GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

Peer Review Report Phase 2 Implementation of the Standard in Practice

KENYA

Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Kenya 2016

PHASE 2:
IMPLEMENTATION OF THE STANDARD IN PRACTICE

March 2016
(reflecting the legal and regulatory framework
as at December 2015)

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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 Global Forum on an equal footing.

The Global Forum is charged with in-depth monitoring and peer review of the implementation of the international standards of transparency and exchange of information for tax purposes. These standards are 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 2004. The standards have also been incorporated into the UN Model Tax Convention.

The standards provide for international 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.

All members of the Global Forum, as well as jurisdictions identified by the Global Forum as relevant to its work, are being reviewed. This process is undertaken in two phases. Phase 1 reviews assess the quality of a jurisdiction's legal and regulatory framework for the exchange of information, while Phase 2 reviews look at the practical implementation of that framework. Some Global Forum members are undergoing combined – Phase 1 and Phase 2 – reviews. The Global Forum has also put in place a process for supplementary reports to follow-up on recommendations, as well as for the ongoing monitoring of jurisdictions following the conclusion of a review. The ultimate goal 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 approved 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 and www.eoi-tax.org.

Executive summary

1. This report summarises the legal and regulatory framework for transparency and exchange of information as well as the practical implementation of that framework in Kenya. The international standard which is set out in the Global Forum's Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information, is concerned with the availability of relevant information within a jurisdiction, the competent authority's ability to gain timely access to that information, and in turn, whether that information can be effectively exchanged with its exchange of information (EOI) partners. Kenya has a well-developed legal and regulatory framework, although the report identifies some areas where its legal infrastructure could be improved to more effectively implement the international standard. The recommendations that have been made are mainly in regards to the availability of ownership and accounting information for all entities and the renegotiation, signing and ratification of EOI agreements with all relevant partners.

2. Kenya is an emerging economy located in East Africa with more than 41 million inhabitants, and with the largest economy in East Africa, it forms a regional financial and transportation hub. Agriculture and fishery are the largest economic sectors accounting for almost 25% of GDP with retail trade, transport and communication being the fastest growing sectors. Kenya has a fully developed tax system including an income tax and a value added tax.

3. Relevant entities include companies, partnerships, trusts and co-operative societies. Companies and co-operative societies are required to maintain a register of members and in most cases the list of members must be furnished to the authorities on a regular basis. Partnerships must be registered with the tax authorities and details of each partner must be provided upon registration. Subsequent changes must also be submitted. Ownership and identity information on companies, partnerships and co-operative societies is therefore generally available. However, some improvements are needed to Kenya's legal and regulatory framework with respect to the availability of company ownership information where the shares are held by nominees.

4. All trusts with income chargeable to tax in Kenya have to be registered for tax purposes and are obliged to submit an annual tax return. In accordance with a 2014 amendment to the Income Tax Act, in the event of a change to the trust, all trustees are now subject to a requirement to submit updated identity information on all settlors, trustees and beneficiaries to the Kenyan Revenue Authority (KRA). Trustees are also subject to common law fiduciary duties which include the maintenance of trust ownership information; in limited cases ownership information may also be maintained pursuant to the anti-money laundering (AML) regime. However, the obligations under statute and common law may not necessarily cover the identification of all trustees, settlors and beneficiaries of all trusts. Therefore, ownership information relating to trusts may only be available in some cases.

5. In practice, the Registrar of Companies as well as the regulators in Kenya requires most companies and partnerships, including foreign companies to submit updated ownership information annually. In practice, ownership information requirements are monitored by the audit inspection programme in place by the KRA as well as by the Central Bank and the Capital Markets Authority. However, it is noted that the Registrar of Companies did not have a regular system of oversight in place during the review period to monitor compliance with ownership obligations and fines were not regularly enforced in practice. Therefore, the monitoring activities carried out by the KRA and the regulators may not ensure that all relevant entities are in compliance with the ownership information requirements under the various legal acts.

6. All legal and natural persons that carry on a business in Kenya are obliged to maintain a full range of accounting records, including underlying documentation for a period of ten years and this requirement ensures that accounting records to the standard are required to be maintained by all relevant entities. The requirements of the legal and regulatory framework to maintain accounting records and underlying documentation are also monitored by the KRA in the course of their audit programme. However, this programme may not cover all relevant entities in Kenya. In addition, the Registrar did not have a regular oversight programme in place to monitor the compliance of the accounting record keeping obligations under the entity acts.

7. Full bank information, including all records pertaining to account holders as well as related financial and transaction information, is required to be kept by Kenyan banks AML legislation. The legal obligations to keep banking information are effectively monitored and enforced by the Central Bank of Kenya, ensuring that banking information is available in practice.

8. In respect of access to information, the KRA has a range of powers under the Income Tax Act to obtain relevant information from taxpayers

and from third parties both for domestic purposes and in response to an EOI request. These powers include search and seizure powers and enforcement of these provisions is secured by the existence of penalties for non-compliance. In terms of rights and safeguards, information can be obtained directly by the KRA and there is no requirement to notify the taxpayer. For one request (out of a total of six requests that were sent to Kenya) that was successfully received over the review period, the competent authority accessed the requested information from its own databases and third parties, including from a financial institution

9. Kenya has 20 signed double tax conventions (DTCs) covering 23 jurisdictions. Of these 20 agreements, ten are in force. Kenya continues to expand its network of exchange of information instruments, has 21 additional agreements under various stages of negotiation and has completed all the formal procedures in order to join the multilateral Convention on Mutual Administrative Cooperation in Tax Matters ("Multilateral Convention"). However, as of December 2015, this had not yet been signed by Kenya. It is noted, however, that of the ten agreements that are in force, only seven of these agreements are to the standard. Kenya should continue the renegotiation of all its agreements to bring them in line with the international standard. In addition, the timeframe to bring signed treaties into force can in some cases take several years. Therefore, Kenya should also ensure the expeditious ratification of its treaties.

10. From a total of six requests that were sent to Kenya during the review period, Kenya successfully received one of those requests which related to ownership and banking information. The information in respect of one of those requests was gathered by the International Taxation Office (EOI Unit) of the KRA from its own databases and from third parties. Despite this request having been received in May 2014, the requested information was only transmitted to the requesting treaty partner in December 2015. Further, during the time taken to process these request, status updates were not provided to the requesting treaty partner.

11. Over the review period, EOI operated on an ad-hoc basis in Kenya with officials from the KRA overseeing the EOI function. The processes as carried out by these officials were formalised into an EOI Unit in January 2015. Due to substantial delays in the delegation of the competent authority power from the Minister of Finance to the KRA, this unit processed the one EOI request received over the review period in May 2014 and provided all requested information to the requesting partner in December 2015. Therefore, Kenya is recommended to closely monitor its newly implemented EOI processes to ensure it can provide all requested information to its treaty partners in a timely manner.

12. Kenya has been assigned a rating for each of the 10 essential elements as well as an overall rating. The ratings for the essential elements are based on the analysis in the text of the report, taking into account the Phase 1 determinations and any recommendations made in respect of Kenya's legal and regulatory framework and the effectiveness of its exchange of information in practice. These ratings have been compared with the ratings assigned to other jurisdictions for each of the essential elements to ensure a consistent and comprehensive approach. On this basis, Kenya has been assigned the following ratings: Compliant for elements A.3, B.1, B.2, C.3 and C.4, Largely Compliant for elements A.1, A.2 and C.1, Partially Compliant for elements C.2 and C.5. In view of the ratings for each of the essential elements taken in their entirety, the overall rating for Kenya is "Largely Compliant".

13. A follow up report on the steps undertaken by Kenya to answer the recommendations made in this report should be provided to the PRG by June 2017 and thereafter in accordance with the process set out under the Methodology for the second round of reviews.

Introduction

Information and methodology used for the peer review of Kenya

14. The assessment of the legal and regulatory framework of Kenya and its practical implementation was based on the international standards of transparency and exchange of information as described in the Global Forum's *Terms of Reference*, and was prepared using the *Methodology for Peer Reviews and Non-Member Reviews*. The assessment was based on the laws, regulations and exchange of information mechanisms in force or effect as at 18 December 2015, other information, explanations and materials supplied by Kenya, and information supplied by partner jurisdictions.

15. The *Terms of Reference* ("ToR") break down the standards of transparency and exchange of information into 10 essential elements and 31 enumerated aspects under three broad categories: (A) availability of information; (B) access to information; and (C) exchanging information. This review assesses Kenya's legal and regulatory framework against these elements and each of the enumerated aspects. In respect of each essential element, a determination is made that either: *(i)* the element is in place; *(ii)* the element is in place but certain aspects of the legal implementation of the element need improvement; or *(iii)* the element is not in place. These determinations are accompanied by recommendations for improvement where relevant. A summary of the findings against the elements is set out at the end of this report.

16. Both the Phase 1 and Phase 2 assessments were were conducted by a team which consisted of two expert assessors and a representative of the Global Forum Secretariat: Mr. David Smith, EOI policy advisor, CTIS Business International, HM Revenue and Customs, United Kingdom, Mr. Antonio Nikolakopoulos, Official, Central Liaison Office, San Marino; and Ms. Mary O'Leary from the Global Forum Secretariat. In the course of the Phase 1 review, the assessment team examined the legal and regulatory framework for transparency and exchange of information and relevant exchange of information mechanisms in Kenya.

17. The Phase 2 review of Kenya analyses the practical implementation and effectiveness of the legal framework in the three year review period of 1 July 2011 to 30 June 2014, as well as any amendments made to the legal and regulatory framework since the Phase 1 review. This assessment is therefore based on the laws, regulations, and EOI mechanisms in force or effect as at 18 December 2015, other materials supplied by Kenya, and peer input supplied by EOI partner jurisdictions.

Overview of Kenya

Governance and Economic Context

18. Kenya is a unitary state located on the East coast of Africa. It has been a sovereign state since gaining independence from the British Crown in 1963. The country, which is divided into 47 counties, covers an area of approximately 582650 square kilometres bordering Tanzania to the South, Uganda to the West, Ethiopia and South Sudan to the North, Somalia to the East and the Indian Ocean to the South East. Its population of approximately 41 million is unevenly distributed with about 80% of inhabitants living on the South belt from the Indian Ocean to the shores of Lake Victoria in the west. Nairobi is the capital. The two official working languages are Bantu Swahili and English. The Kenya shilling (KES) is the national currency. As at 18 December 2015, KES 108 = EUR 1[1] and all amounts referred to in this report are in Kenyan shillings, unless otherwise indicated.

19. Kenya is the largest economy in East Africa and forms a regional, financial and transportation hub. After independence, Kenya experienced rapid economic growth mainly through government led programmes focused on public investment, the encouragement of smallholder agricultural production, and incentives for private industrial investment. As a result, gross domestic product (GDP) grew rapidly for the initial 10 years of its independence. Whilst growth has not been constant, with the early 1990s and the most recent global financial crisis being difficult periods, the last three years have seen steady economic growth year on year. In 2014, the GDP was recorded as KES 13 615 (EUR 121) billion growing 5% from 2013[2].

20. Agriculture (principally coffee and tea cultivation) and fishery are the largest sectors of the economy and account for about 29% of GDP. The fastest growing segments are wholesale and retail trade, transport and communication, which together account for almost 27% of total output. Manufacturing is the third largest sector and represents 11% of the GDP.

1. www.xe.com/fr/currencyconverter/convert/?Amount=1&From=EUR&To=KES.
2. https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html.

Other sectors include: real estate, tourism, education, construction, public administration, mining and quarrying.

21. The main imports are machinery, petroleum products, motor vehicles, iron and steel, resins and plastics. Kenya's main import partners are India, China, UAE, South Africa, Saudi Arabia, the United States and Japan. Agricultural products are central to Kenya's export industry with horticultural produce and tea being the most important. Other export items include textiles, coffee, tobacco, iron and steel products, petroleum products and cement. Kenya's main export partners are the UK, the Netherlands, Uganda, Tanzania, the United States and Pakistan.

22. Kenya is a member of the East African Community (EAC), the Common Market for East and Central Africa (COMESA), the Intergovernmental Authority on Development (IGAD), the United Nations (UN), the World Customs Organization (WCO) and the World Trade Organization (WTO), among others. Since July 2010, Kenya has been a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes. Kenya became a member of the Global Forum's Steering Group in October 2011. Kenya is also a first mover for the "Africa Initiative", a programme initiated by the Global Forum to promote the implementation of the standards for exchange of information amongst African developing countries.

Legal and Regulatory context

23. Kenya is a common law jurisdiction which derives its laws from English common law and Kenyan statutes.

24. Kenya declared independence from the United Kingdom on 12 December 1963, establishing its government as a parliamentary democracy. Previously, Kenya's legal system had been operating as a unitary system with a unicameral legislature until the coming into force of the 2010 Constitution (Constitution), which is now the primary source of law. The Kenyan Constitution defines the country's main fundamental rights and guarantees, organisational structure, hierarchy of laws and separation of the government's autonomous powers into legislative, executive and judiciary powers, exercised at national and county levels. As the national capital, Nairobi is the seat of all three branches of the Kenyan government.

25. The President, who is popularly and directly elected through elections held every five years, appoints the Cabinet of Ministers and together they exercise executive power.

26. At the national level, legislative power is exercised by the Kenyan Parliament which is a bicameral house consisting of the National Assembly and the Senate (Article 93(2), Constitution). The National Assembly is

composed of 349 members (consisting of 290 democratically elected members, 47 women who are each elected by the registered voters of the counties, and 12 members nominated by parliamentary political parties according to their proportion of members of the National Assembly) all of whom serve a five-year term. The Senate consists of 67 members; 47 members each elected by the registered voters of the 47 counties; 16 women members who are nominated by political parties according to their proportion of members of the Senate; two members representing the youth; two members representing persons with disabilities; and the Speaker, who is an ex officio member (Article 98, Constitution).

27. Kenya's 47 counties are further divided into a number of county wards. Each county has its own Assembly and the 2010 Constitution provides for the limited powers of counties to make certain laws, though not with respect to taxation, the financial sector or corporate matters (Article 185(2), Constitution).

28. Regarding the hierarchy of laws, a law of a higher rank will prevail over a law of a lower rank when they concern the same subject matter, and a law which is later in time will revoke an older law of equal hierarchy. Additionally, a national law will prevail over county legislation (Article 191, Constitution). International treaties and conventions on tax matters will always prevail over domestic tax law, provided that they do not violate the Constitution or its complementary laws (sections 41 and 41A, Income Tax Act).

29. The judicial system consists of the Supreme Court, the Court of Appeal, the High Court and subordinate courts which consist of the Magistrates Courts, the Courts Martial, and other specialised courts or tribunals such as the tax tribunal (Articles 162 and 169, Constitution). The Supreme Court has exclusive original jurisdiction to hear and determine disputes relating to Constitutional matters, appellate jurisdiction to hear and determine appeals from the Court of Appeal and any other court or tribunal as prescribed by national legislation. All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court. The Court of Appeal, comprised of a president of the Court of Appeal who is elected by the judges of the Court of Appeal, has jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament. The High Court has unlimited original jurisdiction in criminal and civil matters and jurisdiction to determine questions relating to the Bill of Rights. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

Financial sector

30. Kenya has a well-developed financial sector and is the financial hub for the East and Central African regions. In 2010, the financial sector accounted for 5.6 % of total GDP. The financial sector is supervised by a number of authorities. The Central Bank of Kenya is the body responsible for the supervision and regulation of banks, the promotion of sound financial and monetary policy directed to achieving and maintaining stability in the general level of prices. All banks must be licensed by the Central Bank and are subject to the Banking Law. The banking sector comprises 43 banks, of which 30 are locally based banks. The 13 others are branches of foreign banks. All commercial banks are required to maintain a minimum core capital of KES 1 billion (EUR 9.1 million). The total net assets in the banking sector grew by 18.5 per cent from KES 2 501 billion (EUR 21.5 billion) in December 2013 to KES 3 200 billion (EUR 28.7 billion) in December 2014.

31. Capital market institutions and market intermediaries are regulated and supervised by the Capital Markets Authority. These include stockbrokers, investment banks, investment advisers, fund managers and authorised depositories all of which are licensed banks, approved collective investment schemes or other approved institutions, including a Securities Exchange, Central Depository and Settlement Corporation, a venture capitalist firm and a credit rating agency.

Capital Markets Authority in practice

32. The Nairobi Securities Exchange (NSE) operates as the Securities Exchange in Kenya. The securities traded at the NSE are shares, bonds and Real Estate Investment Trusts (REITs). As of December 2015, the market capitalisation of companies listed on the stock market stands as KES 2 064 trillion (EUR 17 439 billion). With 63 listed companies, the NSE is sub-Saharan Africa's fourth-largest bourse and the one with the longest history in East Africa. All persons who intend to trade in shares that are listed on the Nairobi Securities Exchange must open a central depository account to obtain or trade shares.

33. The 63 listed companies operate in the following sectors:

Sector	Number of companies
Agriculture	6
Commercial and Services	10
Telecommunication and Technology	1
Automobile and Accessories	3
Banking	11

Sector	Number of companies
Insurance	6
Investment	5
Manufacturing and Allied	10
Construction and Allied	5
Energy and Petroleum	5
Investment Services	1
Total	63

Taxation and international cooperation

34. The Kenya Revenue Authority (KRA), established in 1995, is charged with the responsibility of collecting revenue on behalf of the Government of Kenya. The Chief Executive of the Authority is the Commissioner-General of Taxation (Commissioner) who is appointed by the Minister for Finance (s. 11 Kenya Revenue Authority Act). In terms of revenue collection and other support functions, the authority is divided into six departments: the Domestic Taxes Department (Medium and Small Taxpayers), the Domestic Taxes Department (Large Taxpayers), the Customs Services Department, the Technical Support Services Department, the Corporate Support Services Department and the Investigations and Enforcement Department.

35. Kenya taxes its residents (companies and individuals) on all income that is accrued in or is derived from Kenya and certain income (such as income from foreign pensions and foreign exchange gains) that is deemed to be derived from Kenya. Where a resident company carries on business partly within and partly outside Kenya, all of that income will be deemed to have accrued in or derived from Kenya. Non-resident companies and individuals are taxed only on Kenya-source income. A company is resident in Kenya if it is incorporated under the laws of Kenya or its management and control are exercised in Kenya at any time during the year of assessment. Foreign companies not having their effective management and control in Kenya are subject to income tax on certain income from sources in Kenya, such as income being derived from a permanent establishment there.

36. Kenya has a range of taxes which are collected at the national level such as income tax, a value-added tax (VAT), customs duties and other duties on import and export goods and an excise tax (Article 209 (1), Constitution). Income tax rates are progressive with a maximum rate of 30%. Non-residents (including non-resident partners of a partnership co-ordinating businesses in Kenya) are taxable on certain income derived from Kenya. The income tax rate for resident companies is 30% and for non-resident companies is 37.5%.

Dividends are taxed on a withholding basis which is a final tax. Dividends are tax exempt for resident companies controlling more than 12.5% of the shareholding of the issuing company. Dividends received by financial institutions are tax exempt. The 47 counties may impose property rates, entertainment taxes, and any other tax that is authorised to impose by an Act of Parliament (Article 209(3), Constitution).

37. Partnerships are considered tax transparent and tax is levied on the partners directly. Trustees are subject to tax in respect of the income earned from the trust property under their control or administration. Beneficiaries will also be subject to tax on any income received, with a credit received for any tax paid by the trustee.

38. Kenya has DTCs in force with some of its main trading partners since the 1970s and it has now signed 21 DTCs (ten of which are in force). The powers to obtain and exchange information under these DTCs are contained in the Income Tax Act (ITA). The competent authority for exchange agreements in Kenya is the Minister of Finance who delegates this power to the Commissioner General of the Kenya Revenue Authority. As of December 2015, Kenya has also 21 agreements under various stages of negotiation, mainly with other Global Forum members.

Recent developments

39. In December 2015, Kenya passed the Business Registration Act 2015. This Act provides for the creation of an independent entity, the Business Registration Service, formed in order to ensure the effective administration of the laws relating to the incorporation, registration, operation and management of companies, partnerships and other entities. This body will also be responsible for the monitoring of registered entities and it is intended will greatly strengthen the ability of the Registrar of Companies to supervise that all registered companies are in compliance with their legal requirements including the maintenance of updated ownership information.

40. In respect of its EOI agreements, Kenya signed the Multilateral Convention on 08 February 2016.

Compliance with the Standards

A. Availability of information

Overview

41. Effective exchange of information requires the availability of reliable information. In particular, it requires information on the identity of owners and other stakeholders as well as information on the transactions carried out by entities and other organisational structures. Such information may be kept for tax, regulatory, commercial or other reasons. If 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. This section of the report describes and assesses Kenya's legal and regulatory framework on availability of information as well as the practical implementation of that framework.

42. Availability of ownership and identity information in respect of companies is generally ensured by the requirement to keep an up to date register of members. As of September 2015, pursuant to the newly enacted Companies Act, the issuance of share warrants to bearer is now prohibited by all Kenyan companies. However, the process for pre-existing bearer shares is unclear. Kenya is recommended to monitor the implementation of this new provision to ensure that full ownership information is available for all companies.

43. In respect of nominee ownership information, reporting institutions that are subject to the AML regime in Kenya are obliged to maintain beneficial ownership information if they establish a business relationship with a company. Kenya has reported that such information should be held as a consequence of the fiduciary obligations owed by the nominee to the beneficial

holder. Further, nominees with income subject to tax in Kenya are required to be registered with the KRA and in the event of a change to the arrangement are required to provide full beneficial ownership information to the KRA for all clients for which they act. However, for nominees without income subject to tax in Kenya, there is no requirement to register with the KRA. Further, at the time of registration, ownership information in respect of the client for whom the nominee is acting is not legally required. Therefore, Kenya is recommended to implement requirements for all nominees to have to maintain ownership information in all cases for clients for which they act.

44. Partnerships must be registered with the tax authorities and details of each partner must be furnished upon registration. Any change in this respect must also be submitted, ensuring the availability of up to date ownership information on partnerships. Co-operative societies are required to keep an up to date register of members, and a list of members must also be provided to the Registrar.

45. Where a trust has income accruing in or derived from Kenya, then the trust, trustee and beneficiaries must be registered for tax purposes and the trust must file a tax return. Further, in the case of a change to the identity information of the settlor, trustee or beneficiary in a trust, this must be submitted to the KRA. Under common law, trustees may have the obligation to maintain certain trust information. In addition, under AML legislation where certain businesses and professionals act as trustees or provide services to a trust, they will have the obligation to identify their customer and the beneficial owner. However not all trusts are covered by these requirements and ownership information on the settlors, trustees and beneficiaries of all trusts may not be available in all cases.

