125]

a) **prohibiting them**

b) **converting them into registered shares or share warrants** (for example through dematerialisation)

c) **immobilising them** by requiring them to be held with a regulated financial institution or professional intermediary, and/or

120. Interpretive Note to Recommendation 24, par. 11.
121. Interpretive Note to Recommendation 24, par. 18.
122. The glossary of the *FATF Recommendations* defines *bearer shares* as negotiable instruments that accord ownership in a legal person to the person who possesses the bearer share certificate.
123. Nominee arrangements, whereby individuals assume a management or ownership position on behalf of an unnamed principal, are often involved in grand schemes corruption, and pose significant obstacles to the usefulness of company registries: World Bank / UNODC StAR report (2011), pp. 51 and 72.
124. Interpretive Note to Recommendation 24, par. 14 to 15.
125. Interpretive Note to Recommendation 24, par. 14.

d) requiring shareholders with a controlling interest to **notify the company**, and the company to **record their identity**.

36. The Interpretive Note to Recommendation 24 also requires countries to take measures to prevent the misuse of nominee shares and nominee directors, for example by applying one or more of the following mechanisms:

a) requiring nominee shareholders and directors to disclose the identity of their nominator to the company and to any relevant registry, and for this information to be included in the relevant register, and/or

b) requiring nominee shareholders and directors to be licensed, for their nominee status to be recorded in company registries, for the nominees to maintain information identifying their nominator, and make this information available to the competent authorities upon request.[126]

37. Other types of disclosure measures can also be useful to prevent the misuse of nominee shareholder and director arrangements. For example:

a) Where the nominator is a legal person, countries should consider requiring disclosure of the identity of any natural persons who own or control the nominator.

b) Where a director is a legal person, countries should consider requiring at least one director to be a natural person, or the provision of information of any natural person who controls the director.

c) TCSPs often serve as nominee directors and shareholders as a way to ensure that the names of the entity's beneficial owners are not recorded.[127] TCSPs are required to be subject to AML/CFT obligations and should be supervised (Recommendations 22 and 28), including for CDD which includes beneficial ownership information, Where nominee services are commonplace, a country should consider a licensing regime for nominee shareholders and directors. Such a regime would require the licenced nominee to maintain information on the person on whose behalf they are acting.

d) Criminals often use informal nominee arrangements whereby friends, family members or associates purport to be the beneficial owners of corporate vehicles. This can be particularly challenging given the informal and private nature of such arrangements. This

126. Interpretive Note to Recommendation 24, par. 15.
127. World Bank / UNODC StAR report (2011), p. 60.

issue can be addressed by placing obligations on the nominee to disclose to the company registry the identity of the person on behalf of whom they are acting and imposing sanctions for false declarations.

e) Measures to complement disclosure, such as increased accountability or awareness of accountability, to deter the misuse of such arrangements.

MECHANISMS AND SOURCES FOR OBTAINING BENEFICIAL OWNERSHIP INFORMATION OF LEGAL PERSONS

38. Information that relates to the beneficial ownership of corporate vehicles can be found in a number of different places, including company registries, financial institutions, DNFBPs, the legal person itself, and other national authorities, such as tax authorities or stock exchange commissions. The *FATF Recommendations* recognise these different sources and the need to provide flexibility for countries to implement the requirements in a manner that corresponds with their legal, regulatory, economic and cultural characteristics. An effective system is one that prevents the misuse of legal persons for criminal purposes. The interpretative note to Recommendation 24 states that it is very likely that countries will need to utilise a combination of mechanisms to achieve this objective. Whichever mechanism(s) is used, the fundamental requirement relating to beneficial ownership information remains the same. Countries should ensure that either:

1. information on the beneficial ownership of a company is obtained by that company and available at a specified location in their country; or

2. there are mechanisms in place so that the beneficial ownership of a company can be determined in a timely manner by a competent authority.[128]

39. Persons who breach these measures should be subject to effective, proportionate and dissuasive sanctions. An effective system may include a combination of the mechanisms outlined below. Such a system ensures that competent authorities have timely access to information held by the full range of parties that collect and hold ownership information, including financial institutions, DNFBPs, company registries, and/or companies themselves. Countries should consider these characteristics of an effective system when developing and implementing mechanisms in line with this guidance for the implementation of Recommendation 24.

128. Interpretive Note to Recommendation 24 at par. 7 and Immediate Outcome 5 of the *FATF Methodology*, FATF (2013a).

40. For companies, Recommendation 24 sets out three options for the practical steps that countries could take to ensure that beneficial ownership information is obtained and available. Countries may choose the mechanisms they rely on to ensure the availability of beneficial ownership information on companies. In particular, countries should use one or more of the following mechanisms:

a) requiring companies or company registries to obtain and hold up-to-date information on the companies' beneficial ownership

b) requiring companies to take reasonable measures[129] to obtain and hold up-to-date information on the companies' beneficial ownership, and/or

c) using existing information, including: (i) information obtained by financial institutions and/or DNFBPs, in accordance with Recommendations 10 and 22; (ii) information held by other competent authorities on the legal and beneficial ownership of companies; (iii) the basic information held by the company; and (iv) available information on companies listed on a stock exchange, where disclosure requirements ensure adequate transparency of beneficial ownership.

41. While the implementation of any of these mechanisms may be sufficient to meet the standards, in practice, since they do not exclude each other, countries may use a combination of these mechanisms to achieve the objectives of Recommendation 24.[130] Countries should consider the feasibility of the possible mechanisms based on their particular circumstances and risk assessment. In determining the appropriate mechanism, countries should seek to strike an appropriate balance between allowing the legitimate operation of corporate vehicles and the need to combat ML/TF. This guidance paper is not intended to indicate a preference for any of the mechanisms offered. Rather, it provides guidance for determining and implementing measures.

Mechanism #1 – Company registries

42. Countries may implement Recommendation 24 by requiring company registries to obtain and hold up to date information on beneficial ownership.[131]

129. Measures taken should be proportionate to the level of risk or complexity induced by the ownership structure of the company or the nature of the controlling shareholders.

130. Interpretive Note to Recommendation 24, par. 8.

131. Interpretive Note to Recommendation 24, par. 8(a). While par. 8(a) includes requiring companies or company registries to obtain and hold beneficial ownership

43. Company registries[132] are a valuable source of information about the ownership of legal persons. Pursuant to Recommendation 24, all companies created in a country should be registered in a company registry which should record and maintain (at a minimum) basic information on a company, including company name, proof of incorporation, legal form and status, address of the registered office, basic regulating powers and list of directors.[133] The basic information held by registries should be made publicly available to facilitate timely access by financial institutions, DNFBPs and other competent authorities.[134] A well-resourced and proactive company registry holding beneficial ownership information can be an effective mechanism because it allows law enforcement authorities to access such information from a single source.

44. The role of company registries varies greatly between countries, as does the level and quality of information obtained on companies. Countries should be aware of any issues that could negatively impact the reliability of the information contained in the company registry. For example, many company registries play a passive role, acting as repositories of information or documents, rather than undertaking checks or other measures to ensure that the information they receive is accurate. Additionally, in many countries, company registry information is not always reliably kept up to date. Where these issues exist, countries should consider taking measures to enhance the reliability of information contained in their company registry.

45. Certainly, a well-resourced and proactive company registry holding beneficial ownership information can be an effective mechanism because it allows competent authorities to access such information from a single source. Company registries often do not collect beneficial ownership information and were traditionally established to facilitate company formation and access to related information for trade purposes. Consequently, most countries seeking to implement the beneficial ownership requirements through an existing company registry may need to substantially change its role, functions and resourcing. Below are some examples of considerations for countries seeking to establish a registry of beneficial ownership.

