GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

Peer Review Report Combined: Phase 1 + Phase 2

SOUTH AFRICA

OECD

Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: South Africa 2012

COMBINED: PHASE 1 + PHASE 2

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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 100 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 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 adopted by the Global Forum.

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 in South Africa as well as the practical implementation of that framework. 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.

2. South Africa allows for the formation of companies, partnerships, trusts and cooperative societies. Availability of ownership information on companies and cooperative societies is ensured through the obligation for them to keep an up to date register of members. Share warrants to bearer could be issued by public companies until 1 May 2011. However, the prohibition to acquire or dispose of bearer securities suggests that share warrants to bearer have never been issued, and no such warrants have been encountered in practice.

3. Partnerships are not governed by a specific law. They are regarded transparent for income tax purposes, meaning that all partners must file a tax return individually. Recent changes to the income tax returns ensure that information is generally available to the tax authorities regarding the ownership of partnerships.

4. The comprehensive registration requirements for trusts in South Africa, with both the Offices of the Master of the High Court and the tax authorities, include the furnishing of ownership information. In addition, trustees and trust administrators must maintain full ownership information on trusts pursuant to their obligations under the AML/CFT legislation.

5. All relevant entities and arrangements are subject to the obligations under the tax law to keep reliable accounting records, including underlying documentation for a period of at least five years. The AML/CFT legislation ensures that all records pertaining to the accounts as well as to related financial and transactional information is required to be kept by South African banks.

6. The South African authorities have access powers at their disposal that allow them to make requests for information, enter and search business premises, make formal inquiries and seize documents from any person within their jurisdiction. These information gathering measures are reinforced by penalties where a person fails to produce the requested information. There are no secrecy provisions that may impede the effective access to information.

7. South Africa has a network of information exchange mechanisms that covers more than 90 jurisdictions, including all relevant partners. Information can be exchanged under DTCs, TIEAs and the *OECD/CoE Convention on Mutual Administrative Assistance in Tax Matters* (once in force for South Africa). As it is South Africa's policy to incorporate provisions on the exchange of information to the international standard in all of its information exchange agreements, these generally contain sufficient provisions to enable South Africa to exchange all relevant information.

8. The Enforcement Risk Planning Division of the South African Revenue Service has the responsibility for the day-to-day administration of all information exchange requests. This division has important sources of information directly available to answer incoming requests: SARS' own databases contain general information on taxpayers and their income, based on the tax returns filed. Direct access to various external databases is also provided for. Access to these systems allows South Africa's competent authority to directly answer the more straight forward requests received from their exchange of information partners. In more complex cases and in most cases where information must be obtained from a taxpayer, the information is obtained by an officer of a local revenue office.

9. South Africa has been able to respond to information exchange requests in a timely manner. In the period assessed, South Africa was in position to provide a final response within 90 days in 80% of the cases and within 180 days in 10% more instances. Where the provision of information was delayed, updates and interim responses were sent. When South Africa is not in a position to respond to a request within 90 days, it is standard practice to send a status update along with the information already available at the time this update is sent out.

10. Input received from South Africa's exchange of information partners suggests that the South African authorities respond to requests very quickly with responses of high quality. Peers also indicate that they are being informed about the status of their request when it cannot be answered immediately. Altogether, South Africa is considered by its peers to be a reliable and cooperative partner.

Introduction

Information and methodology used for the peer review of South Africa

11. The assessment of the legal and regulatory framework of South Africa 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 June 2012, other information, explanations and materials supplied by South Africa, and information supplied by partner jurisdictions. During the on-site visit, the assessment team met with officials and representatives of relevant South African government agencies, including the South African Revenue Service, the Companies and Intellectual Properties Commission, the Financial Services Board and the Financial Intelligence Centre (see Annex 4).

12. The *Terms of Reference* breaks 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) exchange of information. This combined review assesses South Africa's legal and regulatory framework and the implementation and effectiveness of this framework against these elements and each of the enumerated aspects. In respect of each essential element, a determination is made regarding South Africa's legal and regulatory framework 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. In addition, to reflect the Phase 2 component, recommendations are also made concerning South Africa's practical application of each of the essential elements. As outlined in the *Note on Assessment Criteria*, following a jurisdiction's Phase 2 review, a "rating" will be applied to each of the essential elements to reflect the overall position of a jurisdiction. However, this rating will only be published "at such time as a representative subset of Phase 2 reviews is completed". This

report therefore includes recommendations in respect of South Africa's legal and regulatory framework and the actual implementation of the essential elements, as well as a determination on the legal and regulatory framework, but it does not include a rating of the elements.

13. The assessment was conducted by a team which consisted of two expert assessors and a representative of the Global Forum Secretariat: Mr. Juan Pablo Barzola, Argentinean Tax Administration; Ms. Helen Ritchie, HM Revenue and Customs of the United Kingdom; and Mr. Mikkel Thunnissen from the Global Forum Secretariat.

Overview of South Africa

14. The Republic of South Africa (South Africa) is located on the southern tip of the African continent where the Atlantic and Indian Ocean meet. It shares land borders with Botswana, Lesotho, Mozambique, Namibia, Swaziland and Zimbabwe. Pretoria (also called Tshwane) is South Africa's administrative capital, while Cape Town and Bloemfontein are the legislative and judicial capital respectively. South Africa's population amounts to more than 50 million and has many different backgrounds, which is reflected in the fact that its Constitution recognises 11 official languages.

15. South Africa has the largest economy in Africa with a gross domestic product of USD 522 billion in 2010. After a slowdown caused by the global economic crisis in 2009, the growth rate is estimated to be back at 3.1% in 2011. South Africa's inward foreign direct investment stock amounted to USD 132 billion (EUR 105 billion) in 2010, while the outward foreign direct investment stock was recorded at USD 81 billion (EUR 64.5 billion).[1] The South African economy is dominated by the services sector which accounts for 66% of the economy, while industry and agriculture make up 31.5% and 2.5% respectively. The services sector is concentrated in Johannesburg, which serves as a business hub for sub-Saharan Africa. South Africa also has many natural resources, such as diamonds, gold and platinum, which form an important part of its exports. South Africa's main trading partners are China (People's Rep.), Germany, the United States and Japan. The official currency in South Africa is the South African Rand (ZAR). As at 13 June 2012, ZAR 10.52 = EUR 1.[2]

1. Data drawn from the United Nations Conference on Trade and Development (UNCTAD), available on *http://unctadstat.unctad.org.*
2. *www.xe.com*.

Legal system

16. The Republic of South Africa is a unitary state with nine provinces. The Constitution recognises a separation of powers between the legislature, the executive and the judiciary. The legislative power lies with Parliament, consisting of the National Assembly and the National Council of Provinces. The National Assembly has 400 members directly elected by the people for a five-year term, while the National Council has 90 members and is elected indirectly by the provincial legislatures. Most legislation must be approved by both the National Assembly and the National Council of Provinces. The President is the head of state and head of government, and is elected by the National Assembly from amongst its members. The President leads the Cabinet, which forms the national government holding the executive power.

17. South Africa has a common law system, meaning that there is no single primary source from which the law originates. As a result of its history, South African law is heavily influenced by both Roman-Dutch law and English law. Today, the sources of law are the Constitution, legislation passed by Parliament or lower legislative bodies and subsidiary legislation, common law (case law and customary law) and indigenous law. In terms of hierarchy, the Constitution is the highest source of law, followed by national laws and regulations, provincial laws and regulations and municipal by-laws, supplemented with common law. According to the Constitution (section 231) an international agreement is binding once approved by Parliament and may be enacted into law by national legislation.

18. The judicial power is exercised by the courts. Magistrate's Courts have jurisdiction in first instance over both criminal and civil cases with certain exceptions. Regional Magistrate's Courts only deal with criminal cases, where District Courts also deal with civil cases. Any tax disputes between a taxpayer and the tax authorities are dealt with in first instance by the specialised Tax Courts. Appeals from the Magistrate's Courts and the Tax Courts can be made to the High Courts, which also deal with some more complex cases in first instance. Further appeal to a decision of the High Courts can be made to the Supreme Court of Appeal. Its decisions are binding on all lower courts, and appeal to the Constitutional Court is only possible in limited circumstances where constitutional issues are applicable. The Constitutional Court only deals with constitutional matters.

Financial sector

19. All banks must be authorised to conduct the business of a bank. Most banks and branches of foreign banks are governed by the Banks Act, 1990. Furthermore, it is also possible to establish mutual banks and co-operative banks. Mutual banks and co-operative banks conduct activities that are

similar to those of 'regular' banks. All of these banks are supervised by the Bank Supervision Department of the South African Reserve Bank, except for one of the co-operative banks (which is supervised by the Co-operative Banks Development Agency). As at 1 January 2012, there were 12 South African based banks, 6 branches of foreign banks, 2 mutual banks and 2 co-operative banks operating in South Africa. Together, they held assets of more than ZAR 3 000 billion (EUR 285 billion).

20. The Johannesburg Stock Exchange is the largest stock exchange in Africa. It is largely self-regulatory, with the main rules implemented in the Stock Exchanges Control Act and the Financial Markets Control Act. Some of its main responsibilities are setting listing standards and disclosure obligations for listed companies.

21. The financial sector further comprises almost 200 insurance firms, collective investment schemes managing about ZAR 850 billion (EUR 81 billion, as at March 2010) and other financial intermediaries. The Financial Services Board is responsible for regulating and supervising the non-bank part of the financial services industry and has established different departments which are responsible for the different types of service providers. These providers of financial services are generally also subject to obligations under AML/CFT legislation and in that regard they must carry out customer due diligence and report any suspicious transactions.

Taxation and international cooperation

22. The Constitution allows for national, provincial and local government to impose taxes. Income tax, value-added tax and customs and excise duties may only be levied on a national level. The main taxes imposed by provincial government are gambling taxes and license fees on vehicles, while local government mainly levies property taxes and surcharges on fees for services rendered. For the fiscal year 2010-2011, a total of ZAR 674.2 billion (EUR 64 billion) of net taxes were collected, with the income tax and value-added tax together accounting for 84% of this amount.

23. South African residents are liable to income tax on their worldwide income and gains. Companies are considered resident if they are incorporated or if they have their effective management in South Africa. Foreign companies not having their effective management in South Africa are subject to income tax on income from sources in South Africa, such as having a permanent establishment there. The standard tax rate for both resident and non-resident companies is 28%.

24. The tax rate for individuals (both residents and non-residents) is progressive ranging between 18% and 40%. These rates also apply to special

trusts.[3] Other trusts formed under South Africa's law or effectively managed in South Africa are subject to tax at a flat rate of 40%. Partnerships are not regarded as separate legal entities and are considered tax transparent; tax (except for value added tax) is levied on the partners directly.

25. A capital gains tax was implemented on 1 October 2001 and forms part of the income tax system. It comes into effect when a taxpayer disposes of an asset. For individuals and special trusts 33.3% of the net capital gain is taxed and for other trusts and companies 66.6% of the net capital gain is taxed. The rates are the same as for other taxable income.

26. Withholding taxes apply in respect of dividends (15%), royalties (12%) and also for sportspersons (15%). A withholding tax on interest is provided for in the tax law, but is not in effect.

27. South Africa has an extensive network of double taxation conventions (DTCs) and in recent years added Tax Information Exchange Agreements to its network. These agreements are all implemented in the Income Tax Law, providing the tax authorities with the powers to obtain and exchange information under them.

28. On a national level, the taxes are administered by the South African Revenue Service (SARS). The head office in Pretoria is responsible for the general policy, while the regional offices make the tax assessments, perform audits and collect taxes. The competent authority for the purposes of exchange of information is located in the head office.

Recent developments

29. South Africa signed the *OECD/CoE Convention on Mutual Administrative Assistance in Tax Matters* in November 2011 and this agreement is currently in the process of ratification by Parliament. This further enlarges its network for the exchange of information and other means of tax cooperation.

30. On 1 April 2012 South Africa abolished its secondary tax on companies (a tax on dividends declared by companies and imposed on companies rather than on shareholders) and switched to a classic withholding tax system on dividends. The current rate is 15%.

31. A new Tax Administration Bill has been passed by Parliament and is expected to enter into force before 2013. This piece of legislation contains

3. A special trust is a trust created (i) solely for the benefit of a person who suffers from a mental illness or serious physical disability, or (ii) by the will of a deceased person and solely for the benefit of beneficiaries who are relatives of the deceased person, where the youngest of the beneficiaries is under the age of 21 (s. 1 ITA).

administrative provisions that are generic to all tax acts (income tax act, value-added tax act, etc.) which are currently duplicated in the different acts, including on the collection of information. It can also be seen as a preliminary step to rewrite and revise the current Income Tax Act, which is a medium term project.

Compliance with the Standards

A. Availability of Information

Overview

32. 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 such information is not kept or the information is not maintained for a reasonable period of time, a jurisdiction's competent authority may not be able to obtain and provide it when requested. This section of the report describes and assesses South Africa's legal and regulatory framework for availability of information. It also assesses the implementation and effectiveness of this framework.

33. Companies, close corporations and co-operative societies are all required to register with the Companies and Intellectual Property Commission (CIPC). Availability of ownership and identity information in respect of these types of entities is ensured by the requirement to keep an up to date register of members. Close corporations must also furnish full details of their owners to the CIPC.

34. Until 1 May 2011 public companies were allowed to issue share warrants to bearer under the Companies Act of 1973. However, since 1961 a person was not allowed to acquire or dispose of any share warrants to bearer, nor could dividends be paid in respect of bearer securities; this suggests that share warrants to bearer would not have been issued. In addition, share warrants to

bearer could only be converted into registered shares with Treasury's permission, of which no records could be found. The number of public companies that may have issued such warrants is approximately 3 000 (representing 0.24% of the total number of companies registered in South Africa), but no share warrants to bearer have been encountered in practice and no issues have been raised on this matter by South Africa's exchange of information partners.

35. Although no general register for partnerships exist, in some cases partnerships are required to register their business at a local level and/or must register for VAT purposes when they meet certain conditions. As partnerships are regarded transparent for tax purposes, all partners must file a tax return individually and should declare therein their share in the profit and the partnership's name. The requirement to provide the partnership's name in the income tax return has only been introduced from the fiscal year 2011-2012 onwards (and not (yet) for trusts). It is therefore recommended that South Africa monitors the availability of ownership information on partnerships, in particular where one or more of the partners is a trust.

36. South Africa has comprehensive registration requirements for trusts having South African trust property or being formed under South African law. Such trusts must be registered with the office of the Master of the High Court and/or with the tax authorities, and in both cases ownership information must be provided. Trustees and trust administrators are also subject to the obligations under the AML/CFT legislation and must carry out comprehensive CDD, which includes maintaining full ownership information on the trust.

37. All relevant entities and arrangements are subject to the obligations under the Income Tax Act to keep reliable accounting records, including underlying documentation for a period of at least five years. In addition, companies, close corporations, trustees and co-operative societies are required to keep accounting records under their respective governing laws. These obligations result in South Africa being able to provide accounting information to its exchange of information partners when requested.

38. The AML/CFT legislation ensures that all records pertaining to the accounts as well as to related financial and transactional information is required to be kept by South African banks. In addition, the Financial Surveillance Department keeps information on all cross-border transactions. Bank information was received in all cases where this was requested by exchange of information partners.

39. Enforcement provisions are in place in respect of the relevant obligations to maintain ownership and identity information for all relevant entities and arrangements. It appears that the size of the applicable penalties is generally dissuasive enough to ensure compliance. In respect of the (timely) submission

of income tax returns, which is particularly relevant in respect of foreign companies and partnerships, the South African authorities have made a considerable effort to improve compliance. South Africa should continue to use the enforcement measures available to them in this regard. It is clear from input provided by South Africa's exchange of information partners that South Africa has not been in a position where it could not provide the requested information because it was not available.