46. Enforcement measures consisting of fines are set down in the various entity acts, the ITA and the AML regime to ensure compliance with the information keeping requirements. In practice, monitoring of entities ownership information obligations is carried out by the KRA, the Capital Markets Authority and the Central Bank via desktop audits and on-site inspections. However, it is noted that the Registrar of Companies did not have a regular system of oversight in place during the review period to monitor compliance with ownership obligations and fines were not regularly imposed in practice. Therefore, Kenya is recommended to implement a comprehensive system of oversight to ensure that updated ownership information is being maintained in respect of all relevant entities.

47. In Kenya, all relevant entities are obliged to maintain a full range of accounting records, including underlying documentation for a period of ten years.

48. Compliance in respect of all entities to maintain accounting information is monitored by the KRA both via the submission of accounting

information in the tax returns as well as being verified in the course of the on-site inspection programme. However, the monitoring activities in place by the KRA will only cover those entities with income subject to tax in Kenya. Therefore, Kenya is recommended to implement an oversight programme to monitor the compliance with accounting record requirements to ensure that accounting records for all relevant entities are available in practice.

49. In respect of bank information, the AML legislation ensures that all records pertaining to the accounts as well as to related financial and transactional information are required to be kept by Kenyan banks. A system of oversight of financial entities is in place by the Central Bank whereby offsite and on-site inspections are regularly conducted. In the course of the inspections of financial entities, compliance with the customer due diligence requirements under the AML regime is also verified.

50. Enforcement provisions are in place in respect of the relevant obligations to maintain ownership and identity, accounting, and banking information for all relevant entities and arrangements.

51. Over the three year review period (1 July 2011-30 June 2014), although six EOI requests were sent to Kenya, Kenya only received one of those requests which concerned ownership and banking information. Kenya was able to provide all of the requested information, although with long delays in its provision (see also section C.5 *Timeliness of responses to requests for information*).

A.1. Ownership and identity information

Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities.

Companies *(ToR A.1.1)*

52. The Companies Act, No. 17, 2015 (“Companies Act”) was enacted in September 2015, replacing the previous Companies Act (2009) and is the central piece of legislation governing the establishment of and further arrangements with respect to companies. Under the Companies Act, three types of companies may be incorporated (s. 5-7 Companies Act):

- Companies limited by shares: the liability of the members of this type of company is limited to the amount unpaid (if any) on their shares.
- Companies limited by guarantee: these companies can be formed with or without share capital and the liability of the members is limited to

the amount defined in the memorandum of the company in excess of the company's assets in the event that the company is liquidated. Prior approval is required for incorporation whereby the Attorney-General must be satisfied that the company is formed for promoting commerce, art, science, religion, charity or for some other beneficial object.

- Unlimited companies: there is no limit on the liability of the members.

53. A company can further either be a private or a public company. A private company cannot have more than 50 members, must restrict the right to transfer its shares, and is not allowed to invite the public to subscribe for any shares or debentures in the company (s. 9 Companies Act). As of December 2015, there were 369 013 private companies registered in Kenya.

54. A public company is a registered company (s. 10 Companies Act) that may offer securities for subscription or sale to the public and may or may not be listed on the stock exchange. Most public companies are initially private companies that are subsequently converted to public companies when they invite members of the public to subscribe to their shares and debentures. There is a requirement under the Companies Act that when the membership of a private company exceeds 50, then it must convert to a public company. Public companies are seldom used except in the case of companies quoted on the Nairobi Securities Exchange (NSE) and for purposes related to the control of dealings in agricultural land. Even then, it is usual to incorporate as a private company and convert subsequently. As of December 2015, there were 2 351 public companies registered in Kenya.

55. The rules described below on the availability of ownership information apply to all companies, unless indicated otherwise.

56. All companies incorporated under the Companies Act are required to have a registered office in Kenya (s. 46 Companies Act). The location of the registered office and any change must be notified to the Registrar of Companies within 14 days after the date of incorporation or any change (s. 47 Companies Act).

Ownership information held by companies

57. All companies incorporated under the Companies Act are required to keep a register of members. This register should contain the following information (s. 93 Companies Act):

a. the names and addresses of the members;

b. the date on which each person was entered in the register of members; and

c. the date on which any person ceased to be a member.

58. Section 94 of the Companies Act provides that, as the main rule, the register of members must be kept at the company's registered office and lodged with the Registrar. Not keeping a register of members or failure to lodge the register with the Registrar can lead to a fine of KES 500 000 (EUR 389) being enforced on the company and any officer in default for every day that the company is not in compliance (sections 93(10 and 11) Companies Act).

59. In the event that the register of members is not in the form of an index, every public company is also required to maintain an index of the names of the members where they can be sufficiently identified and any changes to the register shall also have to be made to the index within 14 days after the date on which any change occurs (s. 95(1) Companies Act). This index is kept at all times in the same place as the register of members (s. 95(4) Companies Act) within 28 days shall lodge a copy with the Registrar.

60. Transfers of shares shall only be registered by the company upon delivery of a proper instrument of transfer to the company (s. 497(1) Companies Act).

Ownership information held by the authorities

Companies law

61. All companies incorporated under the Companies Act are required to register their memorandum and articles of association (if any) with the Registrar of Companies, who will retain these documents and certify that the company has been incorporated (sections 12 and 13 Companies Act). The memorandum must contain the names of the initial members of the company and the number of shares he/she owns (s. 14 and Companies (General) Regulations 2015). Furthermore, companies must file an annual return with the Registrar of Companies, generally every year on the anniversary of its incorporation (s. 705 Companies Act). In respect of companies having a share capital the return must contain the register of members, including all current and former members and the capital paid up by them (s. 707 Companies Act). Consequently, the annual return shows any changes in the shareholding of the company. In respect of companies not having a share capital there is no obligation to include information on its members in the return. However, the return must state the registered office (s. 707 Companies Act). Non-compliance with these provisions can lead to a fine of KES 200 000 708 (EUR 1 755) being imposed on the company and any officer. Further, every day that the company is not in compliance with this requirement, this may lead to a fine of 20 000 (EUR 176) for every day in default on the company or the officer (sections 708(2) Companies Act).

Registration in practice

62. The first step in registering a company entails a company search which may be performed online. The desired name of the company must be reserved and within 30 days of registration, a legal representative of the company must present themselves at the office of the Registrar of Companies in order to incorporate the company. Amongst the forms that must be submitted at the time of registration is "Form 208" which is a declaration of compliance by the company with the requirements of the Companies Act including the requirement to maintain an updated shareholder register as set out under section 93 of the Companies Act.

63. Form 4 requires information such as the company name, the authorised business objects, names and addresses of the directors, secretary, and auditors, the stated capital and the share structure of the company. Form 4 contains a declaration by all directors and secretary of a company that the minimum capital requirements of the Act have been met. The "Regulations Form" will require the name of the company, first directors, the authorised business objects, shareholder information, the number of shares held by each shareholder and the consideration paid for the shares. The company regulations may be drawn up by the party proposing to incorporate the company or the standard form as proposed in the company regulation form may be adopted.

64. In the case that the company is to operate in a regulated sector such as banking or securities market, the entity must be licensed by the relevant authority prior to registration and will be required to provide evidence of licensing at the time of registration.

65. The registration system of the KRA is linked to that of the Registrar of Companies whereby any entity wishing to be registered for tax purposes and to obtain a Personal Identification Number must be registered for business purposes with the Registrar of Companies.

66. All changes made to the information of a registered company must be filed with the Registrar of Companies within 28 days. Every year the registered entities (s. 93, Companies Act) must file an annual return which includes current financial information on the company as well as all changes including changes to shareholding information during the year. On cross-checking of the information provided in the annual return form with that information provided during the year (such as changes to shareholder information), officials from the Registrar of Companies' Department have reported that there is a high level of compliance with the requirement to update all information. All documents are archived after the mandatory retention period and are maintained indefinitely.

67. Since March 2014, all payments to the Registrar can be performed via "M-pesa" a mobile payment service in order to encourage compliance with annual registration payments. Due to new initiatives undertaken by the Registrar in 2013, the registration period for entities has decreased from three days to 24 hours. The process has also been greatly simplified to further incentivise compliance.

68. There are over 300 staff within the Registrar of Companies' Department stationed within Nairobi and nine other offices throughout Kenya who are responsible for the registration of companies, intellectual property and marriage registration. Of those 300, about 150 are involved in the registration of companies. Over the review period, officials from the Registrar have reported that, generally, on-site inspections were not performed and that there was no system of oversight in place in order to monitor registered entities compliance with the obligations under the various entity acts.

69. In December 2015, Kenya passed the Business Registration Service Act 2015. This Act provides for the creation of an independent entity, the Business Registration Service, formed in order to ensure the effective administration of the laws relating to the incorporation, registration, operation and management of companies, partnerships and other entities. This body will also be responsible for the monitoring of registered entities, and it is intended that it will greatly strengthen the ability of the Registrar of Companies in the supervision of companies. As this Act was passed after the review period and the on-site visit, its effectiveness could not be tested by the assessment team.

Tax law

70. Pursuant to the ITA all companies with income chargeable to tax in Kenya are required to register with the KRA (s. 132 ITA).

71. At the time of registration, every company must submit a designated form to which the memorandum of the company must be attached. As noted above, the memorandum contains the names of the initial members of the company and the number of shares he/she owns. Any person who fails to comply with this requirement will be liable to a fine of KES 2 000 (EUR 18) for every omission. Upon registration, the company is assigned a personal identification number (PIN) for tax purposes (s. 132(1) ITA) which is required to be quoted on all correspondence with the KRA. A valid PIN is also required for numerous other transactions in the course of business in Kenya, such as bank account opening, transacting in land, registration for VAT, registration of motor vehicles, customs clearance and other transactions with the government. Therefore, a valid PIN will generally be required by all companies wishing to carry on a business in Kenya. In 2014, the KRA implemented a new online registration referred to as the "i-tax' system" whereby

a PIN can be obtained online and within 48 hours once all relevant information, including ownership information, has been furnished.

72. A company is tax resident in Kenya when it is incorporated under the laws of Kenya or when it is managed and controlled in Kenya (s. 2 ITA). For companies resident in Kenya, all income accrued in or derived from or deemed to be derived from Kenya will be chargeable to tax (s. 3(2)(a)(i) ITA). In addition, where a resident company carries on business partly within and partly outside Kenya all of that income will be deemed to be derived from Kenya (4(a) ITA). All companies with income chargeable to tax will be required to file income tax returns without exception (sections 52B(1)(a) and 52B(1)(b) ITA). This has to be done within six months of the end of the income year and can be performed online or via paper copy. Failure to file a tax return attracts a penalty of 5% of the outstanding tax amount (s. 72(1) ITA) subject to a minimum amount of KES 1 000 (EUR 9) for individuals and KES 10 000 (EUR 90) for legal entities (s. 74B ITA). Currently, updated, ownership information does not have to be provided at the time of filing an annual tax return. However, subsequent to an 2014 amendment to the ITA, where there is a change in 10% or more of the shareholding of a company, the Commissioner of the KRA will have to be notified (s. 54B(b)(i), ITA). Further, requirements for an updated share register to be kept by all companies and for companies with share capital to file annual returns with the Registrar of Companies ensure that updated company ownership information is available. Further, Kenya is currently amending the income tax return to ensure that updated ownership information will also be provided when filing an annual tax return.

Tax registration and filing in practice

73. As of 2014, all companies must register for tax purposes online via a programme called i-tax. This process has been communicated via a far-reaching campaign conducted by the KRA and there is an i-tax system in all 47 counties of the country. Officials from the KRA have reported that advantages of the system include the ease of use for the taxpayer and increased number of entities registering for tax purposes since the introduction of the system. On the successful registration, the entity is issued with a PIN which must be quoted on all future correspondence with the KRA.

74. As a PIN is required for many business transactions in Kenya including opening a bank account and any dealing with any government agency, this measure ensures that all entities are registered both for business and tax purposes. There is a team of officers within the KRA which are responsible for ensuring that all businesses are registered for tax purposes. The compliance team has a monitoring programming in place whereby they examine

the list of "nil-filers" and every month there is a turnaround report of the nil-filers circulated to all regional offices.

75. There is also a deactivation mechanism in place within the KRA whereby a taxpayer can apply for removal from the tax register. In the case that a business entity requests to be removed from an obligation (such as the obligation to pay VAT) an officer will visit the entity to ensure that removal from this obligation is appropriate.

76. As set out above, at the time of registration with the KRA, all companies must supply the details of at least two directors and in addition every company must submit a designated form to which the memorandum of the company must be attached. Further, since 2014, subsequent to an amendment to the ITA, where there is a change in 10% or more of the shareholding of a company, the Commissioner of the KRA will have to be notified (s. 54B(b)(i), ITA). Over the review period, one request for ownership information was received and processed by Kenya and this information was accessed from the KRA database and also by issuing a notice to a third party.

77. Within the KRA, the Domestic Tax and Revenue Department (DTRD) is responsible for overseeing the filing of income tax returns and compliance with the obligations set out under the Income Tax Act. As of December 2015, there are 1 800 auditors within the DTRD of the KRA responsible for all aspects of tax return filing and enforcement of tax obligations. Officials from the KRA have indicated that there is a compliance rate of approximately 65-70% with the annual filing requirements for companies and is higher for large taxpayers and in particular amongst multi-nationals operating in Kenya where compliance is about 90%. Finally, Kenyan officials have indicated that because of the dual registration programme they can now readily access original ownership information as provided at the time of business registration and updated ownership information which must be provided to the Registrar of Companies' Department within 28 days of any change (except in the case of publicly traded companies where changes to ownership information are not required to be submitted).

78. In the case of non-compliance with tax filing obligations, there are sanctions in place which are readily enforced. Officials from the KRA have reported that in the event of non-compliance with tax filing obligations, a special collection procedure is initiated with a demand notice which indicates the penalty for non-compliance If there is continued non-compliance the KRA will raise a tax assessment based on previous returns, performance of the sector and other economic factors (see also section A.1.6 *Enforcement in practice* for further details on the fines enforced by the KRA over the review period).

Ownership information held by service providers

79. Service providers in Kenya are governed by the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA). All "reporting institutions" being financial institutions (banks, securities firms and insurance institutions) and designated non-financial businesses or professions (DNFBP) that are subject to the provisions of the POCAMLA have to identify the true identity of "customers" with whom they enter into a business relationship or carry out a transaction (s. 45 POCAMLA). DNFBPs are limited to casinos, real estate agencies, dealers in precious metals and stones, accountants who are either sole practitioners or partners in their firms and any other such business in which the risk of money laundering exists as the Minister may declare (s. 2 POCAMLA). Therefore, professional trustees, nominees, lawyers, notaries or tax advisors are not covered by the scope of the AML regime in Kenya. As of December 2015, the Minister had not declared any other businesses as subject to the POCAMLA.

80. In its customer due diligence procedures, the POCAMLA requires that all reporting institutions maintain records of all transactions and ensure that its customer accounts are in the correct name of the account holder (s. 46 POCAMLA). Records that are required to be maintained include the name, physical and postal address of every person conducting the transaction or on whose behalf the transaction is being conducted, the date and time of the transaction, the currency used and the type and identifying number of any account with the reporting institution involved in the transaction.

81. Reporting institutions are obliged to keep records for not less than seven years after the date on which a relationship is terminated in case of a business relationship, or not less than seven years after the date a transaction is concluded (s. 46(4) POCAMLA).

Ownership information held by service providers in practice

AML obligations in practice

82. The Financial Reporting Centre (FRC) is the financial intelligence unit of Kenya which has been in place since 2012 and operates as an independent statutory body (s. 21, POCAMLA*)* responsible for issuing guidelines for all reporting institutions to ensure compliance with the AML regime. The FRC is an autonomous unit which comes under the portfolio of the National Treasury. As at December 2015, the FRC has a staff of 17 full-time employees seconded from various state agencies.

83. There are three main directorates within the FRC; Compliance, International Cooperation and Research. The Compliance Directorate is responsible for ensuring that accountable institutions comply with their

obligations under the AML regime, including ownership obligations such as the identification of all persons who transact with an accountable institution. In regards to the compliance role of the FRC, they have issued guidelines (which have the force of law in Kenya) in conjunction with the regulators in order to ensure that they are complying with the Customer Due Diligence (CDD) measures set out under the POCAMLA.

84. Officials from the FRC have reported that increased co-ordination with other government agencies has greatly assisted in increasing the effectiveness of the AML regime. They are also currently in the process of finalising an MOU with the KRA after which time they foresee an increase in the number of reports that they will transmit to the KRA. Further, as of December 2015, there is a project underway within the FRC in co-ordination with the World Bank in order to undertake a national risk assessment of its reporting institutions. In the course of this project, the FRC has conducted various sensitisation sessions with the regulators and reporting institutions to explain their requirements under the act such as "Know Your Customer"(KYC) and CDD procedures. Officials from the FRC have reported that as a result of such activities, there is high compliance by reporting institutions with the obligations under the POCAMLA including ownership information requirements.

Foreign companies

85. According to the *Terms of Reference*, where a company or body corporate has a sufficient nexus to another jurisdiction (for example, because it is resident by reason of having its place of effective management or administration there), that other jurisdiction will also have the responsibility of ensuring that ownership information is available.

86. Any company incorporated outside of Kenya must register at the Registrar of Companies prior to the commencement of carrying on business (s. 974(1) Companies Act). As at December 2015, there were approximately 4 062 foreign companies registered with the Registrar of Companies of which 497 were registered with the KRA for tax purposes.

87. This registration process with the Registrar of Companies includes the furnishing of certain information (s. 975(2) Companies Act) which shall be prescribed under the regulations set out under the Act. Further, as of September 2015, pursuant to section 975(3) of the Companies Act, every foreign company is now required to provide the following information at the time of registration:

- a certified copy of their incorporation or registration;
- a certified copy of its constitution;

- a list of directors and shareholders and their personal details; and
- a notice of address of its registered office.

88. Any change in these details must be notified to the Registrar within one month (s. 986(1) Companies Act). In the event of failure to comply with these requirements, section 986(s. 3 and 4) of the Companies Act provides for a fine not exceeding KES 200 000 (EUR 1 756) and an additional fine of KES 20 000 (EUR 176) for every day in default.

89. Foreign companies that are managed and controlled in Kenya are considered tax resident in Kenya (s. 2(b)(ii) ITA). Foreign companies having a fixed place of business (permanent establishment) in Kenya will be subject to the provisions of the ITA (s. 18(5) ITA).Section 52B of the ITA requires every company subject to Kenyan income tax to submit an annual income tax return. At the time of registration foreign companies will submit a designated form to which the memorandum of the company must be attached. As noted above (see section *Ownership information to be submitted to the authorities*), it would then depend on the law of the jurisdiction where the company was incorporated whether or not its memorandum contains ownership information.

90. Therefore, while tax registration does not require the furnishing of ownership information, such information may be included in the memorandum of the company. However, all foreign companies with a sufficient nexus to Kenya will be subject to the requirements of the ITA, as set out below, to ensure that ownership information is being maintained. Further, the KRA is able to require the production of ownership information at any time in relation to the administration and enforcement of the company's tax obligations (see section B.1).

91. Although non-Kenyan companies are not required to set out details of their owners in the income tax return, there are various provisions in the ITA under which ownership information is relevant in ascertaining a taxpayer's tax liabilities. These include: (a) s. 4A(1)(a) – the deferral of a foreign exchange loss where the loss has arisen from a loan from persons deemed to be in control of that company; (b) the Second Schedule to the ITA – which defines control as a person holding a share or the possession of power in a company and various sections of the ITA where control of a company is necessary to be demonstrated such as section 5 "Income from employment"; (c) s. 16 – the non-deductibility of losses where the loss is associated with the production of income for the personal use of the owners; (d) s. 24(1) which deems certain income to be dividend payments to the shareholders; and (e) Second Schedule paragraph 13 – where the Commissioner has the power to determine the true market value of assets for the purposes of computing depreciation allowances if the buyer is a body of persons over whom the seller

has control or the seller is a body of persons over whom the buyer has control. In September 2014, Kenya also enacted an amendment to the Income Tax Act whereby all persons registered for tax now have to notify the Commission of any changes to shareholdings of 10% or more of the issued capital (s. 54B(b)(i), ITA). Therefore, this provision will also apply to all foreign companies registered with the KRA when there are changes in 10% or more of its shareholding. Accordingly, companies, whether local or foreign with a sufficient nexus to Kenya, are obliged to maintain ownership information in order to meet their tax obligations.

92. The KRA has reported that it is currently reformulating the company income tax return which will eventually be replaced with an online version only. The new form will require all companies, including all foreign companies, to submit up-to-date information of all legal owners. In the case of foreign companies this will apply to members with 10% or more of the share capital of the company. The KRA is encouraged to amend the company tax return as soon as possible to ensure that ownership information on foreign companies is available in all cases.

Ownership information for foreign companies in practice

93. As set out above, any company incorporated outside of Kenya that establishes a place of business in Kenya must register at the Registrar of Companies within 30 days of establishment of a place of business. Although there is no strict requirement for ownership information to be submitted at the time of registration, officials from the Registrar have reported that in 90% of cases where a foreign company submits its memorandum of registration, this also contains the list of founding shareholders. Further, at the time of filing the annual return each year many foreign companies also submit a copy of their updated shareholder register. Upon a sample search of 100 of the 4 062 companies registered with the Registrar of Companies, officials have reported that updated shareholder information was on file in 95% of those cases. Kenyan authorities have reported that the composition of foreign companies is diverse and includes those in telecommunications, financial, manufacturing and agricultural production among others. Those foreign companies operating in the financial sector will also be subject to the requirements of the POCAMLA, including the KYC requirements ensuring ownership information is available in respect of those companies.

94. Similarly, while at the time of tax registration, ownership information pertaining to foreign companies is not requested, in practice, this information will have to be held by the foreign companies with sufficient nexus to Kenya in order to comply with various sections of the ITA as set out above. Further, since 2014, pursuant to an amendment to the ITA, where there is a change in 10% or more of the shareholding of a company, including in all foreign

companies, the Commissioner of the KRA will have to be notified. Officials from the KRA have reported that in a search of the 497 foreign companies that are registered with them, ownership information is available for almost all of those companies and that via analysis of those 497 companies, there are only approximately 40 of those that are determined to have their place of effective management in Kenya.

95. Finally, Kenyan officials have reported that foreign companies are subject to the same system of oversight and programme of enforcement as they already have in place for all domestic companies and that in practice in the course of an on-site visit of a foreign company, the maintenance of an updated shareholder register is also verified (see also section *Enforcement provisions to ensure availability of information* A.1.6).

96. Over the review period, Kenya did not receive any requests relating to foreign companies in Kenya. However, in the case that such information was requested, in light of the above legal requirements for foreign companies to maintain ownership information as well as the monitoring of these requirements by the Registrar and the KRA, this information should be available if it were to be requested.

Nominees

97. The *Terms of Reference* require that jurisdictions ensure that information is available to their competent authorities that identify the owners of companies and any bodies corporate. Owners include legal owners, and, in any case where a legal owner acts on behalf of another person as a nominee or under a similar arrangement, that other person, as well as persons in an ownership chain, 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.