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information, issues relating to companies holding such information are discussed under Mechanism #2 below.

132. Interpretive Note to Recommendation 24 (footnote 40) defines a *company registry* as a register in the country of companies incorporated or licensed in that country and normally maintained by or for the incorporating authority. It does not refer to information held by or for the company itself.

133. Interpretive Note to Recommendation 24, par. 4(a) and 5.

134. Interpretive Note to 24, par. 13.

a) Are the registry's statutory objectives sufficiently broad to cover the role of collecting, verifying and maintaining beneficial ownership information? Should the company registry be required to verify beneficial ownership information and should it be given AML/CFT obligations?

b) Does the company registry authority have sufficient human and capital resources to enable it to undertake the additional functions of collecting, verifying and maintaining beneficial ownership information? A good understanding and knowledge of corporate law is necessary to determine the beneficial owner of a complicated legal structure.

c) Are there mechanisms for ensuring that the beneficial ownership information provided to the registry is accurate and up to date? Are individual applicants who form legal persons required to submit accurate beneficial ownership information to the registry when the legal person is created? Does the registry verify the accuracy of the information it receives using reliable, independent source documents, data or information? For example, could the provision of beneficial ownership information to the company registry be made a condition for incorporation?

d) How are changes in the beneficial ownership information monitored and recorded over time? Are legal persons and/or beneficial owners required to provide information to the registry within a defined time period once any changes are made?

e) Is there a competent authority with responsibility for enforcing these requirements? Are there effective, appropriate and dissuasive sanctions for failing to comply with these requirements? Are legal persons and/or beneficial owners who fail to comply with disclosure and updating requirements (for example, by failing to disclose, or submitting inaccurate or incomplete information) subject to liability and sanctions?[135]

f) Is the information held by the registry available to competent authorities in a timely manner? Does the system allow the registry to be searched using multiple fields? Does the registry provide authorities with direct access through remote login or similar mechanisms? Or do authorities have to request information from the registry?

135. See Interpretive Note to 24 and World Bank / UNODC StAR report (2011), par. 75.

g) Is the information held by the registry subject to limited availability or is it publicly available?[136] Beneficial ownership information may, as required by the FATF standards, be available only to selected competent authorities (including law enforcement), and possibly to financial institutions and DNFBPs. Consideration should be given to how technological advances may allow registries to provide public access (although this may raise and need to be balanced against privacy issues). For example, although this is not required by the FATF Recommendations, some countries may be able to provide public access to information through a searchable online database which would increase transparency by allowing greater scrutiny of information by, for example, the civil society, and timely access to information by financial institutions, DNFBPs and overseas authorities.

h) Are there jurisdictional or constitutional impediments to implementing an effective registry of beneficial ownership? For example, in some countries, state/provincial level authorities have responsibility for creating and regulating legal persons, and there are constitutional impediments that limit the national authorities' jurisdiction to impose beneficial ownership requirements on those authorities. Even where constitutional impediments do not exist, it is challenging to ensure the consistent application of beneficial ownership requirements on all the registries within a provincial/state-based system. Countries facing these challenges must still ensure that their company registries hold basic information, but may need to combine this with other measures to ensure the timely availability of adequate and accurate beneficial ownership information. Another legal impediment for some jurisdictions is whether data protection laws conflict with the sharing of beneficial ownership information as described in (g).

136. See Interpretive Note to 24, par. 13

Box 5. **Example features – Company registry holds beneficial ownership information**

A mechanism which provides for the company registry to hold beneficial ownership (BO) information could include some or all of the following features:

- Companies are required to provide basic and BO information for the company registry upon registration.
- Companies are required to provide basic and BO information both annually and when changes occur to ensure that the information is up-to-date.
- Companies are required to make a declaration regarding the beneficial owner and the ownership structure. This could include the provision of copies of documentation for the verification of identity.
- The company registry authority is required to verify the identity of the beneficial owners.
- Companies that fail to provide BO information are subject to dissuasive administrative sanctions, such as restrictions on incorporation, and such sanctions are applied.
- The provision of false information is subject to proportionate and dissuasive administrative and criminal sanctions for the company. The company's representative could also be held personally liable.
- The company registry authority regularly applies such sanctions when obligations are breached.
- The company registry authority takes a proactive role, including checking of information against other sources (such as shareholder, population or national identity registers), to identify anomalies or inconsistencies.
- Information in the company register is recorded digitally and is searchable. The search function supports searches by multiple fields.
- Competent authorities have access to the company registry online, including full search capability.
- The company registry authority has the capability to identify indicators of misuse or unusual activity (red flags) in the database.
- Basic information on the company is publicly available, BO information could also be made publicly available, or available to financial institutions and DNFBPs.

- The company registry authority may also obtain and hold shareholder information on companies in addition to beneficial ownership information.
- The company registry authority collects information on the board of directors, senior management and the natural person authorized to act on behalf of the company. In addition, directors are required to be natural persons.
- The measures under this mechanism are combined with aspects of mechanism 2 (outlined below) given that the company will be providing information to the registry.

Mechanism #2(a) – Require companies to hold beneficial ownership information

46. Countries may implement Recommendation 24 by requiring companies themselves to obtain and hold up-to-date information on beneficial ownership.[137] As a starting point, countries should require companies to maintain a list of their shareholders or members.[138] Below are some considerations for countries taking this approach:

a) Companies keep shareholder registers, such as shareholder lists, that are then available to competent authorities.[139] However, shareholder registers contain information on legal ownership, but not necessarily on beneficial ownership.

b) Are there mechanisms in place to ensure that the beneficial ownership information collected by companies is accurate and up-to-date? Do companies have powers to require updated information from their shareholders (including the power to request beneficial ownership information at any time)? If so, are there sanctions for failing to respond or provide false information for the legal person and its representatives (for example, could the company apply to the court for an order subjecting the shares to restrictions, such as, the suspension of dividends)?

c) Are shareholders required to disclose the names of person(s) on whose behalf shares are held? When there are any changes

137. Interpretive Note to Recommendation 24, par. 8(a).
138. Interpretive Note to Recommendation 24, par. 6.
139. FATF (2006), p. 13.

in ownership or control, are shareholders required to notify the company within a set time period?

d) If countries choose to implement this mechanism, how will companies become aware of their obligations? Have the authorities provided guidance to companies or shareholders explaining their obligations, and is this guidance publicly available?

e) Are competent authorities able to access this information in a timely manner? How can the competent authorities obtain beneficial ownership information without alerting the company of a potential investigation? Is beneficial ownership information required to be accessible within the country of incorporation? How are companies that have no physical presence in the country of incorporation dealt with?

f) Are legal persons obligated to keep updated the list of their representatives, including their roles, functions and authority?

Mechanism #2(b) – Require companies to take reasonable measures

47. Countries may also implement Recommendation 24 by requiring companies to take reasonable measures to obtain and hold up-to-date information on their beneficial ownership.[140] Countries should establish a clear and practical framework to outline the meaning of reasonable measures in this instance. The extent to which companies take measures to obtain and hold up-to-date beneficial ownership information should be proportionate to the level of ML/TF risk or complexity induced by the ownership structure of the company or the nature of the controlling shareholders. In addition to the considerations identified above under mechanism 2, the following are considerations for countries taking this approach:

a) Has the country identified and assessed the ML/TF risks associated with legal persons, to enable it to implement a risk-based approach as is required by Recommendations 1 and 24?

b) Has the country established a legal or enforceable framework setting forth a mechanism governing how companies should take 'reasonable measures' to obtain and hold up-to-date beneficial ownership information? Is it based on the country's understanding of ML/TF risks, through a comprehensive risk assessment? Are there different requirements for different types of companies?