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)

40. Companies are primarily governed by the Companies Act, 2008 (CA). Section 8(1) CA draws a primary distinction between profit companies and non-profit companies. Non-profit companies may only be established for a public benefit purpose or for the purpose of one or more cultural or social activities, or communal or group interests, and they must apply all of their assets and income to their purpose(s) (s. 1 Schedule 1 CA). With respect to profit companies, four types are distinguished in section 8(2) CA:

- State-owned company: these companies are owned by the government (either the central or local government). State-owned companies are in principle subject to the same rules as public companies.
- Private company: a company is considered a private company if its Memorandum of Incorporation prohibits it from offering its securities to the public and restricts the transferability of its securities.
- Personal liability company: this is any private company the Memorandum of Incorporation of which states that it is a personal liability company. This type of company is mainly used by individuals in independent professions, such as lawyers and physicians.
- Public company: any company that is not a state-owned company, private company or personal liability company.

41. Any person wishing to incorporate a company must file a completed and signed Memorandum of Incorporation together with a notice of incorporation and the prescribed fee with the Companies and Intellectual Property Commission (CIPC) (s. 13 CA). Upon acceptance by the CIPC, the company is registered and assigned a unique registration number (s. 14 CA). The CIPC then delivers a registration certificate to the company indicating the time and

date of registration, from which date the company has legal status (sections 14 and 19 CA). The rules described below on the availability of ownership information apply to all for profit companies, unless indicated otherwise.

42. All profit companies are required to continuously maintain at least one office in South Africa (s. 23(3)(a) CA). The location of its (principal) office and any change in respect thereof shall be registered with the CIPC (s. 23(3)(b) CA). Any person who knowingly provides false information to the CIPC regarding any incorporation or registration requirement is subject to a fine or to imprisonment for a period not exceeding 12 months (sections 215(2)(e) and 216(b) CA).

43. The CA came into effect on 1 May 2011. Pre-existing companies were already registered under the Companies Act of 1973 and are now subject to the obligations of the CA, taking into account some transitional provisions.

44. Before the CA came into effect it was also possible to form "close corporations" under the Close Corporations Act, 1984 (CCA); no new close corporations can be formed (s. 13 CCA). The requirements in respect of close corporations are described separately below.

Ownership information held by companies

45. All companies are required to keep a register of its issued securities, which includes its shares. This register must contain, among other information, the following information (s. 50(2)(b) and s. 51(5) CA and s. 32 Companies Regulations):

(a) the names and addresses of the persons to whom the securities were issued;

(b) the number of securities issued to each of them; and

(c) where shares are transferred: the name of the transferee, a description of the shares transferred and the date of the transfer.

46. A company may only make an entry of a transfer of shares in its securities register if a proper instrument of transfer has been delivered to the company or if the transfer was effected by operation of law (s. 51(6) CA). In general, a person only acquires the rights associated with the shares when that person's name is entered in the company's securities register (s. 37(9)(a) CA).

47. Section 25 CA (in conjunction with s. 24(4)(a) CA) provides that the securities register must be kept at the company's registered office or another location within South Africa. If the register is kept in another location than the company's registered office or if the register is moved to another location, the company must notify the CIPC of that other location (s. 25(2) CA). Information on a company's shareholders will be held in another location

where a company has issued uncertificated shares. Uncertificated shares are shares not evidenced by a certificate or written instrument, as opposed to certificated shares (s. 1 CA and s. 29 Securities Services Act of 2004). Uncertificated shares must be administered by a licensed central securities depository or a participant accepted by such central securities depository (s. 50(3) CA and Chapter IV Securities Services Act of 2004). The central securities depository or the participant is obliged to keep the ownership information in respect of the uncertificated shares (s. 50(3)(b) and s. 53(3) CA) and this information is regarded as forming part of the company's securities register (s. 50(3)(a) CA). The ownership information must be furnished to the company or the CIPC when they request so (s. 52(1) CA and s. 33(m) and s. 35(h) Securities Services Act). Not keeping a securities register can result in the imposition of a fine or imprisonment, as described under A.1.6.

Ownership information held by the authorities

48. All companies are required to register with the CIPC, which is established as an independent organ of the state (s. 185 CA). Information held by the CIPC includes the company's Memorandum of Incorporation, its incorporators and its directors, but there is no requirement to furnish ownership information to the CIPC. At 31 December 2011, the records of the CIPC showed registration of 290 480 private companies, 7 384 personal liability companies and 3 053 public companies (see below for close corporations).

Tax law

49. Every person who at any time becomes liable to income tax must register with the tax authorities (s. 67(1) Income Tax Act of 1962 ("ITA")). All companies incorporated in South Africa are considered residents[4] and are therefore subject to tax on their worldwide income (s. 1 and s. 5 ITA). Therefore, every company incorporated in South Africa should be registered with the tax authorities. In practice, the CIPC provides registration information on companies to the tax authorities on a daily basis, therewith facilitating the detection of any companies that should be registered with the tax authorities but are not. Data transferred includes all new company registrations and any amendments to existing registrations. In addition, tax authority officials have access to the CIPC database for any further needs.

50. There is no obligation for a company to furnish ownership information upon registration with the tax authorities (or the CIPC), although the registration form does provide the possibility to indicate the company's three

4. Except when the company is a dual resident and it is deemed, under a tax treaty, to be a resident only of another jurisdiction (s. 1 ITA).

main shareholders. An obligation does exist to file with the tax authorities a copy of the Memorandum of Incorporation and articles of association and copies of all amendments thereto (s. 70(4) ITA), but these documents generally do not contain (full) ownership information.

51. However, the (annual) income tax return that must be submitted by every company (s. 66(5) ITA) requires that all companies except those listed on a stock exchange indicate whether a change of ownership has occurred. If any change has occurred, a schedule containing details of all changes in shareholding/members' interest during the year of assessment must be prepared (see *Guide on how to complete the IT14 Return for companies and close corporations*). Ownership information is relevant to the tax authorities, for example because the carry forward of losses may be disallowed when a change of ownership has occurred (s. 103(2) ITA). This requires companies to maintain information about their shareholders in order to meet their tax obligations, which is confirmed by section 73A(1) ITA stating that a person who is required to submit a return must retain all records relevant to that return. In addition, the tax authorities may require a company to file a return showing all amounts received by or accrued to any person in respect of any share or interest in any business carried on by the company, including the names and addresses of the persons having received these amounts (s. 69 ITA). A variety of penalties exist where a person does not comply with its obligations under the ITA (see A.1.6).

Ownership information held by service providers

52. Any person which is considered an "accountable institution" under the Financial Intelligence Centre Act of 2001 ("FICA") is required to establish and verify the identity of its clients upon establishing a business relationship or when concluding a single transaction (s. 21 FICA). The list of "accountable institutions" includes attorneys and financial service providers, but does not encompass all persons providing company services. The service providers that are required to carry out customer due diligence (CDD) must obtain and verify, among other details, the following information in respect of a company (s. 7 – 10 Money Laundering and Terrorist Financing Control Regulations):

(a) the registered name and address of the company; and

(b) the name, address and date of birth of any natural person or equivalent details of any legal person, partnership or trust, as may be applicable, holding 25% or more of the voting rights at a general meeting of the company concerned.

53. This puts an express obligation on the service provider to identify the owners of at least 25 percent of the company, which may not necessarily oblige the service provider to identify all owners. It should be noted that full

ownership information on the legal owners is available through the securities register that the company is required to maintain (see above). Documentation in respect of the CDD carried out must be maintained by the service provider for at least five years after the end of its business relationship with the person they provide services to (ss. 22 and 23 FICA). Failure to carry out CDD or to maintain the documentation for at least five years are considered offences (ss. 46 and 47 FICA) and can lead upon conviction to a fine not exceeding ZAR 100 million (EUR 9.5 million) or to imprisonment for a period not exceeding 15 years (s. 68(1) FICA).

Close corporations

54. Close corporations are companies with a maximum of ten members, which must be either natural persons or trustees (sections 28 and 29 CCA). Each member contributes either money, property or services to the corporation and receives a certificate stating the current percentage of such member's interest in the corporation (sections 24 and 31 CCA). The possibility to establish a close corporation was introduced in 1984 to promote small businesses to register so they are no longer in the informal sector. This has been a success as about 3.5 million close corporations existed at one point in time. The number of registrations at the CIPC is currently down to 958 321 and is expected to decrease further following the decision to eliminate most differences with small private companies and the CCA no longer allowing the formation of new close corporations.

55. All existing close corporations were required to register their founding statement at the CIPC (or its predecessor) in order to obtain a certificate of incorporation (sections 13 and 14 CCA). Such founding statement must contain, among other information, the following particulars (s. 12 CCA):

(a) the full name of the corporation;

(b) the principal business to be carried on by the corporation;

(c) contact details of the corporation (office address etc.);

(d) the full name of each member, his or her identity number or, if he or she has no such number, the date of birth, and his or her residential address;

(e) the size, expressed as a percentage, of each member's interest in the corporation; and

(f) particulars of the contribution of each member to the corporation.

56. If any change occurs in respect of the information on the members and their interest in the corporation, the founding statement must be updated and the amended founding statement must be lodged with the CIPC within

28 days after the change (s. 15(1) CCA). This means that the registers at the CIPC contain up-to-date information on the ownership of all close corporations. In addition, a close corporation is required to keep a copy of its founding statement at its registered office (s. 16(1) CCA). Non-compliance with the requirements under the CCA can result in the imposition of a fine or imprisonment, as described under A.1.6.

57. As close corporations are mainly used for small local business operations, it is not likely that foreign tax authorities have an interest in ownership information on them. The South African competent authority has no recollection of requests for ownership information in respect of close corporations having been received to date. Also, no issues have been raised by South Africa's exchange of information partners in relation to close corporations.

Foreign companies

58. A company incorporated outside South Africa may elect to transfer its registration to South Africa if the law of the jurisdiction in which the company is registered, permits such transfer (s. 13(5 and 6) CA). The company must also have a clear nexus with South Africa: the whole or greater part of its assets and undertakings are within South Africa (excluding any foreign subsidiaries), the majority of its shareholders must be resident in South Africa and the majority of its directors are or will be South African citizens (s. 13(6)(c-e) CA). In addition, the company must not have issued bearer shares or be permitted to do so (s. 13(7) CA). Upon registration, evidence must be provided to the CIPC that the company fulfils all these conditions, which must contain at least some information on the company's shareholders. Once its transfer of registration has been approved by the CIPC, the company exists as if it had been originally incorporated and registered under the CA (s. 13(5 and 10) CA) and it is therefore subject to all the obligations under the CA, including the obligation to maintain a securities register. The CIPC indicated that only a few companies a year transfer their registration to South Africa.

Tax law

59. Section 67(1) ITA requires all persons liable to income tax to register with the tax authorities. This means that foreign companies being effectively managed in South Africa must be registered, as they are considered residents for income tax purposes (s. 1 ITA), as well as foreign companies having a permanent establishment in South Africa or deriving any other taxable income from South Africa. Registration with the tax authorities does not require the furnishing of ownership information.

60. However, foreign companies being effectively managed in South Africa must keep ownership information to substantiate their income tax

return. Such foreign companies are required to submit an annual income tax return (s. 66(5) ITA), which requires the company to indicate whether any change of ownership has occurred. If such change has occurred, a schedule containing details of all changes in shareholding/members' interest during the year of assessment must be prepared (see *Guide on how to complete the IT14 Return for companies and close corporations*). This requires companies to maintain information about their shareholders in order to meet their tax obligations, which is confirmed by section 73A(1) ITA stating that a person who is required to submit a return must retain all records relevant to that return. Such ownership information is relevant to the tax authorities, for example because the carry forward of losses may be disallowed when a change of ownership has occurred (s. 103(2) ITA).

61. Based on the above, foreign companies being effectively managed in South Africa (and therefore regarded as tax resident) need to maintain information about their shareholders in order to meet their tax obligations, *i.e.* filing proper income tax returns indicating whether a change of ownership has occurred.

Nominees

62. Section 56(1) CA provides that, unless its Memorandum of Incorporation provides otherwise, a company's shares may be held by, and registered in the name of, one person for the beneficial interest of another person, thus allowing the existence of nominee shareholders. Where shares in a public company are held by a nominee, such nominee must disclose the identity of the person on whose behalf those shares are held (s. 56(3) CA). Disclosure must be done in writing to the company within five business days after the end of every month during which a change has occurred (s. 56(4) CA). The public company is then required to establish and maintain a register of such disclosures (ss. 56(7) CA, 117 and 118 CA).

63. In addition to the requirements for nominee shareholders in respect of public companies, all companies that know or have reasonable cause to believe that any of their shares are held by a nominee may require such nominee to disclose the identity of each person for whom the shares are held (s. 56(5) CA). The nominee must provide this information within ten business days after receipt of the request (s. 56(6) CA). This means that, although it is not expressly stated, persons acting as a nominee shareholder (whether or not acting by way of business) are required to identify the person(s) for whom they act as a legal owner and to make this information available to the company if requested. If the nominee shareholder, with a fraudulent purpose, knowingly provides false or misleading information to the company, he/she commits an offence and is subject to a fine or to imprisonment for a period not exceeding ten years, or both (ss. 214(1)(b) and 216(a) CA).

64. Under the Financial Intelligence Centre Act (FICA), service providers, when establishing a business relationship, must verify the identity of their clients and also determine whether a client is acting on behalf of another person, and if so, verify the identity of that other person (s. 21 FICA). Service providers covered by these obligations include financial institutions and lawyers (Schedule 1 of the FICA). This means that if these persons act professionally as a nominee shareholder, they must know who they are acting for and keep this information (s. 22 and s. 23 FICA). Non-compliance with these obligations can lead to a fine not exceeding ZAR 100 million (EUR 9.5 million) or to imprisonment for a period not exceeding 15 years (s. 68(1) FICA).

65. No issues have been raised by South Africa's exchange of information partners in relation to nominee ownership.

Conclusion

66. Both the CIPC and the tax authorities maintain a register on all companies, but these registers do not contain ownership information except in the case of close corporations. However, all companies are required to keep a securities register containing full details on the owners of their shares. Foreign companies must be registered when establishing a place of business in South Africa or when they are effectively managed in South Africa. Such foreign companies must then also meet tax obligations, requiring them to maintain information about their shareholders. Persons acting as nominee shareholders are required to identify the person(s) for whom they act as a legal owner to meet their obligations under the CA. The same obligation on nominee shareholders also exists under the FICA, which applies to professional service providers, such as financial institutions and lawyers.

Bearer shares *(ToR A.1.2)*

67. A person can only acquire the rights associated with the shares of a company when that person's name is entered in the company's securities register (s. 37(9) CA). It is therefore not possible to own shares in a company without having your name entered in the securities register. A similar rule also existed under the Companies Act of 1973 (s. 103(2)), thus bearer shares do not exist in South Africa.

68. However, section 101 of the Companies Act of 1973 provided that a public company having a share capital may, if so authorised by its articles of association, issue share warrants to bearer. Such share warrants are issued with respect to any paid-up shares and entitles the bearer thereof to the shares specified. It also may provide for the payment of the future dividends by means of coupons or otherwise. The bearer of a share warrant may, if the articles of association of the company so provide, be deemed to be a member

of that company (s. 103(4) Companies Act of 1973). Upon delivery of the warrant, the bearer will receive the shares specified.

69. Under the Companies Act of 1973 (s. 105(3)), the securities register of the company must contain in respect of share warrants to bearer (i) the fact that the warrant is issued, (ii) a statement of the shares included in the warrant, and (iii) the date of the issue of the warrant. This does not ensure the availability of information on the owners of share warrants to bearer.

70. Currently, companies are governed by the CA, which became effective on 1 May 2011. The CA, as opposed to the Companies Act of 1973, no longer allows the issuance of share warrants to bearer. No specific transition rules apply regarding share warrants to bearer. There may, therefore, still be share warrants to bearer in circulation.