98. Pursuant to a 2014 amendment to the ITA, every person carrying on a business shall notify the Commissioner of *any changes* to the beneficial owner of the shareholding within thirty days of the occurrence (s. 54B(b)(ii)). However, it remains that while professional nominees in receipt of income subject to tax in Kenya have to be registered with the tax authorities, there is no legal requirement for ownership information to be provided at that time and it will only be in the event of a change to the beneficial ownership information that a nominee will have to disclose this to the KRA. Officials from the KRA have advised that in practice, at the time of registration all nominees must disclose ownership information on all clients for which they act. Officials from the KRA reported that as of December 2015, no persons had come forth to declare nomineeship.

99. All listed companies are subject to licensing and regulation by the Capital Markets Authority and will be obliged to provide ownership information on all shareholders (regulation 10 Capital Markets (Licensing Requirements) Regulations). Further, Rule 18.80 of the Capital Market Licensing Regulations requires that licensed persons (including professional nominees) have to maintain all ownership information on the client for whose behalf the nominee is acting.

100. Nevertheless, while there has been a 2014 amendment to the ITA in respect of disclosing beneficial ownership information in the case of a change to the beneficial ownership information, it remains that no indication needs to be given in the share registers or information filed with the KRA when shares or other interests in companies are held by nominees on behalf of a third party. Kenyan authorities report, however, that such information identifying the person for whom they act should be held as a consequence of the general common law fiduciary obligation owed by a nominee to the beneficial owner. Pursuant to the ITA, the Commissioner has the power to interview any person in receipt of income whether in his own capacity or "as representative of another person" (s. 56(2) ITA) (see section B.1.1). The Commissioner may also require any person who receives income as the representative of another person to furnish a return containing ownership information for the person for whom they act (s. 61 ITA). However, the KRA will generally not know who is a nominee shareholder unless this has been ascertained in the course of an audit or if they have been alerted to this fact in some other way and they then proceed to access this information.

101. There are certain requirements for the identification of persons on whose behalf nominees act under the AML framework. First, nominees that are financial institutions or DNFPBs are obliged to conduct CDD on their customers and thus maintain full information on the persons on whose behalf they hold an interest in the company. In addition, under Section 45(4) of POCAMLA if it appears to a reporting institution that an applicant requesting to enter into any transaction, whether or not in the course of a continuing business relationship, is acting on behalf of another person, the reporting institution should take reasonable measures to establish the true identity of a person on whose behalf or for whose ultimate benefit the applicant may be acting in the proposed transaction, whether as trustee, nominee, agent or otherwise.

102. Consequently, where it appears that a client of a reporting institution is acting on behalf of another person the reporting institution will be required to carry out CDD (s. 46 POCAMLA) when establishing a business relationship to identify the person(s) for whom the nominee is acting as a legal owner in accordance with section 45(4). Documentation in respect of the CDD carried out must be maintained by the reporting institution for at

least seven years after the end of its business relationship with the person for whom they act (s. 46(4) POCAMLA). Failure to carry out CDD or to maintain the documentation for at least seven years can lead to an administrative fine not exceeding 10% of the amount of the monetary instruments involved in the offence (s. 11(1 POCAMLA). Where the offence is committed by a body corporate or one of their officials, that person, as well as the body corporate, shall be prosecuted in accordance with the Act (s. 17(5) POCAMLA).

103. Therefore, the above combination of requirements as set out under the ITA, the POCAMLA and the Capital Market Licensing regulations ensure that ownership information will be available in Kenya in most cases where a nominee acts in a professional capacity. Further, in those cases where a nominee acts in a non-professional capacity, the ability of the Commissioner to request ownership information from such persons should ensure that ownership information will also be available in these cases. Nevertheless, the situation remains that as nominees are not obliged to provide ownership information at the time of registration, this may not ensure that ownership information is available in all cases.

Nominee ownership information in practice

104. Authorities from the KRA have indicated that in practice there will only be exceptional cases whereby a nominee will not be acting for profit or gain and therefore not deemed to be acting in a professional capacity, and hence this category represents a very small proportion of all nominees acting in Kenya. In addition, authorities have reported that they have never come across a nominee acting in a non-professional capacity.

105. In the case that nominees are operating in the stock market, they will have to be licensed by the Capital Markets Authority which is an autonomous body coming under the portfolio of the Ministry of Finance and this will include the supply of beneficial ownership information. As of December 2015, there were 112 officials working at the Capital Markets Authority. In regards to inspections of records, the Capital Markets Authority performs both offsite and on-site inspections on the licensed entities.

106. To date no requests involving nominee shareholders have been received so far by Kenya, and of the EOI partners that provided peer input, none indicated that there were any issues in relation to nominee ownership.

Conclusion of company ownership information in practice

107. All companies incorporated under the Companies Act are required to keep a register of members. In addition, the Registrar of Companies keeps a register of all companies and the information available includes ownership

information where the company has a share capital. The KRA also maintains a register on all companies chargeable to tax, and since 2014, this register also now contains updated ownership information. Foreign companies must be registered with the Registrar of Companies when establishing a place of business in Kenya. Foreign companies chargeable to tax must also register for tax purposes and file an annual return. Certain provisions of the ITA will warrant the maintenance of accurate ownership information on all companies including foreign companies and in addition, since 2014, there is a requirement in the annual company return to submit updated ownership information. Since 2014, there is a requirement under the ITA for professional nominees to inform the KRA of any changes of identity to the clients for whom they act. However, this may not ensure the availability of information for all clients for which a nominee acts. Under AML legislation, there are certain requirements for the identification of persons on whose behalf nominees act, but those requirements are not applicable to all cases where shares of a company are held by a nominee. Kenya is therefore recommended to ensure that ownership information is available in all cases where shares are held by a nominee.

108. Over the review period, Kenya provided ownership information in the two cases in which it was requested, although it is noted that there were long delays in its provision. In respect of monitoring, it is noted that over the review period, while a system of monitoring was in place by the KRA, very little activity in respect of monitoring of entities obligations was undertaken by the Registrar General. It is noted that in December 2015, Kenya passed the Business Registration Act 2015 providing for the creation of an independent entity, the Business Registration Service in order to monitor compliance of all registered entities more closely. However, as this entity was established very recently in Kenya, the effectiveness of this measure could not be monitored by the assessment team. Therefore, Kenya is recommended to improve its system of oversight in order to ensure that updated ownership information is being maintained in respect of all relevant entities.

Bearer shares *(ToR A.1.2)*

109. Previously, public companies were permitted to issue share warrants to bearer in Kenya. Pursuant to the Companies Act as enacted in September 2015, companies may no longer issue such shares (s. 504(1), Companies Act). Any share issued in contravention of this prohibition is deemed to be void (s. 504(2), Companies Act). Therefore, Kenyan law no longer provides for the issuance of share warrants to bearer.

Ownership information for bearer shares in practice

110. Pursuant to the enactment of the new Companies Act in September 2015, share warrants to bearer are no longer permitted to be issued in Kenya. Whilst share warrants to bearer were permitted to be registered over the review period, this was only authorised for public companies of which these represented 1% of the total number of companies operating in Kenya. The Registrar of Companies has reported that, in a comprehensive search of public companies, none were found to have provision for the issuance of bearer share warrants in their Articles of Association. Further, officials from the Capital Markets Authority and the KRA have reported that they have never encountered bearer shares being issued by a publicly registered company. Over the review period, no requests related to companies that had issued bearer shares nor did any peer report any issues in this regard. Kenyan officials have reported that with the introduction of the Companies Act in September 2015 that all previously existing bearer shares are declared void (s. 504(1 and 2), Companies Act). However, in the case that a shareholder was to approach a company with a previously existing bearer share, as to whether or not the share could be revived or the process for reviving the share rights is unclear. Authorities from Kenya have reported that they are soon to implement a transitional procedure via the regulations to the Companies Act for any share warrants to bearer that may have been issued prior to this prohibition. Nevertheless, Kenya is recommended to should monitor the implementation of the new provisions of the Companies Act prohibiting the issuance of share warrants to bearer to ensure that full ownership information is available for all companies.

Partnerships *(ToR A.1.3)*

111. Under the Partnerships Act a partnership is defined as "the relation which subsists between persons carrying on a business in common with a view of profit" (s. 2(1) Partnerships Act). Three types of partnerships can be distinguished:

- General partnership (GP): every partner is liable jointly with the other partner(s) for all debts and obligations of the partnership incurred while he/she is a partner (s. 4 Partnerships Act). General Partnerships are governed by the provisions of the Partnerships Act.
- Limited partnership (LP): consisting of one or more general partners, who are liable for all debts and obligations of the partnership, and one or more limited partners contributing capital, who are liable for the debts and obligations of the partnership to the extent of the amount of capital contributed (s. 56 Partnerships Act). LPs are governed by the provisions of the Partnerships Act (sections 60 Partnership Act).

- Limited Liability Partnerships (LLP): is a legal entity with separate legal personality from that of its partners (s. 6 Limited Liability Partnership (LLP) Act). LLPs are capable of holding property and carrying out legal acts in their own name. Generally, LLPs are governed by the provisions of the LLP Act. However, the provisions of the Partnerships Act will also apply to LLPs unless a provision of the LLP Act states otherwise (s. 8 LLP Act).

Registration of partnerships

112. There is no requirement for GPs to register with the Registrar, but they may do so if they wish. In regards to LPs, a strict requirement for forming an LP is that there is at least one limited partner (s. 56 Partnerships Act) and a limited partner will only be recognised as such if they are registered as a limited partner (s. 57(1) Partnerships Act). Further, in order to carry on business as an LP, the LP must be registered under a name which includes the words "limited partnership".

113. Section 68 of the Partnerships Act sets out the procedure for the registration of an LP at the Registrar of Partnerships. The following particulars must be submitted upon registration:

a. the name of the partnership;

b. the name and address of the proposed general partners;

c. name of each proposed limited partner and the amount of capital contribution made by the partner to the partnership;

d. the location and address of the proposed registered office; and;

e. if the application relates to an existing general partnership, the date of its formation.

114. Every LLP formed under the LLP Act must be registered in order to be recognised as such (s. 16 LLP Act).In respect of LLPs, section 17 of the LLP Act prescribes that a statement signed by each person who proposes to be a partner of the proposed LLP including the following information must be lodged with the Registrar of Partnerships;

a. the name of that partnership;

b. the general nature of the proposed business of that partnership;

c. the proposed registered office of that partnership;

d. the name, identity document (if any), nationality, and usual place of residence of each person who will be a partner of the partnership;

e. if any of the persons referred to in paragraph (d) is a body corporate —

   i. the body's corporate name;

   ii. the body's place of incorporation or registration;

   iii. the body's registration number (if any); and

   iv. the registered office of the body to which all communications may be addressed;

115. The Registrar must maintain the originals of all documents lodged with respect to LPs for not less than ten years (Fifth Schedule, Article 14 (2) Partnerships Act). The Fifth Schedule of the Partnerships Act contains detailed requirements for LPs to provide changes to ownership information (of both general and limited partners) to the Registrar within 28 days after the change has occurred (Fifth Schedule, Article 5(1) and (3) Partnerships Act).

116. In regards to LLPs, whenever a change occurs in any of the particulars registered in regards to an LLP, the Registrar of Partnerships must be notified of this change within 14 days after the date of such change (s. 33(1) LLP Act).

117. Under section 71 of the Partnerships Act a person who knowingly provides or causes another person to provide, false information (to the Registrar during registration or any other time) commits an offence and is liable on conviction to a term not exceeding six years or to a fine not exceeding KES 100 000 (EUR 903) or to both. These offences and penalties will equally apply to LLPs as long as there is nothing expressly stated to the contrary in the LLP Act (s. 8 of LLP Act). In addition, sections 4 and 17(5) of the LLP Act also provides that the Registrar may refuse to register an entity (including an existing partnership or a private company) as an LLP if the Registrar is not satisfied with the information purporting to be provided in respect of the entity.

118. These registration requirements and the obligation to submit any change ensure the availability of ownership information in respect of all LPs and LLPs formed under Kenyan law and carrying on a business in Kenya.

Tax law

119. Partnerships are considered transparent for tax purposes, which means that the partners are taxed separately for their share in the partnership's income and will be required to file an annual tax return in respect of this income (sections 3(2)(a)(i) and 4(b) ITA). The managing partner is also required to lodge a tax return in respect of the partnership. At the time of

lodging the partnership income tax return, a separate schedule detailing all payments, benefits, advantages and facilities made or granted to the partners in the year of income with full names of all the partners with the amount of the share to which each partner was entitled must be included (s. 54(1)(b) ITA). Therefore, the managing partner will have the responsibility for maintaining comprehensive partnership level records. This requirement is irrespective of whether the partnership is general, limited, limited liability or a foreign partnership that derives income in Kenya.

120. In addition, the Commissioner has the power to ask the precedent resident partner in Kenya to furnish an income tax return within 30 days containing a full and true statement of the income and of such particulars as may be required for the purposes of the Act (s. 52(4) ITA). Such a return must contain the names and addresses of the other partners together with the amount of the share to which each partner was entitled. This means that where a partnership return has been submitted upon request by the tax authorities, full partnership ownership information for the relevant year will also be available directly within the tax authorities.

Partnership ownership information in practice

121. In respect of LPs and LLPs, the requirements of the LP Act and LLP Act respectively establish obligations for LPs and LLPs to provide identity information on each partner at the time of registration, to notify the Registrar of Companies of any change in this information and to submit renewals with ownership information on all partners.

122. Currently all LPs and LLPs must be registered in person at the Registrar of Companies and the process for doing so is similar to that as above outlined for companies (see section A.1.1 *Registration of companies in practice*). In addition to completion of the relevant forms, a stamped partnership agreement must be submitted containing all partners' names, the general nature of the business, addresses of the partnership, names, address, occupation and TINs of the partners. Upon submission of the relevant forms the partnership is issued a certificate of registration. All subsequent changes to the information submitted at the time of registration must be submitted to the Registrar of Companies. Annual renewals must be filed annually. Officials from the Registrar have indicated that the information submitted is cross-checked with all information as provided throughout the year in order to ensure that partnerships are in compliance with their obligations to update all changes with the Registrar of Companies. In the course of the cross-checking as performed by the Registrar, compliance has been found to be very high.

123. In practice, all partnerships (LLPs, LPs and GPs) must be registered with the KRA via the i-tax system and all partners in a partnership must be

identified at the time of registration. Further, the ITA requires that all partnerships submit an annual return containing the names and addresses of the partners. Therefore, there are comprehensive obligations to ensure that identity information on all partners of relevant partnerships is being maintained. As of December 2015, there were 14 445 partnerships registered in the i-tax system of which 11 706 have filed their partnership returns, representing a 81.3% rate of compliance.

124. Further, for all partnerships that come under the supervision of the Capital Markets Authority (i.e. those involved in the securities market) Guideline 5.10 of the guidelines as issued by the Capital Markets Authority require that all partners in unit trusts, partnerships and other unincorporated bodies be identified.

Conclusion

125. All LPs and LLPs carrying on a business in Kenya must be registered with the Registrar and upon registration details of all partners must be submitted. GPs may also register but there is no obligation to do so. Any changes in the ownership of LPs and LLPs must be notified within 28 days. Updated ownership information on LPs and LLPs is therefore available at the Registrar. All forms of partnership must be registered for tax purposes and are subject to annual tax return filing requirements. In addition, the tax authorities may request that a tax return for a partnership be made including ownership information on all partners. These obligations ensure that ownership information regarding all partnerships incorporated in Kenya, carrying on business, or with income, deductions or credits for tax purposes will be made available.

126. There are both comprehensive legal requirements in place in Kenya and a system of oversight of these obligations by the KRA in the form of desktop inspections and on-site visits to ensure that updated partnership ownership information is being maintained. In the three year period under review, Kenya has not received any EOI requests for information relating to the identity of partners in a partnership.

Trusts *(ToR A.1.4)*

127. Trusts are recognised in Kenya under both common and statutory law. At common law, trusts are generally created when assets are transferred by a person (the settlor) to a trustee for the benefit of another person (the beneficiary). There are no apparent prohibitions for a Kenyan resident to act as a trustee or otherwise in a fiduciary capacity in relation to a trust formed in Kenya or under foreign law. Likewise, there are no apparent prohibitions for a resident of Kenya from administering a trust or acting as a protector of a

trust governed under foreign law. The law of trusts in Kenya is derived from the common law and the United Kingdom Trustees Act of 1860. Trust law was developed by the English Courts of equity and is a part of the common law which evolved into the laws of Kenya and is still retained as part of the existing law (s. 3(1) Judicature Act (1967)).

128. The other statutes concerning trusts in Kenya are the Trustee (Perpetual Succession) Act (TPSA) (1981), the Trustees Act (1982), and the Public Trustee Act (PTA) (2009). The TPSA enables trustees of a voluntary association established for a religious, literary, scientific, sports, or charitable purpose on registration under the Act, to become incorporated to hold immovable property in trust for the members of the relevant association. The Trustee Act sets out the powers that may be exercised by Kenyan resident trustees administering trusts in Kenya. These powers include the power to sell trust property, employ agents and to delegate trust functions. The PTA creates the office of the Public Trustee and provides the holder with corporate status. The Public Trustee then operates under the Act as a trustee empowered by the Office of the Attorney General to administer the properties of mentally incapacitated persons and to be appointed as an ordinary trustee among other functions. Since these enactments are restricted in their application, the laws governing a trust which does not fall within these enactments depends on the trust instrument as executed by the trustee. If the trust instrument does not state all the powers of the trustee and the rights of the beneficiaries, the Courts are left to follow English common law on trusts.

Tax Filing

129. All Kenyan trusts are taxable on income accruing in or derived from Kenya, and where business is carried on by the trust partly outside Kenya, trusts will also be taxable on that income (sections 3 and 4 ITA). In certain instances, foreign source income may also be deemed as income accruing in or derived from Kenya. Foreign trusts are taxed in respect of Kenyan source income and will also be required to register with the KRA (sections 3(1) and 132 ITA). The current KRA registration form as used to register a trust includes a section specifying that ownership information on all beneficiaries is required. Further, at the time of registration, the trust deed, which will contain ownership and identity information on the trustee, settlor, and the beneficiaries (either individual beneficiary ownership information or the identification of the class of beneficiaries) must also be filed with the KRA. As of December 2015, there were 887 trusts registered with the KRA.

130. The income of trusts is deemed to be income of the trustee, with the tax on this income payable by both the trustee and its beneficiaries with double taxation being relieved through a credit allowed to the beneficiary for any tax paid by the trustee (s. 11(1) and (3) ITA). Section 52B of the

ITA obliges all persons with chargeable income to file an annual tax return with the KRA. At present, the form used to file a return in respect of the trust is the same form used by companies (i.e. the Company Return, Form IT2C). The return must state the trust's income for the year and the names and addresses of the trust's beneficiaries. In addition, all beneficiaries who receive an income from the trust are also required to submit an annual tax return to the KRA (s. 52(b) ITA). Subject to a 2014 amendment to the ITA, all persons carrying on business in Kenya are subject to a requirement to notify the Commissioner of any changes to the information submitted at the time of registration, including ownership information, within thirty days of their occurrence. In the case of a trust, this specifically provides a requirement for the trust to supply full identity and address details of trustees, settlors and beneficiaries (s. 54B(iii)).

131. In the event that there is no taxable income earned by a Kenyan trust, there will be no tax filing requirements for the trust or beneficiaries. Further, foreign trusts with a Kenyan resident trustee deriving solely foreign sourced income will not be subject to tax filing requirements in respect of that income as that income will not be subject to tax in Kenya (s. 3(1) ITA).

132. Failure to furnish a return to the KRA within the time required under the ITA is an offence and shall be charged with additional tax equal to 5% of the normal tax (s. 72(1) ITA).

Trust ownership and identity information required to be held by the trust

133. Kenya has confirmed that English common law relating to trusts and the fiduciary duties of the trustee as applicable to trustees operating in Kenya is followed and this is also set out under statute (s. 3(1) Judicature Act). Pursuant to English common law requirements, for a trust to be valid, the trust needs to meet the three certainties: the certainty of intention, the certainty of subject matter and the certainty of object. This means that a trust is only valid if evidenced by a clear intention on behalf of the settlor to create a trust, clarity as to the assets that constitute the trust property and identifiable beneficiaries (*Knight v. Knight* (1849) 3 Beav 148). A written declaration of trust may not exist or not identify the settlor on the face of the document. However, trustees have a duty of care to act in accordance with the wishes of the settlor. As a matter of good practice trustees would keep sufficient records to enable them to perform their duties.

134. Trustees should obtain "good receipt" from beneficiaries when they distribute trust property. This requires trustees inter alia to establish that the person receiving the trust property is the correct beneficiary of the trust property being distributed (*Evans v. Hickson* (1861) 30 Beav 136). The trustee

is obligated to administer the trust solely in the interests of the beneficiaries. Therefore, as a matter of good practice, it is likely that the beneficiaries of the trust or the class of beneficiaries will have to be made clearly identifiable in the trust deed.

135. In the event of non-compliance with these duties by the trustee, beneficiaries have the right to enforce the trust (*Beswick v Beswick* [1968] AC 58). In the event of non-compliance of their duties, the settlor or beneficiaries can commence legal proceedings against the trustee.

Information held by service providers

136. Service providers such as financial institutions and DNFBPs that come within the scope of the AML regime (see section A.1.1 *Ownership information held by service providers*) are obliged to take reasonable measures to determine the true identity of the person on whose behalf or for whose ultimate benefit a trustee may be acting (s. 46 (4) POCAMLA). These businesses and professions are obliged to carry out CDD to determine the persons for whom the trustee is acting and therefore ownership information regarding the settlor and beneficiaries will be maintained in these cases under the AML regime. However, to the extent that a trustee is not a financial institution or a DNFBP, trustees acting in a business capacity will generally not come under the provisions of the AML regime.

Trust ownership information in practice

Tax filing in practice

137. All trusts with income chargeable to tax in Kenya are obliged to be registered with the KRA. Similar to that for companies as outlined above (see section A.1.1 *Registration in practice*), as of 2014, all entities, including trusts, must register for tax purposes with the KRA online via the ”i-tax system”. At the time of registering a trust, information required includes the identification of all trustees and beneficiaries. Prior to being allocated a PIN, the trustee will then be required to go to the office of the KRA and submit a hard copy of the trust deed.

138. As of December 2015 there were 887 trusts registered with the KRA. Pursuant to a 2014 amendment to the ITA, in the event that there is any change to the trust such as a change in the settlor, trustee, or beneficiary, the Commissioner will also have to be notified of these changes within 30 days. Officials from the KRA have reported that by performing a search of the trusts registered, this procedure has been dutifully carried out by those trusts where there have been changes.