140. Interpretive Note to Recommendation 24, par. 8(b).

c) Are companies permitted flexibility to determine what measures are reasonable? If so, is there a minimum level of action that the company should take? Have authorities provided companies with clear guidance on what measures they expect companies to take in certain circumstances? If the company is implementing their measures based on ML/TF risks, do companies have a good understanding of their ML/TF risks?

Box 6. **Example features – Companies holding beneficial ownership information**

A mechanism which provides for companies to hold, or take reasonable measures to hold BO information, could include some or all of the following features:

- Companies are required to hold beneficial ownership information, and they are provided with the authority to request information from shareholders on the beneficial ownership of shares.
- Companies can seek to apply restrictions against shareholders for failure to provide BO information through appropriate courts or authorities, such as in relation to shareholder voting rights, or the sale of shares.
- The provision of false information by shareholders is subject to dissuasive administrative or criminal sanctions.
- Shareholders are required to provide information on changes to beneficial ownership without delay.
- Companies are required to provide lists of shareholders and beneficial owners to competent authorities upon request in a timely manner.
- Failure by a company to provide the information to authorities is subject to sanctions, which may include administrative penalties or restrictions on incorporation.
- Lists of shareholders and beneficial owners are required to be held, and provided, in electronic form.
- Where lists of shareholders and beneficial owners are held with a third party provider on the company's behalf, the company remains liable for the obligations.
- Companies are required to understand and hold information on their ownership structure, including any chain of ownership.

- Where BO information cannot be identified, companies are required to publish this fact on their website.
- Any companies exempt from holding BO information are exempt by the country on the basis of low ML/TF risk.
- Beneficial ownership information is required to be held in the country of incorporation.
- Companies and shareholders are made aware of their obligations through the provision of guidance and awareness raising activities, for example through the provision of information to companies upon registration.

Mechanism #3 – Reliance on existing information

48. Countries may also implement Recommendation 24 by using existing information collected on the beneficial ownership of corporate entities to identify beneficial owner.[141] Possible sources of information include: company registries and other types of registries (such as, land, motor vehicle and moveable property registries); financial institutions and DNFBPs; other authorities (such as supervisors or tax authorities; information held by stock exchanges, and commercial databases.[142] The identification by other authorities (for example tax authorities or financial supervisors) of information that can be useful for AML/CFT purposes may assist in enhancing companies' co-operation and improve the mechanisms for determining beneficial ownership. Below are some considerations for countries taking this approach.

a) Do the competent authorities (particularly law enforcement) know where beneficial ownership information is held? Do they have timely access to such information where appropriate? Do the law enforcement authorities have sufficient powers? Are there mechanisms in place to facilitate authorities' access to information held by other authorities (such as tax authorities, supervisory authorities, or land titles offices) so that it can be effectively used in investigations? Are there sufficient mechanisms for information sharing between competent authorities?

b) In relation to tax information, are other competent authorities (particularly law enforcement) aware of the information

141. Interpretive Note to Recommendation 24, par. 8(c).
142. World Bank / UNODC StAR report (2011), pp. 51 and 77.

collected and maintained by tax authorities? The extent to which tax authorities collect information on the ownership and control of legal persons varies greatly from country to country, depending on the tax regime.[143]

c) Are commercial databases available which might contain beneficial ownership information? Many offer risk management services which collect data on corporate entities, and are primarily used by the private sector when carrying out CDD.

49. There are also a number of specific considerations when relying on the CDD information obtained and held by financial institutions and DNFBPs as outlined below:

a) Do financial institutions and DNFBPs adequately implement CDD obligations, including measures to identify and verify the identity of the beneficial owner, as is required by Recommendations 10 and 22? Are financial institutions and DNFBPs adequately supervised (Recommendations 26 and 28)?

b) Have financial institutions and DNFBPs been provided with sufficient guidance on how to properly conduct CDD (Recommendation 34)? Such guidance will facilitate implementation of the CDD requirements, thereby improving the quality and sufficiency of information on beneficial ownership being collected by these entities. For example, such guidance could identify the types of documents or resources which can be used to verify the legal status and indirect or direct ownership and control of legal persons created within the country.[144]

c) Can competent authorities access the CDD information held by financial institutions and DNFBPs in a timely manner (Recommendation 30)? Do competent authorities have sufficient processes and procedures, and established relationships, in place to avoid undue delays in receiving information from financial institutions and DNFBPs and ensure that information can be accessed in a timely manner? Do financial institutions and DNFBPs possess a good understanding and knowledge of corporate law to assist in determining the beneficial owner of a complicated legal structure?

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143. World Bank / UNODC StAR report (2011), p. 82.

144. See section VII of this paper for a more comprehensive discussion of the CDD requirements applicable to financial institutions and DNFBPs, and how effective implementation of those CDD requirements can help countries meet their obligations under Recommendations 24 and 25.

d) How will competent authorities be aware of the existence of the legal person's accounts held by a financial institution (Recommendation 31)? For example, does the jurisdiction have a mechanism to identify the holders of bank accounts or a similar mechanism that may assist competent authorities, upon appropriate authority, to identify the relevant financial institutions to approach in a timely manner.

e) How will competent authorities be aware of DNFBPs, including TCSPs, with whom the legal person is a customer? Are TCSPs subject to registration or licencing requirements, enabling them to be identified and contacted easily?

Box 7. **Examples features – other sources and a combined approach**

A mechanism which establishes a combined approach for beneficial ownership could include some or all of the following features:

- Financial institutions carry out CDD and understand their CDD obligations with respect to beneficial ownership, and are subject to AML/CFT supervision, in line with Recommendation 10.
- If the company registry does not obtain and hold information on the beneficial owner, it may hold information relevant for beneficial ownership including directors, senior management and the company's representative.
- BO information held by the tax authority is accessible in a timely manner to competent authorities, and law enforcement authorities are aware of the information available and have mechanisms for timely access to it.
- Competent authorities are able to identify financial institutions that may hold BO information in a timely manner, for example, through a national register of bank accounts.
- Competent authorities are able to identify TCSPs that may hold BO information in a timely manner, for example through a central register of transactions of shares, or a register of TCSPs, or any other mechanism the supervisor uses to identify TCSPs.
- Other information on accurate and current beneficial ownership is available from asset registries such as for land, property, vehicles, shares or other assets.

OTHER MEASURES TO ENHANCE THE TRANSPARENCY OF COMPANIES

50. Regardless of which of the above mechanisms is used, Recommendation 24 specifically requires countries to establish mechanisms to ensure that companies co-operate with competent authorities to the fullest extent possible in determining the beneficial owner. Countries have three options for facilitating such cooperation which may be used alone or in combination.[145]

a) Require companies to authorise[146] at least one natural person resident in the country of incorporation to be accountable to the competent authorities for providing all basic information and available beneficial ownership information, and giving further assistance to the authorities as needed.

b) Require companies to authorise a company service provider (for example, a lawyer, accountant or other TCSP) in the country to be accountable to the competent authorities for providing such information and assistance.

c) Take other comparable measures which can effectively ensure a company's cooperation.