71. There are no statistics available on how many share warrants to bearer may be in existence. However, there are important indications that this number is very low:

- Only public companies could have issued share warrants to bearer (s. 101 Companies Act of 1973). The number of public companies was around 3 000 as at 1 May 2011 (as at 31 December 2011, 3 053 public companies were registered), when the possibility to issue share warrants to bearer was deleted following the entry into force of the new CA. This represents 0.24% of all companies registered in South Africa.
- Section 15 of the Exchange Control Regulations, 1961 (ECR) prohibits dealings in bearer securities. According to ss. 9(1) and 9(3) of the Currency and Exchanges Act, 1933, the ECR may suspend any Act of Parliament (including future Acts like the Companies Act of 1973) having any bearing upon currency (including the disposal of any money or goods). It is specifically stated that no person shall dispose of, acquire or otherwise deal in any bearer security (s. 15(3) ECR) and that no dividend shall be paid in respect of any bearer security (s. 15(1) ECR). This means that any issued share warrant to bearer cannot be transferred and no income can be received on it. It also suggests that, despite the possibility to do so under the Companies Act of 1973, starting from 1961 no new share warrants to bearer would have been issued, as the acquisition of bearer securities was prohibited. In addition, the owner of a bearer security may only convert this in a registered security with the permission of the Treasury (s. 15(4) ECR). No evidence of such conversions could be found in the Treasury's files. Any person contravening any provision in the ECR is liable to a fine of ZAR 250 000 (EUR 23 752) or to imprisonment for a period not exceeding five years, or both (s. 22 ECR).

72. The ECR issued in 1961 suggest that the issuance of share warrants to bearer is not a common practice in South Africa (if allowed at all), because no dealings in such share warrants were allowed and they could only be converted into registered shares with Treasury's permission, which does not seem to have occurred. Their use would therefore be very limited. This is consistent with the background of the relevant provisions in the ECR, being to prevent hostile takeovers; a company wishing to prevent a hostile takeover would be expected not to issue any bearer securities.

73. Both the CIPC and the tax authorities have indicated that they have never encountered a situation where a public company had issued share warrants to bearer or where a public company's articles of association authorised such issuance. In addition, the Director Issuer Regulation at the Johannesburg Stock Exchange confirmed that the stock exchange does not permit the issue or listing of share warrants to bearer and that he has never encountered share warrants to bearer. Finally, no issues have been raised by South Africa's exchange of information partners in relation to share warrants to bearer.

Conclusion

74. The issuance of share warrants to bearer by public companies was allowed under the Companies Act of 1973 until 1 May 2011. However, since 1961 a person was not allowed to acquire or dispose of any share warrants to bearer, nor could dividends be paid in respect of bearer securities; this suggests that share warrants to bearer would not have been issued. In addition, share warrants to bearer could only be converted into registered shares with Treasury's permission, of which no records could be found. The number of public companies that may have issued such warrants (around 3 000) represents 0.24% of the total number of companies registered in South Africa. Finally, no share warrants to bearer have been encountered in practice and no issues have been raised on this matter by South Africa's exchange of information partners. Nevertheless, it cannot be excluded that a limited number of share warrants to bearer is still in circulation, although their use is restricted. Therefore, South Africa should take measures to ensure that appropriate mechanisms are in place to identify the owners of any remaining share warrants to bearer.

Partnerships *(ToR A.1.3)*

75. In South Africa, partnerships are not regarded as legal entities in the sense that there is no law governing partnerships. The legal principles that apply in respect of partnerships are derived mainly from Roman-Dutch law and have been further established by the South African Supreme Court of

Appeal. A partnership is established by means of a (written or oral) contract that embodies the basic requirements for a partnership:

(i) each of the partners contributes something to the partnership, whether it be money, labour or skill;

(ii) the business should be carried on for the joint benefit of the partners;

(iii) the object should be to make a profit; and

(iv) the contract must be legitimate.

76. A distinction can be made between ordinary and extraordinary partnerships. Ordinary partnerships are in fact general partnerships, where each partner is liable to third parties for the full amount of the partnership debts upon dissolution of the partnership. Extraordinary partnerships have at least one partner, the existence and identity of which is not disclosed to the outside world. Such partners are not liable to third parties for the partnership debts, but they are liable to the other partners, either for their pro-rata share in the partnership or to the extent of the partner's contribution. Partnerships (whether ordinary or extraordinary) have no legal personality and cannot own property in their own name.

77. South African authorities indicate that partnerships are not widely used. Most professions use personal liability companies and the close corporation has also been a good alternative for partnerships (although new close corporations may no longer be formed).

78. No separate partnership register exists in South Africa. Partnerships conducting certain businesses may be required to register their business in the Province(s) they want to conduct their business in, following provincial licensing rules set out on the basis of section 2(1) of the Businesses Act, 1991. If the business is conducted through a partnership, the information to be furnished for obtaining a business license often includes full details of each of the partners in a partnership. However, the rules for when to obtain a business license are different in each Province and do not cover all businesses and activities.

Tax law

79. For purposes of the value-added tax, partnerships are regarded as separate bodies that must be registered as such if they meet the general conditions (s. 51 Value-Added Tax Act ("VATA")). Registration is compulsory for every partnership where the total value of taxable supplies (goods or services) exceeds ZAR 1 million (EUR 95 008) in any 12-month period (s. 23(1)(a) VATA). Furthermore, a partnership can register voluntarily where the total value of taxable supplies is expected to exceed or has exceeded ZAR 50 000

(EUR 4 751) in any 12-month period (s. 23(3) VATA). The registration form (Form VAT 101e) contains mandatory fields for submitting details on the two most senior partners, but if the partnership has more than two partners no information has to be submitted on the other partners. As at 31 January 2012, a total of 14 864 partnerships were registered for VAT purposes.

80. Partnerships are considered transparent for income tax purposes, which means that the partners are taxed separately for their share in the partnership's income. Although section 66(15) ITA provides for separate partnership income tax returns, these do not currently exist. Each partner must submit its own income tax return and should therein declare his/her share in the profit and the partnership's name. It should be noted that where the partner is a trust, the income tax return for trusts only contains the question whether the trust is a partner in a partnership, but the name of the partnership does not have to be provided. However, the South African authorities confirmed that a reply in the affirmative results in the automatic, system generated, issue of a query requesting the name of the partnership. In all cases the partners should keep all records relevant to that return under section 73A(1) ITA.

81. Based on the information provided in the income tax returns, the tax authorities would be aware of the existence of partnerships and have details on all partners where the partnership carries on business in South Africa or otherwise derives South African income. The data from the income tax returns is collated by the South African authorities and allows them to search on either the name of a partner or the name of a partnership and link the partner to a specific partnership and vice versa. Where one or more of the partners is a trust, the name of the partnership would only be available after it responds to the question that is automatically generated by the system if the trust indicates it is a partner in a partnership. In any case, the South African authorities indicate that the participation of trusts in partnerships is limited.

82. It is noted that the requirement to provide the name of the partnership has only been introduced starting from the fiscal year 2011-2012, and that this requirement has not (yet) been introduced on the income tax return for trusts. The automatic, system generated, issue of a query requesting the name of the partnership should ensure that this information is also available where a trust is a partner in a partnership. The fiscal year 2011-2012 ended on 29 February 2012 for individuals and trusts; in respect of companies, it ends on whatever date in 2012 the company year closes. This means that in respect of previous years (and possibly in cases where one or more of the partners are trusts), it might be difficult to link partners to a specific partnership and vice versa, as the partnership's name did not have to be provided and the automatic, system generated query was not in place. In any case, where the partnership is registered for VAT purposes, which will generally be the case for larger internationally operating partnerships, the tax authorities would be

able to link the partnership to at least two partners, who could subsequently be requested to provide the details of the other partners, if any.

Conclusion

83. There is no separate legal requirement for partnerships to maintain ownership information on the partners. Although partnerships may be registered for VAT purposes, only the details of the two most senior partners are registered. However, all partners resident in South Africa and foreign partners of partnerships with income from South Africa must file annual tax returns, and all partners must declare therein their share in the profit and the partnership's name (where a trust is a partner in a partnership, the partnership's name only has to be provided after the issue of an automatic, system generated query by the tax authorities). In addition, each partner should keep all records relevant to that return under section 73A(1) ITA. The requirement to provide the partnership's name in the income tax return has only been introduced from the fiscal year 2011-2012 onwards (and not (yet) for trusts). This means that in respect of previous years and in cases where one or more of the partners are trusts, it might be difficult to link partners to a specific partnership and vice versa, as the partnership's name did not have to be provided. It is therefore recommended that South Africa monitors the availability of ownership information on partnerships, in particular where one or more of the partners is a trust.

84. No issues have been raised by South Africa's exchange of information partners regarding the availability of information on partnerships. South African authorities indicated that they have not received a request for such information in recent years.

Trusts *(ToR A.1.4)*

85. South African law allows for the creation of trusts. As a general rule trusts can be created by agreement (*inter vivos*), by means of a will or by court order. The Trust Property Control Act of 1988 ("TPCA") refers to a trust as an arrangement through which the ownership in property of one person is made over or bequeathed to another person and is then to be administered or disposed of by the trustee according to the provisions of the trust instrument for the benefit of the persons or class of persons designated in the trust instrument (s. 1 TPCA).

86. The TPCA contains rules in respect of trustees of trusts with South African trust property. This means that South African trustees of trusts of which none of the trust property is situated in South Africa are not covered by the TPCA (but they are subject to tax obligations and AML/CFT

obligations). In contrast, the provisions of the TPCA do apply to foreign trustees of trusts which have South African trust property (s. 8 TPCA).

Ownership information held by the authorities

87. All trustees who are appointed after the entry into force of the TPCA (31 March 1989) are required, before assuming control over the trust property, to lodge the trust instrument (or a certified copy thereof) in terms of which the trust property is to be administered or disposed of by him, with the Master of the High Court ("Master") in whose area of jurisdiction the greatest portion of the trust assets are situated (s. 4(1) TPCA). There currently are 14 areas of jurisdiction, each with a Master. The trustee then needs authorisation of the Master to be allowed to act as a trustee (s. 6(1) TPCA). The information to be furnished with the Master in order to obtain such authorisation is set out in a Memorandum issued by the Master and includes:

- the names and ages of the beneficiaries under the trust and the relationship of the trustee to the beneficiaries;
- the full names and copies of the identity documents of the trustees, including their profession or business occupation, and what previous practical experience each trustee has in trust administration (mentioning any specific cases);
- whether the trust will be subject to annual audit and, if so, the details of the auditor to be appointed to act in the trust;
- the name of the bank and branch thereof at which the trust banking account will be kept; and
- what steps will be taken by the trustee(s) to maintain accurate records of the trust and whether he will exercise direct personal control over the trust and if not, what agent or firm has been instructed by him and to what extent.

88. With the above information, the Master has details about the trustees and beneficiaries of all trusts with South African trust property. Any new trustee must be authorised by the Master as well, and will thereupon be registered. The identity of the founder (which is the terminology used in South Africa to indicate the settlor) of the trust will be clear from the trust instrument lodged with the Master. In South Africa, an *inter vivos* trust is created by a founder who enters into an agreement with the trustee for the benefit of the trust beneficiaries. The creation of such trusts is regulated by rules of contract law. It is inherent in the nature of the contract that it must be entered into between a specific person (the founder) and the trustee in order to create the required legal bond (*vinculum iuris*) between them. Where the trust instrument is in the form of a will, it is inherent that the will must be

an expression of the wishes of a specific person. Finally, a trust can be created by court order. Any amendment in the trust instrument must be lodged to the Master (s. 4(2) TPCA), although it is not possible under South African common law that persons become founders after the establishment of the trust.

89. A new digital database has been developed for the registration of trusts. Some basic information (trust name and trustees) is available on-line to the public as well, although much information still needs to be added to this new database. Anyone who has an interest in a trust can request more detailed information. The underlying paper files are kept indefinitely by the Master's offices.

90. As at February 2012, 477 461 trusts are registered with the Master's offices. Because the requirements before the coming into force of the TPCA were less stringent, full ownership information on the trusts existing before 31 March 1989 and not having had a change of trustee cannot be guaranteed to be available at the Master's offices, although any available files are still being kept. The number of trusts affected is approximately 2 000 out of the 477 461 trusts registered. It is noted that the trustees are subject to tax obligations and AML/CFT obligations.

Tax law

91. Trusts are regarded as separate persons for income tax purposes (s. 1 ITA) and all trusts resident in South Africa and foreign trusts deriving South African income must register with the tax authorities and must file annual income tax returns. A trust is resident in South Africa when created under the laws of South Africa or when effectively managed in South Africa (s. 1 ITA), which would be the case when the main trustee is a resident in South Africa. Registration with the tax authorities requires the submission of a registration form (Form IT 77 TR) including details on (i) the trust name, (ii) the main trustee and, if applicable, two other trustees, and (iii) the beneficiaries. In addition, a copy of the trust deed must be provided, which would contain the identity of the founders. The same form can be used to register changes to any of the details, although there is no legal obligation to do so. The annual income tax return does contain the questions of whether any changes were made to the trust deed, the beneficiaries or the trustees. This requires that such information must be kept up-to-date by the trust so it can meet its tax obligations, as section 73A(1) ITA states that a person who is required to submit a return must retain all records relevant to that return. Administrative penalties can be imposed or criminal prosecution can be initiated where a person does not comply with its obligations under the ITA (see A.1.6).

92. The ownership information to be furnished to the tax authorities is very similar to that to be furnished to the Master. If necessary, officials of SARS can cross-check the information in their possession with the information filed with the Master. In practice, local revenue offices and the respective Master's offices have established good working contacts and the database available at the Master's offices is provided to the tax authorities through CD-ROM. In addition, the tax authorities and the Chief Master's office sometimes hold discussions on how to improve cooperation and sharing of information.

Ownership information held by trustees and service providers

93. Any person professionally administering trust property is considered an "accountable institution" under the FICA (Schedule 1, section 2). Consequently, trustees and trust administrators of any trust (foreign or domestic) are required to carry out CDD when establishing a business relationship (s. 21 FICA), and to establish and verify the identity of their client. In respect of a trust, CDD requires the trustee or trust administrator to obtain, among other details, the name, address and date of birth of any natural person or equivalent details of any legal person, partnership or trust, as may be applicable (ss. 15 and 16 Money Laundering and Terrorist Financing Control Regulations):

(a) of each trustee of the trust;

(b) concerning each beneficiary of the trust referred to by name in the trust deed or other founding instrument in terms of which the trust is created trust, or particulars of how the beneficiaries of the trust are determined; and

(c) of the founder (settlor) of the trust.

94. The obligation under the FICA includes all relevant ownership information in respect of trusts under the international standard. The trustee or trust administrator must also take reasonable steps to maintain the correctness of particulars which are susceptible to change (s. 19 Money Laundering and Terrorist Financing Control Regulations). Documentation in respect of the CDD carried out must be maintained by the service provider for at least five years after the end of its business relationship with the person they provide services to (s. 22 and 23 FICA). Failure to carry out CDD or to maintain the documentation for at least five years are considered offences (s. 46 and 47 FICA) and can lead upon conviction to a fine not exceeding ZAR 100 million (EUR 9.5 million) or to imprisonment for a period not exceeding 15 years (s. 68(1) FICA).

95. Trustees and trust administrators not acting by way of business are not covered by the obligations under the FICA, as they will not establish a 'business

relationship' with a client. Similarly, trustees and trust administrators of a trust established by virtue of a testamentary writing or court order are exempted from carrying out CDD (s. 10(2) Regulation GNR.1596 of 20 December 2002), as in these cases persons do not deliberately distance themselves from the trust property. In any case, ownership information will be available in the registers of the Master's offices where the trust has South African trust property, or with the tax authorities or the trust itself where the trust is formed under South African law or is managed in South Africa (*i.e.* where the main trustee is a resident in South Africa). Finally, under South African common law trustees have certain obligations towards the beneficiaries, which means that they would have to know who these beneficiaries are (see also A.2.1).

Conclusion

96. South Africa has comprehensive registration requirements for trusts having South African trust property or being created under South African law. Such trusts must be registered with the Master's office and/or with the tax authorities, and in both cases ownership information must be provided upon registration. Such information must also be kept up-to-date for the trust to be able to meet its obligations towards the Master's office and/or the tax authorities.

97. Trustees and trust administrators resident in South Africa, whether they administer a domestic or foreign trust, are also subject to the obligations under the AML/CFT legislation and must carry out comprehensive CDD, which includes maintaining full ownership information on the trust.