139. In the case of a trust carrying on business in Kenya (which as mentioned above will not cover those cases where the trust is deriving passive income such as dividends), the trust must file an annual return with the KRA and where there has been a distribution of trust income to a beneficiary this must be detailed. Officials from the KRA have reported that most trustees comply with the annual return filing requirement which are due by four months after the end of the accounting basis period of the trust. In the event of non-compliance, it is the practice of the KRA to write a letter to the trustee reminding them of the annual return filing requirement. The KRA has reported that over the review period a separate compliance rate for filing of trust income tax returns was not maintained (see also section A.1.6 *Enforcement provisions to ensure availability of information*).

140. In addition, the trustees of all ordinary trusts in Kenya are subject to the common law duties on trustees which should extend to an obligation to have full knowledge of all beneficiaries and in certain cases the settlors for all trusts for which they act. In the case of ordinary trusts, officials from the Attorney-General's Office of Kenya have reported that due to the relatively recent independence from the United Kingdom (1963), as yet Kenya does not have its own case law setting down the fiduciary duties as applicable to trustees in Kenya and that the English common law relating to trusts and the fiduciary duties of the trustee as applicable to trustees operating in Kenya is followed.

141. English common law principles set out that in the event of non-compliance with these duties by the trustee, beneficiaries have the right to enforce the trust (*Beswick v Beswick* [1968] AC 58). In the event of non-compliance of their duties, the settlor or beneficiaries can commence legal proceedings against the trustee. Generally, this should ensure that trustees are complying with their ongoing records keeping requirements.

Conclusion of trust information in practice

142. The availability of ownership and identity information in respect of trusts in Kenya is dependent on common law and provisions of the ITA. While there is a requirement since January 2015 for all registered trusts to notify the KRA in the event of any change to the trust ownership information, this does not ensure that trust identify and ownership information will be available in all cases, such as those cases where the trust does not derive income chargeable to tax in Kenya. Further, as the requirement to update the KRA was only made law in September 2014 and came into effect in January 2015, Kenya should closely monitor the practical implementation of these amendments to the ITA to ensure that identity and ownership information on all settlors, beneficiaries and trustees in Kenya is being maintained.

143. In certain cases, the obligations of the POCAMLA will also apply in requiring the trustee to have updated identity and ownership information available on the trust. However, to the extent that a trustee is not a financial institution or a DNFBP, trustees acting in a business capacity will generally not come under the provisions of the AML regime.

Conclusion

144. All Kenyan trusts and foreign trusts chargeable to tax in Kenya must be registered for tax purposes and file an annual tax return with the KRA detailing the payments made and all ownership information in respect of the beneficiaries. In certain cases, the identity of beneficiaries and settlors may have to be identified by the trustee where they transact with or engage a service provider subject to the AML regime. Trustees may also be under a common law duty to be able to identify the settlors and beneficiaries of the trust. However, in the case that a trust is not chargeable to tax in Kenya there are no registration or tax filing requirements under the ITA and in such cases the obligation to identify all settlors, trustees and beneficiaries may not be consistently provided for. It is therefore recommended that Kenya takes measures to ensure the availability of ownership information in respect of trusts in all cases.

145. Where a trust is created under the laws of Kenya which has no other connection with Kenya, there may be no information about the trust available in Kenya. In these situations trust information should be available in the jurisdiction where the trustee is located as the relevant records would be situated there.

146. In the three year period under review, Kenya has not received any EOI request for information relating to the identity of the settlor, trustee or beneficiary of a trust and of the EOI partners that provided peer input, none indicated that there were any issues in relation to trust information. Nevertheless, from the above analysis, in the case that a trustee was not carrying on business in Kenya (such as only being in receipt of passive income) or does not have income chargeable to tax in Kenya, they will not be subject to the requirement to register with the KRA and maintain updated information. Therefore, on the implementation of legal requirement for trust identity and ownership information to be made available, Kenya is recommended to monitor these legal requirements in order to ensure that identity and ownership information is made available in all cases.

Foundations *(ToR A.1.5)*

147. The Kenyan legal and regulatory framework does not provide for the establishment of foundations.

Other relevant entities and arrangements

148. Under the Co-operative Societies Act (CSA), co-operative societies can be established for the promotion of the welfare and economic interests of their members. Two types of co-operative societies can be distinguished in Kenya:

- Primary societies: the membership of primary societies is restricted to individual persons and must consist of a least ten members all of whom shall be qualified for membership of the co-operative society under the act (s. 2 CSA).
- Co-operative unions: the membership of Co-operative unions is restricted to primary societies of which they must have at least two registered primary societies as its members (s. 2 CSA).

149. Primary co-operative societies must have at least ten members, who must be individuals over eighteen years of age, whose employment occupation or profession falls within the category of that for which the co-operative is registered and either resides or owns immovable property in the (intended) area of operations (s. 14 CSA). Alternatively, a Co-operative union must have at least two other co-operative societies as its members (s. 2 CSA). The word "co-operative" has to form part of the name of the co-operative society (s. 10(2) CSA) and only co-operative societies that have been given approval via registration from the Commissioner may trade or carry on a business under any name that includes the word "co-operative" (s. 90(1) CSA). Therefore, all co-operative societies must be registered and may do so only when they have as their objective to promote the welfare and economic interests of their members in accordance with the co-operative principles (s. 4 CSA). Any person carrying on business as a co-operative society without registration shall be subject to penalties such as a fine not exceeding KES 50 000 (EUR 439) or to imprisonment for a term not exceeding two years, or both (s 90(2) CSA). For tax purposes, co-operative societies are treated the same as companies.

150. Co-operative societies must submit a registered address at the time of registration and must notify the Commission of any changes to this address within one month from the date of the change (s. 23 CSA). Co-operative societies are obliged to keep a list of members at their registered address which is open to inspection by any person free of charge at all times during business hours (s. 24 CSA).

151. In addition, the register of members of a co-operative society must contain details of the date on which any person became a member, the date on which they ceased to be a member and the number of shares held by each member. Therefore, changes to membership must be recorded. As of December 2015, there was 18 889 co-operative societies registered with the Kenyan Commission of Co-operatives.

Cooperative societies in practice

152. In order to operate as a co-operative society in Kenya, the entity must first be authorised to do so from the Commissioner of the KRA. In practice, officials from the KRA have reported that at the time of seeking approval, the co-operative society must supply details, such as the list of all members. For tax purposes, co-operative societies are treated the same as companies and therefore in the case that the co-operative society has derived taxable income in Kenya, it is also subject to a requirement to file a tax return with the KRA. The tax return requires such information as ownership information on the members. As of December 2015, there were 13 936 co-operative societies registered with the KRA of which 9 765 have filed their returns representing a 70% compliance rate.

153. In the three year review period, Kenya has not received any EOI requests for information relating to a co-operative society and of the EOI partners that provided peer input, none indicated that there were any issues ownership information in relation to a co-operative society

Enforcement provisions to ensure availability of information *(ToR A.1.6)*

154. Jurisdictions should have in place effective enforcement provisions to ensure the availability of ownership and identity information, one possibility among others being sufficiently strong compulsory powers to access the information. This subsection of the report assesses whether the provisions requiring the availability of information with the public authorities or within the entities reviewed in section A.1 are enforceable and failures are punishable.

155. Companies and co-operative societies are required to keep a register of members. For companies, not keeping a register of members can lead to a default fine of KES 500 000 (EUR 4 392) being enforced on the company and any officer in default (s. 93(10) Companies Act) Further, for every day in default a fine of KES 50 000 (EUR 439) may also be imposed on the company or officer (s. 93 (11) Companies Act). Where a co-operative society does not comply with the requirement to maintain a register of members, a fine of up to KES 50 000 (EUR 439) or imprisonment of up two years or both may be imposed on the co-operative society and any officer or member in default (s. 94(1)(a) CSA). All companies must also register and provide an annual return containing updated information on members to the Registrar of Companies. For companies that do not comply with annual filing requirements, this can lead to a default fine of KES 200 000 (EUR 1 756) being imposed on the company and any officer in default and an additional 20 000 (EUR 176) being imposed on the company or officer in default for every additional day (sections 708 Companies Act).

156. Upon registration with the KRA, companies must register their initial members. Foreign companies must also register for tax purposes and submit their memorandum at the time of registration which may contain membership information. Any person not complying with this obligation will be liable to a fine of KES 2 000 (EUR 18) for every omission. Additionally every company must file an annual tax return. Further, in 2014, the company tax return was amended by Kenya so that all companies are now obliged to provide updated ownership information at the time of filing their annual return. Foreign companies will be subject to a requirement to list all members with a 10% or greater interest in the share capital of the company. Failure to file a tax return attracts a penalty of 5% of the tax outstanding (s. 72(1) ITA).

157. Both LPs and LLPs must register and upon registration details of each partner must be furnished. Any change in this respect must also be registered. Under section 71 of the Partnership Act, a person who knowingly provides or causes another person to provide, false information (to the Registrar during registration or any other time) commits an offence and is liable on conviction to a term not exceeding six years or to a fine not exceeding KES 100 000 (EUR 903) or to both. These offences and penalties will apply to LPs and LLPs. Sections 4 and 17(5) of the LLPA also provides that the Registrar may refuse to register an entity (including an existing partnership or a private company) as an LLP if the Registrar is not satisfied with the information purporting to be provided in respect of the entity. All partnerships will have to register for tax purposes and will be subject to annual filing requirements with updated ownership information. Any partnership not complying with the obligation to register will be liable to a fine of KES 2 000 (EUR 18) for every omission. Further, failure to file a tax return attracts a penalty of 5% of the tax outstanding (s. 72(1) ITA).

158. All trustees are subject to tax are under an obligation to file an annual tax return. Failure to file a tax return attracts a penalty of 5% of the tax outstanding (s. 72(1) ITA). In respect of trustees of ordinary trusts, in the event of non-compliance with their duties under common law, the settlor or beneficiaries can commence legal proceedings which may result in fines or other penalties such as injunctions being enforced on the trustee.

159. Reporting institutions subject to the AML regime (POCAMLA) that enter into a business relationship with someone they suspect may be acting as a trustee must verify the identity of the settlor or the beneficiary for whom they act. Under Section 11(1) of the POCAMLA, a reporting institution that fails to comply with any of the requirements of know your customer obligations as set out under sections 44, 45, and 46, or of any regulations, commits an offence. Under Section 16(2), a natural person who contravenes the provisions of section 11(1) is on conviction liable to imprisonment for a term not exceeding seven years, a fine not exceeding KES 2.5 million (EUR 21 467)

or to both. In the case of a legal person committing an offence they will be liable on conviction to a fine not exceeding KES 10 million (EUR 84 415) or the amount of the value of the property involved in the offence, whichever is the higher. In addition, under Section 16(6) of the POCAMLA, where any offence under this Part is committed by a body corporate with the consent or connivance of any director, manager, secretary or any other officer of the body corporate, or any person purporting to act in such capacity, that person, as well as the body corporate, shall be prosecuted in accordance with the provisions of this Act.

160. All co-operative societies must be registered. Any person carrying on business as a co-operative society without registration shall be subject to penalties such as a fine not exceeding KES 50 000 (EUR 439) or to imprisonment for a term not exceeding two years, or both (s 94(2) CSA). For tax purposes, co-operative societies are treated the same as companies and will therefore be subject to the penalties for non-registration and non-filing of tax returns under the ITA as set out above.

161. Enforcement provisions are in place in respect of the relevant obligations to maintain ownership and identity information for all relevant entities and arrangements.

Enforcement in practice

162. The enforcement of sanctions for non-compliance by the different authorities is outlined below.

Enforcement by Registrar for companies and partnerships

163. All companies must be registered with the Registrar of Companies in Kenya as must all LPs and LLPs. While GPs are not required to be registered, officials have reported that most GPs chose to do so. Changes to information provided at the time of registration such as changes to the registered address, business name, or directors must be filed with the Registrar before these changes will take legal effect (sections 47(5)(b), 63(1) and 138(1) Companies Act). In the case of foreign companies, any changes to documents filed at the time of registration, including the shareholder register must be filed with the Registrar within 30 days. All registered entities are also required to file an annual return with the Registrar which will include all updated ownership information. Non-compliance with these provisions can lead to a fine of KES 200 000 (EUR 1 756) being imposed on the company and any officer in default and an additional 20 000 (EUR 176) being imposed on the company or officer in default for every additional day (s 708 Companies Act).

164. Officials from the office of the Registrar of Companies have reported that while they have noted a high rate of compliance with the obligation to file an annual return, precise compliance rates for annual return filing over the review period were unavailable. In the case of companies, since 2012, there has been a requirement for all companies to nominate a company secretary to be responsible for compliance with the filing obligations of companies. This measure has increased the compliance of companies with filing obligations. While the Registrar of Companies has reported that in cases of non-compliance, fines were imposed, segregated data relating specifically to the amount of fines imposed over the review period were not maintained. Pursuant to section 894 of the Companies Act as enacted in September 2015, the Registrar is now empowered to strike off entities which the Registrar reasonably believes is no longer carrying on business or an operation. Officials from the Registrar have reported that this provision will further enhance its capacity to monitor registered entities. Further, pursuant to section 164 of the Companies Act, the Registrar is enabled to conduct investigations of companies. Officials from the Registrar have reported that this only occurs in exceptional cases.

Enforcement of tax law obligations

165. All companies, partnerships and trusts with taxable income in Kenya must be registered with the KRA. In order to ensure that all entities registered for business purposes are also registered for tax, officials from the KRA cross-check the tax registers with the register of companies, and reminders are sent to the companies that had not yet registered for tax purposes. In the event that companies continued not to comply with the legal requirement to register for tax purposes, these entities were subject to an audit by company inspectors and fines were also imposed in some cases.

166. In Kenya, partnerships are tax transparent and are treated as transparent entities through which partnership income flows to the partners and such share of income is included in the tax returns of its partners. All resident partnerships or partnerships with a permanent establishment in Kenya are obliged to file a yearly partnership return with the KRA.

167. Trusts with income chargeable to tax in Kenya are also subject to registration with the KRA. All trusts with income chargeable to tax in Kenya which fail to furnish a return to the KRA within the time required under the ITA will be subject to a penalty in respect of each day during which the default continues.

168. Within the KRA, taxpayers are segmented according to size whereby there are large taxpayers which are supervised by the large taxpayer office (LTO), medium taxpayers which are supervised by the medium taxpayer

office (MTO) and the remainder, mainly consisting of sole traders and small entities, are segregated into 16 smaller categories (referred to as the 16 stations) based on turnover and the nature of their activities.

169. In respect of the submission of tax returns (submission of tax returns is not regimented by entity but by the categories utilised by the KRA as outlined in the preceding paragraph), the Kenyan authorities indicated that there is quite a high compliance rate and that in regards to the large and medium taxpayer group, there is 100% tax filing compliance. While there is a lower rate amongst the 16 stations of approximately 75%, the lower rate of compliance is mainly attributable to individuals who have either ceased trading or are unfamiliar with their tax filing obligations. In the event that tax returns are not filed on time, a reminder notice is issued to the company one month after the deadline. In the event that there is continued non-compliance with the tax return filing requirement, the KRA has applied penalties and the KRA may raise an assessment on the person based on previous year's assessment with interest. Therefore, there is an incentive for companies to file the tax returns with the KRA annually on a timely basis.

170. In addition to the monitoring of tax filing obligations, there is a comprehensive system of oversight of the ownership obligations under the ITA in place by the KRA in the form of desktop reviews and an active system of on-site audits of entities registered for tax purposes.

171. Over the review period, officials from the KRA have reported that the taxpayers investigated were chosen as a result of careful risk analysis where certain factors such as taxpayer profile, history, industry, compliance with information filing obligations, customer base and payment profile were assessed. In the course of conducting on-site inspections, officials from the KRA have confirmed that certain ownership information obligations such as the maintenance of an updated shareholder register will be verified. In the event of non-compliance with the ownership information obligations as set out under the Companies Act, the KRA auditor will report such omissions to the Registrar of Companies as the body responsible for the enforcement of penalties under the Companies Act.

172. Officials from the KRA have reported that audits are carried out in line with an audit manual which the KRA has in place and sets out clear procedures and guidelines for all auditors to follow. The audit programme is carried out on a risk based approach of which there are 4 categories of risk that have been identified; ownership risk (which will include body co-operates and trusts), the complexity of the group (larger for multinationals etc.), the previous tax compliance history and the tax agent responsible for the ensuring that the taxpayer complies with their tax filing obligations. In regards to penalties, for corporate tax there are two types of penalty available. Firstly, there is late compliance fee charged at 2% of the tax liability per

month and which is levied on a compound basis. There is also a default penalty of 20% of the tax liability that will be applied (s 72D, ITA). In addition to the penalty payable under section 72D, a late payment interest of two percent per month or part thereof shall be charged on the amount of tax remaining unpaid for more than one month after the due date until the full amount is recovered.

173. Over the review period, in 2012 the LTO carried out 68 audits carried out, in 2013 this number was 64 and in 2014 the LTO carried out 72 audits on large taxpayers. These audits led to the imposition of fines amounting to 52.4 million in 2012, 63.2 million in 2013 and 83.3 million in 2014.

174. For the medium taxpayer companies, the MTO carried out 45 audits in 2012 amounting to the imposition of approximately USD 32 million in fines, 60 audits in 2013 amounting in USD 51.4 million in fines and 88 audits in 2014 resulting in USD 79.3 million in fines and recovered tax.

175. In regards to the 16 stations covering mainly small entities and sole traders, in 2012, there was 248 audits carried out amounting to fines and recovered tax of USD 42.7 million. In 2013, there were 242 audits carried out by the 16 stations resulting in fines being imposed of USD 70.1 million. In 2014 the 16 stations conducted 232 audits amounting to fines and tax recovered of USD 83.6 million.

Enforcement by regulators

176. Financial institutions and DNFBPs (sees section A.1 *Ownership information held by service providers*) are subject to the requirements of the POCAMLA and their compliance with the requirements are overseen by the Financial Reporting Centre (FRC). The FRC carries out regular on-site and desktop inspections on entities subject to the POCAMLA in order to monitor their compliance with the requirements of the law including the requirements to maintain ownership information in the course of conducting CDD. Officials from the FRC have reported that they have designed a form that must be completed in the course of on-site visits and this will demonstrate if reporting instructions are complying with the AML regime.

177. The capital market authority (CMA) regulates all licensed entities operating on the stock exchange in Kenya. In regards to the on-site inspections undertaken by the CMA, in 2012 there were 53 on-site inspections undertaken, in 2013 there were 64 carried out and in 2014 there was 53 on-site inspections undertaken by the CMA in order to verify compliance with requirements under the regulatory laws as well as the AML regime.

Conclusion of Enforcement in practice

178. Enforcement provisions are in place in respect of the relevant obligations to maintain ownership and identity information for all relevant entities and arrangements. While all companies and most partnerships must be registered with the Companies Registrar, it is noted that over the review period, a system of monitoring of registered entities compliance with their legal requirements under the relevant entity acts was not in place. Further, fines for non-compliance were not regularly enforced in practice by the Registrar over the review period. Therefore, it is recommended that the Registrar implements a regular system of oversight of registered entities compliance with ownership and identity requirements and that its enforcement powers are sufficiently exercised in practice.

179. All companies, trusts and partnerships with income chargeable to tax in Kenya must be registered for tax with the KRA. All co-operative societies must receive permission from the Commissioner of the KRA prior to commencement and are registered with the KRA at this time. However, as tax is levied on a quasi-territorial basis in Kenya, in cases where relevant entities are in receipt of foreign income only (excluding income from foreign pensions and foreign exchange gains), these entities will not be considered tax resident in Kenya and will not be under an obligation to register with the KRA. Therefore, while there is a comprehensive system of oversight of entities compliance with the requirements of the ITA (including the requirement to submit tax returns outlining any changes in ownership) via desktop audits and on-site inspections, there may be a small category of entities that are not registered for tax and therefore will not come under the supervision of the KRA. While there is also a programme of inspection in place by the regulators (the FRC and the CMA), the scope of supervision is narrow and will only cover a very small category of entities in Kenya.

180. It can be concluded that while there is some supervision undertaken in Kenya by the KRA and the regulators, this may not cover all entities. Therefore, Kenya is recommended to implement a comprehensive system of oversight to ensure that updated ownership information is being maintained in respect of all relevant entities.

Determination and factors underlying recommendations

Phase 1 determination	
The element is in place, but certain aspects of the legal implementation of the element need improvement.	
Factors underlying recommendations	**Recommendations**
New obligations were introduced in the ITA requiring nominees to provide beneficial ownership information to the KRA in the case of a change to this information. However, this requirement may not require nominees to have beneficial ownership available in all cases.	An obligation should be established for all nominees to maintain relevant ownership and identity information where they act as the legal owners on behalf of any other persons.
Ownership and identity information may not consistently be available with respect to all settlors, trustees and beneficiaries of all trusts in Kenya.	Kenya should ensure the availability of ownership and identity information in respect of trusts in all cases.

Phase 2 rating	
Largely Compliant	
Factors underlying recommendations	**Recommendations**
In September 2015, Kenya enacted a new Companies Act which includes a provision prohibiting the issuance of share warrants to bearer by all companies.	Kenya should monitor the implementation of the provisions in the new Companies Act prohibiting the issuance of share warrants to bearer to ensure that full ownership information is available for all companies.
While there is monitoring of ownership information obligations undertaken in Kenya by the tax authorities this may not cover all relevant entities. Further, although there is a system of monitoring with the requirements of the AML regime in place by the Central Bank, the scope of the AML regime is limited. Further, over the review period, the Registrar of Companies did not have a system of oversight in place to monitor compliance with ownership obligations and sanctions for non-compliance were not enforced in practice.	Kenya is recommended to improve its system of oversight in order to ensure that updated ownership information is being maintained in respect of all relevant entities.

A.2. Accounting records

Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements.

181. A condition for exchange of information for tax purposes to be effective is that reliable information, foreseeably relevant to the tax requirements of a requesting jurisdiction, is available, or can be made available, in a timely manner. This requires clear rules regarding the maintenance of accounting records.

General requirements *(ToR A.2.1)*

182. Every company is responsible for ensuring that proper books of account are kept that explain all monies received and expended by the company, all sales and purchases of goods by the company and its assets and liabilities (s. 147(1) CA). Such books of account must give a true and fair view of the state of the company's affairs (financial position) and must explain its transactions (s. 147(2) CA). The books of account must be maintained at the registered office of the company and only in exceptional circumstances with the permission of the Registrar can these books be kept outside of Kenya (s. 147(3)(a) and (b) CA). If a director of a company fails to take all reasonable steps to comply with these obligations, he/she is subject to a fine not exceeding KES 10 000 (EUR 90) or to imprisonment not exceeding one year, or both (s. 147(4) CA). Where the Registrar has cause to believe that any provisions of the Act, including the obligation to maintain accounting records, is not being complied with, it may call on the company to produce this information, including accounting records, for inspection at any time (s. 164(1)(a)). In addition, certain regulated businesses, such as banks, must submit accounting records to the supervising authorities (s. 23 Banking Act).