51. Additionally, companies and all the persons, authorities and entities mentioned above (or if the company is being dissolved, its administrators, liquidators or other persons involved in the dissolution), are required to maintain the information and records referred to for at least five years after the date on which the company is dissolved or otherwise ceases to exist, or five years after the date on which the company ceases to be a customer of the professional intermediary or the financial institution.[147]

52. Below are some considerations for countries implementing these requirements:

a) Are companies aware of their obligations to give assistance to the authorities? Have the authorities provided guidance to companies explaining their obligations, and is this guidance publicly available?

b) Where countries have implemented a mechanism that allows companies to cooperate with the competent authorities through another person in the country, is that person readily identifiable

145. Interpretive Note to Recommendation 24, par. 9.
146. Board members of senior management may not require specific authorisation by the company, as this might already fall within the scope of their authority.
147. Interpretive Note to Recommendation 24, par. 10.

to the competent authorities? Is the person required to respond in a timely fashion to authorized requests for beneficial ownership information from competent authorities? Is the person aware of its obligations to maintain and produce adequate, accurate and current beneficial ownership information to the authorities?

c) Is there a competent authority with responsibility for enforcing these requirements? Are there effective, appropriate and dissuasive sanctions for failing to comply with these requirements? Are third parties who are responsible for cooperating with the authorities subject to liability and sanctions for failure to comply with these obligations?

VI. ENHANCING TRANSPARENCY OF LEGAL ARRANGEMENTS (RECOMMENDATION 25)

53. Countries should take measures to prevent the misuse of legal arrangements for ML/TF by ensuring that legal arrangements are sufficiently transparent, in line with Recommendation 25 and its Interpretive Note. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts (including information on the settlor, trustee and beneficiaries) that can be obtained or accessed in a timely fashion by competent authorities. This section outlines the key issues for consideration and provides guidance to countries for the implementation of the obligations in Recommendation 25 to enhance the transparency of legal arrangements.

SCOPE OF RECOMMENDATION 25

54. Recommendation 25 applies broadly to "legal arrangements" meaning express trusts[148] or other similar arrangements, including fiducie, treuhand and fideicomiso.[149]

55. Much of Recommendation 25 focuses on how to apply comprehensive AML/CFT measures to trusts. Trusts enable property to be managed by one person on behalf of another, and are a traditional feature of common law. They also exist in some civil law countries or are managed by entities in these countries, and have a wide range of legitimate uses (for example, the protection of beneficiaries, the creation of investment vehicles and pension funds, and the management of gifts, bequests or charitable donations). Given the ease with which some types of trust can be established, the involvement of an external professional such as a notary or TCSP is not always necessary to establish one. Specific registration requirements for trusts are uncommon, though information may be required in tax declarations if the administration of the trust generates income. On the other hand, trusts usually do not possess a separate legal personality and so cannot conduct transactions or own assets in their own right, but only through their trustees.

56. Some countries have implemented measures that may improve the transparency of trusts including: establishing registration or other regulatory

148. The term *express trust* is defined in the glossary to the *FATF Recommendations* to mean a trust clearly created by the settlor, usually in the form of a document (such as a written deed of trust). They are to be contrasted with trusts which come into being through the operation of the law and do not result from the clear intent or decision of a settlor to create a trust or similar legal arrangements (such as a constructive trust).

149. Glossary to the *FATF Recommendations*.

regimes for charitable trusts; imposing responsibilities on relevant DNFBPs including lawyers or TCSPs; imposing requirements to involve specific types of regulated entities in the formation of trusts; collection of information by tax administrations or other competent authorities; establishing registries of professional trustees; and establishing trust registries.

57. For other legal arrangements that have similar structures or functions, Recommendation 25 specifically requires countries to take similar measures to those required for trusts, with a view to achieving similar levels of transparency. At a minimum, countries should ensure that information similar to that specified in respect of trusts should be recorded and kept accurate and current, and that such information is accessible in a timely way by competent authorities.[150]

UNDERSTANDING THE RISK ASSOCIATED WITH LEGAL ARRANGEMENTS

58. As a starting point, countries should understand the legal arrangements that exist in their jurisdiction and the associated ML/TF risks. Countries should conduct a comprehensive risk assessment of legal arrangements, and this should form part of the broader assessment of the ML/TF risks in the country.[151] This should include consideration of the relevant legal and regulatory contextual issues particular to the country. As part of the risk assessment, countries are recommended to identify typologies which indicate higher risks by reviewing cases where trusts and other legal arrangements are being misused for criminal purposes. When assessing the risks associated with different types of legal arrangements, countries could consider assessing the risks of specific jurisdictions, and types of service providers.[152] This risk assessment should consider both the threats and vulnerabilities associated with legal arrangements that can be created in the jurisdiction, as well as the threats and vulnerabilities associated with legal arrangements created under the law of another jurisdiction and operating in the jurisdiction performing the risk assessment.

150. Interpretive Note to Recommendation 25 at paragraph 9.
151. Under Recommendation 1, countries are required to identify, assess and understand the ML/TF risks. See FATF (2012).
152. World Bank / UNODC StAR report (2011), p. 66.

REQUIREMENTS FOR TRUST LAW COUNTRIES

59. Trust law countries[153] should require the trustees of any express trust governed under their law to obtain and hold adequate, accurate, and current beneficial ownership information regarding the trust. This information should be kept as accurate, current and up-to-date as possible by updating it within a reasonable period following any change. In this context, beneficial ownership information includes:

a) information on the identity of the settlor, trustee(s), protector (if any), beneficiary or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust, and

b) basic information on other regulated agents of, and service providers to the trust, including investment advisors or managers, accountants, and tax advisors.[154]

60. The purpose of these requirements is to ensure that trustees are always responsible for holding this information (whichever country the trustee is in, and regardless of where the trust is located). In most instances, this is information that the trustee would normally have in any case because holding it is either a legal requirement, or a practical necessity in meeting the responsibilities of a trustee. It is important to ensure that the trustee identifies any person who owns or controls the trust in whatever capacity they may be in. As noted, beneficial ownership information for legal arrangements includes information on the identity of the settlor, trustee, beneficiaries or class of beneficiaries, protector (if any) and any other person exercising control over the trust. The specific parties involved may vary depending on the nature of the trust and countries should establish mechanisms based on the nature of express trusts being established under their laws.

61. It is not necessary for countries to include these requirements in legislation, provided that appropriate obligations to such effect exist for trustees (for example, through common law or case law).[155] It is not expected that a trust law country would be required to enforce such requirements globally on every trust governed by their law—only that it is an obligation on the trustee which could be enforced (with appropriate sanctions) by any competent authority with competence to deal with the trust.

153. For the purposes of this guidance paper, a *trust law country* is any country whose law allows for the creation and recognition of trusts.
154. Interpretive Note to Recommendation 25, par. 1.
155. Interpretive Note to Recommendation 25, par. 8.

COMMON REQUIREMENTS FOR ALL COUNTRIES

62. Recommendation 25 includes requirements for all countries, whether they recognise trust law or not. The *FATF Recommendations* recognise that many countries do not have trust law and may not give legal recognition to trusts and there is no requirement for countries to do so. However, even though many countries do not have trust law and may not recognise trusts, people in those countries frequently create trusts–governed by the law of a different country—as a way to manage their assets. This means that if a trust is created under the law of one country, but the trust is administered (and the trustee and trust assets are located) in a different country, the latter is likely to have more contact with the trust and its assets, as well as persons or entities involved in the trust. Therefore, that country should be the country responsible for the trust and implement appropriate sanctions as necessary.