Foundations *(ToR A.1.5)*

98. The South African legal and regulatory framework does not provide for the establishment of foundations.

Other relevant entities and arrangements

99. Under the Co-operatives Act, 2005 ("CoA"), co-operative societies can be formed in South Africa. A co-operative society is defined as "an autonomous association of persons united voluntarily to meet their common economic and social needs and aspirations through a jointly owned and democratically controlled enterprise organised and operated on co-operative principles" (s. 1 CoA). Co-operative societies must have at least five individuals or at least two other co-operative societies as their members (s. 6(1) CoA). The word "co-operative" or "co-op" has to form part of the name of the co-operative society and it is an offence to use these words as part of your (business) name when you are not registered under the CoA (s. 12 CoA).

100. The CoA is meant to provide a legal framework to facilitate the establishment of co-operative societies. This is supported by an active policy of promoting the use of this type of entity for businesses in order to enhance development on a local level. This resulted in a significant increase in the number of registered co-operative societies from around 5 000 in 2005 to 55 036 as at 31 January 2012. Agriculture is still the main sector of activities for co-operative societies, while services, "multi-purpose" and trading are other important sectors. The vast majority of the co-operatives are only active on a local level, although the growing number of co-operative societies might result in these entities becoming increasingly involved in international business.

101. Co-operative societies must maintain a registered office in South Africa and must notify the CIPC (which is the official registrar for co-operative societies) of this office and any changes related thereto (s. 20 CoA). Upon registration, a list of the founding members must be submitted to the CIPC (s. 6(2)(b) CoA), but no updates on membership need to be provided. However, a co-operative society must keep a list of members at its offices, containing the following details (s. 21(1)(d) CoA):

(a) the name and address of each member;

(b) the date on which each member became a member;

(c) if applicable, the date on which a person's membership was terminated; and

(d) the amount of any membership fees paid, the number of membership shares owned and the number and amount of member loans.

102. Any co-operative society or a responsible officer (*e.g.* a director) failing to keep a list of its members is liable to a fine or to imprisonment for a period not exceeding 24 months, or both (s. 92(3) CoA).

103. For tax purposes, co-operative societies are treated the same as companies, meaning that they are subject to tax on their worldwide income and therefore must register with the tax authorities (s. 67(1) ITA). In practice, the tax authorities are informed on a daily basis by the CIPC about new registrations and upon registration of a new co-operative society a tax identification number is immediately issued. The rules described above regarding the tax law obligations for companies (see A.1.1) apply equally to co-operative societies.

Conclusion

104. All co-operative societies are required to keep a list of members and therefore ownership information is available with them. To the recollection of the South African competent authority, no requests for ownership

information in respect of co-operative societies have been received to date. No issues have been raised by South Africa's exchange of information partners in relation to co-operative societies.

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

105. 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. Questions linked to access are dealt with in Part B.

Companies, close corporations and co-operative societies

106. Companies are all required to keep a securities register. Whenever the CIPC has reasonable grounds for believing that any person has contravened the CA, a compliance notice may be issued (s. 171(1) CA), requiring that person to take the action required by the CA. If that person then fails to comply with the notice, the CIPC may either apply to a court for the imposition of an administrative fine or refer the matter for prosecution as an offence (s. 171(7) CA). The administrative fine may not exceed the greater of (i) 10% of the company's turnover for the period during which it failed to comply with the notice, and (ii) ZAR 1 million (EUR 95 008) (ss. 175(1) and 175(5) CA). Where the company or a responsible officer (*e.g.* a director) is prosecuted for failing to comply with the notice, a fine not exceeding ZAR 20 000[5] (EUR 1 900) or imprisonment for a period not exceeding 12 months can be imposed, or both (ss. 214(3) and 216(b) CA). The last-mentioned penalties also apply where a person knowingly provides false information to the CIPC (ss. 215(2)(e) and 216(b) CA).

107. Close corporations are also required to register their founding statement and any amendments to it with the CIPC and they must also keep a copy

5. The relevant law does not mention a maximum amount of the fine. Where a law contains a prescribed maximum period of imprisonment but no prescribed maximum amount of the fine in relation to the same offence, such maximum amount must be calculated to the same ratio as the ratio between the amount of the fine as determined in terms of section 92(1)(b) of the Magistrates' Courts Act, 1944 and the period of imprisonment mentioned in section 92(1)(a) of the Magistrates' Courts Act, 1944, where the court is not a court of a regional division (s. 1(1) Adjustment of Fines Act, 1991).

of it themselves. The founding statement contains full ownership details. The procedures and penalties described in the previous paragraph equally apply in the case of non-compliance by close corporations (s. 82 CCA).

108. As the maximum amount of the administrative fine is considerable and responsible officers may face two years imprisonment in case of non-compliance, the enforcement provisions in respect of companies and close corporations appear dissuasive enough to ensure compliance. The CIPC does not keep statistics on the penalties imposed on companies and/or its directors. It is estimated that in recent years around 100 prosecutions a year have taken place in relation to offences by companies and close corporations together, but it is not known whether those offences related to the availability of ownership information. Ownership information on South African companies or close corporations has been available in all cases where this was requested by an exchange of information partner.

109. Co-operative societies must keep a list of members at its offices. Any co-operative society or a responsible officer (*e.g.* a director) failing to keep a list of its members is liable to a fine not exceeding ZAR 40 000[6] (EUR 3 800) or to imprisonment for a period not exceeding 24 months, or both (s. 92(3) CoA). No statistics are kept on the penalties imposed on co-operative societies with respect to non-compliance on this issue. Although it was noted by the South African authorities that compliance with the CoA by new co-operative societies is a challenge more generally, no particular problems have arisen as to the maintaining of a list of members. The South African authorities stated that because the focus has been on getting co-operative societies familiar with their obligations and in light of the developmental aspect of the use of co-operative societies, the total number of prosecutions under the CoA in recent years has been very low.

Tax law (foreign companies, partnerships and trusts)

110. Foreign companies, partners in a partnership and trusts are required to maintain ownership information to meet their tax obligations, such as registering with the tax authorities and submitting annual tax returns. Where a person fails to comply with its tax obligations, administrative penalties can be imposed and criminal prosecution can be initiated. The power to impose administrative penalties is obtained from section 75B ITA, which also provides the mandate to make regulations containing further rules. Such regulations have been issued by Government Notice 1404 ("GN1404"). A failure to register as a taxpayer or to submit a tax return or other related documents or information are specifically mentioned as acts of non-compliance (paragraphs 4(a) and 4(d) GN1404). The amount of the administrative penalty that

6. See footnote 5.

can be imposed depends on the amount of taxable income of the taxpayer and ranges from ZAR 250 (EUR 23.75) to ZAR 16 000 (EUR 1 521) (paragraph 5(1) GN1404). The penalty increases with the same amount for each month the non-compliance continues, with a maximum of 35 months after receipt of the penalty assessment (paragraph 5(2)(a) GN1404).

111. Besides being liable to an administrative penalty, a person failing to register as a taxpayer or failing to submit a tax return or document as required under the ITA is also guilty of an offence and therefore liable to a fine not exceeding ZAR 40 000[7] (EUR 3 800) or imprisonment for a period not exceeding 24 months (ss. 75(1)(a) and 75(1)(b) ITA). Furthermore, any person who has been convicted of failing to submit a tax return or information may receive a notice from the tax authorities to comply. In case of non-compliance with such notice, the person is guilty of another offence and liable to a fine of ZAR 50 (EUR 4.75) for each day the failure continues or to imprisonment for a period not exceeding 12 months (s. 75(3) ITA).

112. The combination of an administrative penalty and the possibility to prosecute a person results in a range of enforcement provisions that appears dissuasive enough to ensure compliance. South Africa has introduced a streamlined administrative penalty system in 2008. The South African authorities reported that, with respect to the fiscal year 2010-2011, administrative penalties were issued to more than 700 000 taxpayers for failing to submit an income tax return on time. As the availability of information on foreign companies and partnerships largely depends on the submission of tax returns, it is recommended that South Africa continues to use the enforcement measures available to them to ensure that taxpayers comply with their obligation to submit an income tax return.

113. In addition to the statistics with respect to the (timely) submission of income tax returns, statistics kept by the South African Revenue Service indicate that in the period between 1 April 2011 until February 2012, over 230 taxpayers have been successfully prosecuted for a range of tax-related offences, resulting in imprisonment sentences totalling 370 years and in fines totalling nearly ZAR 5 million (EUR 475 040).

Trusts

114. Trustees have the obligation to register the trust with the Master and obtain authorisation to act as a trustee where the trust has South African trust property. Without such authorisation, any action performed by the trustee is legally void and no party (including third parties) can enforce any rights

7. See footnote 5.

related to an action of such trustee.[8] In addition, if an authorised trustee fails to perform any duty imposed by him under the TPCA (*e.g.* filing an amended trust instrument) or fails to comply with any lawful request of the Master, he can be removed from his office (s. 20(2)(e) TPCA), although the South African authorities indicated that this measure will not be applied lightly. No statistics are kept by the Master on the number and type of sanctions imposed in terms of the TPCA.

115. Trustees having the obligation to carry out CDD under the AML/CFT legislation (all trustees of a trust other than a trust established by virtue of a testamentary writing or court order, and acting by way of business) are liable to a fine not exceeding ZAR 100 million (EUR 9.5 million) or to imprisonment for a period not exceeding 15 years in case of non-compliance (s. 68(1) FICA). In recent years the focus of the Financial Intelligence Centre (the regulatory authority under the FICA) has been on getting service providers familiar with their obligations, and penalties for non-compliance have not been imposed immediately. Instead, service providers received more time to comply, so ultimately full compliance was achieved in the vast majority of cases.

Conclusion

116. Enforcement provisions are in place in respect of the relevant obligations to maintain ownership and identity information for all relevant entities and arrangements. The CIPC has the necessary tools to address non-compliance by companies, close corporations and co-operative societies. In respect of foreign companies, partnerships and trusts, the tax law contains sufficient enforcement provisions in case of non-compliance. In addition, the Master and the Financial Intelligence Centre have possibilities to address non-compliance by trusts/trustees.

117. Although not in all cases specific statistics are kept on whether the different enforcement provisions have been used to address non-compliance in relation to the availability of ownership information, it appears that in all cases the size of the applicable penalties is dissuasive enough to ensure compliance. In respect of the (timely) submission of income tax returns, which is particularly relevant in respect of foreign companies and partnerships, the South African authorities have made a considerable effort to improve compliance. South Africa should continue to use the enforcement measures available to them in this regard. In practice, ownership information on relevant entities

8. See for example a lower court ruling *Simplex (Pty) Ltd v Van der Merwe and others NNO* 1996 (1) SA 111 (W) and a recent ruling by the Supreme Court of Appeal *Lupacchini NO and another v Minister of Safety and Security* [2011] 2 All SA 138 (SCA). [SA Law Reports reference for consistency; 2010 (6) SA 457 (SCA).]

and arrangements has been available in all cases where this was requested by an exchange of information partner.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating	
To be finalised as soon as a representative subset of Phase 2 reviews is completed.	
Factors underlying recommendations	**Recommendations**
Ownership information on partnerships is only comprehensively available from the fiscal year 2011-2012 onwards, and where one of the partners is a trust information on the partnership's name is only available after an automatic, system generated query by the tax authorities.	South Africa should monitor the availability of ownership information on partnerships, in particular where one or more of the partners is a trust.

A.2. Accounting records

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

118. 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) and* ***underlying documentation*** *(ToR A.2.2)*

Companies

119. Section 28 CA puts an obligation on any company to keep accurate and complete accounting records at the registered office of the company. Furthermore, every company must prepare annual financial statements within six months after the end of its financial year (s. 30(1) CA). Any holder of a beneficial interest in the company is entitled to receive, on request, a

copy of the financial statements (s. 31(1)(b) CA). Section 29(1) CA sets out what financial statements should look like when a company provides financial statements to any person for any reason, therewith effectively putting in place the minimum requirements for annual financial statements of a company. According to this provision, financial statements must (i) satisfy the financial reporting standards as to form and content, if any such standards are prescribed (ii) present fairly the state of affairs and business of the company, and explain the transactions and financial position of the business of the company, and (iii) show the company's assets, liabilities and equity, as well as its income and expenses, and any other prescribed information. Further details on what accounting records should entail are set out in the Companies Regulations, 2011 ("CR"). According to section 25 CR the accounting records of a company must include:

(a) a record showing the company's assets and liabilities, including a record of the company's non-current assets, showing for each asset (i) the date the company acquired it, and the acquisition cost, and (ii) the date the company disposed of it, the value of the consideration received for it, and the name of the person to whom it was transferred;

(b) daily records of all money received and paid out, in sufficient detail to enable the nature of the transactions and, except in the case of cash transactions, the names of the parties to the transactions to be identified;

(c) daily records of all goods purchased or sold on credit, and services received or rendered on credit, in sufficient detail to enable the nature of those goods or services and the parties to the transactions to be identified; and

(d) statements of every account maintained in a financial institution in the name of the company, or in any name under which the company carries on its activities, together with vouchers or other supporting documents for all transactions recorded on any such statement.

120. In addition, the annual financial statements of a company must either be audited or independently reviewed, except where all shareholders are also directors of that company (ss. 30(2) and 30(2A) CA). A copy of the audited financial statement or, where there is no obligation to file the financial statement, a financial accountability statement must be filed with the annual return at the CIPC (s. 33(1) CA and s. 30(4) CR). All these requirements together ensure the availability of reliable accounting records for companies.

121. It is an offence for a company to fail to keep accurate or complete accounting records with an intention to deceive or mislead any person, and it is an offence for any person to falsify, or be a party to the falsification of, a company's accounting records (ss. 28(3) and 214(1)(a) CA). The penalty

for failing to keep accounting records is a fine not exceeding ZAR 20 000[9] (EUR 1 900) or imprisonment for a period not exceeding 12 months, or both (s. 216(b) CA). The penalty for falsifying accounting records is a fine not exceeding ZAR 200 000 (EUR 19 012) or imprisonment for a period not exceeding 10 years, or both (s. 216(a) CA). In addition, the CIPC may issue a compliance notice in respect of a failure to keep accounting records (ss. 28(4) and 171(1) CA). In that case, the penalties for failing to comply with such notice as described in section A.1.6 of this report apply.

Close corporations

122. Close corporations must keep such accounting records as are necessary to fairly present the state of affairs and business of the corporation, and to explain the transactions and financial position of the business of the corporation, including (s. 56(1) CCA):

(a) records showing its assets and liabilities;

(b) a register of fixed assets showing in respect thereof the respective dates of any acquisition and the cost thereof, depreciation (if any), the respective dates of any disposals and the consideration received in respect thereof;

(c) records containing entries from day to day of all cash received and paid out, in sufficient detail to enable the nature of the transactions and, except in the case of cash sales, the names of the parties to the transactions to be identified;

(d) records of all goods purchased and sold on credit, and services received and rendered on credit, in sufficient detail to enable the nature of those goods or services and the parties to the transactions to be identified; and

(e) vouchers supporting entries in the accounting records.

123. The members of a close corporation must also cause financial statements to be prepared within six months after the end of its financial year (s. 58(1) CCA). Every close corporation must also appoint an accounting officer (s. 59(1) CCA), who must determine whether the annual financial statements are in accordance with the accounting records (s. 62(1) CCA). The CIPC may issue a compliance notice in respect of a failure to keep accounting records (s. 82 CCA and s. 171(1) CA). In that case, the penalties for failing to comply with such notice as described in section A.1.6 of this report apply.

9. See footnote 5.

Trusts

124. Under South African common law trustees are under a fiduciary duty to keep true accounts of the trust, and to provide these to the beneficiaries.[10] Any trustee of a trust having South African trust property is also accountable to the Master of the High Court for the administration and disposal of trust property and shall, at the written request of the Master, deliver any book, record, account or document relating to the administration or disposal of the trust property (s. 16(1) TPCA). This places an implicit obligation on the trustee to keep all relevant accounting records, including underlying documentation, regarding the trust. Any trustee failing to perform any duty imposed by him under the TPCA or the trust instrument, or failing to comply with any lawful request of the Master, can be directed by court order to comply and can ultimately be removed from his office (ss. 19 and 20(2)(e) TPCA).

125. All trustees resident in South Africa and acting by way of business are subject to the obligations imposed by the AML/CFT legislation. This means that the trustee must keep records in respect of every transaction it is involved in (s. 22(1) FICA).