183. Generally, every partner in a partnership has the obligation to ensure that accounting records of transactions affecting the partnership are properly kept (s. 16(1) PA). In addition, under the LLP Act, all LLPs are required to maintain accounting records that must give a true and fair view of the state of the partnership's affairs (financial position) and must explain its transactions (s. 30 LLP Act). The partnership and every partner in an LLP that fails to keep proper books of accounts is liable on summary conviction to a fine not exceeding KES 100 000 (EUR 911) or to imprisonment for a term not exceeding one year, or both (s. 30(5)(a) LLP Act). Partners in a GP or LP that fail to maintain accounting records will be subject to the penalties set out under the ITA (see section *Tax law obligations* below).

184. At common law, all trustees of Kenyan trusts are subject to a fiduciary duty to the beneficiaries to keep proper records and accounts of their trusteeship. In addition, all trusts carrying on a business in Kenya will be

subject to statutory requirements to maintain accounting records including underlying documentation necessary for computing tax as prescribed by the ITA and set out below.

185. Every co-operative society must ensure that proper books of account are kept which give a true and fair view of the state of the company's affairs (financial position) and must explain its transactions (s. 25(1)(b)(c) CSA). Furthermore, the books of account must be drawn up in accordance with International Accounting Standards (s. 25(a) CSA). The accounts have to be maintained at the registered office of the co-operative society (s. 25(2) CSA. In addition, all co-operative societies with income deemed to have accrued in or to be derived from Kenya will be subject to statutory requirements to maintain accounting records including underlying documentation as prescribed by the ITA and set out below.

186. The accounts of every co-operative society must be audited by an independent auditor annually (s. 25(3) CSA) and must file a copy of the audited accounts with their annual return as submitted each year to the Commissioner (s. 25(10) CSA). Failure to have these accounts audited and submitted to the Commissioner within one year shall result in the members of the committee losing their positions and not being eligible for re-election for three years unless the failure was due to circumstances beyond their control (s. 25(11) CSA).

Tax law obligations

187. In addition to the requirements for the separate entities, section 54A of the ITA provides that all persons carrying on a business (including foreign companies that are managed and controlled in Kenya or with a permanent establishment in Kenya) must keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner are adequate for the purpose of computing tax.

188. Any person who contravenes this requirement is liable to a penalty not exceeding KES 20 000 (EUR 171) (s. 54A(2) ITA). In addition, where a person fails to maintain such records, the Commissioner may issue a notice requiring that they do so (s. 55(1) ITA). Finally, any person carrying on business will be subject to the requirement to file a tax return which must be accompanied by a copy of the accounts relating to that income year (s. 54(1)(a) ITA).

189. As partnerships are considered transparent for tax purposes, these record-keeping obligations are imposed on the partners (s. 4(b) ITA). Therefore similar to that for companies, partners will be also subject to the obligations as outlined above to maintain accounting records for tax purposes. They must also file a copy of the accounts as part of their annual tax

filing obligations. Partners who fail to keep these records are liable to a fine of up to KES 100 000 (EUR 909) or imprisonment of up to six months or to both (sections 107 and 109(d) ITA).

190. If a trust carries on a business in Kenya, the obligations as set out above under the ITA to maintain records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner are adequate for the purpose of computing tax, will also apply. Pursuant to a 2014 amendment to the ITA, under section 54A, the definition of "carrying on business" for the purposes of the obligation to maintain accounting records in Kenya includes "any activity giving rise to income other than employment income". This requirement imposes an obligation for all professional trustees in Kenya to maintain accounting information in all cases.

191. In the event of a trust not being chargeable to tax (including foreign trusts in receipt of foreign income only) the obligations to maintain accounting records arise from the requirements of the common law. Pursuant to section 3(1) of the Judicature Act, the principles set out under English common law, including those pertaining to the fiduciary duties of trustees, are followed in Kenya. Under common law, all trustees are subject to a fiduciary duty to the beneficiaries to keep proper records and accounts of their trusteeship. Kenya has reported that the common law requirements are those principles as set out under English common law.

192. It is a well-established principle of English common law that it is the "duty of a trustee to keep clear and distinct accounts of the property he administers and to be constantly ready with his accounts". These accounts should be open for inspection at all times by the beneficiary and should trustees default in rendering their accounts, the beneficiary is entitled to have the accounts seized by the court. In that event, trustees would be held liable for paying the costs of the order and in certain cases may also be removed. Furthermore, where trustees are found guilty of active breaches of trust or wilful default or omission, they may be held personally liable for any loss.

Underlying documentation *(ToR A.2.2)*

193. The accounting record keeping obligations under the CA requires proper books of account to be kept with respect to (s. 147(1) CA):

- all monies received and expended by the company and the matters in respect of which receipt and expenditure takes place;
- Sales and purchases of goods by the company; and
- Assets and liabilities of the company.

194. Kenya maintains that this imposes a strict requirement in the CA for companies to maintain all underlying documentation (such as invoices, contracts, etc.) in support of the accounting records. This obligation applies equally to Kenyan companies both carrying on business in and outside of Kenya as well as foreign companies with their place of effective management in Kenya as well as those with a permanent establishment.

195. Under section 2(1) of the LLP Act accounting records are defined to include:

- invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes, vouchers and other documents of prime entry;
- documents and records that record such entries; and
- such working papers and other documents as are necessary to explain the methods and calculations by which accounts are made up.

196. Therefore this will impose a requirement for underlying documentation to be maintained for LLPs. In respect of GPs and LPs, under the Partnership Act, every partner shall have the responsibility to ensure that accounting records of transactions affecting the partnership in which he is involved are properly kept (s. 16, Partnership Act). Whilst this obligation is worded quite generally, the obligations under the ITA as described below will apply equally to all partnerships and will therefore extend to the maintenance of underlying documentation.

197. In respect of co-operative societies, the books of account must explain (s. 25(1), CSA):

- all sums of money received and paid by the co-operative society and the reasons thereto;
- all sales and purchases of goods and services by the co-operative society; and
- all assets and liabilities of the co-operative society.

198. All co-operative societies are under an obligation to appoint an independent auditor (s. 25(3) CSA). The auditor can require the production of any book, document, cash or securities relating or belonging to the co-operative society by any officer, agent, trustee or member having custody of such book, document, cash or securities. Therefore, it may be expected that where there is an obligation to have the accounts audited and access to detailed documentation permitted, sufficient underlying documentation is kept in respect of all co-operative societies in Kenya.

Tax law obligations

199. As indicated under section A.2.1, the ITA requires all persons carrying on a business to keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner, are adequate for the purpose of computing tax. Kenyan authorities have confirmed that this provision will require the maintenance of such items as invoices, vouchers and contracts. All relevant entities including all Kenyan incorporated companies, foreign companies with their management and control in Kenya, co-operative societies, partnerships and trusts carrying on a business will be covered by the obligations to maintain underlying documentation for accounting purposes.

5-year retention standard *(ToR A.2.3)*

200. The LLP Act states that every LLP shall have to retain its accounting records for at least seven years after completion of the matters to which they relate (s. 30(2) LLP Act). Whilst the other entity laws do not contain a minimum retention period, the tax law contains the explicit requirement that the books and records required to be kept must be retained for at least ten years (s. 55(2) ITA). These requirements will cover all relevant entities including all Kenyan incorporated companies, foreign companies with their management and control in Kenya, co-operative societies, partnerships and trusts carrying on a business in Kenya (see also section A.2.2).

201. There is a limited exception to the ten year retention period requirement identified in respect of liquidated companies. The liquidator may inform the Commissioner that he proposes to destroy all accounting records, and in the event that he does not receive a response within three months of this notification, he may then proceed to destroy the accounting records. However, the statute of limitations for reassessment of tax by the Commissioner is seven years after the income year to which the assessment relates (s. 79(1) ITA). As a possible reassessment cannot be opposed without clear proof in the form of documentation, this imposes a strong motivation for all persons to maintain clear and comprehensive accounting records for at least seven years. Officials from the KRA have reported that as of December 2015, there had never been a request made for accounting records of a liquidated company to be destroyed. Further, officials have reported that in the case that such a request was made it is highly unlikely that such a request would be granted. Therefore, in practice, such an exception is not viewed as one that would hinder the exchange of information in Kenya. Nevertheless, Kenya should monitor this exception to ensure that accounting records are maintained even in the case of liquidated companies.

Availability of accounting information in practice

202. In Kenya, the obligations to maintain reliable accounting records and underlying documentation re set out under the ITA are presided over by the KRA. All entities with income subject to tax in Kenya are subject to the requirement to file an annual tax return with the KRA. Tax returns must be filed in Kenya six months after the close of the business year which for the majority of taxpayers is June 30. In order to simplify the process for submitting accounting information, the KRA has developed an "i-tax system" with a tax return form which will already have certain information prefilled and it requires certain accounting information to be submitted. In the event that more detailed accounting information is required then the Commissioner is empowered to request this information in order to carry out a compliance check. Officials from the KRA have reported that compliance rates for taxpayers in the large and medium taxpayer sector are almost 100%. Further, all legal entities are subject to the same monitoring and inspection procedures by the KRA in respect of their accounting record-keeping obligations under tax laws as set out below.

203. As previously outlined (see section A.1.6 *Enforcement of tax law obligations*), there is a comprehensive system of oversight of the accounting obligations under the ITA in place by the KRA in the form of desktop reviews and an active system of on-site audits of entities registered for tax purposes. In regards to on-site audits, 361 taxpayers were investigated by the KRA concerning their tax filing obligations in 2012, 366 taxpayers were investigated by the KRA in 2013, and 392 taxpayers were investigated in 2014. These investigations covered both ownership and accounting information keeping obligations. The taxpayers investigated were chosen as a result of careful risk analysis where certain factors such as taxpayer profile, history, industry, compliance with information filing obligations, customer base and payment profile are assessed.

204. Officials from the KRA have reported that with regard to the on-site inspections carried out over the review period, compliance with accounting records was generally found to be high. There were a small number of cases where breaches were identified and depending on the seriousness of the breach, a range of fines were applied. However records have not been maintained for those fines.

205. There are also accounting requirements set out under the various entity acts. While the Registrar of Companies is the body responsible for overseeing compliance with these requirements, officials from the Registrar have reported that supervision of entities' compliance with the legal requirements, including the accounting record keeping obligations was not undertaken over the review period. While there is a requirement for all registered entities to file an annual return, this requirement does not require any accounting information and there is no system of desktop or on-site inspections carried on by the Registrar.

Conclusions on A.2

206. The Companies Act, the Partnership Acts and the Co-operative Societies Act contain obligations for companies, partnerships and co-operative societies respectively to keep accounting books and records which are generally in accordance with the standard. Whilst the entity acts do not specify a time retention period for accounting documents to be retained, there is a clear requirement for companies, partnerships, and co-operative societies carrying on a business in Kenya to keep reliable accounting records including underlying documentation for at least five years under the tax law. Pursuant to a 2014 amendment to the ITA, all trusts with taxable income in Kenya are also obliged to be registered for tax purposes and subject to the requirements of the ITA, including the accounting record obligations.

207. In practice, the legal requirements to maintain accounting information to the standard by legal entities as set out under the ITA and the various entity acts are supervised by the KRA and the Registrar of Companies. While there is a comprehensive oversight programme in the form of desktop audits and on-site visits in place by the KRA, generally only entities with Kenya sourced income are required to be registered with the KRA. In a small number of cases taxpayers with certain foreign source income will also be subject to a requirement to be registered with the KRA (those deriving foreign income from pensions, exchange gains and income where a business is carried on partly in Kenya all foreign source income will also be deemed to be income derived from Kenya). Therefore, there may be a small number of cases where entities are not required to be registered with the KRA and will not come under the annual filing requirement to supply certain accounting information or be subject to the supervision programme in place by the KRA. While most entities are required to be registered with the Registrar of Companies, officials from the Registrar have reported that there is currently no supervision of accounting record requirements undertaken by the Registrar. Therefore, Kenya is recommended to implement a comprehensive system of oversight to ensure that accounting information is being maintained by all relevant entities.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 Rating	
Largely Compliant	
Factors underlying recommendation	**Recommendation**
Over the review period, although there was a comprehensive system of oversight in place by the tax authorities, this may not cover all relevant entities in Kenya. In addition, the Registrar did not have a regular oversight programme in place to monitor the compliance of the accounting record keeping obligations under the entity acts.	Kenya is recommended to implement an oversight programme to supervise the compliance with accounting record requirements to ensure that accounting records for all relevant entities are available in practice.

A.3. Banking information

Banking information should be available for all account-holders.

208. No person is allowed to engage in banking business or in the business of taking deposits in Kenya unless it holds a valid license for that purpose issued by the Central Bank (s. 3(1) Banking Act). The Central Bank is the regulatory and supervisory body for the Kenyan banking industry. As at December 2015, a total of 43 banks were operating in Kenya, with 30 being locally owned and 13 being foreign owned

Record-keeping requirements (ToR A.3.1)

209. Banks and other financial institutions defined as "reporting institutions" under the POCAMLA are obliged to keep records of all transactions for a period of at least seven years from the date the relevant business or transaction was completed (s. 46(1) POCAMLA).

210. Section 46(3) of the POCAMLA requires all reporting institutions to keep records of the following information in respect of all transactions:

a. the name, physical and postal address and occupation (or where appropriate business or principal activity) of each person:

    i. conducting the transaction; or

    ii. on whose behalf the transaction is being conducted;

b. the nature, time and date of the transaction;

c. the type and amount of currency involved;

d. the type and identifying number of any account with the reporting institution involved in the transaction;

e. if the transaction involves a negotiable instrument other than currency, the name of the drawer of the instrument, the name of the institution on which it was drawn, the name of the payee (if any), the amount and date of the instrument, the number (if any) of the instrument and details of any endorsements appearing on the instrument; and

f. the name and address of the reporting institution and of the officer, employee or agent of the reporting institution who prepared the record. The reporting institution must also ensure that its customer accounts are kept in the correct name of the account holder.

211. These records must be maintained for a period of at least seven years after termination of the business relationship (or after the transaction where there is no business relationship, e.g. a one-off transaction) (s. 46(4) POCAMLA). Failure to carry out CDD or to maintain the documentation for at least five years is considered an offence and can lead to an administrative fine not exceeding 10% of the amount of the monetary instruments involved in the offence (s. 16(5) POCAMLA).

Availability of banking information in practice

212. The Central Bank of Kenya is mandated to ensure that all licensed banks and non-banking financial institutions adhere to the statutory and regulatory requirements and that these requirements are enforced in the course of a comprehensive system of oversight and supervision.

213. Within the Central Bank, there is a dedicated department which is responsible for ensuring that all licensed entities comply with their regulatory obligations as outlined above under the provisions of the POCAMLA. As of December 2015, there was approximately 1 600 employees within the Central Bank of Kenya and 87 officers are directly responsible for the ongoing monitoring of entities compliance with the legal obligations.

214. Over the three year review period (1 July 2011-30 June 2014), both desktop and on-site inspections were carried out by the Central Bank on all licensed entities. The number of on-site visits and the entity inspected are listed in the table below.

	2011	2012	2013	2014
Banks	43	43	43	43
Micro finance Bank	6	8	9	9
Credit Reference Bureaus	2	2	2	2
Forex Bureau	118	112	101	87
Money Remittance Providers	N/A	N/A	1	4

215. Officials from the Central Bank have reported that in the course of carrying out these on-site inspections, generally compliance is found to be very high. Over the review period, there have been five instances of institutions that were found to have contravened information keeping sections of the Banking Act. In most cases, institutions are found to be in compliance with the requirements of the Banking Act. In cases where there are breaches of obligations under the POCAMLA, these have generally being in regard to deficiency in training of staff and failure to carry out a comprehensive risk appraisal and therefore unrelated to entities obligation to maintain bank information and carry out CDD effectively.

216. Over the review period, other enforcement actions taken included; placing institutions on a supervisory plan that is monitored on a quarterly basis, the withholding of corporate approvals including freezing of expansion plans, the issuance of directives to entities to comply followed by targeted inspections, and the conditional renewal of licences. In addition, penalties amounting to KSH.1m (approximately EUR 900) were levied in three separate cases and in other cases senior officers were disqualified.

217. Officials from the Central Bank reported that they have attended many information sessions related to EOI as conducted by the KRA. It is also the intention of both agencies to sign an MOU shortly in order to further facilitate co-operation between the two agencies.

Conclusion

218. The customer identification obligations and record keeping obligations set out under the AML regime require banking information to be available in Kenya for all transactions by all account holders. The Central Bank of Kenya actively undertakes monitoring of financial institutions compliance with these requirements and where deficiencies have been found, penalties are applied in practice. Over the review period Kenya received one request concerning banking information. Kenya was able to provide all of the requested banking information, although with long delays in its provision (see section C.5 *Timeliness of responses to requests for information*). Three further requests were also sent to Kenya in March 2014, however these were never received by Kenya due to issues with the postal service. These requests were resubmitted by the requesting jurisdiction in December 2015 and Kenyan officials have reported that they are processing those requests. However, aside from the organisational issues in providing the information in a timely manner over the review period, Kenya was able to provide all requested banking information to its treaty partners and no issues were raised by peers in practice.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating
Compliant

B. Access to information

Overview

219. A variety of information may be needed in respect of the administration and enforcement of relevant tax laws and jurisdictions should have the authority to access all such information. This includes information held by banks and other financial institutions as well as information concerning the ownership and accounting information of companies or the identity of interest holders in other persons or entities. This section of the report examines whether Kenya's legal and regulatory framework gives to its competent authority access powers that cover all relevant persons and information, and whether the rights and safeguards that are in place would be compatible with effective exchange of information.

220. The KRA has broad access powers derived from a number of general provisions within the ITA which permit the Commissioner to obtain ownership, banking and accounting information. The power to search buildings and seize documents is also provided for. In addition, penalties including imprisonment and administrative fines may be imposed where a person fails to produce the information requested. Any secrecy obligations, including bank secrecy, are waived when a person is asked to produce information. Attorney-client privilege as defined in the law must be respected but its scope is in line with the international standard.

221. There are no statutory secrecy provisions in Kenyan law that impede effective exchange of information in tax matters and all rights and safeguards are compatible with effective exchange of information.

222. Under its EOI agreements, Kenya's named competent authority is the Minister of Finance or his authorised delegated representative. Over the review period, EOI operated on an ad-hoc basis in Kenya with officials from the KRA overseeing the EOI function. The processes as carried out by these officials were formalised into an EOI Unit within the International Taxation office of the KRA in January 2015. After considerable delays, the competent authority power was delegated via official gazette from the Ministry of

Finance to the KRA in November 2015 enabling the EOI unit to process all EOI requests.

223. Over the review period, although six requests in total were sent by two treaty partners, only one request was successfully received by Kenya. In that case the information was gathered from the databases of the KRA and third parties including from a financial institution. All of the requested information was provided to the treaty partner in December 2015. While there were no issues with accessing the requested information, due to the delay in the delegation of the competent authority power to the KRA, there were significant delays in its provision (see section C.5 *Timeliness of responses to requests for information*).

B.1. Competent Authority's ability to obtain and provide information

> 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 of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information).

224. In Kenya, the Minister of Finance or his authorised representative is the designated competent authority.

Ownership and identity information (ToR B.1.1)

225. The KRA has sufficiently broad access powers to obtain bank, ownership and identity information and accounting records from any person for domestic tax purposes as provided for in five sections of the ITA, namely sections 52 and 56, 69, 119 and 120.

226. Section 52(1) of the ITA provides that the KRA can require, by notice in writing, any person to furnish it, within the time specified in the notice, with a return of income for any year containing a full and true statement of the income of that person, including income deemed to be his under the Act. Additionally, for the purpose of obtaining information in respect of the income of a person, the Commissioner may require any person to furnish information as specified in a notice including any accounts, books of account and other documents which the Commissioner may consider necessary (s. 56 ITA). The Commissioner is empowered to make copies or to retain any information obtained pursuant to this section for such period as may be reasonable for their examination (s. 56(1)(b) ITA). The Commissioner may also require any person to attend an examination regarding their income or the income of any other person or regarding any transaction or other matter (s. 56(2) ITA).

227. Where a judge has been satisfied that a person has committed or is reasonably suspected of committing an offence under the Act, they may authorise a Principle Revenue Officer to enter and search premises and remove documents or other relevant articles (s. 119(a)(b)(c) ITA).

228. Section 120(1) of the ITA provides that any officer authorised by the Commissioner shall at all times have full and free access to all lands, buildings and places and all books and documents for the purpose of inspecting books and documents or for any other purpose of the Act (s. 120(1) ITA). In addition the KRA can require, any person to give it all reasonable assistance and to answer all questions relating to an enquiry either in person or in writing (s. 120(2) ITA).

229. Finally, the Commissioner is empowered to seek information such as registers, accounts, books and records via the issuing of a notice to any office of the government, local authority or government body which may be required for the purpose of the Act (s. 69 ITA). This provision will extend to government bodies such as the Registrar of Companies.

230. Failure to comply with a notice under the ITA constitutes an offence which is subject to default fines set out for any person found guilty of an offence under the Act. In particular, under the default provisions a person may be liable to a fine of up to KES 100 000 (EUR 909) or imprisonment of up to six months or both (s. 107 ITA). It is also an offence to knowingly provide false information to the tax authorities (s. 111(1)(c) ITA) when requested by notice to furnish information or a tax return.

Bank information

231. The powers described above in regards to ownership and identity information apply equally where banking information must be obtained. When banking information must be sought from a bank pursuant to section 56 of the ITA, the bank is not obliged to furnish the Commissioner with the information. Instead, all books and documents must be inspected at the place where they are kept but copies may be made of all relevant information (s. 56(1) ITA).

Accounting records *(ToR B.1.2)*

232. The powers described under the previous subsection (B.1.1 *Ownership and identity information*) apply equally where accounting information must be obtained.

Use of information gathering measures absent domestic tax interest (ToR B.1.3)

233. The concept of "domestic tax interest" describes a situation where a contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes. The international standard requires a jurisdiction to be able to use its information gathering powers, notwithstanding that it may not need the information for its own tax purposes.

234. Pursuant to section 56 of the ITA, for the purpose of obtaining information in respect of the income of a person, the Commissioner may require any person to furnish information as specified in a notice including any accounts, books of account and other documents which the Commissioner may consider necessary. A definition of income is not provided for in the ITA. Kenya has stated that reference to "income" in these provision will not be restricted to income assessed under the ITA but will also extend to income in the jurisdiction of the treaty partner. The ITA provides that the powers under section 56 may be exercised any time up to seven years after the year of income to which it relates. However, Kenya maintains that the provisions of its international agreements take precedence over the provisions of the ITA or any other written law (see below) and that the seven year limitation would, therefore, not apply in the case of an EOI request.

235. In any case, Section 120(1) of the ITA is a wide-ranging power permitting the Commissioner to have full and free access to all lands, buildings and places and all books and documents for the purpose of inspecting books and documents or for any other purpose of the Act. In addition, the KRA can require, any person to give it all reasonable assistance and to answer all questions relating to an enquiry either in person or in writing (s. 120(2) ITA). There is no time limitation in respect of which the powers under section 120 may be exercised by the KRA.