63. For this reason, Recommendation 25 places specific requirements on all countries, irrespective of whether the country recognises trust law. In particular, all countries should implement the following measures:

a) Require that trustees disclose their status to financial institutions and DNFBPs when forming a business relationship or carrying out an occasional transaction above the threshold.[156] The trustee needs to actively make such disclosure (and not only upon the request of a competent authority). Trustees should not be prevented from doing this even if, for example, the terms of the trust deed require them to conceal their status. The only source of information on the trustee often available comes from the business relationship of a financial institution/DNFBP and the trustee.

b) Require professional trustees to maintain the information they hold for at least five years after their involvement with the trust ceases. Countries are also encouraged to extend this requirement to non-professional trustees and the other relevant authorities, persons and entities.[157]

156. See Recommendation 10 for further details on the thresholds for occasional transactions.

157. Interpretive Note to 25, par. 5 (Other authorities, persons and entities who might be holding useful information on trusts includes trust registries, tax authorities, agents and services providers to the trust, including investment advisors or managers, lawyers, or TCSPs).

OTHER POSSIBLE MEASURES

64. Countries are encouraged to ensure that other relevant authorities, persons and entities hold information on all trusts with which they have a relationship. Potential sources of information on trusts, trustees, and trust assets are:

a) registries (for example, a central registry of trusts or trust assets), or asset registries for land, property, vehicles, shares or other assets

b) other competent authorities that hold information on trusts and trustees (for example, tax authorities which collect information on assets and income relating to trusts), and

c) other agents and service providers to the trust, including investment advisors or managers, lawyers, or trust and company service providers.[158]

65. Countries should also consider measures to facilitate the access of financial institutions and DNFBPs to the information held by these other authorities, persons and entities.

66. Although the above measures are not required, countries could consider their implementation (alone or in combination) to help meet the standards of Recommendation 25 for countries to ensure that the competent authorities have timely access to the beneficial ownership information on trusts. Below are some considerations for countries choosing to implement this approach.

a) ***Registries:*** Although not required the FATF Recommendations, a centralised registry of trusts to which disclosure must be made of the information pertaining to all trusts (including information on the settlor and beneficiary) could be an effective mechanism as it would provide timely information on the trust and (if kept accurate) could provide competent authorities with access to necessary information for disclosure and international cooperation. Centralised trust registries would also ensure that beneficial ownership information is freely available to competent authorities across jurisdictions in a timely manner, without tipping off a trust under investigation. For example, establishing a central trust registry may be an effective approach where a limited number of trusts exist in a country. However, for some countries, requiring the registration of trusts would require changes to the legal basis of trusts. In common law countries

158. Interpretive Note to Recommendation 25, par. 3.

for instance, trusts, unlike companies, are private arrangements that are not created by, nor need to be acknowledged by the state in order to exist. Although most countries do not require trusts to register, they may still require the registration of trust information (including information on the settlor and beneficiary/beneficiaries) in at least some specific circumstances. For example, some countries require trusts with a charitable purpose to register as charities, either with a dedicated charities regulator or with the tax authorities responsible for administering any tax exemptions given to charitable organisations. Such arrangements often apply to both charitable trusts and to legal persons which are charities.

b) ***Other competent authorities:*** In many countries, tax authorities are the most extensive source of information on the ownership and control of trusts, though they will only hold information if the trust generates tax liabilities in the jurisdiction. Typically, if a trust receives income above a specific threshold, the trustee must file a tax return with the tax authorities on behalf of the trust. Such a tax return may include information regarding the trust's trustee, the settlor, and each beneficiary with taxable income from the trust in that taxation period. However, not all countries require information on beneficiaries to be included. Countries should review the information collected by other authorities and consider approaches to ensure that competent authorities have timely access to information already being collected on trusts for other purposes. Some countries have agreements for the automatic exchange of tax information which may provide for greater exchange of information on trusts between different jurisdictions. In particular, through this system, banks will report certain beneficial ownership information for tax purposes on an annual basis to a domestic tax authority on a trust that holds an account with the bank and where the beneficiary is resident of a foreign jurisdiction. The domestic tax authority will automatically pass on that information to the foreign jurisdiction's tax authority. Whether the foreign jurisdiction's tax authority can pass on this information to other competent authorities must be examined in light of the confidentiality and data safeguards included in the legal instrument providing for automatic exchange of tax information.

c) ***Other agents and service providers to the trust:*** Recommendation 22 requires all lawyers, notaries, other independent legal professionals and accountants to be subject to record keeping requirements when they are creating, operating or

managing a legal arrangement. Recommendation 22 also requires all TCSPs to be subject to record keeping requirements when they are acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement. Countries could also consider a centralised registry of professional trustees (or any other equivalent mechanisms) to ensure that the regulator identifies all trustees established in a given jurisdictions. This could facilitate timely access by the competent authorities to beneficial ownership information held by the trustee in the country.

OTHER REQUIREMENTS AND A COMBINED APPROACH

67. In many countries, a combined approach using several of these sources of information may be the most effective approach to ensure that competent authorities can access information in a timely fashion. An effective approach is one that prevents the misuse of legal arrangements for criminal purposes and includes measures that make legal arrangements sufficiently transparent by ensuring that accurate and up-to-date basic and beneficial ownership information is available to competent authorities on a timely basis.[159] Persons who fail to comply with their obligations established in line with the *FATF Recommendations* should be subject to effective, proportionate and dissuasive sanctions. Such a system ensures that competent authorities have timely access to information held by parties that collect and hold basic and beneficial ownership information. Regardless of which approach is chosen, countries should ensure that there are clear responsibilities and consider these characteristics of an effective system when developing and implementing mechanisms in line with this guidance for the implementation of Recommendation 25.

68. Countries should hold trustees liable for failing to perform their obligations as outlined above, or make them subject to effective, proportionate and dissuasive sanctions (whether criminal, civil or administrative) for failing to comply. Countries should also ensure that there are effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, for failing to grant to competent authorities timely access to information regarding the trust.[160]

159. See Immediate Outcome 5 of the *FATF Methodology*, FATF (2013a).
160. Interpretive Note to Recommendation 25, par. 11.

Box 8. **Example features – trusts and other legal arrangements**

A mechanism to ensure the availability of beneficial ownership information on trusts and other legal arrangements could include some or all of the following features:

- Trustees are required to obtain and hold information on the trustee, the settlor, the protector (if any), the beneficiaries or class of beneficiaries, and any other person exercising control over the trust.
- Trustees are required to hold the information in electronic form, and are required to provide it to competent authorities upon request within a set time period,
- The obligations on professional trustees are supervised and enforced by a competent authority and trustees are subject to dissuasive and proportionate sanctions for failure to hold the required information, or for failing to grant to competent authorities timely access to information regarding the trust.
- Trustees of express trusts are required to disclose their status to financial institutions. Sanctions apply for the provision of false information such as administrative penalties.
- TCSPs, lawyers and accountants carry out CDD and understand their CDD obligations with respect to beneficial ownership, and are subject to AML/CFT supervision, in line with R.10.
- A country has established a central registry of trusts which includes information on the trustee, the settlor, the protector (if any), the beneficiaries or class of beneficiaries, and any other person exercising control over the trust. The example features identified above in relation to a company registry are relevant.

VII. RELATIONSHIP BETWEEN BENEFICIAL OWNERSHIP OBLIGATIONS AND OTHER RECOMMENDATIONS (CDD AND WIRE TRANSFERS REQUIREMENTS)

69. One way to fulfil the obligations under Recommendations 24 and 25 is to rely on the CDD information collected and maintained by financial institutions and/or DNFBPs pursuant to Recommendations 10 and 22, combined with adequate law enforcement powers to obtain access to that information.[161] However, having adequate powers for law enforcement to obtain beneficial ownership information is not sufficient to meet the requirements of Recommendations 24 and 25 if that information simply is not obtained and maintained in the first place. Therefore, under such an approach, the effective implementation of the CDD requirements in Recommendations 10 and 22 relating to beneficial owners relates directly to the obligations under Recommendations 24 and 5.