Co-operative societies

126. Section 21(g) CoA requires co-operative societies to keep adequate accounting records. Although no guidance is provided on what "adequate" accounting records are, there is an obligation to lodge financial statements within 15 days of approval by the annual general meeting (s. 19 Co-operatives Administrative Regulations, 2007). There is also an obligation to have the financial statements audited (s. 47(1) CoA), although in practice the majority of the co-operative societies are granted an exemption from that obligation. Co-operative societies may derive some guidance on the type of accounting records to be kept from section 134 of the (former) Co-operatives Act, 1981, which contained language similar to the wording for companies and close corporation (see above). Any co-operative society or a responsible officer (*e.g.* a director) failing to keep accounting records is liable to a fine not exceeding ZAR 40 000[11] (EUR 3 800) or to imprisonment for a period not exceeding 24 months, or both (s. 92(3) CoA).

10. This principle was set out by the Appellate Division (predecessor of the Supreme Court of Appeal) in *Mia v Cachalia* 1934 AD 102.
11. See footnote 5.

Tax law obligations

127. All relevant entities and arrangements (companies and close corporations formed in South Africa, foreign companies effectively managed in South Africa, partners in a partnership, trusts and co-operative societies) must register for tax purposes and file annual income tax returns (see section A.1 of this report for a description per entity or arrangement). Any person who is required to render an income tax return must keep all records relevant to that return (s. 73A(1) ITA). The term "records" is defined as including "ledgers, cash books, journals, cheque books, bank statements, deposit slips, invoices and stock lists and all other books of account related to any trade carried on by that person" (s. 73A(2) ITA). The term "trade" is further defined as "including every profession, trade, business, employment, calling, occupation or venture, including the letting of property and the use of or the grant of permission to use any patent, design, trademark or copyright, or any other property which is of a similar nature" (s. 1 ITA). In the case of partnerships it is noted that, as partnerships are transparent for tax purposes (other than VAT), each partner is obliged to retain and provide the required records from a tax perspective. Without detracting from this obligation, partners are also entitled to entrust the management of the partnership to a specific partner or partners who would then be required to maintain and keep the accounts, which is what usually occurs in practice.

128. In respect of the capital gains tax, all records required to determine the taxable gain or loss must be kept (s. 73B ITA) and a separate definition of the term "records" applies specifically designed to deal with assets and liabilities with respect to them. For this purpose, the term "records" includes (s. 73B(3) ITA):

(a) any agreement for the acquisition, disposal or lease of an asset together with related correspondence;

(b) copies of valuations used in the determination of a taxable gain or loss;

(c) invoices or other evidence of payment records such as bank statements and paid cheques relating to any costs claimed in respect of the acquisition, improvement or disposal of any asset; and

(d) details supporting the proportional use of an asset for both private and business purposes.

129. Failure to keep accounting records or to make them available to the tax authorities, is subject to an administrative fine (s. 75B ITA and paragraphs 4(e) and 4(n) GN1404). The amount of the administrative penalty that can be imposed depends on the amount of taxable income of the taxpayer and ranges from ZAR 250 (EUR 23.75) to ZAR 16 000 (EUR 1 521) (paragraph

5(1) GN1404). The penalty increases with the same amount for each month the non-compliance continues, with a maximum of 35 months after receipt of the penalty assessment (paragraph 5(2)(a) GN1404). Besides being liable to an administrative penalty, a person failing to keep accounting records as required under the ITA is also guilty of an offence and therefore liable to a fine not exceeding ZAR 40 000[12] (EUR 3 800) or imprisonment for a period not exceeding 24 months (s. 75(1)(f) ITA).

130. The obligation under sections 73A and 73B ITA are supported by declarations on the income tax returns generally stating that the person filing the return has all the necessary supporting accounts and statements to support all declarations on this return which will be retained for audit or inspection purposes. The record-keeping obligations under the tax law ensure that reliable accounting records must be kept, as all books of account related to any trade must be kept, as well as all relevant records in respect of assets that are not part of a trade but could give rise to a capital gain. Together, these records should be sufficient to (i) correctly explain all transactions (ii) enable the financial position of the entity or arrangement to be determined with reasonable accuracy, and (iii) allow financial statements to be prepared. In addition, underlying documentation must be kept.

Availability of accounting information in practice

131. South Africa's exchange of information partners reported that they regularly request accounting information. Types of information requested includes information on the turnover and profit declared in South Africa, assets held, financial transactions and specific invoices. It was reported that the requested information was generally provided very quickly. Only in two cases could accounting information not be (fully) provided. One case related to information dating back to the 1990s, which was beyond the statutory retention period, and the information was no longer available (and is not required to be available under the international standard). The other case related to a non-compliant taxpayer in respect of which an investigation has now been launched in South Africa as well. It has not been established (yet) whether the information was actually kept or not (see also C.5.1). This seems to be an isolated case as in all other instances the accounting information was available.

12. See footnote 5.

5-year retention standard (ToR A.2.3)

132. For tax purposes, the accounting records required to be kept must be retained for at least five years from the date on which the income tax return was received by the Commissioner (ss. 73A(1) and 73B(1) ITA). As noted above, this obligation covers all relevant entities and arrangements and should therefore ensure the availability of accounting records for at least five years as required by the international standard.

133. In respect of companies (excluding close corporations), the retention period for the accounting records that must be kept under the CA is set at seven years (ss. 24(1)(b) and 24(3)(c)(iii) CA), therewith overriding the retention period applicable under tax law.

Conclusion

134. All relevant entities and arrangements are subject to the obligations under the ITA to keep reliable accounting records, including underlying documentation for a period of at least five years. In addition, companies, close corporations, trustees and co-operative societies are required to keep accounting records under their respective governing laws. Together, these obligations result in South Africa being able to provide accounting information to its exchange of information partners when requested.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

A.3. Banking information

Banking information should be available for all account-holders.

135. There are a number of different laws governing the banking sector in South Africa. The Banks Act, 1990 ("BA") contains rules on the governance of public companies conducting the business of a bank and of branches of foreign banks. Furthermore, it is also possible to establish mutual banks and co-operative banks, which are governed by the Mutual Banks Act, 1993 ("MBA") and the Co-operative Banks Act, 2007 ("CBA") respectively. Mutual banks and co-operative banks conduct activities that are similar to those of

'regular' banks. All of these banks are supervised by the Bank Supervision Department of the South African Reserve Bank, except for one of the co-operative banks (which is supervised by the Co-operative Banks Development Agency). As at 1 January 2012, there were 12 South African based banks, 6 branches of foreign banks, 2 mutual banks and 2 co-operative banks operating in South Africa. Together, they held assets of more than ZAR 3 000 billion (EUR 285 billion).

136. It is an offence to conduct the business of a bank without being registered and therewith authorised (s. 9 BA, s. 9 MBA and s. 77 CBA). Two entities in South Africa conduct activities similar to that of a bank while not subject to one of the laws mentioned above. These entities, the South African Postbank Limited ("Postbank") and a 100% subsidiary of the Ithala Development Finance Corporation Ltd ("Ithala"), are governed by their own laws and are answerable to National Parliament and the KwaZulu-Natal Parliament respectively.

Record-keeping requirements (ToR A.3.1)

137. Regulation 50 of the Regulations relating to banks (GN 1033) contains rules in respect of protecting a bank against being used for purposes of market abuse and financial fraud. In that context, a bank must implement, as a minimum, structures, policies, processes and procedures adequate to (i) identify customers, (ii) maintain internal records of transactions, and (iii) provide a clear audit trail.

138. In addition, for AML/CFT purposes, all banks (including the Postbank and Ithala) are considered "accountable institutions" under the FICA (paragraphs 6, 7, 14 and 16 of Schedule 1 to the FICA). This means that they have an obligation to establish and verify the identity of their clients upon establishing a business relationship or when concluding a single transaction, and to keep record thereof (ss. 21 and 22 FICA). In addition, the following information must be kept (s. 22(1) FICA):

(a) any document or copy of a document obtained by the accountable institution in order to verify a person's identity in terms of section 21 FICA;

(b) the nature of the business relationship or transaction;

(c) in the case of a transaction, the amount involved and the parties to that transaction; and

(d) all accounts that are involved in transactions concluded by that accountable institution in the course of a business relationship or a single transaction.

139. These record keeping obligations require banking information to be available in South Africa for all account holders. The records must be maintained by the bank for a period of at least five years after termination of the business relationship or the single transaction (s. 23 FICA). Failure to maintain the documentation for at least five years is considered an offence (s. 47 FICA) and can lead upon conviction (of the bank and/or the individual responsible within the bank) to a fine not exceeding ZAR 100 million (EUR 9.5 million) or to imprisonment for a period not exceeding 15 years (s. 68(1) FICA). Most banks are large complex financial organisations. All banks are obliged to have appropriate risk management systems, policies and controls in place and are subject to a comprehensive system of supervision. The South African authorities have indicated that they do not experience difficulties in obtaining the relevant information from banks (see also B.1.1).

Records kept by the authorities

140. Sections 2 and 3 of the Exchange Control Regulations, 1961 effectively prohibit the transfer of money to and from South Africa by any person that is not authorised to do so. The Financial Surveillance Department ("FSD") of the South African Reserve Bank is the authority responsible for monitoring such cross-border transactions. The FSD has entered into service level agreements with authorised dealers (mostly banks and bureaux de change) which are required to report all in- and outflow cross-border foreign exchange transactions (cash transactions excluded) to the FSD on a daily basis. The reporting takes place through an electronic system and the information reported includes (i) the name and address of the individual or entity, (ii) its identity or registration number, (iii) the account number, and (iv) the amount transferred. This ensures the availability of information directly with the authorities on any amount transferred to or from South Africa, in addition to the obligation for banks to keep records on the transactions where the accounts of their customers are involved. The FSD has data available from 1 April 2001 and retains it indefinitely.

Conclusion

141. There are sufficient legal obligations in place for financial institutions to keep banking information available, most notably under the FICA. In addition, the FSD keeps information on all cross-border transactions.

142. South Africa's exchange of information partners report that banking information was received in a timely manner in all cases where this was requested.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

B. Access to Information

Overview

143. 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 of companies or the identity of interest holders in other persons or entities. This section of the report examines whether South Africa'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.

144. The Enforcement Risk Planning Division of SARS has the responsibility for the day-to-day administration of all information exchange requests. This division has important sources of information directly available to answer incoming requests: SARS' own databases contain general information on taxpayers and their income, based on the tax returns filed. Direct access to various external databases is also provided for. One system combines information from different databases and can identify links between individuals and companies. Access to these systems allows South Africa's competent authority to directly answer the more straight forward requests received from their exchange of information partners. In more complex cases and in most cases where information must be obtained from a taxpayer, the information is obtained by an officer of a local revenue office.

145. Both the officers at the Division of Enforcement Risk Planning and the officers at local revenue offices have strong access powers at their disposal. These powers allow them to make requests for information, enter and search business premises, make formal inquiries and seize documents. These information gathering measures are reinforced by penalties where a person fails to produce the requested information. As South Africa's information exchange agreements are effectively implemented in its domestic law, the access powers can be used for exchange of information purposes even if South Africa does not have a domestic interest in the information.

146. There are no secrecy provisions that may impede the effective access to information. Furthermore, no rights and safeguards (*e.g.* notification or appeal rights) exist in South Africa that will unduly prevent or delay effective exchange of 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).

147. Under South Africa's information exchange agreements the Commissioner for the South African Revenue Service or his authorised representative is the designated competent authority. The Senior Manager of the Division of Enforcement Risk Planning is currently the only authorised representative in respect of exchange of tax information. In practice, the Senior Manager of the Division of Enforcement Risk Planning acts as the Competent Authority for purposes of exchange of tax information.

148. The Competent Authority is based at the headquarters of the South African Revenue Service ("SARS") in Pretoria. The Division of Enforcement Risk Planning ("ERP"), managed by the Competent Authority, is responsible for the day-to-day administration of all information exchange requests. SARS further has 53 local revenue offices with specialised audit departments and, if appropriate in the region, large business departments. All SARS officers involved in carrying out the ITA have the power to access information for tax purposes in the manner explained below (s. 3(1) ITA).

Ownership and identity information *(ToR B.1.1)*

149. The powers to obtain information for tax purposes are provided for in the ITA. Section 74A ITA provides that the Commissioner or any officer may, for the purposes of the administration of the ITA in relation to any taxpayer, require such taxpayer or any other person to furnish such information, documents or things as the Commissioner or such officer may require. The broad language used in this provision means that all types of information can be obtained, including ownership and identity information. Also, information can be requested regardless of whether the person is required to keep that information.

150. If so authorised, an officer may also call on any person at any premises (except dwellings) at any time during such person's normal business hours, with reasonable prior notice, for purposes of obtaining information, documents or things as the officer may require (s. 74B ITA).

Gathering information in practice

151. Each information exchange request is assigned to an officer within ERP. This officer will either collect the information himself/herself or forward it to a local revenue office, depending on the type of information requested. The ERP officer has direct access to SARS' core systems and some external systems, such as the property register or the register kept by CIPC. General information on taxpayers and their income, based on the tax returns filed, is readily available in SARS' core systems. Furthermore, one of the systems combines different databases and can identify links between individuals and companies. Searches can be done using the name, registration number, identity number, telephone number or address. Usually, the ERP officer will first check whether the requested information is available in one of these systems. The ERP officer will also check whether the requested information is available in public sources of information.

152. Besides the information that can be accessed directly by the ERP officer, information that can be obtained from third parties is usually requested directly by the ERP officer. This includes information to be obtained from banks, other government agencies and regulatory authorities. Finally, the ERP officer may directly ask any other assumed holder of the information to provide the requested information in instances where the information request is straight forward.

153. In more complex cases and in most cases where information must be obtained from a South African taxpayer, the officer who is assigned the case will forward it to a local revenue office. At the local level, requests are usually dealt with by the audit departments, as they have most experience in obtaining information from taxpayers. The official of the local revenue office who is assigned the case would normally send a request based on section 74A ITA to the person holding the information to provide this information within 14 or 21 business days. In complex cases, such as transfer pricing cases or where (other) detailed accounting information must be provided, this period is often extended. In case of non-compliance other means to obtain the information may be applied (see B.1.4).

154. It is not exactly known how many cases are referred to local revenue offices. It is estimated, however, that in the period under review more than 90% of the cases have been handled by ERP without the need of assistance by a local revenue office. It is noted that this percentage has decreased in 2011 due to the (more complicated) nature of the requests.

155. Ownership information may be available in SARS' core systems, but in most instances it is not automatically stored. Other authorities that may have ownership and identity information available are the CIPC (on close corporations or co-operative societies), the offices of the Masters of the High Court (on trusts) and the Financial Intelligence Centre ("FIC", on any type of

entity). In practice, however, a request for ownership information is usually referred to a local revenue office.

Bank information

156. Requests for bank information are dealt with by the ERP officer directly making a request to a bank or to the Financial Surveillance Department. Whenever bank statements or ownership of bank accounts are required, the information is requested directly from a commercial bank. Where information requested relates to foreign exchange transactions, *i.e.* incoming and outgoing transfers, such information is requested from the Financial Surveillance Department of the South African Reserve Bank. In practice, the majority of the requests deal with information that needs to be obtained from commercial banks.

Information requested and obtained

157. South Africa's exchange of information partners reported that they regularly request ownership information, in particular in respect of companies. Also, information regarding the identity of directors has been requested in some instances. Furthermore, requests for bank information were made. The requested information was provided by South Africa in a timely manner and no issues regarding access to the information have arisen.

Accounting records *(ToR B.1.2)*

158. The legal powers and practice described under the previous subsection (Ownership and identity information) apply equally where accounting information must be obtained. As detailed accounting information is not stored in SARS' core systems, requests for accounting information are usually forwarded to a local revenue office.

159. As mentioned above (in section A.2 of this report) there has been one case where accounting information could not be provided because the taxpayer was non-compliant. Although an investigation has now been launched in South Africa as well, the information has not been accessed (see also C.5.1). Nevertheless, this seems to be an isolated case as in all other instances the accounting information was available.