236. The use of Kenya's domestic powers for EOI purposes is based on treaties and the way in which they have been given effect in domestic law. Both the Constitution and certain provisions of the ITA include specific provisions on the integration of Kenya's international treaty obligations into domestic laws such as the ITA. In particular, article 2(6) of the Constitution provides that:

> Any treaty or convention ratified by Kenya shall form part of the laws of Kenya under this Constitution.

237. In this way, Kenya's international agreements form part of the laws of Kenya and are given effect for purposes of the ITA by section 41 of the ITA, which provides:

> The Minister may from time to time by notice declare that arrangements, specified in the notice and being arrangements that have been made with the government of any country with a view to affording relief from double taxation in relation to income tax and other taxes of a similar character imposed by the laws of the country, shall, notwithstanding anything to the contrary in this Act or in any other written law, have effect in relation to income tax, and that notice shall, subject to the provisions of this section, have effect according to its tenor.

238. Similarly, Section 41A of the ITA, introduced in 2012, establishes similar measures with regard to TIEAs. This Section provides that:

> The Minister may, by notice in the Gazette, from time to time declare that arrangements specified in the notice, being arrangements made with the government of any country with the view of exchanging information relating to income tax or other taxes of a similar character imposed by the laws of that country, shall, notwithstanding anything to the contrary in this Act or any other written law, have effect in relation to income tax, and that notice shall, subject to the provisions of this section, have effect accordingly.

239. Section 120(1) of the ITA provides for full and free access to all lands, buildings, places, books and documents for the purpose of inspecting books and documents for "any purpose of the Act". Kenya has confirmed that the legislative intention of sections 41 and 41A is to give full effect to their international agreements. Therefore, fulfilling the obligations under their international agreements as set out under sections 41 and 41A, including giving full effect to the provisions for the exchange of information, represents a "purpose of the Act" permitting Kenya to use these powers to access information pursuant to an EOI request.

Compulsory powers *(ToR B.1.4)*

240. Jurisdictions should have in place effective enforcement provisions to compel the production of information.

241. As previously described, the KRA has powers to compel the production of information from natural and legal persons, whether or not liable to tax under the ITA, in response to an exchange of information request.

242. Search and seizure powers under the supervision of a judge are also provided for under the ITA. Where a judge has been satisfied that a person has committed or is reasonably suspected of committing an offence under the act, they may authorise a Principle Revenue Officer to enter and

search premises and remove documents or other relevant articles (s. 119(a)(b)(c) ITA). All officers authorised by the Commissioner to enquire into the affairs of a person for any purpose under the Act are also granted the power to inspect all books and documents (s. 120(1) ITA). In addition the KRA can require, any person to give it all reasonable assistance and to answer all questions relating to an enquiry either in person or in writing (s. 120(2) ITA).

243. In the case where a person does not provide the information as requested or provides false information, administrative penalties may apply. Any person who provides false information may be subject to a fine of up to KES 10 000 (EUR 90) or to a term of imprisonment of a term not exceeding two years or both (s. 111(1)(e) ITA). In addition, in the case of any person refusing to comply with a notice for information the general penalty provision may also be applied whereby any such person may be liable to a fine of up to KES 100 000 (EUR 909) or imprisonment of up to six months or both (s. 107 ITA).

Use of information gathering powers in practice

244. Over the review period six EOI requests in total were sent to Kenya (albeit with only one request actually being successfully received and processed by Kenya) by two treaty partners. In regards to the three requests from the first treaty partner, two of these were sent in February 2012 and concerned identity information for individuals who had left an outstanding tax liability in the partner jurisdiction. These two requests were never received in Kenya but officials have since contacted the treaty partner and request that they resubmit the other two requests via encrypted email. As of December 2015, these other two requests have not yet been resubmitted by the treaty partner. The third request from the first treaty partner was sent in March 2014 and was successfully received by Kenya in May 2014 and concerned ownership and banking information. Although there were no issues in accessing the requested information, due to delays in the delegation of the competent authority power to the KRA, the requested information was only sent to the requesting jurisdiction in December 2015.

245. All three requests from the other treaty partner were sent to Kenya in March 2014 and concerned banking information. However, Kenya did not receive any of these three requests over the review period and has attributed this to issues with the postal service. Kenya contacted the treaty partner in this regard who resubmitted these three requests via encrypted email in December 2015.

246. Over the review period, EOI operated on an ad-hoc basis in Kenya with officials from the KRA overseeing the EOI function. In order to streamline the process for EOI, the processes as carried out by these officials were formalised into an EOI Unit within the International Taxation office of the

KRA in January 2015. The competent authority power was delegated from the Minister of Finance to the KRA in November 2015 and therefore, the EOI Unit within the KRA is now the body responsible for the processing of all requests in Kenya. For the one successfully received request over the review period, the following procedures were used by those officials within the EOI unit of the KRA for accessing information.

Access to ownership information

247. On receipt of the EOI requests at the offices of the Ministry of Finance, the request were then delivered to the Commissioner-General of the KRA as the delegated competent authority in order to process the requests. The Commissioner-General reviewed the request and then allocated the requests to one of the three designated EOI officials within the KRA who is then responsible for ensuring this information is retrieved and for overall monitoring of the process. The three designated EOI officers sit within the International Taxation department of the KRA.

248. On receipt of an EOI request, the EOI officer firstly ensures that the request is valid and complies with the EOI request requirements set out in the agreement under which it has been made. On verification of the validity of the request, the officer will look at the information requested to decide if they are capable of finding it within the tax database at the KRA.

249. For the one request received over the review period, the KRA accessed the requested ownership information via its own databases, a notice to a third party (including to a bank). While there were no issues in practice in gathering this information, as noted further on in the report, once the requested information had been gathered, there were significant delays in providing the requested information to the treaty partner.

Access to banking information

250. For the request received by the KRA over the review period, in order to access the requested banking information, the KRA requested this information from the bank and also from third parties.

251. In order to access the requested banking information, a notice was sent from the KRA to the bank outlining the requested information and a timeframe of 30 days was allocated to the bank within which to provide copies of the requested information. Further, officials from the KRA have reported that in order to access the requested information, they also invoked their powers of investigation and called one taxpayer for questioning at the head-offices of the KRA in Nairobi.

252. In both the case of accessing the information from the bank as well as accessing the information from the taxpayer, the KRA reported that there were no issues in using their access powers and in no case did the holder of the information object to its provision to the KRA in the allocated time-frames. Further, the requesting jurisdiction has provided input that it was fully satisfied with the banking information it has received.

Access to accounting information

253. As outlined above, during the review period, Kenya did not receive any requests concerning accounting information. However, in the case that accounting information was requested, officials from the KRA have reported that they would proceed to access the information in the same manner as for all other types of information, i.e. by first checking its own databases and by then proceeding to request it from third parties via notice.

Secrecy provisions *(ToR B.1.5)*

254. Jurisdictions should not decline on the basis of their secrecy provisions (e.g. bank secrecy, corporate secrecy, professional secrecy, etc.) to respond to a request for information made pursuant to an EOI mechanism.

Bank secrecy

255. Some of Kenya's laws contain provisions that protect bank secrecy, however, these provisions are overridden in the laws themselves and therefore bank secrecy will not impede Kenya's ability to exchange information. Specifically, under the Banking Act, no person shall disclose or publish any information which comes into his possession as a result of the performance of his duties or responsibilities under the Act (s. 31(2) Banking Act). Nevertheless the secrecy as set out the Banking Act is not absolute and while the provisions of the Banking act generally prevail over other written laws (s. 52A(1) Banking Act), there is an express exception in the case of the ITA (s. 52A(2) Banking Act). Therefore, the confidentiality provisions under the Banking Act cannot prevent the furnishing of banking information in the case of an EOI request.

Other secrecy provisions

256. Secrecy of information received by officers under the ITA is protected by provisions of the ITA which provide for official secrecy in relation to documents and information that come into the possession of a person in the course of his duties under the Act. Official secrecy is set out under section 125 of the ITA whereby all officers shall maintain all information and

documents that have come into their possession in the course of their duties as secret.

257. However, these secrecy requirements are overridden by an express provision which states that an officer shall not be prevented from providing information necessary for the obtaining of relief or for the prevention of fraud or for the administration of statutory provisions against legal avoidance in relation to those taxes under an arrangement with another country (s. 125(4) ITA).

258. Furthermore, as outlined above, sections 41 and 41A of the ITA, which relate to the administration of DTCs and TIEAs, override any other sections of the ITA and therefore will in practice override all other secrecy provisions in the ITA.

Legal privilege (attorney-client privilege)

259. Common law attorney-client privilege as set out under English common law exists is Kenya. At common law, the privilege attaches to confidential written or oral communications between a professional legal adviser and his client, or any person representing the client, in connection with and in contemplation of, and for the purposes of legal proceedings or in connection with the giving of legal advice. Thus, where an attorney acts in any capacity other than as an attorney (e.g. as a real estate broker), the attorney-client privilege should not apply. Pursuant to section 3(1) of the Judicature Act, the principles set out under English common law, including those pertaining to attorney-client privilege, are binding on Kenyan courts. Common law precedent on this issue has been recently applied in the Kenyan case of *Baseline Architects Ltd and 2 others v National Hospital Insurance Fund Board Management* [2008] eKLR.

260. In addition, the scope of the attorney-client privilege (referred to as "advocate" in Kenya) in Kenya is set out under section 134 of the Evidence Act.

> No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

261. The term "professional employment" is not defined in the Evidence Act but section 9 of the Advocates Law contains a definition of the term "advocate" which is confined to any person whose name has been entered

on the Roll of Advocates or whom upon the Roll of Advocates has the rank of Senior Counsel. Kenya has confirmed that in the case that an advocate takes up a different role such as that of trustee, agent, or nominee, any communication in and information disclosed in the course of such a role shall not be covered by professional secrecy. Therefore, where an attorney acts in any other capacity other than as an attorney (e.g. as a nominee shareholder, a trustee, a company director or under a power of attorney), the attorney-client privilege does not apply and exchange of information resulting from and relating to any such communications cannot be declined because of attorney-client privilege. As a result, attorney-client privilege as set out in Kenya is in line with the international standard and will not be a barrier to effective exchange of information.

262. Therefore, the scope of attorney-client privilege as set out in the *Evidence Act* is confined to confidential communications produced between a client and their solicitor for the purposes of providing legal advice or for use in contemplated legal proceedings and is in line with the international standard.

263. As outlined above, the power of the competent authority to access books, records and computers and the power to obtain information or evidence via a notice are set out in sections 119 and 120 of the ITA. Pursuant to section 120(1) the powers to access books and documents has effect notwithstanding any rule of law relating to privilege or the public interest. Similarly under section 120(1) the power to obtain information via a notice has effect notwithstanding any rule of law or enactment in relation to the production of, or access to, the documents.

264. Officials from the KRA have reported that there has never been a case of attorney-client privilege claimed over information sought by the KRA either for domestic or EOI purposes. Of those peers that provided input in the course of the review, no issues related to claims of attorney-client privilege were reported.

Conclusion

265. Over the review period, six requests were sent to Kenya from two different treaty partners of which, one request was successfully received by Kenya. In order to access the information for the one request that was successfully received, Kenya utilised its access powers to access this information from its own databases, and from third parties, including from a financial institution. Nevertheless, as Kenya has only utilised its access powers for one case over the review period, it is recommended to monitor the use of its access powers for the purposes of EOI. Further, due to significant delays in the delegation of the competent authority power from the Ministry of Finance

to the KRA, there were significant delays in providing this information to the treaty partner (see section C.5 *Timeliness of responses to requests for information*).

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating
Compliant

B.2. Notification requirements and rights and safeguards

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.

266. Rights and safeguards should not unduly prevent or delay effective exchange of 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 requesting jurisdiction).

Not unduly prevent or delay exchange of information (ToR B.2.1)

267. The KRA is not obliged to inform any persons that are the subject of an EOI request of the existence of the request or to notify them prior to contacting third parties to obtain information. The procedure to obtain information is described under section B.1.

268. There is no requirement in Kenya' domestic legislation that the taxpayer under investigation or examination must be notified of a request. There is an appeal procedure set out under Part X of the ITA. However, this appeal procedure will only apply in the case of a notice of assessment or a notice from the Commissioner requiring the preservation of books and documents relating to an assessment and not in relation to any notice requiring information in response to an EOI request.

269. In practice there is no requirement for the KRA to inform the information holder of the reason for a request for information, nor to notify the taxpayer of a request for information.

270. The only recourse for a taxpayer or third party by which to object to the processing of an EOI request would be judicial review. In Kenya, any

decision taken by the Commissioner-General under the ITA, including the decision to access information for the purposes of an EOI request is subject to judicial review by the High Court of Kenya. The grounds for judicial review are those set out under common law[3]: where it has been determined that the decision maker has acted illegally, in an irrational manner or unreasonably. As of December 2015, no request for judicial review regarding the Commissioner's decision to access information either for domestic or EOI purposes had ever been submitted in Kenya. In the case that a request for judicial review was received, Kenyan officials have reported that they would have to review the grounds of the request before proceeding to transmit the information to the requesting jurisdiction. Kenya would also continue to communicate effectively with the requesting jurisdiction throughout this process.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating
Compliant

3. *Bromley Council v Greater London Council* (1983) 1 AC 768, *Associated Provincial Picture Houses Ltd Wednesbury Corp* (1948) 1 KB 223.

C. Exchanging information

Overview

271. Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanism for doing so. In Kenya, the legal authority to exchange information derives from its EOI agreements, as soon as such agreement is given effect by an Act of Parliament as set out under the 2010 Constitution. This section of the report examines whether Kenya has a network of information exchange agreements that would allow it to achieve effective exchange of information in practice.

272. Kenya's network of EOI agreements covers 23 jurisdictions and it is currently actively (re)negotiating agreements. The signed agreements include 20 bilateral DTCs and a multilateral DTC between members of the East African Community. Ten of these agreements are in force and of those agreements that are in force, seven meet the internationally agreed standard containing sufficient provisions to enable Kenya to exchange all relevant information. On the enactment of its new Constitution in 2010, Kenya's ratification of its agreements was temporarily suspended until it enacted the necessary legislation required for it to enter into and ratify international agreements (Treaty Making and Ratification Act 2012). Nonetheless, it is noted that during the review period (July 2011 – June 2014), Kenya has not ratified any of its outstanding signed agreements and it is noted that the timeframe to bring treaties into force in Kenya takes several years. As of December 2015, Kenya has still not ratified 12 of its 21 signed agreements and it is recommended to ratify all of its signed agreements expeditiously. Further, since its Phase 1 review (2013) Kenya has not taken any steps to renegotiate its three agreements found not to the standard due to its intention to shortly join the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (hereon referred to as "Multilateral Convention"). For this reason, element C.1 was found to be in place but needing improvement and rated "Largely Compliant".

273. Kenya has signed 21 EOI agreements covering 23 treaty partners. Of these agreements, ten are in force and Kenya is currently negotiating or has

initialled an additional 21 agreements. Comments were sought from Global Forum members in the course of the preparation of this report, and in two cases Kenya has not entered into negotiations or advanced the signature of a negotiated agreement due to its intention to join the Multilateral Convention of which both partners are already members. However, as of December 2015, Kenya has still not signed the Convention and as a result, does not have an agreement in place with these two jurisdictions despite a desire on the part of the treaty partners to do so. Consequently, element C.2 was found to be in place but needing improvement, and is rated “Partially Compliant”.

274. All EOI articles in Kenya’s agreements contain confidentiality provisions which meet the international standard and its domestic legislation also contains relevant confidentiality provisions and enforcement measures for tax officials to keep information secret and confidential. While each of the articles might vary slightly in wording, these provisions generally contain all of the essential aspects of Article 26(2) of the OECD Model Tax Convention. Breach of this confidentiality obligation is an offence and may lead to the enforcement of fines or imprisonment. Consequently, element C.3 was found to be in place and rated “Compliant”.

275. Kenya’s DTCs protect rights and safeguards in accordance with the standard, by ensuring that the parties are not obliged to provide information that would disclose any trade, business, industrial, commercial or professional secret or information the disclosure of which would be contrary to public policy. Hence, element C.4 was found to be in place and rated “Compliant”.

276. Over the review period, a total of six requests were sent to Kenya by two treaty partners, of which only one of those requests was successfully received. Kenyan officials have attributed the non-receipt of those requests to the unreliability of the postal service. Kenya has no record of receipt of the remaining five requests but has contacted the two treaty partner asking them to resubmit the missing requests via encrypted email. One of the treaty partners resubmitted its three missing request in December 2015. The one successfully received request was received by Kenya in May 2014 and was processed by the EOI Unit which sits within the International Taxation Directorate of the KRA.

277. However, due to delays in the delegation of the competent authority power from the Ministry of Finance to the KRA, the information for the one successfully received request was only provided to the treaty partner in December 2015. During the time taken to process the request, Kenya did not provide updates to its treaty partner. Further, although a formal EOI Unit was established within the KRA in January 2015 and the requested information provided in December 2015, as this is outside of the review period, the functions of the EOI Unit and the processes for exchanging information were

unable to be tested in practice. Therefore, element C.5 is rated "Partially Compliant".

278. Details of all of Kenya's EOI agreements are set out in Annex 2 to this report, including their dates of signature and entry into force. The terms of Kenya's laws and agreements governing the exchange of information are set out below.

C.1. Exchange-of-information mechanisms

Exchange of information mechanisms should allow for effective exchange of information.

279. To date, Kenya has concluded 20 double tax conventions (DTCs) as well as being a signatory since 2010 to the multilateral East African Community (EAC) tax treaty[4] with four other members of the EAC. In total, its network of signed agreements covers 23 jurisdictions (see Annex 2), and ten of these EOI agreements are in force. A further 3 agreements have recently been initialed and are awaiting signature and Kenya has another 17 agreements under negotiation. This section of the report explores whether these agreements allow Kenya to effectively exchange information.

280. Under article 2(6) of the 2010 Constitution of Kenya, DTCs and TIEAs are given the force of law once they are duly signed and ratified. The Treaty Making and Ratification Act 2012 came into force in December 2012 granting full powers to parliament in this respect. For an international agreement to be ratified, the Act provides that it first needs Cabinet approval (Article 7, Constitution) and thereafter consideration by Parliament after which grant of full powers is made (Article 8, Constitution). Prior to the coming into force of the Treaty Making and Ratification Act, all international agreements were discussed and adopted by Cabinet.

281. According to the hierarchy of legal norms provided in the Constitution, international agreements must conform to the Constitution to be implemented (Article 2(4), Constitution), and they form part of the laws of Kenya once they have been duly ratified (Article 2(6), Constitution). Section 41 of the ITA provides that, arrangements that have been made with the government of any country with a view to affording relief from double taxation shall take precedent over all other sections of the ITA or any other written law. Section 41A

4. The "East African Community treaty" is an economic treaty including double tax and exchange of information provisions between member states of the East African Community (EAC); its full title is: Treaty for the Establishment of the East African Community. The other member states are Burundi, Rwanda, Tanzania and Uganda.

outlines a similar position for TIEAs and in the case of anything contrary to the ITA or any other written law, the provisions of the TIEA will take precedence.

282. As regards EOI requests and provision of information, the competent authority under Kenya's EOI agreements and domestic laws is the Minister of Finance or his authorised representative. An EOI Unit has been established within the KRA to process EOI requests. In December 2015, the Minister of Finance delegated the competent authority power to the Commissioner of the KRA in order to enable them to process EOI requests. As EOI operated on an ad-hoc basis over the review period, the reason for the Minister of Finance not processing the EOI requests itself is unclear and it is noted that the delay in the delegation of the competent authority power impeded the exchange of information over the review period.

Foreseeably relevant standard *(ToR C.1.1)*

283. The international standard for exchange of information envisages information exchange to the widest possible extent. Nevertheless it does not allow "fishing expeditions", i.e. speculative requests for information that have no apparent nexus to an open inquiry or investigation. The balance between these two competing considerations is captured in the standard of "foreseeable relevance" which is included in Article 26(1) of the OECD Model Tax Convention, set out below:

> 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.

284. The commentary to Article 26(1) of the OECD Model Tax Convention refers to the standard of "foreseeable relevance" and states that the Contracting States may agree to an alternative formulation of this standard that is consistent with the scope of the Article, for instance by replacing "foreseeably relevant" with "necessary". The DTCs signed with France, Iran (not in force), Korea (not in force),, Kuwait (not in force), Mauritius (not in force), Netherlands (not in force), Qatar (not in force), the Seychelles (not in force), and the United Arab Emirates (not in force) expressly provide for the exchange of information which is foreseeably relevant for the carrying out of the provisions of the Convention or the administration or enforcement of the domestic laws concerning taxes of

every kind' and meet the foreseeably relevant standard. A further ten[5] DTCs signed by Kenya provide for exchange of information that is necessary for "carrying out the provisions of this Convention or for the administration or enforcement of domestic laws" or contain language which has similar meaning. The Kenyan authorities have confirmed that the term "necessary" under these EOI agreements is interpreted in accordance with Commentary to Article 26(1) of the OECD Model Tax Convention. Therefore, these eleven DTCs also meet the foreseeably relevant standard.

285. The DTC with Germany provides for exchange of such information as is necessary for the carrying out of the provisions of the Convention. In addition, the agreement extends the exchange of information to the prevention of fraud or fiscal evasion "by mutual agreement" between the treaty partners but this provision only allows for exchange in such cases rather than requiring it. Germany interprets the agreement as limited in scope and not permitting it to exchange all types of information and, accordingly, this agreement does not meet the standard. Once Kenya signs the Multilateral Convention, this will facilitate exchange of information between both parties via an agreement that is in line with the international standard. However as of December 2015, Kenya has still not signed the Convention.

In respect of all persons (*ToR C.1.2*)

286. For EOI to be effective it is necessary that a jurisdiction's obligations to provide information are not restricted by the residence or nationality of the person to whom the information relates or by the residence or nationality of the person in possession or control of the information requested. For this reason the international standard for EOI envisages that EOI mechanisms will provide for exchange of information in respect of all persons.

287. Article 26(1) of the OECD Model Tax Convention indicates that "[t]he exchange of information is not restricted by Article 1", which defines the personal scope of application of the Convention and indicates that it applies to persons who are residents of one or both of the Contracting States. Eleven[6] of Kenya's 20 DTCs contain this sentence, allowing for EOI in respect of all persons.

5. DTCs signed with Canada, Denmark, the East African Community (Uganda, Burundi, Rwanda and Tanzania), India, Italy, Norway, South Africa, Sweden, the United Kingdom and Zambia.
6. East African Community (Uganda, Burundi, Rwanda and Tanzania), France, Iran, Korea, Kuwait, Mauritius, the Netherlands,, Qatar, Seychelles, South Africa, United Arab Emirates.