70. Under Recommendations 10 and 22, financial institutions and DNFBPs are required to implement CDD measures,[162] including identifying and verifying the identity of their customers, when:

a) establishing business relations[163]

b) carrying out occasional transactions above USD/EUR 15 000 or wire transfers in the circumstances covered by the Interpretive Note to Recommendation 16

c) there is a suspicion of ML/TF, or

d) the financial institution/DNFBP has doubts about the veracity or adequacy of previously obtained customer identification data.

71. Under Recommendations 10 and 22, countries should require financial institutions and DNFBPs to identify and take reasonable measures to verify the identity of the beneficial owner such that the financial institution/DNFBP is satisfied that it knows who the beneficial owner is. For legal persons, they this should include the natural person(s) (if any) who ultimately have a controlling ownership interest, or to the extent that there is doubt as to whether the persons with the controlling ownership interest are the beneficial owners, the identity of the natural persons (if any) exercising

161. See guidance on Recommendation 24 and 25 below for further details.

162. For further guidance on the application of the risk-based approach to CDD, see the FATF RBA guidance.

163. The *FATF Recommendations* do not define this notion. It is left to countries to decide whether business relations are established.

control of the legal person through other means. Where this does not lead to a natural person, this should include the relevant natural person who holds the position of senior managing official.[164] For legal arrangements, this should the identity of the settlor, trustee(s), protector (if any), beneficiaries or class or beneficiaries, or any other person exercising control over the trust.[165]

72. In addition, countries should require financial institutions and DNFBPs to understand the ownership and control structure of the customer. They should conduct ongoing CDD on the business relationship, and scrutinise transactions throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer and its business and risk profiles, including, where necessary, the customer's source of funds.[166] To ensure that financial institutions and DNFBPs understand the ML/TF risks in relation to corporate vehicles, countries should take steps to identify and assess the risks and make information available to them.[167] Financial institutions and DNFBPs should be required to record the CDD procedures performed and maintain these records for at least 5 years, in line with Recommendation 11.[168] When accepting business through a third party introducer, a financial institutions or DNFBP should always be sure to immediately obtain information on the beneficial ownership of the client. Copies of the underlying documentation that confirm the client and BO information should be available to the financial institution or DNFBP upon first request as envisaged by R17.

73. When considering the implementation of the CDD requirements in the context of legal arrangements, the financial institution is required to:

a) identify and verify the customer's identity (for example, a trust), and

b) identify and verify the identity of any person acting on behalf of the customer, for example the trustee of the trust, and verify that any person purporting to act on behalf of the customer is so authorised.[169]

164. Interpretive Note to Recommendation 10, par. 5(b)(i). This process is described in further detail above at par. 32.
165. Interpretive Note to Recommendation 10, par. 5(b)(ii).
166. The CDD obligations are outlined in full in Recommendation 10 and the Interpretive Note to R.10.
167. Interpretive note to Recommendation 1, par. 3.
168. For example, in the context of implementing INR10, para 5 (b) (i), cases should be documented where there is doubt as to whether the persons with the controlling ownership interest are the beneficial owners, or where no natural person exerts control through ownership interests.
169. Interpretive note to Recommendation 10, par. 1 and 4.

74. Correspondingly, trustees are required to disclose their status to the financial institution when, as a trustee, they are forming a business relationship or carrying out an occasional transaction above the threshold.[170] The financial institution is also obligated to identify the beneficial owners of the trust and take reasonable measures to verify the identity of such persons. For a trust, this would mean the verifying 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 (including through a chain of control/ownership). As noted above, financial institutions should understand the ownership and control structure of the trust (which may be set out in the trust deed).[171]

75. It is also essential to have effective monitoring and supervision of financial institutions and DNFBPs[172] to ensure that they are complying with CDD requirements. Implementation of the CDD requirements should form part of any comprehensive mechanism to increase transparency of corporate vehicles. It is particularly important to extend these requirements to businesses and professions which are often involved in the creation and management of corporate vehicles (such as lawyers, notaries, accountants and TCSPs).

WIRE TRANSFERS AND BENEFICIAL OWNERSHIP AS PART OF CDD

76. In relation to wire transfers, the circumstances covered by the Interpretive Note to Recommendation 16 include wire transfers above USD/EUR 1 000.[173] This means that financial institutions should undertake CDD when carrying out cross-border wire transfers above USD/EUR 1 000, including the requirement to identify and take reasonable measures to verify the identity of the beneficial owner of the originator or beneficiary, as outlined above. In addition, Recommendation 16 also requires financial institutions to take further measures such as collecting certain originator information and ensuring that this information accompanies a wire transfer.[174]

TRUST AND COMPANY SERVICE PROVIDERS (TCSPS)

77. In many countries, trust and company services (such as company formation and management) are offered by a range of different types of entities, including regulated professionals, such as lawyers and accountants.

170. Interpretive note to Recommendation 25, par. 2.
171. Interpretive note to Recommendation 10, par. 5 and 5(b)(ii).
172. See the definition of DNFBPs in the glossary to the *FATF Recommendations*.
173. Interpretive Note to Recommendation 16, par. 5.
174. Interpretive Note to Recommendation 16, par. 11-18.

Although lawyers and accountants are usually subject to regulation of their primary profession or business, they are not always subject to comprehensive AML/CFT and CDD requirements. As well, in many countries, trust and company services are also offered by other companies that specialise in providing trust and company services, but which may not be regulated in relation to their profession or business. In the absence of specific AML/CFT regulation and a designated supervisor, such specialists may be left unregulated. TCSPs play an important role in undertaking CDD on their clients both during the establishment of corporate vehicles and their ongoing management.

78. The lack of AML/CFT regulation of legal professionals and TCSPs limits a country's ability to ensure the transparency of corporate vehicles under Recommendations 24 and 25. Another common challenge is that, even where legal professionals and TCSPs are subject to AML/CFT requirements, deficiencies often exist in how the CDD obligations with respect to beneficial ownership are being implemented. Supervision for compliance with these requirements is often ineffective. For these reasons, beneficial ownership information of legal arrangements may not be available. To address these issues, countries should ensure that all legal professionals and TCSPs are required to conduct CDD pursuant to Recommendation 22.[175]

ISSUES RELATING TO THE LEGAL PROFESSION

79. Another issue (as lawyers often act as trustees and/or nominees) is that, where lawyers have AML/CFT obligations, practical issues often arise relating to legal professional privilege. Indeed, the right of a client to obtain legal representation and advice, be candid with his legal adviser and not fear later disclosure of those discussions to his prejudice is an important feature of the legal profession.[176] The scope of legal professional privilege and legal professional secrecy is often contained in constitutional law or is recognised by common law, and is tied to fundamental rights laid down in treaty or other international obligations.[177] The scope of legal professional privilege and legal

175. To assist countries, the FATF has published *Guidance on the Risk-Based Approach for TCSPs* (2009). The FATF is currently updating this guidance in line with the revised FATF Recommendations.

176. This is recognised as an aspect of the fundamental right of access to justice laid down in the *Universal Declaration of Human Rights*. This right is recognised in the *FATF Recommendations* which exclude information covered by legal professional privilege or professional secrecy from the obligation to file a suspicious transaction report and provides that it is a matter for each country as to what those terms cover.

177. FATF (2013b).

professional secrecy depends on the constitutional and legal framework of each country, and in some federal systems, of each state or province within the country. In addition, the scope of legal professional privilege and legal professional secrecy, and the associated obligations, may also vary across different types of legal professionals within a country and the types of services being offered by them to the legal arrangement.