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

160. The powers described above can be applied "for the purposes of the administration of the ITA in relation to any taxpayer". The term "taxpayer" is defined as "any person chargeable with any tax leviable under this Act

[the ITA] and includes every person required by this Act to furnish any return" (s. 1 ITA). As this puts the powers in the context of South African tax laws and taxation and the rules themselves do not specifically state that the powers can be used for exchange of information purposes, they appear on their face to require that the South African tax authorities have an interest in the information for their own tax purposes. However, DTCs and TIEAs are implemented in South Africa's tax law through section 108 ITA:

> "(1) The National Executive may enter into an agreement with the government of any other country, whereby arrangements are made with such government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Republic and of such other country, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of the Republic and of such other country.
>
> (2) As soon as may be after the approval by Parliament of any such agreement, as contemplated in section 231 of the Constitution, the arrangements thereby made shall be notified by publication in the Gazette and the arrangements so notified shall thereupon have effect as if enacted in this Act."

161. This provision provides the authority to enter into DTCs and TIEAs and also implements these agreements into domestic law, therewith transposing the obligations imposed by the agreements to the ITA. Accordingly, South African authorities indicate that all of the powers at their disposal for domestic purposes are also available for the purpose of exchange of information under its agreements. This interpretation has recently been confirmed in a court case (Case No. 13446/2011, Western Cape High Court, Cape Town), where the judge ruled (para. [30]):

> "Declaring that s 74(A) and 74(B) [of the ITA] may be invoked by the applicant [= SARS] for purposes of obtaining information from the respondent [= holder of the information] and any person in the Republic of South Africa for purposes of complying with its obligations under any double taxation agreement, alternatively, treaty concluded for the exchange of information."

162. Finally, it is also a matter of fact that South Africa has engaged in international cooperation for tax matters for many years and has used its access powers in doing so. In light of the foregoing, it can be concluded that South Africa has the authority to exercise its access powers for information exchange purposes under its information exchange agreements.

Compulsory powers (ToR B.1.4)

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

164. Any person not furnishing or producing or making available the information as requested under section 74A or 74B ITA is subject to an administrative penalty (s. 75B ITA and paragraphs 4(e) and 4(f) GN1404). The amount of the administrative penalty that can be imposed depends on the amount of taxable income of the taxpayer and ranges from ZAR 250 (EUR 23.75) to ZAR 16 000 (EUR 1 521) (paragraph 5(1) GN1404). The penalty increases by the same amount for each month the non-compliance continues to a maximum of 35 months after receipt of the penalty assessment (paragraph 5(2)(a) GN1404).

165. Besides being liable to an administrative penalty, a person failing to comply with section 74A or 74B ITA is also guilty of an offence and therefore liable to a fine not exceeding ZAR 40 000[13] (EUR 3 800) or imprisonment for a period not exceeding 24 months (ss. 75(1)(a) and 75(1)(b) ITA). Furthermore, any person who has been convicted of failing to submit any information may receive a notice from the tax authorities to comply. In case of non-compliance with such notice, the person is guilty of another offence and liable to a fine of ZAR 50 (EUR 4.75) for each day the failure continues or to imprisonment for a period not exceeding 12 months (s. 75(3) ITA).

166. In addition to the prospect of a monetary penalty or imprisonment, the production of information may also be compelled by using a formal inquiry or search and seizure powers. A formal inquiry must be authorised by a judge of the High Court and may be requested where there has been non-compliance in terms of the ITA, *i.e.* the person has not produced the information (s. 74C(5) ITA).

167. A warrant authorising search and seizure may also be issued only where there has been non-compliance in terms of the ITA (s. 74D(3) ITA). Where a judge has issued such warrant, the authorised officer(s) may, without prior notice and at any time (s. 74D(1) ITA):

(a) enter and search any premises and search any person present on the premises for any information, document or things that may afford evidence as to the non-compliance by any taxpayer with his obligations in terms of this Act;

(b) seize any such information, document or things; and

(c) in carrying out any such search, open or cause to be opened or removed and opened, anything in which such officer suspects any information, documents or things to be contained.

13. See footnote 5.

Use of compulsory powers in practice

168. The South African authorities indicated that in practice taxpayers do comply with requests to produce information, and they could not remember cases in which monetary penalties or imprisonment had to be imposed against persons refusing to provide information for exchange purposes.

169. To the knowledge of the South African authorities, a formal inquiry or the search and seizure powers have also not been used to compel the production of information for exchange purposes. It is generally not necessary to use these measures as the authorities have the 'lighter' option of visiting the premises of a person on the basis of section 74B ITA.

170. The input of South Africa's exchange of information partners suggests that delays due to the non-compliance of taxpayers are rare and information is usually still provided. There has only been one case where information could not be provided due to the non-compliance of the taxpayer (see sections B.1.2 and A.2 of this report). Although an investigation has been launched on this taxpayer in South Africa, to date the compulsory powers described above have not been used to compel the production of the requested information, as the obtaining of the information was delayed on the part of the tax authorities. Nevertheless, this seems to be an isolated case (see also C.5.1).

Secrecy provisions *(ToR B.1.5)*

171. There are no provisions under South Africa's laws relating to the secrecy of ownership or accounting information. Common law accepts that a duty of confidentiality may arise through a contractual obligation, for example between a bank and its clients. However, the access powers contained in the ITA override the common law duty of confidentiality.[14]

Legal professional privilege (attorney-client privilege)

172. South Africa recognises the common law principle of legal professional privilege as a just cause to refuse to comply with a request to produce information to the tax authorities. There are four essential requirements that have to be met before legal professional privilege may be successfully claimed:[15]

14. As a general principle, a banker may disclose information about a customer's affairs where the disclosure is under compulsion of law (*Optimprops 1030 v First National Bank of Southern Africa Ltd* 2001 2 All SA 24 (D) 29).
15. Schwikkard and Van der Merwe, *Law of Evidence* (2009) at 135-6.

- the communications that are sought to be protected must have been made to a legal adviser acting in a professional capacity;
- the information must have been supplied in confidence;
- the information must have been supplied for the purpose of pending litigation or for the purpose of obtaining legal advice; and
- the client must claim the privilege.

173. These requirements are in accordance with the international standard. Case law shows that the mere fact that an attorney is in possession of confidential information does not create a legal professional privilege, as the attorney was not consulted to obtain legal advice.[16] Also, South African courts have refused to extend the privilege to other professional relationships, such as journalists, insurers and doctors.[17]

174. The South African authorities and South Africa's exchange of information partners have indicated that no cases have occurred in practice where information could not be obtained because the holder of the information (lawfully or not) claimed legal professional privilege or made any other secrecy claim.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

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.

175. 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).

16. *R v Davies* 1956 (3) SA 52 (A).
17. *S v Cornelissen* 1994 (2) SACR 41 (W); *Howe v Mabuya* 1961 (2) SA 635 (D); *Botha v Botha* 1972 (2) SA 559 (N).

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

176. There is no requirement in South Africa's domestic legislation that the taxpayer under investigation or examination must be notified of a request. In addition, when requesting a person to produce information the South African authorities do not have to inform the person that the request is made for exchange of information purposes.

177. Where possible, information will be obtained without requesting a taxpayer or a third person to produce such information. In cases where information is requested from a person in South Africa, the authorities will generally not inform that person of the purpose of the request. In fact, one of South Africa's exchange of information partners indicated that in one specific case they were informed by the South African authorities that the taxpayer could (indirectly) become aware of the request for information, and they were asked whether this would be appropriate. This shows that the South African authorities are aware of the risks of undermining the chance of success of the investigation conducted by the requesting jurisdiction, and that they will try to prevent this from happening.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

C. Exchanging Information

Overview

178. Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanism for doing so. A jurisdiction's practical capacity to effectively exchange information relies both on having adequate mechanisms in place as well as an adequate institutional framework. This section of the report examines whether South Africa has a network of information exchange agreements that would allow it to achieve effective exchange of information in practice.

179. South Africa has a network of information exchange mechanisms that covers more than 90 jurisdictions, including all relevant partners. Information can be exchanged under DTCs, TIEAs and the *OECD/CoE Convention on Mutual Administrative Assistance in Tax Matters* (once in force for South Africa). South Africa is also actively (re)negotiating agreements, expanding its network even further. As it is South Africa's policy to incorporate provisions on the exchange of information to the international standard in all of its information exchange agreements, these generally contain sufficient provisions to enable South Africa to exchange all relevant information.

180. South Africa has been able to respond to information exchange requests in a timely manner. In 90% of the cases the information was provided within 180 days, and in 80% of the cases the information was provided within 90 days. Where the provision of information was delayed, updates and interim responses were sent. The process to obtain information is organised in such a way that information that is readily available in SARS' databases can be exchanged well within 90 days, and information that needs to be obtained from other persons can be provided within 180 days. When South Africa is not in a position to respond to a request within 90 days it is standard practice to send a status update along with the information already available at the time this update is sent out.

181. The confidentiality of information exchanged with South Africa is protected by obligations implemented in the information exchange agreements,

complemented by domestic legislation which provides for tax officers to keep information secret and confidential. Breach of this confidentiality obligation may lead to the tax officer(s) concerned to be fined or imprisoned. In practice, documentation regarding information exchange requests is stored on a secure server which can only be accessed by a limited number of people.

182. South Africa's agreements ensure that the contracting parties are not obliged to provide information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy.

C.1. Exchange of information mechanisms

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

183. The responsibility for negotiating DTCs, which form the largest part of South Africa's information exchange agreements, is shared between the International Tax Division at National Treasury and the International Development & Treaties Division at SARS. National Treasury has the lead on the policy perspective and ultimately makes the decision regarding whether or not negotiations may take place with a specific jurisdiction. The DTC negotiations are mainly prepared and conducted by SARS.

184. Exchange of information is a high priority in DTC negotiations and it is South African policy not to conclude a DTC without an article on exchange of information that is in line with the international standard, following the language of Article 26 of the OECD or UN Model Tax Convention.

185. It is noted that the exchange of information relationship with Grenada and Sierra Leone is based on an extension of an old agreement between South Africa and the United Kingdom. According to a legal opinion obtained from South Africa's Department of International Relations and Cooperation State Law Advisor, Grenada and Sierra Leone are still covered by this agreement. South Africa would therefore accommodate requests coming from these jurisdictions, on the condition of reciprocity.

186. More recently South Africa also started negotiating TIEAs. As South Africa closely follows the wording of the OECD Model TIEA and its treaty partners do as well, these negotiations are usually conducted by e-mail without major difficulties. South Africa has signed 9 TIEAs and another 11 TIEAs are in various stages of negotiation.[18]

187. South Africa's network of information exchange agreements now covers 76 DTCs and 9 TIEAs (see Annex 2). In addition, on 3 November 2011

18. See *www.sars.gov.za/home.asp?pid=53079*.

South Africa signed the *OECD/CoE Convention on Mutual Administrative Assistance in Tax Matters*. Once in force with respect to South Africa, information can be exchanged under this agreement according to the international standard (provided that the domestic laws of the relevant jurisdictions do not impose any restrictions) with the jurisdictions for which the agreement is in force as well. This section of the report explores whether the information exchange mechanisms allow South Africa to effectively exchange information.

Other forms of information exchange

188. In addition to exchanging information on request, South Africa exchanges information spontaneously. Where South Africa's tax authorities identify information that is relevant to administration or enforcement of the tax laws of an exchange of information partner, they can transmit this information without the need for a prior request. In recent years, South Africa exchanged information spontaneously in a few instances, and received spontaneous information from some exchange of information partners as well.

189. Under South Africa's DTCs it is also possible to exchange information automatically. No information has been exchanged automatically by South Africa to date, as appropriate systems are not in place for this form of information exchange to take place.

Foreseeably relevant standard *(ToR C.1.1)*

190. 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."*

191. Seven of South Africa's DTCs (Australia, Ireland, Malaysia, Mexico, the Netherlands, the Seychelles and the United Kingdom) and all but one of South Africa's TIEAs (not the TIEA with Bermuda) use this or similar

language and therefore clearly meet the "foreseeably relevant" standard. The DTC with Austria also contains the language quoted above, but this language is supplemented by a provision requiring the requesting jurisdiction to provide certain additional information when making a request. The additional information listed is based on Article 5(5) of the OECD Model TIEA, but it requires the requesting jurisdiction to provide the name and address of any person believed to be in possession of the requested information. This condition is not in accordance with the international standard. It is recommended that South Africa amend its DTC with Austria to remove this restrictive condition.

192. The DTC with Switzerland provides only for the exchange of information as is necessary for carrying out the provisions of the Convention and of the provisions of domestic law concerning tax fraud. As it does not provide for the exchange of information for the administration of the domestic tax laws other than those pertaining to tax fraud, this DTC does not meet the "foreseeably relevant" standard. It is recommended that South Africa update its DTC with Switzerland to remove this limitation.

193. The other DTCs concluded by South Africa and its TIEA with Bermuda provide for the exchange of information that is "necessary" or "relevant" for carrying out the provisions of the Convention or of the domestic laws of the Contracting States, or contain language which has similar meaning. 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". South Africa's authorities state that they interpret these alternative formulations as equivalent to the term "foreseeably relevant". These DTCs and the TIEA with Bermuda therefore meet the "foreseeably relevant" standard.

194. South Africa's DTCs with Grenada, Israel, Malawi, Sierra Leone, Switzerland, Zambia and Zimbabwe hold additional language, generally noting that they apply to information available under the respective taxation laws of the Contracting States or to information that is in proper order at the disposal of the authorities. This wording does not limit South Africa's ability to respond to a request from these jurisdictions, as South Africa regards all information they can obtain by using their access powers as information "available under its taxation laws" and "in proper order at their disposal". It is noted, however, that while this is not an issue for South Africa it may impose a restriction on the other jurisdiction's ability to respond to a request, as they may interpret this language more restrictively.

195. South Africa's authorities have advised that they have not declined any request for information received over the last three years on the basis that the requested information was not foreseeably relevant.

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

196. 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.

197. The DTCs applicable to 14 jurisdictions[19] 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. However, in respect of 13 jurisdictions the DTCs 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. In respect of the DTC with Switzerland there is no obligation to exchange information in respect of all persons, since this DTC only provides for exchange of information for the purposes of carrying out the Convention or the domestic law concerning tax fraud (see also C.1.5).

198. South Africa's other DTCs and its TIEAs specifically provide for exchange of information in respect of all persons. South Africa's authorities have advised that no difficulties have arisen with any of its exchange of information partners with respect to this issue.

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

199. 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 Tax Convention (Article 26(5)) and the OECD Model TIEA (Article 5(4)), which are primary authoritative sources of the standards, 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

19. These jurisdictions are: Chinese Taipei, Grenada, Israel, Kuwait, Malawi, Romania, Russia, Sierra Leone, Singapore, Switzerland, Thailand, Tunisia, Zambia and Zimbabwe.

in an agency or fiduciary capacity or because the information relates to an ownership interest.

200. As most of South Africa's DTCs were concluded before the update of the OECD Model Tax Convention in 2005, they generally do not contain a provision corresponding to Article 26(5), which was introduced at that update. Only the DTCs with Australia, Austria, Ireland, Kenya, Malaysia, Mexico, the Netherlands, the Seychelles, Sudan and the United Kingdom contain such a provision, as well as all TIEAs concluded by South Africa. 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.

201. South Africa's domestic laws allow it to access and exchange the information covered by Article 26(5) even in the absence of such provision in the information exchange agreement. Accordingly, no requests for bank information have been declined by South Africa. Restrictions in access to bank information may however exist for some of South Africa's treaty partners, which is the case for at least three of them (Botswana, Luxembourg and Switzerland). It is recommended that South Africa monitor effective exchange of information with such treaty partners and, if necessary, renegotiate its older DTCs to incorporate wording in line with Article 26(5) of the OECD Model Tax Convention.

Absence of domestic tax interest (ToR C.1.4)

202. 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.

203. As most of South Africa's DTCs were concluded before the update of the OECD Model Tax Convention in 2005, they generally do not contain a provision corresponding to Article 26(4), which was introduced at that update and which stipulates that a domestic tax interest should not be a reason to decline an information request. Only the DTCs with Australia, Austria, Canada, Ireland, Kenya, Malaysia, Mexico, the Netherlands, the Seychelles, Sudan, the United Kingdom and the United States contain such a provision, as well as all TIEAs concluded by South Africa. 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.