288. The remaining DTCs do not specifically include a provision which extends the scope of the exchange of information Article to persons other than residents of one of the Contracting States. The DTCs with nine[7] jurisdictions provide for the exchange of information as is necessary for carrying out the provisions of the domestic laws of the Contracting States, or similar language. To the extent that the domestic (tax) laws are applicable to non-residents as well as to residents, information under these agreements can be exchanged in respect of all persons, and the agreements meet the standard.

289. Although Kenya's EOI agreements vary in respect of explicitly stating that the agreement is "in respect of all persons", both discussions with Kenyan authorities and feedback from exchange partners indicate that in practice no difficulties have arisen with any of its exchange of information partners regarding an exchange request relating to residents of either of the contracting states or residents of third party jurisdictions.

Obligation to exchange all types of information *(ToR C.1.3)*

290. Jurisdictions cannot engage in effective exchange of information if they cannot exchange information held by financial institutions, nominees or persons acting in an agency or a fiduciary capacity, as well as ownership information. Both the OECD Model Convention (Article 26(5)) and the OECD Model TIEA (Article 5(4)), stipulate that bank secrecy cannot form the basis for declining a request to provide information and that a request for information cannot be declined solely because the information is held by nominees or persons acting in an agency or fiduciary capacity or because the information relates to an ownership interest.

291. As some of Kenya's agreements were concluded before the update of the OECD Model Tax Convention in 2005, those agreements do not contain a provision corresponding to Article 26(5), which was introduced at that update. However, the more recently concluded DTCs with France, Iran, Korea, Kuwait, Qatar, the Netherlands,, the Seychelles, South Africa Mauritius and the United Arab Emirates contain such a provision. However, the absence of this provision does not automatically create restrictions on the exchange of information held by banks, other financial institutions, nominees, agents and fiduciaries, as well as ownership information. The Commentary to Article 26(5) indicates that while paragraph 5 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. Kenya's domestic laws allow it to access and exchange bank information even in the absence of such provision in the DTC.

7. Canada, Denmark, Germany, India, Italy, Norway, Sweden, the United Kingdom and Zambia.

292. As some of Kenya's EOI partners (Burundi, Rwanda, Tanzania, and Zambia) have not been assessed for compliance with the international standard, it is unclear as to whether some of these countries have restrictions to the access of bank information in their domestic law. Kenya has reported that it is currently renegotiating its DTC with Zambia. Kenya should continue to renegotiate its DTCs to include a provision similar to Article 26(5) of the OECD Model Tax Convention and ensure that negotiations are carried out expeditiously.

Absence of domestic tax interest (ToR C.1.4)

293. The concept of "domestic tax interest" describes a situation where a contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes. A refusal to provide information based on a domestic tax interest requirement is not consistent with the international standard. Jurisdictions must be able to use their information gathering measures even though invoked solely to obtain and provide information to the requesting jurisdiction.

294. Kenya's DTCs with France (the only one of these DTCs which is in force), Iran, Korea, Kuwait, Qatar, the Netherlands, the Seychelles, South Africa, Mauritius, and the United Arab Emirates contain such a provision. However, the absence of this provision does not automatically create restrictions on the exchange of information. The Commentary to Article 26(4) indicates that paragraph 4 was introduced to express an implicit obligation to exchange information also in situations where the requested information is not needed by the requested State for domestic tax purposes.

295. The DTCs with Sweden and the United Kingdom provide for the exchange of "such information (being information which is at [a party's] disposal under their respective taxation laws in the normal course of administration)". This language is interpreted by both Sweden and the United Kingdom as not allowing them to use their access powers to obtain any kind of information if required solely for EOI purposes. Therefore, these agreements are not in line with the international standard.

296. The DTC with Zambia limits exchange to information that is "available under [a party's] respective taxation laws, as is necessary for the carrying out of the provisions of the Convention or for the prevention of fraud or the administration of statutory provisions against legal avoidance in relation to taxes which are the subject of this convention". Kenya interprets this wording as requiring them to access any information available under its taxation laws even if required solely for the purposes of EOI. Therefore, this wording does not pose a restriction on exchange of information.

Absence of dual criminality principles (ToR C.1.5)

297. The principle of dual criminality provides that assistance can only be provided if the conduct being investigated (and giving rise to the information request) would constitute a crime under the laws of the requested country if it had occurred in the requested country. In order to be effective, exchange of information should not be constrained by the application of the dual criminality principle.

298. None of the agreements concluded by Kenya apply the dual criminality principle to restrict the exchange of information. Kenyan authorities have reported and peer input confirms that no request has been turned down on this basis during the period under review.

Exchange of information in both civil and criminal tax matters (ToR C.1.6)

299. Information exchange may be requested both for tax administration purposes and for tax prosecution purposes. The international standard is not limited to information exchange in criminal tax matters but extends to information requested for tax administration purposes (also referred to as "civil tax matters").

300. All of the EOI agreements concluded by Kenya provide for the exchange of information in both civil and criminal tax matters in all cases. Most of Kenya's DTCs contain a similar wording to the one used in Article 26(1) of the OECD Model Tax Convention, which refers to information foreseeably relevant "for carrying out the provisions of this Convention or to the administration and enforcement of the domestic [tax] laws", without excluding either civil nor criminal matters. In addition, the agreements with Denmark, the EAC, India, Iran, Italy, Kuwait, the Netherlands, Norway, South Africa, Sweden, the United Kingdom and Zambia specifically mention that the information exchange will occur including for the prevention of fraud and/or evasion in relation to taxes (criminal matters).

301. It is nevertheless noted that the confidentiality provision in eight of Kenya's older DTCs (Canada, Denmark, Germany, India, Italy, Norway, Sweden and Zambia) does not expressly provide that the competent authority may disclose the information received to other persons or authorities concerned with the enforcement or prosecution in respect of taxes. The confidentiality provision in these eight agreements also does not expressly mention courts as being an authority to which information may be disclosed. However, all of these treaties provide for the disclosure of information to "persons or authorities ….concerned with the assessment or collection of the taxes". Even though these agreements don't explicitly mention an exception to confidentiality for the use of information in court proceedings, the wording "assessment or collection" of taxes is interpreted by Kenya to extend to the use of information for tax related court proceedings concerning both civil and

criminal matters. Therefore, this wording permits the exchange of information in both civil and criminal tax matters.

302. Although Kenya has not exchange any information over the review period, Kenyan officials have reported that the process of exchanging information related to criminal matters is the same as that for civil matters.

Provide information in specific form requested (ToR C.1.7)

303. 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. 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.

304. No restrictions apply in any DTC concluded by Kenya for information to be provided in the specific form requested.

305. Over the review period, two requests sent to Kenya contained requests for authenticated statements. These requests were not received by Kenya over the review period and were resubmitted by this treaty partner in December 2015. Officials from Kenya's competent authority have reported that they are currently preparing these statements for this partner and for all other requests they will provide information in the specific form requested to the extent permitted under Kenyan law and administrative practice.

In force (ToR C.1.8)

306. Exchange of information cannot take place unless a jurisdiction has EOI arrangements in force. Where such arrangements have been signed, the international standard requires that jurisdictions must take all steps necessary to bring them into force expeditiously.

307. Kenya has a network of 20 signed DTCs of which ten are in force. The DTCs with the EAC (2010), Italy (1979), Iran (2012), Korea (2014), Kuwait (2013), Mauritius (2012), the Netherlands (2015), Qatar (2014), Seychelles (2014), and the United Arab Emirates (2011) are not yet in force in Kenya. In regards to the EAC DTC Kenyan officials have reported that they have completed all notifications for the agreement to come into force in Kenya. However, pursuant to article 30 of the EAC DTC, the agreement does not come into force until these notifications have been completed by all parties to the agreement.

308. On analysis of the Kenyan treaty network, it can be seen that the time taken between the signature of an EOI arrangement and its entry into force can be quite long. In five jurisdictions, the ratification process took more than two years, in the case of the DTC with Germany ratification took three years, in the case of the DTCs with India and the United Kingdom ratification in Kenya took four years. The DTC with Italy dating back to more than thirty years ago (1979), and ratified by Italy in 1981, has still not been ratified by Kenya. Moreover, a protocol amending the Convention, with respect to provisions other than those concerning EOI, was signed by both parties in 1997 and was ratified by Italy in 2000. Upon ratification by Kenya of this Convention and Protocol, Kenya and Italy shall enter into negotiations of a further protocol which will also include an on EOI article based on the current standards.

309. In the past, the ratification procedure for agreements has taken between two and three years and in a number of cases the process took as much as four years. These delays can be explained as follows:

- Since the enactment of the 2010 Constitution, the focus of the Kenyan Cabinet has been on the legal and constitutional reforms culminating in the first elections under the new Constitution which took place in March 2013. As mentioned above, pre-approval from Cabinet is required for all DTCs before they can proceed to Parliament. As Kenya has been undergoing a change in government and their Cabinet of Ministers, this has impacted on the approval of the remaining eleven DTCs.
- Further, following the passing of the 2010 Constitution, containing Article 2(6) which sets out that that any treaty or convention ratified by Kenya shall form part of the laws of Kenya, this requirement necessitated the passing of the Treaty Making and Ratification Act 2012 by Parliament, the purpose of which being to guide the ratification process and to ensure that Parliamentary authority is obtained before passing of any treaties into law.

310. In one case a treaty partner reported that they were in a position to sign a renegotiated agreement in April 2011 but Kenya has yet to sign the agreement. Similarly, Kenya has reported that this delay is due to the enactment of the 2010 Constitution which required the enactment of the Treaty Making and Ratification Act 2012. As of December 2015, Kenya has still not signed the amended agreement and should proceed to do so expeditiously.

311. With the Treaty Making and Ratification Act 2012 now in force facilitating the ratification of all agreements, Kenyan authorities have confirmed that they are currently in the process of finalising the ratification procedures for the remaining DTCs. Nonetheless, Kenya is recommended to bring its EOI agreements into force quickly.

Signature and ratification in practice

312. In practice, requests to enter into an exchange of information agreement are usually received at the Ministry of Foreign Affairs who will then proceed to send the request to the Ministry of Finance. On occasion, the request will be accompanied with a draft model DTC or TIEA as used by the requesting party. The Ministry of Finance will then proceed to acknowledge receipt and respond via the same channels with their own draft model agreement.

313. Negotiations of all DTCs have taken place in person however they intend to conduct all future TIEA negotiations via secure email correspondence. On the finalisation of negotiations, the Minister of Finance will then initial the agreement. The agreement must get cabinet approval in Kenya. Once approved by Cabinet, the Attorney-General and the Minister of Finance are directed to take the necessary action. First, the agreement is reviewed for legality by the office of the Attorney-General and once this has been completed, the agreement is gazetted for signature by Minister of Finance. Upon signature the agreement will then be tabled in Parliament for ratification. Notice of ratification of exchange of information agreements is conveyed via diplomatic channels to the treaty partner.

314. To date, Kenya has signed 20 agreements (all DTCs) (mainly European countries of economic significance). As of December 2015, there were an additional 20 agreements in various stages of negotiation. Kenya also wishes to implement a treaty negotiation policy and have had assistance from the International Bureau of Fiscal documentation (IBFD) in order to better streamline its treaty negotiation processes and policy. However, it is noted that as of December 2015, not all of its signed agreements are in line with the international standard. Therefore, Kenya is recommended to renegotiate its agreements (namely Sweden, Germany, and the UK) found not to be to the standard.

315. Of its 20 signed agreements, as of December 2015, nine of those agreements have been ratified by and are in force in Kenya. Authorities from Kenya have reported that the DTCs with the EAC, Iran, Kuwait, Mauritius, Qatar and the Seychelles have all been gazetted and should be brought into force shortly. Kenyan officials have also reported that Kenya has completed all processes to bring the EAC agreement into force. However, as stated in this agreement, the EAC DTC does not enter into force until all of the members have completed the notifications for ratification. Nevertheless, it is noted that ratification has taken a long time in Kenya and that many of its agreements have still not been ratified. Further, one peer has indicated that despite having initialled an agreement with Kenya over one year ago and sending Kenya several communications since, Kenya has still not advanced to signature. Therefore, Kenya is recommended to ensure that all agreements are signed and ratified expeditiously.

Be given effect through domestic law (ToR C.1.9)

316. For information exchange to be effective, the parties to an EOI arrangement need to enact any legislation necessary to comply with the terms of the arrangement.

317. The 2010 Constitution grants the President of Kenya the power to conclude treaties subject to ratification by an Act of Parliament. Once an agreement has been signed by the Minister, an explanatory memorandum is then prepared which accompanies the agreement for Cabinet approval. Once Cabinet approval has been obtained, the agreement is then presented to the Speaker of the National Assembly for Parliamentary debate and public participation before approval by the House. Subsequently, the Minister is authorised to sign and deposit the instruments of ratification with the relevant bodies. Once signed, the agreement becomes Kenyan law.

318. The ITA provides that to the extent that the terms of an international arrangement are inconsistent with the provisions of the ITA or any other written law, the terms of the international arrangement prevail (sections 41 and 41A ITA).

319. All of Kenya's DTCs that are in force have been given effect through domestic law in the manner described above. In the three year period under review there have been no cases where information could not be made available due to any inconsistency or lack of domestic legislation being in force in Kenya.

Determination and factors underlying recommendations

Phase 1 Determination	
The element is in place, but certain aspects of the legal implementation of the element need improvement.	
Factors underlying recommendations	**Recommendations**
Of the 20 agreements signed by Kenya,17 provide for exchange of information to the standard. Kenya needs to take the necessary steps to renegotiate the three DTCs which do not meet the standard.	Kenya should ensure that all its agreements provide for exchange of information to the standard.
Of the 20 EOI agreements signed by Kenya, ten are in force. The ratification of EOI arrangements can take several years and is delayed on some occasions.	Kenya should ensure the ratification of all EOI arrangements signed with counterparts expeditiously.

Phase 2 rating
Largely Compliant

C.2. Exchange of information mechanisms with all relevant partners

> The jurisdictions' network of information exchange mechanisms should cover all relevant partners.

320. Ultimately, the international standard requires that jurisdictions exchange information with all relevant partners, meaning those partners who are interested in entering into an information exchange arrangement. 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 it may indicate a lack of commitment to implement the standards.

321. Kenya has DTCs in force with ten jurisdictions, including two of its main trading partners (India and the United Kingdom). Seven of these agreements allow for exchange of information according to the international standard (Canada, France, Denmark, India, Norway, South Africa and Zambia). In regards to the EAC DTC, Kenyan officials have reported that they have completed all notifications for the agreement to come into force in Kenya. However, pursuant to article 30 of the EAC DTC, the agreement does not come into force until these notifications have been completed by all parties to the agreement.

322. In terms of recent developments, five TIEAs have been recently initialled with Bermuda, the Cayman Islands, Guernsey, the Isle of Man and Malta and a DTCs has been initialled with Egypt. Treaty negotiations are also underway with a number of other jurisdictions.

323. Comments were sought from Global Forum member jurisdictions in the course of the preparation of this report. One jurisdiction has asked to renegotiate the existing DTC to introduce an exchange of information provision as provided in Article 26 of the OECD Model Tax Convention and these renegotiations are currently underway.

324. During the peer review process, two additional peers submitted input in this regard. The first peer indicated that it had initialled an agreement with Kenya in 2010. The second peer indicated that it had completed negotiations for an EOI agreement with Kenya in 2013. However, neither of these agreements have advanced to signature despite several attempts from both peers to request Kenya to complete these agreements. As of December 2015, these two treaty partners had not received any update in this regard from Kenya.

325. Kenya has requested the join the Multilateral Convention, of which these two jurisdictions are already a Party. However as of December 2015,

despite having completed all the processes for joining the Multilateral Convention in 2013, Kenya has not yet advanced to signature. As a result, there is no EOI mechanism in place with either of these two treaty partner despite the desire of the treaty partners to do so. It is also noted that Kenya's signature (and subsequent ratification) of the Multilateral Convention would provide for an EOI mechanism with five treaty partners (Italy, Korea, Mauritius, Netherlands, and The Seychelles), whose DTC ratification by Kenya is currently pending. Therefore, it is recommended that Kenya should complete negotiations for an EOI agreement expeditiously when requested by partner jurisdictions.

Determination and factors underlying recommendations

Phase 1 determination	
The element is in place, but certain aspects of the legal implementation of the element need improvement.	
Factors underlying recommendations	**Recommendations**
	Kenya should continue to develop its EOI network with all relevant partners.
Over the review period, two jurisdictions requested to enter into an EOI agreement with Kenya. Kenya responded that as it would sign the Multilateral Convention and this would provide an EOI mechanism with both jurisdictions a separate bilateral agreement was not required. However, as of December 2015, Kenya had still not signed the Multilateral Convention.	Kenya should complete negotiations for an EOI agreement expeditiously when requested by partner jurisdictions.

Phase 2 rating
Partially Compliant

C.3. Confidentiality

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

Information received: disclosure, use, and safeguards (ToR C.3.1)

326. Governments would not engage in information exchange without the assurance that the information provided would only be used for the purposes permitted under the exchange mechanism and that its confidentiality would be preserved. Information exchange instruments must therefore contain confidentiality provisions that spell out specifically to whom the information can be disclosed and the purposes for which the information can be used. In addition to the protections afforded by the confidentiality provisions of information exchange instruments, jurisdictions with tax systems generally impose strict confidentiality requirements on information collected for tax purposes.

327. All of the arrangements for the exchange of information concluded by Kenya contain a provision ensuring the confidentiality of information exchanged and limiting the disclosure and use of information received, which has to be respected by Kenya as a party to these agreements.

Exchange of information agreements

328. All of Kenya's DTCs have confidentiality provisions, generally based on the 1963 OECD Draft Convention or the 1977 OECD Model Convention, to ensure that the information exchanged will be disclosed only to persons authorised by the DTCs. While each of the EOI provisions might vary slightly in wording, these provisions generally contain all of the essential aspects of Article 26(2) of the OECD Model Tax Convention and specifically spell out to whom the information exchanged can be disclosed and the purposes for which the information can be used.

Domestic law

329. Treaty obligations are complemented by domestic law and Kenya's domestic legislation also contains relevant confidentiality provisions. Importantly, the ITA provides that tax officials are obliged to regard and deal with all documents and information which may come to their possession or knowledge in connection with the performance of their official functions as secret and shall only be required to disclose such information to a court for carrying out the provisions of the ITA or "to assist in the course of a prosecution for an offence committed in relation to tax" (s. 125(1) and (2) ITA). Section 125(4) provides for a limited numbers of exceptions to this rule,

including the disclosure to the competent authority of the government of another country with which Kenya has entered into an agreement for the avoidance of double taxation or for the exchange of information relating to income tax or taxes of a similar character.

330. Failure to maintain the confidentiality of tax information is an offence and subject on summary conviction to a fine of KES 10 000 (EUR 91), or to imprisonment of up to three years, or to both (s. 126(1)(c) ITA).

331. Section 125 is a very broad provision which is not specifically aimed at dealing with the confidentiality of information exchanged under a DTC or TIEA. Instead, it establishes general confidentiality rules applicable to any information obtained by the Kenyan tax authorities concerning domestic affairs. However, a DTC or a TIEA may establish confidentiality provisions which are more restrictive than those set forth under the Kenyan tax law.

332. In case of potential conflict, section 41(1) of the ITA, sets forth a principle whereby a DTC overrides domestic tax legislation. Therefore, if a DTC establishes confidentiality requirements which are stricter than those set forth under the Income Tax Act, this DTC will take precedence over domestic tax law. Similarly, section 41A of the ITA sets forth the same principle with respect to TIEAs.

All other information exchanged *(ToR C.3.2)*

333. Confidentiality rules should apply to all types of information exchanged, including information provided in a request, background documents to such requests, and any other documents or communications reflecting such information.

334. The confidentiality provisions in Kenya's exchange of information agreements and domestic law do not draw a distinction between information received in response to requests or information forming part of the requests themselves. As such, these provisions apply equally to 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.

Ensuring confidentiality in practice

335. In practice, the following measures have been adopted by the KRA to ensure the confidentiality of information exchanged pursuant to an EOI request.

Handling and storage of EOI requests and related information

336. Peer input indicates that six requests were sent to Kenya over the review period. However, four of these were never received by Kenya. Officials from Kenya attribute this to the unreliability of the postal service in Kenya. As discussed further in the report, there were issues on the receipt and processing of requests in Kenya. The fact that EOI operated on an ad-hoc basis over the review period, with the responsibility being shared between two agencies (the Treasury and the KRA), created a risk of requests being mislaid on their arrival in Kenya. Should this have been the case, this would raise confidentiality issues. However, the issue of breach of confidentiality due to non-receipt of the missing requests is not clear in Kenya and therefore this issue has been attributed to the organisational processes as discussed further in the report (see section C.5.3 *Organisational process and resources*). Further, it is noted that Kenya subsequently, created an encrypted email address to allow requesting jurisdictions to send requests in a secure manner, mitigating some of the confidentiality concerns posed by the previous ad-hoc system. Kenya has also since made contact with both jurisdictions for these requests to be resent via encrypted email. In December 2015, one of the treaty partners resubmitted the three requests which it has originally sent to Kenya in March 2014.

337. Over the review period, EOI operated on an ad-hoc basis in Kenya with officials from the KRA overseeing the EOI function. In order to streamline the process for EOI, the processes as carried out by these officials were formalised into an EOI Unit within the International Taxation office of the KRA in January 2015. The competent authority power was delegated from the Minister of Finance to the KRA in November 2015 and therefore, the EOI Unit within the KRA is now the body responsible for the processing of all requests in Kenya The one request that were successfully received by Kenya was processed by the EOI Unit which sits within the International Taxation Office of the KRA. The EOI Unit has its own secure office within the main KRA building. Access to this building is strictly monitored. All external visitors must obtain a visitor pass from security in order to enter this building which must be displayed at all times. Further access to all areas within the building is only permitted via secure access swipe of employees of the KRA and visitors must be accompanied by an employee at all times.

338. Over the review period when a request for information was received at the EOI Unit of the KRA, it was first reviewed review by the Chief Manager who decides how to process with the request. Throughout all processing of the request, the request and any related information is stored in lockable filing cabinets within the chief manager's office which is completely partitioned and locked outside of regular work hours. During the processing of an EOI request, when communicating with other competent authorities,

this is generally carried out via email in which no confidential details of the request are shared.

339. Other confidentiality measures in place by the EOI Unit include all information to be stored securely and being stamped confidential upon arrival, password measures in order to access online documentation connected with EOI requests, the implementation of a specific EOI database just for use in the processing of EOI requests and the shredding of all documentation (for example, internal documentation to retrieve the information) that is no longer required after the request has been processed.