80. However, investigators have found that a frequent obstacle to accessing information about corporate vehicles is the use of client privilege to refuse to divulge information relevant to the ownership and control of a corporate vehicle.[178] The recent FATF study on Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals also legal professional privilege and legal professional secrecy could impede and delay the criminal investigation.[179] This is appropriate when such claims are made correctly and in accordance with the law. However, some of the case studies do evidence that occasionally extremely wide claims of privilege are made which exceed the generally understood provisions of the protections within the relevant country. To help address these issues, competent authorities and professional bodies should work to ensure that there is a clear and shared understanding of the scope of legal professional privilege and legal professional secrecy in their own country.[180] In particular, countries should ensure that there is a clear understanding of what is, and what is not covered to ensure that investigations involving suspected corporate vehicles are not inappropriately impeded.[181]

178. World Bank / UNODC StAR report (2011), p. 94.
179. FATF (2013b), p. 31.
180. FATF (2013b), p. 85. To assist countries, the FATF has published *Risk Based Approach Guidance for Legal Professionals* (2008). The FATF is currently updating this guidance in line with the revised FATF Recommendations.
181. World Bank / UNODC StAR report (2011), p. 106.

VIII. ACCESS TO INFORMATION BY COMPETENT AUTHORITIES

81. Competent authorities (particularly law enforcement authorities) should have adequate powers, mechanisms and expertise to access, in a timely manner:

a) the basic and beneficial information on legal persons held by relevant parties,[182] and

b) the information held by trustees and other parties, including information held by financial institutions and DNFBPs on: (a) the beneficial ownership of the trust; (b) the residence of the trustee; and (c) any assets held or managed by the financial institution or DNFBP, in relation to any trustees with which they have a business relationship, or for which they undertake an occasional transaction.[183]

82. Cooperation between government entities holding such information is essential and communication mechanisms should be established in legislation or regulations to ensure information held by other government entities is accessible in a timely manner. To facilitate their implementation of these requirements, it is useful for the competent authorities (particularly law enforcement authorities):

to know what basic and beneficial ownership information is available in the country, and which relevant parties are holding it, and to understand the laws in their country relating to trusts and other legal arrangements.

83. The results of the FATF mutual evaluations have highlighted the fact that in many countries, law enforcement and other competent authorities do possess adequate powers and expertise to obtain information. However, such powers on their own are insufficient to meet the requirements of Recommendations 24 and 25, if adequate information on beneficial ownership is not collected and maintained in the first place. Consequently, it is essential that countries also implement measures to ensure that accurate beneficial ownership information on corporate vehicles will be collected and maintained in the country (see sections IV, V and VI of this paper for examples of such measures).

182. Interpretive Note to Recommendations 24, par. 12.
183. Interpretive Note to Recommendation 25, par. 4.

IX. INTERNATIONAL COOPERATION

84. Beneficial owners and TCSPs for any particular corporate vehicle may reside outside the jurisdiction where the corporate vehicle is created. A common law enforcement concern is the difficulty to obtain information on the ownership of foreign companies and trusts, and little, if any, cooperation on identifying beneficial ownership in some countries. As a result, criminals choose to conceal their identities behind a chain of different companies that are incorporated in different jurisdictions. To address this issue, countries where corporate vehicles are established should be able to obtain basic information and beneficial ownership information (even on those beneficial owners residing abroad), and maintain such information so that it can be used in investigations. In turn, those countries where beneficial owners and/or TCSPs reside need to respond to requests to identify the beneficial ownership of legal persons or legal arrangements. This should include the full cooperation of jurisdictional authorities in locating beneficial owners that are wanted pursuant to an international ML/TF investigation. The exchange of information with a foreign counterpart is a critical component of measures to obtain information on a corporate vehicle. It is also noted that the ability of the authorities to access information related to the beneficial owners of legal persons and legal arrangements in foreign jurisdictions is a key aspect to enhancing transparency for tax purposes.

85. The general international cooperation requirements in the *FATF Recommendations*[184] also apply to beneficial ownership information. However, to ensure that there is an improvement in the practical level of international cooperation, Recommendations 24 and 25 contain specific requirements to provide cooperation on identifying the beneficial ownership of corporate vehicles. This includes:

a) facilitating access by foreign competent authorities to basic information held by company registries (for example, by making this information available online, or if it is not available on-line, by having an efficient mechanism through which foreign authorities can request information)

b) facilitating access by foreign competent authorities to any information held by registries or other domestic authorities on legal arrangements

c) exchanging information on shareholders (including when it is held by the company or stock exchange) to enable foreign authorities to quickly move along a chain of legal ownership,

184. As set out in Recommendations 37-40.

and domestically available information on the trusts or other legal arrangements, and

d) using their competent authorities' powers to obtain beneficial ownership information on behalf of foreign counterparts (for example, at the request of foreign authorities, not only when conducting their own investigations).

86. As a starting point, competent authorities could consider providing their foreign counterparts with information on how they can access publicly available information. For example, countries must have mechanisms in place to identify and describes the different types, forms and basic features of legal persons in the country. In addition, basic and/or beneficial ownership information held by various registries or by companies themselves may be publicly available and accessible via the Internet. Competent authorities could consider providing a step-by-step guide on how to access this information, particularly with countries that make frequent requests in this regard. This would allow law enforcement and other competent authorities to check, as a first step, the information that is publicly available before making a formal request for information, such as through mutual legal assistance. Competent authorities should also consider establishing procedures to facilitate requests from their foreign counterparts. This may include procedures to facilitate access to information held by other domestic authorities and companies.

87. In order to monitor compliance with these obligations for legal persons and legal arrangements, countries are required to monitor the quality of the assistance which they receive from other countries.[185]

185. Par. 19 of Recommendation 24, and par. 10 of Recommendation 25.

X. CONCLUSION

88. As financial institutions and DNFBPs implement AML/CFT measures, corporate vehicles are increasingly attractive to criminals for the purpose of disguising their identity and distancing themselves from their illicit assets. Increasing the transparency of corporate vehicles is an effective way to prevent their misuse for criminal purposes, including for the commission of offenses such as money laundering or terrorism financing, corruption, tax fraud, trafficking and other organized crime related offences. The FATF has strengthened the *FATF Recommendations* to ensure that countries implement measures aimed at improving availability of both basic and beneficial ownership information of corporate vehicles. This will ensure that competent authorities have the information they need for investigations when suspected corporate vehicles are involved.

89. The FATF recognises that there are significant challenges to the implementation of measures to prevent the misuse of corporate vehicles and provides this guidance to support countries in their efforts. While this guidance supports the implementation of Recommendations 24 and 25, other standards such as CDD requirements are also relevant in this area, and countries should take a holistic approach to ensure transparency of corporate vehicles.

90. Countries continue to develop effective mechanisms and good practices to ensure transparency, particularly as the standards on beneficial ownership in the *FATF Recommendations* were revised in 2012. The FATF remains committed to work to support countries' efforts to implement effective mechanisms to enhance the transparency of corporate vehicles. In this respect, the FATF will continue to monitor developments in this area, and work with the international community to ensure that countries can learn and benefit from the practical experience of others.

BIBILIOGRAPHY

FATF (2006), *The Misuse of Corporate Vehicles, including Trust and Company Service Providers*, FATF, Paris, France www.fatf-gafi.org/documents/documents/themisuseofcorporatevehiclesincludingtrustandcompanyserviceproviders.html.