204. No domestic tax interest restrictions exist in South Africa's laws even in the absence of a provision corresponding with Article 26(4) of the OECD Model Tax Convention. Accordingly, no requests for information have been declined on this basis by South Africa. A domestic tax interest requirement may however exist for some of South Africa's treaty partners, although no such treaty partners have currently been identified in other peer review reports of the Global Forum. It is recommended that South Africa monitor effective exchange of information with such treaty partners and, if necessary, renegotiate its older DTCs to incorporate wording in line with Article 26(4) of the OECD Model Tax Convention.

Absence of dual criminality principles (ToR C.1.5)

205. 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 jurisdiction if it had occurred in the requested jurisdiction. In order to be effective, exchange of information should not be constrained by the application of the dual criminality principle.

206. The DTC with Switzerland provides that information other than information as is necessary for carrying out the provisions of the Convention shall only be exchanged if it pertains to a fraudulent conduct which constitutes a tax offence which, in both Contracting States, can be punished with imprisonment. It is recommended that South Africa update its DTC with Switzerland to remove this limitation. None of South Africa's other information exchange agreements applies the dual criminality principle to restrict the exchange of information.

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

207. 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").

208. All of the information exchange agreements concluded by South Africa cover both civil and criminal tax matters.

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

209. 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.

210. No restrictions apply in any information exchange agreement concluded by South Africa for information to be provided in the specific form requested. The DTCs with Canada and the United States as well as South Africa's TIEAs specifically state that information shall be provided in the form of depositions of witnesses or authenticated copies of original documents, to the extent possible under the domestic laws of the requested State.

211. South Africa is prepared to provide information in the specific form requested to the extent permitted under South African law and administrative practice. Input from South Africa's exchange of information partners shows that in one case information was requested in a specific form (*i.e.* a taxpayer interview). Although some delay was experienced because of non-compliance of the taxpayer, the information was finally provided, and the requesting jurisdiction indicated that the response was made in an appropriate time and in the form requested.

In force (ToR C.1.8)

212. Exchange of information cannot take place unless a jurisdiction has exchange of information 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.

213. All of South Africa's information exchange agreements must be approved by both the National Assembly and the National Council of Provinces. Usually there are two or three opportunities each year to table and formally present the agreements, which is done by sending them to the Finance Committees of both authorities at the same time. Because the Finance Committee is given a preliminary briefing before the agreement is signed (which means that any comments will already have been dealt with), it normally takes only two days

for them to present the agreement to the National Assembly and the National Council of Provinces respectively. In almost all cases, official approval follows shortly after. Once approved, an official Note is sent to the treaty partner and the agreement is published in the Government Gazette. The process of ratification in South Africa usually does not take more than six months.

214. Of the 85 bilateral information exchange agreements concluded by South Africa, eight are not in force (Democratic Republic of the Congo, Dominica, Gabon, Germany (new DTC), Gibraltar, Kenya, Liberia and Sudan). South Africa has completed all internal procedures and finalised ratification for the agreements with Democratic Republic of the Congo, Gabon, Germany, Kenya and Sudan. The other agreements that are not yet in force have all been signed less than six months ago, and the ratification process is underway in South Africa.

215. The *OECD/CoE Convention on Mutual Administrative Assistance in Tax Matters* was signed by South Africa on 3 November 2011 and is currently in the process of ratification. It is expected that approval by Parliament will be given at the next opportunity in the coming months.

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

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

217. Section 108(1) ITA provides the South African government with the authorisation to conclude information exchange agreements. Once an agreement has been signed, it is approved by Parliament (see C.1.8) and upon publication in the Government Gazette the arrangements of the agreement shall have effect as if enacted in the ITA as contemplated in section 231 of the Constitution (s. 108(2) ITA). In practice, the notice in the Government Gazette currently specifically refers to sections 108 ITA and 231 of the Constitution to ensure that the relevant agreement is given effect in a legitimate manner.

218. All of South Africa's information exchange agreements that are in force have been given effect in the manner described above.[20] In addition, South Africa's legal and regulatory framework is in place to ensure that the authorities can access and provide information under the information exchange agreements.

20. Except for the agreements with Grenada, Sierra Leone and Zambia; these agreements have been given effect by Proclamation, which was the appropriate manner at that time (before the current ITA existed).

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

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

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

219. 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.

220. South Africa has exchange of information relationships with more than 90 jurisdictions, of which 76 are through a DTC, 9 through a TIEA. The *OECD/CoE Convention on Mutual Administrative Assistance in Tax Matters* covers 34 jurisdictions once in force in respect of all of all of them. The exchange of information relationships cover jurisdictions representing:

- all of its major trading partners (China (People's Rep.), Germany, the United States and Japan);
- all of the G20 member jurisdictions, and all of the OECD member jurisdictions but Chile and Estonia; and
- 62 of the Global Forum member jurisdictions.

221. South Africa has a very active DTC and TIEA (re)negotiation program, with more than 20 agreements negotiated and awaiting signature, and more than 25 agreements currently under (re)negotiation. In addition, one multilateral agreement that is awaiting signature is the Southern African Development Community Agreement on Assistance in Tax Matters.

222. Comments were sought from Global Forum member jurisdictions in the course of the preparation of this report, and no jurisdiction advised the

assessment team that South Africa had refused to negotiate or conclude an information exchange agreement with it. In summary, South Africa's network of information exchange agreements covers all relevant partners.

Determination and factors underlying recommendations

Phase 1 determination	
The element is in place.	
Factors underlying recommendations	**Recommendations**
	South Africa should continue to develop its EOI network with all relevant partners.

Phase 2 rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

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)*

223. 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.

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

225. All SARS officers are obliged to preserve and aid in preserving secrecy with regard to all matters that may come to his or her knowledge in the performance of his or her duties in connection with carrying out the provisions of the ITA, and shall not communicate any such matter to any person

whatsoever other than the taxpayer concerned or his or her lawful representative nor suffer or permit any such person to have access to any records in the possession or custody of the Commissioner except in the performance of his or her duties under the ITA or by order of a competent court (s. 4(1) ITA). Any person disclosing information in breach of this provision is guilty of an offence and liable to a fine not exceeding ZAR 40 000[21] (EUR 3 800) or to imprisonment for a period not exceeding two years (s. 4(3) ITA).

226. Section 75A ITA specifically provides for the possibility to publish for general information particulars relating to an offence committed by a person, where such person has been convicted of such offence and that person is no longer allowed an appeal or review. This is in accordance with the international standard, as a publication as meant in section 75A ITA will only occur after the information has been used in a public court proceeding, which is allowed under the international standard and South Africa's information exchange agreements. From the moment information has been made public in a court proceeding, it may also be used for other purposes (see paragraph 13 of the Commentary to Article 26 of the OECD Model Tax Convention). In practice, a publication as meant in section 75A ITA has only occurred in one case ever, which was not related to information received from another jurisdiction.

227. It is noted that the confidentiality provision in some of South Africa's DTCs (Chinese Taipei, Grenada, Malawi, Romania, Russia, Sierra Leone, Zambia and Zimbabwe) 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, and it also does not expressly mention courts as being an authority to which information may be disclosed. The South African authorities indicated that this is not interpreted as a prohibition to use the exchanged information in court proceedings, as courts or other judicial institutions are also regarded as being concerned with the "assessment and collection of taxes" (which is the wording used in the relevant DTCs).

All other information exchanged (ToR C.3.2)

228. 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.

229. The obligation of SARS officers to keep information confidential does not apply when the officer performs his or her duties under the ITA.

21. See footnote 5.

As one of these duties is exchanging information with other jurisdictions (South Africa's agreements are implemented in the ITA through section 108 ITA), there is no restriction on providing information to another jurisdiction in order to comply with an information exchange request under one of South Africa's information exchange agreements.

Ensuring confidentiality in practice

230. When a request for information is received from another jurisdiction, all documents are scanned and stored on a secure server, and the paper files are destroyed. Only the personnel directly involved in exchange of information cases (part of the Division of Enforcement Risk Planning) has access to this server. Currently, five persons have such access. Where a request is forwarded to a local revenue office, the confidentiality of the information is emphasised to ensure maximum awareness of this issue.

231. Currently, SARS does not use an encrypted e-mail system. Where e-mail exchanges occur with other jurisdictions, confidential information is not included in the text of the e-mail. SARS does however use Winzip encryption (if supported by a jurisdiction) should a document be e-mailed to a jurisdiction. The password is e-mailed in a separate mail to the jurisdiction. Otherwise, all information is posted.

232. No issues regarding the confidentiality of information have been raised by South Africa's exchange of information partners.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

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)*

233. The international standard allows requested parties not to supply information in response to a request in certain identified situations.

234. In line with the international standard, South Africa's DTCs and TIEAs generally contain wording stating that the contracting parties are not obliged to provide information which would disclose any trade, business, industrial, commercial or professional secret or trade process, information subject to legal privilege, or information the disclosure of which would be contrary to public policy.

235. No issues in relation to the rights and safeguards of taxpayers and third parties have been encountered in practice, nor have they been raised by South Africa's exchange of information partners.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

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)*

236. 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 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 cooperation as cases in this area must be of sufficient importance to warrant making a request.

237. There are no specific legal or regulatory requirements in place which would prevent South Africa 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.

238. During the period 2007-2010, South Africa has received 221 requests for information[22] from 25 different jurisdictions. The statistics show that the

22. A request is regarded as a single request irrespective of the number of persons involved.

number of requests increased every year, with a considerable increase between 2009 and 2010. The United Kingdom is South Africa's main exchange of information partner, responsible for 59% of the incoming requests, followed by Australia making 16% of the incoming requests.

239. On a total of 221 incoming requests, South Africa was in position to provide a final response within 90 days in 80% of the cases and within 180 days in 10% more instances. Only 5 cases were processed in more than one year and another 7 were still pending as at March 2012. Further details can be found in the table below.

Table 1. Response time to incoming requests

	Response provided within				No final response provided to date	Total
Year	90 days	180 days	1 year	more than 1 year		
2007	12	3	2	2	1	**20**
2008	29	7	2	-	-	**38**
2009	50	6	1	3	-	**60**
2010	85	7	5	-	6	**103**
Total	**176**	**23**	**10**	**5**	**7**	**221**

240. The cases where no final response has been provided to date are almost all cases where the requesting jurisdiction has asked for additional information following the furnishing of the information initially requested. In one case the taxpayer refused to provide information and was brought to court, where no final ruling has been made. The case from 2007 that is still open results from the tax authorities not following through on the request. This seems to be an isolated case, however, and it has recently been picked up again. South Africa should closely monitor the further progress of this case.

241. It is standard practice in South Africa to send an acknowledgement of receipt to the requesting jurisdiction (see also C.5.2 below). No specific statistics are kept on whether further updates or interim responses are sent within 90 days, but the performance indicators for officers handling information exchange requests provide that when the information is readily available within SARS' databases, at the very least an interim report should be sent to the requesting jurisdiction within 21 business days. Where the information needs to be obtained from other sources, a request to the relevant person should be made within these 21 business days. A significant percentage of the requests did in fact concern information which was readily available in SARS' databases, and in these cases information was usually provided within one month of receipt.

242. The input from South Africa's exchange of information partners, together with the notes on the statistics as provided by South Africa to the assessment team, suggests that in the vast majority of the cases a final response, an update or interim response was provided within 90 days. In addition, the South African authorities indicated that it is standard practice to send updates or interim responses within 90 days (see also C.5.2 below). None of South Africa's exchange of information partners indicated that it was not informed in a timely manner.

Organisational process and resources *(ToR C.5.2)*

243. Under South Africa's information exchange mechanisms, the Commissioner of the South African Revenue Service is designated as the primary Competent Authority. This task has been delegated to the Senior Manager of the Division of Enforcement Risk Planning, which is the department responsible for, among other areas, international exchange of information. The Competent Authority (*i.e.* the Senior Manager) works closely with the Exchange of Information Officer, who is responsible for the day-to-day monitoring of the progress of all information requests. A further three officers may be assigned the individual information exchange requests.

Organisational process

244. The current organisational process to obtain and provide information following a request from an information exchange partner is described in the Business Process Manual on Exchange of Information ("EoI Manual"). This EoI Manual was approved in February 2011 and provides an overview and more detailed instructions on how to handle inward and outward information exchange requests. It also comprises the organisational processes for dealing with spontaneous and automatic exchange of information and assistance in collection.

245. When an information request is received, a unique reference number is assigned to it and the request, together with any attachments, is stored in an electronic format (documents are scanned when not received in an electronic format) on a secure server (see also C.3). It is also registered on an Excel-sheet which is used to register the progress of all incoming requests, sorted by jurisdiction where the request originates from.

246. After the request is registered, the Competent Authority checks the validity of the request by verifying whether an information exchange instrument is in place with the jurisdiction that sent the request and whether the request is signed by an authorised person. It only happened once during the period under review that it was not clear whether the person that signed the

request was indeed authorised to do so. This was then checked and the issue was resolved satisfactorily.

247. Once it is established that the request is valid, the Exchange of Information Officer determines the next steps. First, it is determined whether the required minimum information to successfully process the request has been provided. If not, the requesting jurisdiction is informed and asked to provide more details. This would usually be done by e-mail to facilitate a speedy process. In almost all cases during the period under review sufficient information was received by the requesting jurisdiction in the first instance. In these cases an acknowledgement of receipt was sent. The EoI Manual does not set specific time limits, but in practice it usually takes not more than one week from the time a request is received until an acknowledgement of receipt is sent.

248. Depending on the type of information requested, it is either the Division of Enforcement Risk Planning ("ERP") itself or another department within SARS that will be tasked with obtaining the requested information. In general, ERP will try to obtain the information themselves except in more complex cases and in most cases where information must be obtained from a taxpayer, in which cases the request will be forwarded to a local revenue office (see also section B.1.1 of this report). Both ERP and the local revenue offices follow the standard practice of giving the holder of the information 14 or 21 business days to comply with the request, although in complex cases this period is often extended.

249. The EoI Manual does not set specific time limits within which the local revenue office should report back to ERP. In practice, a deadline of two months is usually set to be able to provide the information to the requesting jurisdiction within 90 days, and monthly updates are provided. In addition, the EoI Manual states that any request sent from ERP to a local revenue office following from an international information exchange request should be handled with priority.

250. Once the ERP officer who is assigned the case has either collected the information himself/herself or received the information from a local revenue office, he/she verifies the information against the information request and draws up a report. This report, together with the information gathered, is then reviewed by the Exchange of Information Officer and the Competent Authority. Where the information is insufficient to meet the requirements of the request, the case is given back to the responsible ERP officer setting out what additional information is needed. In other cases, the Exchange of Information Officer will prepare a letter to be sent to the requesting jurisdiction together with the requested information. Such letter is subsequently signed by the Competent Authority and sent to the requesting jurisdiction.

251. Throughout the process of information gathering, the ERP officer who is assigned the case informs the Exchange of Information Officer and the Competent Authority of the progress, which is registered on an Excel-sheet. The Exchange of Information Officer and the Competent Authority have weekly meetings (or more frequently as necessary) to discuss this progress and any issues arising. An electronic reminder is set for some time before 90 or 180 days have passed since the request was received. Where an information exchange request cannot be answered within 90 days, the requesting jurisdiction is informed of the progress. If possible, any information already available is sent in interim responses. Every effort is made to provide a final response within 180 days of receipt of a request.

252. Sending updates and interim responses to the requesting jurisdiction is standard practice in South Africa. In respect of this, South Africa relies on the responsible officers to monitor all ongoing requests, as there is no automatic electronic system ensuring that regular updates are sent. Also, the EoI Manual does not prescribe the sending of regular updates. However, it is envisaged that the exchange of information process will be integrated into SARS' general case management and tracking systems, allowing for more information on the status of requests and time management to be kept automatically. South Africa's exchange of information partners indicate that they do receive regular updates and interim responses, meaning that the organisational process to respond to a request within 90 days is currently sufficient.