340. Over the review period, officials from the EOI Unit approached certain third parties in order to access information by serving them with a notice. In this case, officials have advised that where information is requested from another government agency or from a third party they do not provide any details of the request in the notice unless in cases where it is necessary in order to identify the requested information (name of the taxpayer). Further on delivery of an EOI request to a government agency or a third party, the EOI officer will explain the nature of the request and highlight the sensitivity and confidentiality of all aspects related to the request and in particular to the information requested. The KRA has advised that it has interacted regularly with other government agencies in the form of workshops and presentations in order to highlight, amongst other things, the confidential nature of EOI requests.

341. On provision of the requested information, officials from the EOI Unit have advised that once the information is provided to treaty partners, the information was first copied and those copies stored in secured locked cabinets in the office of the EOI Unit. Kenya has sent information via courier and also via encrypted email to the named contact of the requesting competent authority.

Personnel

342. AS the EOI Unit sits within the International Taxation Directorate of the KRA, all three EOI officers within the Unit are subject to the provisions of the ITA which sets out strict confidentiality obligations for all employees in regards to maintaining all information secret and this obligation extends to information received in the course of processing an EOI request. All employees of the KRA must swear an oath of secrecy with a magistrate at the commencement off their employment with the KRA which extends even after the termination of the work with the KRA.

343. The three EOI officers have previously worked in other government departments and are professionally fully aware of their obligations of confidentiality. Kenya also adheres to the joint Global Forum/OECD publication

Keeping it safe: Guide On The Protection Of Confidentiality Of Information Exchanged For Tax Purposes and, where relevant, it indicated that it uses the guide for best practices related to confidentiality. Further, the officers that have dealt with EOI requests within the KRA over the review period have attended Global forum training of which confidentiality in practice in the ambit of EOI, formed a substantive part of this training.

Conclusion

344. Kenya has a comprehensive system of measures in place to assure confidentiality when processing EOI requests. There are clear handling and storage security measures and all personnel are bound by strict confidentiality rules against any disclosure of information concerning EOI requests. Kenya does not disclose any details of the request in the notice to produce as issued to the holder of the information. Over the review period, no peer raised any issue regarding confidentiality measures in Kenya.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating
Compliant

C.4. Rights and safeguards of taxpayers and third parties

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

Exceptions to requirement to provide information (ToR C.4.1)

345. The international standard allows requested parties not to supply information in response to a request in certain identified situations where an issue of trade, business or other listed secret may arise. Among other reasons, an information request can be declined where the requested information would disclose confidential communications protected by the attorney-client privilege. Attorney-client privilege is a feature of the legal systems of many jurisdictions. However, communications between a client and an attorney or other admitted legal representative are, generally, only privileged to the extent that the attorney or other legal representative acts in his or her capacity as an attorney or other legal representative.

346. Where attorney-client privilege is more broadly defined it does not provide valid grounds on which to decline a request for exchange of information. To the extent, therefore, that an attorney acts as a nominee shareholder, a trustee, a settlor, a company director or under a power of attorney to represent a company in its business affairs, exchange of information resulting from and relating to any such activity cannot be declined because of the attorney-client privilege rule.

347. The EOI agreements concluded by Kenya meet the standards for protection of rights and safeguards of taxpayers and third parties, which are provided in Article 26(3) of the OECD Model Tax Convention. That is, information which is subject to legal privilege; which would disclose any trade, business, industrial, commercial or professional secret or trade process; or which would be contrary to public policy, is not required to be exchanged.

348. Communications between a client and an attorney or other admitted legal representative are, generally, only privileged to the extent that, the attorney or other legal representative acts in his or her capacity as an attorney or other legal representative. Where attorney-client privilege is more broadly defined it does not provide valid grounds on which to decline a request for exchange of information. As noted in part B.1 of this report, Kenya's-client privilege only applies to communications between a client and an attorney to the extent that the attorney acts in his or her professional capacity as an attorney.

349. Kenya has advised that there is no provision in domestic law relating to the circumstances where an exchange of information may be declined. In respect of its DTCs, Kenya refers to the guidance in the commentary of Article 26 of the OECD Model Tax Convention to determine circumstances where requests for exchange of information should be declined.

350. In practice, no issues in relation to the rights and safeguards of taxpayers and third parties have been encountered in practice in Kenya and from the EOI partners that provided peer input, no issues have been raised in this regard.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating
Compliant

C.5. Timeliness of responses to requests for information

> The jurisdiction should provide information under its network of agreements in a timely manner.

Responses within 90 days (ToR C.5.1)

351. In order for exchange of information to be effective it needs to be provided in a timeframe which allows the tax authorities to apply the information to the relevant cases. If a response is provided but only after a significant lapse of time the information may no longer be of use to the requesting authorities. This is particularly important in the context of international co-operation as cases in this area must be of sufficient importance to warrant making a request.

352. There are no specific legal or regulatory requirements in place which would prevent Kenya from responding to a request for information by providing the information requested or providing a status update within 90 days of receipt of the request.

353. Peer input indicates that six requests were sent to Kenya over the review period (1 July 2011-30 June 2014) of which only one of those requests was successfully received by Kenya. Kenya attributes the lack of receipt of the other five requests to the unreliability of its postal service. However, it has since made contact with both requesting jurisdictions and all four requests have been resent via encrypted email to the generic email that Kenya has set up for receiving requests at the office of the EOI Unit.

354. Kenya received the one request in May 2014 and provided acknowledgment of the request in June 2014. However, due to delays in the delegation of the competent authority power from the Minister of Finance to the KRA, the information was not provided to its treaty partners until December 2015, i.e. in a timeframe of 19 months. It is noted that in the time taken to provide the information to its treaty partners, status updates were not provided to the treaty partner. Further, it is noted that despite being aware of the receipt of an EPOI request and having the powers to do so, the Ministry of Finance did not proceed to process the request despite been notified on several occasions by the requesting partner.

355. From the above analysis of the one request received over the review period, it is clear that Kenya experienced long delays in providing the requested information. Further, Kenya did not communicate the status of the processing of the request to peers, despite numerous requests for an update. It is, therefore, recommended that Kenya should ensure that the competent authority communicates effectively with all its treaty partners, including the provision of status updates within 90 days in all cases.

356. Over the review period, EOI operated on an ad-hoc basis in Kenya with officials from the KRA overseeing the EOI function. In order to streamline the process for EOI, the processes as carried out by these officials were formalised into an EOI Unit within the International Taxation office of the KRA in January 2015. The competent authority power was delegated from the Minister of Finance to the KRA in November 2015 and therefore, the EOI Unit within the KRA is now the body responsible for the processing of all requests in Kenya. In December 2015, Kenya provided all of the requested information to the treaty partner and peer input indicates that the requesting partner was satisfied with the information received. Nevertheless, it remains that the processes for EOI have only been utilised in one case over the review period and therefore Kenya is recommended to provide the information requested over the review period expeditiously to its treaty partners and to closely monitor its newly implemented EOI processes to ensure it can provide all future requested information in a timely manner.

Organisational process and resources (ToR C.5.2)

357. The competent authority for exchange agreements in Kenya is the Ministry of Finance who delegates this power to the Commissioner of the Kenya Revenue Authority.

358. Under Kenya's EOI agreements, the competent authority is the Minister of Finance which is delegated to the Commissioner of the KRA. However, over the review period, the competent authority power was only delegated from the Minister of Finance to the KRA in November 2015. For the one request received by Kenya over the review period, this request was delegated to the KRA who had proceeded to process this request. However, subsequent to accessing the requested information, the KRA realised it did not yet have the competent authority power to provide this information to the treaty partner. As a result, the requested information was held for over one year at the offices of the KRA until such time as the competent authority power had been delegated. Once the competent authority power had been delegated, the KRA then proceeded to provide the requested information to this treaty partner in December 2015. Peer input from this treaty partner indicates that it was fully satisfied with the information it received from Kenya in response to this request.

359. On receipt of that one request at the office of the Commissioner of the KRA, it was subsequently forwarded to the International Taxation Office of the KRA for action. On receipt of the requests, they were noted in a hard copy register which contains details of all incoming mail and was not specific for EOI. The requests are then stored in a hard copy file (information exchange file) within the office of the International Taxation Office. In order to gather the information for the one of the requests, information was

gathered from third parties (including from a financial institution) and the KRA also interviewed the taxpayer, based in Mombasa, and was therefore interviewed by a local unit of the KRA. The auditor who interviewed the taxpayer was fully briefed prior by the International Taxation Office and the confidential nature of the request was highlighted. At no time, was the taxpayer made aware that this information was being requested in accordance with an EOI request. The information gathered by the local unit of the KRA in Mombasa was then transmitted in a sealed envelope (marked confidential) to the International Taxation Office of the KRA in Nairobi via secure internal mail which is a mail service handled by the KRA's own personnel.

360. Officials from the International Taxation Office have reported that there was no delay in gathering information and where requested from third parties it was provided within 15-30 days to the KRA. Nevertheless, due to the delay in delegating the competent authority power from the Minister of Finance to the KRA, over the review period, the KRA was not legally enabled to transmit the requested information to its treaty partners and as a result there were considerable delays in providing the requested information. It is also noted that over the review period, Kenya did not provide status updates to its partner despite several requests for it to do so.

361. As mentioned above, in January 2015, an EOI office was formally implemented within the International Taxation office of the KRA which was responsible for the processing of the requested information as provided in December 2015. Prior to this, the same officials were responsible for overseeing the processing of EOI request but this operated on an ad-hoc basis. While the three EOI officials had commenced accessing the information for one of the requests during the review period, it remains that the EOI Unit and the processes for exchanging information are largely untested in practice.

362. In regards to the remaining five requests, Kenya has since contacted the treaty partners and asked that they resubmit the requested information via encrypted email to the competent authority email address that has been established within the EOI Unit for dealing solely with EOI request and EOI related matters (KenyaCompetentAuthority@kra.go.ke). In December 2015, one of those two treaty partners resubmitted the three requests that it had originally sent in March 2014. Officials from the EOI Unit have reported that they are currently processing those requests. Kenya has since updated the competent authority database as maintained by the Global Forum with the details of its competent authority office including the generic email address for the receipt of EOI requests. However, due to the issues with receipt of requests over the review period, Kenya is recommended to inform all of its treaty partners that this transmission of request via encrypted email to its generic email address is the preferred mode of receipt for all future EOI requests.

Resources

363. In January 2015, a formal EOI Unit was established within the International Taxation Office of the KRA. There are three permanent staff members in the KRA who sit within the EOI Unit. The Unit manager reports to the Chief Manager and is assisted by another legal officer. The unit manager and the legal officer are widely trained in exchange of information, having attended many Global Forum training events as well as regional EOI training. Further, both the legal officer and the Unit manager are advocates of the High Court of Kenya. All three officers within the International Taxation Office are highly experienced technical officers with many years of experience in international taxation as well as other areas within the KRA. Kenya has indicated that current staff levels are set at an appropriate level and should be sufficient to meet the number of EOI requests received in the future.

Conclusion

364. Although six requests were sent to Kenya over the review period, Kenya only received one of those requests and exchanged the requested information in a timeframe of 19 months. This delay was attributable to internal issues concerning the delegation of its competent authority power from the Minister of Finance to the KRA which resulted in the EOI Unit within the KRA not having the legal power to send the requested information to its treaty partners. It is noted that status updates in respect of this information were not provided, despite numerous requests for updates. Although an EOI Unit was formalised in the International Taxation Office of the KRA in January 2015, as this is outside of the review period, the EOI processes are largely untested by the assessment team. While Kenya appears to now have the appropriate processes in place for processing EOI, it is recommended to closely monitor its newly implemented EOI processes to ensure it can provide all future requested information in a timely manner. As a result of the fact that the EOI Unit has only been recently established and in addition to the lengthy timeframes for the provision of the requested information and lack of status updates, element C.5 is rated "Partially-Compliant".

Absence of restrictive conditions on exchange of information (ToR C.5.3)

365. There are no specific legal and regulatory requirements in place which impose restrictive conditions on Kenya' exchange of information practice.

Determination and factors underlying recommendations

Phase 1 determination
The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of that are dealt with in the Phase 2 review.

Phase 2 rating	
Partially Compliant	
Due to internal issues with the delegation of the competent authority power in Kenya, there were significant delays in the provision of the information for the one request successfully received over the review period. In addition, status updates were not provided.	Kenya should ensure that it communicates effectively with all its treaty partners, including the provision of requested information or where the information cannot be provided within 90 days, a status update should be provided in all cases.
Over the review period, exchange of information operated on an ad-hoc basis in Kenya. Since January 2015, a formal EOI unit has been in place within the KRA. However, the EOI processes are largely untested in practice.	Kenya is recommended to closely monitor its newly implemented EOI Unit and processes to ensure it can effectively receive all requests and provide all requested information in a timely manner.

Summary of determinations and factors underlying recommendations

Overall Rating
LARGELY COMPLIANT

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities *(ToR A.1)*		
The element is in place, but certain aspects of the legal implementation of the element need improvement.	New obligations were introduced in the ITA requiring nominees to provide beneficial ownership information to the KRA in the case of a change to this information. However, this requirement may not require nominees to have beneficial ownership available in all cases.	An obligation should be established for all nominees to maintain relevant ownership and identity information where they act as the legal owners on behalf of any other persons.
	Ownership and identity information may not consistently be available with respect to all settlors, trustees and beneficiaries of all trusts in Kenya.	Kenya should ensure the availability of ownership and identity information in respect of trusts in all cases.
Phase 2 Rating: Largely Compliant	In September 2015, Kenya enacted a new Companies Act which includes a provision prohibiting the issuance of share warrants to bearer by all companies.	Kenya should monitor the implementation of the new provisions in the Companies Act prohibiting the issuance of share warrants to bearer to ensure that full ownership information is available for all companies.

Determination	Factors underlying recommendations	Recommendations
Phase 2 Rating: Largely Compliant *(continued)*	While there is monitoring of ownership information obligations undertaken in Kenya by the tax authorities this may not cover all relevant entities. Further, although there is a system of monitoring with the requirements of the AML regime in place by the Central Bank, the scope of the AML regime is limited. Further, over the review period, the Registrar of Companies did not have a system of oversight in place to monitor compliance with ownership obligations and sanctions for non-compliance were not enforced in practice.	Kenya is recommended to improve its system of oversight in order to ensure that updated ownership information is being maintained in respect of all relevant entities.
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements *(ToR A.2)*		
The element is in place.	Trustees of Kenyan trusts and foreign trusts are only statutorily required to maintain accounting records where the trust derives income subject to tax in Kenya.	Kenya should ensure that trustees of all Kenyan and foreign trusts maintain accounting records even where the trust derives income not subject to tax in Kenya.
Phase 2 Rating: Largely Compliant	Over the review period, although there was a comprehensive system of oversight in place by the tax authorities, this may not cover all relevant entities in Kenya. In addition, the Registrar did not have a regular oversight program in place to monitor the compliance of the accounting record keeping obligations under the entity acts.	Kenya is recommended to implement an oversight program to supervise the compliance with accounting record requirements to ensure that accounting records for all relevant entities are available in practice.
Banking information should be available for all account-holders *(ToR A.3)*		
The element is in place.		

Determination	Factors underlying recommendations	Recommendations
Phase 2 Rating: Compliant		
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 of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information) *(ToR B.1)*		
The element is in place.		
Phase 2 Rating: Compliant		
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 *(ToR B.2)*		
The element is in place.		
Phase 2 Rating: Compliant		
Exchange of information mechanisms should allow for effective exchange of information *(ToR C.1)*		
The element is in place, but certain aspects of the legal implementation of the element need improvement.	Of the 20 agreements signed by Kenya, 17 provide for exchange of information to the standard. Kenya needs to take the necessary steps to renegotiate the three DTCs which do not meet the standard.	Kenya should ensure that all its agreements provide for exchange of information to the standard.
	Of the 20 EOI agreements signed by Kenya, ten are in force. The ratification of EOI arrangements can take several years and is delayed on some occasions.	Kenya should ensure the ratification of all EOI arrangements signed with counterparts expeditiously.
Phase 2 Rating: Largely Compliant		

Determination	Factors underlying recommendations	Recommendations
The jurisdictions' network of information exchange mechanisms should cover all relevant partners *(ToR C.2)*		
The element is in place, but certain aspects of the legal implementation of the element need improvement.		Kenya should continue to develop its EOI network with all relevant partners.
	Over the review period, two jurisdictions requested to enter into an EOI agreement with Kenya. Kenya responded that as it would sign the Multilateral Convention and this would provide an EOI mechanism with both jurisdictions a separate bilateral agreement was not required. However, as of December 2015, Kenya had still not signed the Multilateral Convention.	Kenya should complete negotiations for an EOI agreement expeditiously when requested by partner jurisdictions.
Phase 2 Rating: Partially Compliant		
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received *(ToR C.3)*		
The element is in place.		
Phase 2 Rating: Compliant		
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties *(ToR C.4)*		
The element is in place.		

Determination	Factors underlying recommendations	Recommendations
Phase 2 Rating: Compliant		
The jurisdiction should provide information under its network of agreements in a timely manner *(ToR C.5)*		
The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review.		
Phase 2 Rating: Partially-Compliant	Over the review period, due to internal issues with the delegation of the competent authority power in Kenya, there were significant delays in the provision of information for the one request successfully received over the review period. In addition, status updates were not regularly provided.	Kenya should ensure that it communicates effectively with all its treaty partners, including the provision of requested information or where the information cannot be provided within 90 days, a status update should be provided in all cases.
	Over the review period, exchange of information operated on an ad-hoc basis in Kenya. Since January 2015, a formal EOI unit has been in place within the KRA. However, the EOI processes are largely untested in practice.	Kenya is recommended to closely monitor its newly implemented EOI Unit and processes to ensure it can effectively receive requests and provide all requested information in a timely manner.

Annex 1. Jurisdiction's response to the review report[8]

Kenya thanks the assessment team and Global Forum Secretariat for their professionalism and patience during the conduct of Kenya's onsite Phase 2 review. We equally extend our gratitude to all peers and members of the Peer Review Group for their valuable input in review and adoption of this report.

Since the adoption of Kenya's Phase 1 report, Kenya has endeavoured to improve its legal framework, expand its treaty network as well as improving exchange of information practices in compliance with the international standard. Kenya commits to ratify, without delay, the amended OECD/CoE Multilateral Convention on Mutual Administrative Assistance in Tax Matters which it signed on 8th February 2016 and to have robust engagement with all its treaty partners.

Kenya is in agreement with its Phase 2 rating of 'Largely Compliant' and takes note of the recommendations on areas of improvement and affirms its commitment to the international standards on exchange of information. Finally, Kenya looks forward to continuing to take the work of the Global Forum forward, namely through its status as a 'first mover' in the Africa Initiative, in its continued role as member of the Steering Group and by engaging with other African jurisdictions in promoting the exchange of information.

8. This Annex presents the jurisdiction's response to the review report and shall not be deemed to represent the Global Forum's views.

Annex 2: List of all exchange-of-information mechanisms in force

List of EOI agreements signed by Kenya as at December 2015, including 20 bilateral Double Tax Conventions (DTCs) and one multilateral Double Tax Convention. Kenya is a party to the EAC multilateral DTC signed on 30 November 2010 (not yet in force), which provides for the necessary legal basis to enhance co-operation and EOI among the five revenue authorities of Kenya, Uganda, Burundi, Rwanda, Tanzania, under Article 27. Furthermore, a "Memorandum of Understanding on the Exchange of Information on Tax Expertise and Other Related Matters" (MoU) was signed on 10 November 2010 by the five revenue authorities which provides for detailed rules and procedures for EOI on tax matters, in line with the 2002 OECD Model TIEA. The EOI agreements listed below do not limit, nor are they limited by, provisions contained other EOI arrangements between the same parties concerned or other instruments which relate to co-operation in tax matters.

	Jurisdiction	Type of EoI arrangement	Date signed	Date entered into force
1	Canada	Double Tax Convention (DTC)	27-Apr-1983	08-Jan-1987
2	Denmark	DTC	13-Dec-1972	24-Mar-87
3	EAC (Uganda, Burundi, Rwanda, Tanzania)	DTC	30-Nov-2010	Not in force
4	France	DTC	04-Dec-07	01-Nov-10
5	Germany	DTC	17-May-77	17-Jul-80
6	India	DTC	12-Apr-85	20-Feb-1989
7	Iran	DTC	29-May-12	Not in force
8	Italy	DTC	15-Oct-79	Not in force
9	Korea	DTC	8-July-14	Not in force
10	Kuwait	DTC	12-Nov-13	Not in force
11	Mauritius	DTC	12-May-12	Not in Force

	Jurisdiction	Type of EoI arrangement	Date signed	Date entered into force
12	Netherlands	DTC	22-July-15	Not in Force
13	Norway	DTC	13-Dec-72	10-Sep-73
14	Qatar	DTC	23-April-14	Not in force
15	Seychelles	DTC	17-March-14	Not in force
16	South Africa	DTC	26-Nov-10	19-June-2015
17	Sweden	DTC	28-Jun-73	28-Dec-73
18	United Arab Emirates	DTC	21-Nov-11	Not in force
19	United Kingdom	DTC	31-Jul-73	30-Sep-77
20	Zambia	DTC	08-Aug-69	01-Apr-64 [a] (eff.)

Note: a. The entry into force date of this agreement is unknown. The date provided in the Kenya-Zambia DTC is the date that the agreement came into effect in Kenya. For Zambia, the agreement came into effect on 1 April, 1964.

Annex 3: List of all laws, regulations and other material consulted

Commercial laws

Business Registration Service Act 2015

Companies Act 2009

Companies Bill 2013

Companies Act 2015

Cooperative Societies Act (Amended), 2004

Partnerships Act No. 16 2012

International Trusts Law 1992

Limited Liability Partnerships Act 2002

Limited Liability Partnerships Act 2011

Limited Liability Partnerships Act Regulations 2011

Public Trustee Act 2009

Trustee Act 1982

Trusts Perpetual Succession Act 1981

Financial sector laws

Banking Act 2009

Capital Markets Authority Act

The Proceeds of Crime and Anti-Money Laundering Act 2009 (POCAMLA)

Taxation laws

Income Tax Act 2010

Kenya Revenue Authority Act 1995

Miscellaneous

Advocates Act 2009

Company Income Tax Return

Evidence Act 2009

Judicature Act 1967

Treaty Making and Ratification Act 2012

2010 Constitution of Kenya

Annex 4: List of all persons interviewed during the on-site visit

Officials from the Kenya Revenue Authority

Officials from the Central Bank of Kenya

Officials from the Kenyan Ministry of Finance

Representative from the Office of the Attorney General of Kenya

Officials from the Capital Markets Authority

Officials from the Kenyan Financial Reporting Centre

Officials from the Registrar-General’s Department, Kenya

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Global Forum on Transparency and Exchange of Information for Tax Purposes

PEER REVIEWS, PHASE 2: KENYA

This report contains a "Phase 2: Implementation of the Standards in Practice" review, as well as revised version of the "Phase 1: Legal and Regulatory Framework review" already released for this country.

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. These standards are 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 2004, which has been incorporated in the *UN Model Tax Convention*.

The standards provide for international 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.

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