FATF & CFATF (2010), *Money Laundering Using Trust and Company Service Providers*, FATF, Paris, France www.fatf-gafi.org/documents/documents/moneylaunderingusingtrustandcompanyserviceproviders.html.

FATF (2012), *FATF Recommendations*, FATF, Paris France www.fatf-gafi.org/topics/fatfrecommendations/documents/fatf-recommendations.html.

FATF (2012), *FATF Guidance: National money laundering and terrorist financing risk assessment*, FATF, Paris, France www.fatf-gafi.org/documents/documents/nationalmoneylaunderingandterroristfinancingriskassessment.html.

FATF (2013a), *FATF Methodology for assessing technical compliance with the FATF Recommendations and the effectiveness of AML/CFT systems,* FATF, Paris, France.

FATF (2013b), *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals*, FATF, Paris, France www.fatf-gafi.org/documents/documents/mltf-vulnerabilities-legal-professionals.html.

World Bank / UNODC StAR report (2011), E van der Does de Willebois, EM Halter, RA Harrison, Ji Won Park and JC Sharman (2011), "*The Puppet Masters: How the Corrupt Use of Legal Structures to Hide Stolen Assets and What to Do About it"*, World Bank and United Nations Office on Drugs and Crime's StAR Initiative.

ANNEX 1

TABLE 1 – RECOMMENDATION 24 – OVERVIEW OF THE BASIC REQUIREMENTS[186]

<table>
<tr><th colspan="3">Initial obligations (INR.24.2)</th></tr>
<tr><td colspan="3">• Understand what types of legal persons are in the country, and describe processes for creating them and obtaining basic and beneficial ownership information - Make this information publicly available
• Understand and assess the ML/TF risks associated with the various types of legal persons</td></tr>
<tr><th colspan="3">Implement measures to enhance transparency of companies (INR.24.3-10, 13-15)</th></tr>
<tr><th colspan="3">Basic information of companies</th></tr>
<tr><td>Countries should:
• Establish a company registry</td><td>Companies should:
• Record basic information about the company
• Maintain an up-to-date shareholder register</td><td>Company registries should:
• Record basic information about the company</td></tr>
<tr><th colspan="3">Beneficial ownership information on companies</th></tr>
<tr><td colspan="3">Countries should use one or more of the following mechanisms:</td></tr>
<tr><td rowspan="2">Mechanism #1 – Company Registries
• Obtain and hold up-to-date information on the beneficial ownership of companies</td><td>Mechanism #2a - Companies
• Obtain and hold up-to-date information on their beneficial ownership, or</td><td rowspan="2">Mechanism #3 – Rely on existing information held by
• Registries
• FIs and DNFBPs, including CDD information (R.10/22)
• Companies
• Other competent authorities (e.g. supervisors, tax authorities)
• Stock exchanges</td></tr>
<tr><td>Mechanism #2b - Companies
• Take reasonable measures to identify their beneficial owners</td></tr>
</table>

186. This table represents an overview of the requirements in Recommendation 24 and does not limit or alter in any way the requirements.

Other measures to enhance transparency of companies (regardless of which mechanism was chosen)

- Require companies to ***cooperate with authorities***, including requiring either a natural person and/or DNFBP in the country who is authorised to cooperate with authorities on behalf of the company, and/or other comparable measures.
- Require companies and other to ***retain records for at least 5 years***.

Implement measures to overcome specific obstacles to the transparency of companies

Bearer shares & bearer share warrants – either:
- Prohibit them
- Convert them into registered shares/ warrants
- Immobilise them, or
- Require controlling shareholders to notify the company, so it can update its records

Nominee shareholders and directors – either:
- Require nominees to disclose to the company registry that they are nominees, and the identity of the person who nominated them
- License nominees, and requiring them to retain records of who has nominated them

Implement measures to enhance transparency of foundations, anstalt & limited liability partnerships (INR.24.16)

Take similar measures as those required for companies, taking into account their different forms and structures

Implement measures to enhance transparency of other types of legal persons (INR.24.17)

Implement measures determined on the basis of a risk-based approach, taking into account the ML/TF risks associated with other types of legal persons, and their different forms and structures

- Other types of legal persons should record and keep accurate and current similar types of basic information as required for companies (minimum)
- Adequate, accurate and current beneficial ownership information should also be available
- Objective is to achieve appropriate levels of transparency, taking into account the level of risk

Fundamental requirements to be implemented for all legal persons (INR.24.11 and 18)

- Ensure that basic and beneficial ownership information is ***accurate and up-to-date***
- Establish effective, proportionate and dissuasive ***sanctions*** for non-compliance

Powers of law enforcement and other competent authorities (INR.24.12)

Ensure that law enforcement and other competent authorities have ***all the powers necessary*** to obtain timely access to basic and beneficial ownership information on legal persons

International cooperation (INR.24.19)

Provide international cooperation relating to basic and beneficial ownership information (R.37-40).

TABLE 2 – RECOMMENDATION 25 – OVERVIEW OF THE BASIC REQUIREMENTS & OTHER MEASURES[187]

Implement measures to enhance transparency of trusts (INR.25.1-3, 5)
Trust law countries
• Require the ***trustee to hold beneficial ownership information*** about the parties to the trust (including the settlor, trustee(s), protector, beneficiaries or class of beneficiaries, and any other person exercising effective ultimate control over a trust) • Require the ***trustee to hold basic information on other regulated agents of, and service providers*** to the trust
All countries
• Require ***trustees to disclose their status*** to any financial institution or DNFBP with whom they do business • Require ***professional trustees to maintain information*** on the trust for at least 5 years
Other possible measures
Countries are encouraged to ensure that other authorities and entities which are likely to do business with trusts, record information about the trust. **Sources of information** include: • ***Registries*** such as a trust registry, or asset registries for land or other assets. • ***Other competent authorities*** such as tax authorities • ***Other agents of, and service providers to the trust*** such as investment advisors, managers, lawyers or TSCPs Consider ***facilitating the access of financial institutions/DNFBP to information*** held by others
Implement measures to enhance transparency of similar legal arrangements (fiducie, treuhand, fideicomiso) (INR.25.9)
Take similar measures as those required for trusts, with a view to achieving similar levels of transparency • At a minimum, ***similar information should be recorded, kept accurate and current, and be accessible*** in a timely way to the competent authorities

187. This table represents an overview of the requirements in Recommendation 25 and does not limit or alter in any way the requirements.

Fundamental requirements to be implemented for all legal arrangements (INR.25.6-8, 11)
• Ensure that basic and beneficial ownership information is ***accurate and up-to-date***. • Establish effective, proportionate and dissuasive ***sanctions*** for non-compliance.
Powers of law enforcement and other competent authorities (INR.25.4)
Ensure that law enforcement and other competent authorities have ***all the powers necessary*** to obtain timely access to basic and beneficial ownership information on legal arrangements, regardless of which party holds it
International cooperation (INR.25.10)
Provide international cooperation relating to basic and beneficial ownership information (R.37-40).

Exchange of Information on Request

HANDBOOK FOR PEER REVIEWS 2016-2020

This handbook is intended to assist the assessment teams and the reviewed jurisdictions that are participating in the Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum) peer reviews and non-member reviews on EOIR under the second round of reviews (2016-20). It provides contextual background information on the Global Forum and the peer review process under the second round of EOIR reviews. It also contains the key documents and authoritative sources that are the basis of the Global Forum's peer review process. Assessors should be familiar with the information and documents contained in this handbook as it will assist in conducting proper and fair assessments. This handbook is also a unique source of information for governments, academics and others interested in transparency and exchange of information for tax purposes.

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