Resources

253. Within ERP five persons are involved in the international exchange of information: the Competent Authority; the Exchange of Information Officer; and three other officers. Besides international exchange of information on request, these persons also deal with domestic exchange of information with law enforcement agencies and regulatory bodies, as well as spontaneous and automatic exchange of information. Because of the increase in the number of requests received, ERP is in the process of hiring an additional officer. ERP has its own budget with sufficient funds to appropriately deal with incoming information exchange requests.

254. It should be noted that until June 2011 all inward requests for information (except VAT cases) were handled by two persons, the Competent Authority and another officer. A transition period of approximately six months was used to make the new officers familiar with international exchange of information. In addition, the EoI Manual (see above) was developed to ensure that the organisational process used could be maintained for the future.

255. In general, SARS tries to have at least four people that could fulfil the role of Competent Authority if necessary. This is mainly done by training 'on

the job', meaning a continuous discussion of cases and providing feedback. The Competent Authority also attends the meetings of OECD's Working Party 10 on Exchange of Information and Tax Compliance and reports important developments to the relevant officers. In addition, officers are sent to training programs. These are mostly domestic trainings on tax treaties in general, of which exchange of information forms an important part. These trainings are attended by staff from both ERP and local revenue offices, and they are an important tool to create awareness throughout SARS on international tax issues, including exchange of information. In recent years, approximately 60 officers a year have received such training, so that in every local revenue office there should be at least one officer with the relevant training.

256. In an international context, South Africa sends officers to training seminars covering exchange of information for tax purposes, organised by international organisations, such as the OECD and the African Tax Administration Forum. On various occasions South Africa also provided instructors to such training seminars.

257. The continuous training results in the ERP officers maintaining high professional standards and having adequate expertise specific to exchange of information. Also, local revenue offices usually have officers with the appropriate awareness and expertise to gather the information necessary to comply with an information exchange request.

Conclusion

258. The organisational process for handling incoming information exchange requests is for the most part described in the EoI Manual. The officers within ERP are responsible for dealing with all requests and collect much of the information themselves. In more complex cases, the assistance of local revenue offices is requested. The timelines used in practice are such that a response to the requesting jurisdiction can be provided within 90 days and if that target is not met, every effort is made to provide a final response within 180 days. There is also sufficient staff with relevant experience working on exchange of information. Extensive training is used to create awareness and skills in respect of exchange of information throughout all offices within SARS.

259. The information received from South Africa's exchange of information partners shows that South Africa has been able to respond to information exchange requests in a timely manner. In almost 90% of the cases the information was provided within 180 days and in 80% of the cases the information was provided within 90 days. Where the provision of information was delayed, updates and interim responses were received. No exchange of information partner indicated an inappropriate delay. It can therefore be concluded

that South Africa has appropriate organisational processes and resources in place to ensure timely responses.

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

260. There are no legal or practical requirements in South Africa that impose unreasonable, disproportionate or unduly restrictive conditions on the exchange of information.

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 practice that are dealt with in the Phase 2 review.

Phase 2 rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

Summary of Determinations and Factors Underlying Recommendations[23]

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)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: To be finalised as soon as a representative subset of Phase 2 reviews is completed.	Ownership information on partnerships is only comprehensively available from the fiscal year 2011-2012 onwards, and where one of the partners is a trust information on the partnership's name is only available after an automatic, system generated query by the tax authorities.	South Africa should monitor the availability of ownership information on partnerships, in particular where one or more of the partners is a trust.
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements *(ToR A.2)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: To be finalised as soon as a representative subset of Phase 2 reviews is completed.		

23. The ratings will be finalised as soon as a representative subset of Phase 2 reviews is completed.

Determination	Factors underlying recommendations	Recommendations
Banking information should be available for all account-holders *(ToR A.3)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: To be finalised as soon as a representative subset of Phase 2 reviews is completed.		
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)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: To be finalised as soon as a representative subset of Phase 2 reviews is completed.		
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)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: To be finalised as soon as a representative subset of Phase 2 reviews is completed.		
Exchange of information mechanisms should allow for effective exchange of information *(ToR C.1)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: To be finalised as soon as a representative subset of Phase 2 reviews is completed.		

Determination	Factors underlying recommendations	Recommendations
The jurisdictions' network of information exchange mechanisms should cover all relevant partners *(ToR C.2)*		
Phase 1 determination: The element is in place.		South Africa should continue to develop its exchange of information network with all relevant partners.
Phase 2 rating: To be finalised as soon as a representative subset of Phase 2 reviews is completed.		
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received *(ToR C.3)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: To be finalised as soon as a representative subset of Phase 2 reviews is completed.		
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties *(ToR C.4)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: To be finalised as soon as a representative subset of Phase 2 reviews is completed.		

Determination	Factors underlying recommendations	Recommendations
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: To be finalised as soon as a representative subset of Phase 2 reviews is completed.		

Annex 1: Jurisdiction's Response to the Review Report[24]

South Africa thanks the assessment team and the Peer Review Group for its searching and helpful review. South Africa regards the report as a fair reflection of its situation and reaffirms its commitment to the global standard for transparency and exchange of information in tax matters. The following developments in exchange of information agreements since Annex 2 was prepared are noted: Norway Protocol was signed on 16 July 2012; Samoa TIEA was signed on 26 July 2012; and the Malta Protocol was signed on 24 August 2012.

24. 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 Exchange-of-Information Mechanisms

Multilateral instruments

South Africa is a signatory to the multilateral *Convention on Mutual Administrative Assistance in Tax Matters*. The status of the multilateral Convention and its amending 2010 Protocol as at 16 July 2012 is set out in the table below.[25] When two or more arrangements for the exchange of information for tax purposes exist between South Africa and a treaty partner, the parties may choose the most appropriate agreement under which to exchange the information.

Country	Original Convention		Protocol (P)/Amended Convention (AC)	
	Signature (opened on 25-Jan-88)	Entry into force	Signature (opened on 27-May-10)	Entry into force
Argentina			03-11-2011 (AC)	
Australia			03-11-2011 (AC)	
Azerbaijan	26-03-2003	01-10-2004		
Belgium	07-02-1992	01-12-2000	04-04-2011 (P)	
Brazil			03-11-2011 (AC)	
Canada	28-04-2004		03-11-2011 (P)	
Colombia			23-05-2012 (AC)	
Costa Rica			01-03-2012 (AC)	
Denmark	16-07-1992	01-04-1995	27-05-2010 (P)	01-06-2011
Finland	11-12-1989	01-04-1995	27-05-2010 (P)	01-06-2011
France	17-09-2003	01-09-2005	27-05-2010 (P)	01-04-2012

25. The updated table is available at *www.oecd.org/tax/exchangeofinformation/conventiononmutualadministrativeassistanceintaxmatters.htm*.

Country	Original Convention		Protocol (P)/Amended Convention (AC)	
	Signature (opened on 25-Jan-88)	Entry into force	Signature (opened on 27-May-10)	Entry into force
Georgia	12-10-2010	01-06-2011	03-11-2010 (P)	01-06-2011
Germany	17-04-2008		03-11-2011 (P)	
Ghana			10-07-2012 (AC)	
Greece	21-02-2012		21-02-2012 (P)	
Iceland	22-07-1996	01-11-1996	27-05-2010 (P)	01-02-2012
India			26-01-2012 (AC)	01-06-2012
Indonesia			03-11-2011 (AC)	
Ireland			30-06-2011 (AC)	
Italy	31-01-2006	01-05-2006	27-05-2010 (P)	01-05-2012
Japan	03-11-2011		03-11-2011 (P)	
Korea	27-05-2010	01-07-2012	27-05-2010 (P)	01-07-2012
Mexico	27-05-2010		27-05-2010 (P)	
Moldova	27-01-2011		27-01-2011 (P)	01-03-2012
Netherlands	25-09-1990	01-02-1997	27-05-2010 (P)	
Norway	05-05-1989	01-04-1995	27-05-2010 (P)	01-06-2011
Poland	19-03-1996	01-10-1997	09-07-2010 (P)	01-10-2011
Portugal	27-05-2010		27-05-2010 (P)	
Russia			03-11-2011 (AC)	
Slovenia	27-05-2010	01-06-2011	27-05-2010 (P)	01-06-2011
South Africa			03-11-2011 (AC)	
Spain	12-11-2009	01-12-2010	18-02-2011 (P)	
Sweden	20-04-1989	01-04-1995	27-05-2010 (P)	01-09-2011
Tunisia			16-07-2012 (AC)	
Turkey			03-11-2011 (AC)	
Ukraine	30-12-2004	01-07-2009	27-05-2010 (P)	
United Kingdom	24-05-2007	01-05-2008	27-05-2010 (P)	01-10-2011
United States	28-06-1989	01-04-1995	27-05-2011 (P)	

Bilateral agreements

Exchange of information agreements signed by South Africa as at June 2012, in alphabetical order:

	Jurisdiction	Type of EoI arrangement	Date signed	Date entered into force
1	Algeria	DTC	28 April 1998	12 June 2000
2	Australia	DTC	01 July 1999	21 December 1999
		Protocol	31 March 2008	12 November 2008
3	Austria	DTC	4 March 1996	6 February 1997
		Protocol	22 August 2011	1 March 2012
4	Bahamas	TIEA	14 September 2011	25 May 2012
5	Belarus	DTC	18 September 2002	29 December 2003
6	Belgium	DTC	1 February 1995	9 October 1998
7	Bermuda	TIEA	6 September 2011	8 February 2012
8	Botswana	DTC	7 August 2003	20 April 2004
9	Brazil	DTC	8 November 2003	24 July 2006
10	Bulgaria	DTC	29 April 2004	27 October 2004
11	Canada	DTC	27 November 1995	30 April 1997
12	Cayman Islands	TIEA	10 May 2011	23 February 2012
13	China (People's Republic)	DTC	25 April 2000	7 January 2001
14	Chinese Taipei	DTC	14 February 1994	12 September 1996
15	Croatia	DTC	18 November 1996	7 November 1997
16	Cyprus[26, 27]	DTC	26 November 1997	8 December 1998
17	Czech Republic	DTC	11 November 1996	3 December 1997

26. Note by Turkey: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Islands. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the "Cyprus issue".

27. Note by all the European Union Member States of the OECD and the European Commission: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

	Jurisdiction	Type of EoI arrangement	Date signed	Date entered into force
18	Democratic Republic of the Congo	DTC	29 April 2005	
19	Denmark	DTC	21 June 1995	21 December 1995
20	Dominica	TIEA	7 February 2012	
21	Egypt	DTC	26 August 1997	16 December 1998
22	Ethiopia	DTC	17 March 2004	4 January 2006
23	Finland	DTC	26 May 1995	12 December 1995
24	France	DTC	8 November 1993	1 November 1995
25	Gabon	DTC	22 March 2005	
26	Germany	DTC	25 January 1973	28 February 1975
		New DTC	9 September 2008	
27	Ghana	DTC	2 November 2004	23 April 2007
28	Gibraltar	TIEA	2 February 2012	
29	Greece	DTC	19 November 1998	14 February 2003
30	Grenada	DTC	5 November 1954	5 October 1960
31	Guernsey	TIEA	21 February 2011	26 February 2012
32	Hungary	DTC	04 March 1994	5 May 1996
33	India	DTC	04 December 1996	28 November 1997
34	Indonesia	DTC	15 July 1997	23 November 1998
35	Iran	DTC	3 November 1997	23 November 1998
36	Ireland	DTC	7 October 1997	5 December 1997
		Protocol	17 March 2010	10 February 2012
37	Israel	DTC	10 February 1978	27 May 1980
38	Italy	DTC	16 November 1995	2 March 1999
39	Japan	DTC	7 March 1997	5 November 1997
40	Jersey	TIEA	12 July 2011	29 February 2012
41	Kenya	DTC	26 November 2010	
42	Korea	DTC	7 July 1995	7 January 1996
43	Kuwait	DTC	17 February 2004	25 April 2006
44	Lesotho	DTC	24 October 1995	9 January 1997
45	Liberia	TIEA	7 February 2012	
46	Luxembourg	DTC	23 November 1998	8 September 2000

	Jurisdiction	Type of EoI arrangement	Date signed	Date entered into force
47	Malawi	DTC	3 May 1971	2 September 1971
48	Malaysia	DTC	26 July 2005	17 March 2006
		Protocol	4 April 2011	6 March 2012
49	Malta	DTC	16 May 1997	12 November 1997
50	Mauritius	DTC	5 July 1996	20 June 1997
51	Mexico	DTC	19 February 2009	22 July 2010
52	Mozambique	DTC	18 September 2007	19 February 2009
53	Namibia	DTC	18 May 1998	11 April 1999
54	Netherlands	DTC	10 October 2005	28 December 2008
		Protocol	8 July 2008	28 December 2008
55	New Zealand	DTC	6 February 2002	23 July 2004
56	Nigeria	DTC	29 April 2000	5 July 2008
57	Norway	DTC	12 February 1996	12 September 1996
58	Oman	DTC	9 October 2002	29 December 2003
59	Pakistan	DTC	26 January 1998	9 March 1999
60	Poland	DTC	10 November 1993	5 December 1995
61	Portugal	DTC	13 November 2006	22 October 2008
62	Romania	DTC	12 November 1993	21 October 1995
63	Russia	DTC	27 November 1995	26 June 2000
64	Rwanda	DTC	5 December 2002	3 August 2010
65	San Marino	TIEA	10 March 2011	28 January 2012
66	Saudi Arabia	DTC	13 March 2007	1 May 2008
67	Seychelles	DTC	26 August 1998	29 July 2002
		Protocol	5 April 2011	15 May 2012
68	Sierra Leone	DTC	5 November 1954	5 October 1960
69	Singapore	DTC	23 December 1996	5 December 1997
70	Slovak Republic	DTC	28 May 1998	30 June 1999
71	Spain	DTC	26 June 2006	28 December 2007
72	Sudan	DTC	7 November 2007	
73	Swaziland	DTC	23 January 2004	8 February 2005
74	Sweden	DTC	24 May 1995	25 December 1995
75	Switzerland	DTC	8 May 2007	27 January 2009

	Jurisdiction	Type of EoI arrangement	Date signed	Date entered into force
76	Tanzania	DTC	22 September 2005	15 June 2007
77	Thailand	DTC	12 February 1996	27 August 1996
78	Tunisia	DTC	2 February 1999	10 December 1999
79	Turkey	DTC	3 March 2005	6 December 2006
80	Uganda	DTC	27 May 1997	9 April 2001
81	Ukraine	DTC	28 August 2003	29 December 2004
82	United Kingdom	DTC	4 July 2002	17 December 2002
		Protocol	8 November 2010	13 October 2011
83	United States	DTC	17 February 1997	28 December 1997
84	Zambia	DTC	22 May 1956	31 August 1956
85	Zimbabwe	DTC	10 June 1965	3 September 1965

Annex 3: List of All Laws, Regulations and Other Material Consulted

Commercial laws

Close Corporations Act, 1984

Companies Act, 1973

Companies Act, 2008

Co-operatives Act, 2005

Regulations GNR 351 Companies Act

Regulations GNR 366 Co-operatives Act

Regulations GNR 1540 Trust Property Control Act

Trust Property Control Act, 1988

Financial sector laws

Banks Act, 1990

Co-operative Banks Act, 2007

Currency and Exchange, 1933

Financial Intelligence Centre Act, 2001

Kwazulu Natal Ithala Development Finance Act, 1999

Mutual Banks Act, 1993

Securities Services Act, 2004

South African Postbank Limited Act, 2010

South African Reserve Bank Act, 1989

Regulations GNR 3 Banks Act

Regulations GNR 8 Currency and Exchange Act

Regulations GNR 1595 Financial Intelligence Centre Act

Taxation laws

Business Process Manual: Exchange of Information

Income Tax Act, 1962

South African Revenue Service Act, 1997

Tax Administration Bill 11B-2011 NA

Value-Added Tax Act, 1991

Miscellaneous

Adjustment of Fines Act, 1991

Attorneys Act, 1979

Constitution of the Republic of South Africa, 1996

Interpretation Act, 1957

Annex 4: People Interviewed During On-Site Visit

South African Revenue Service

Chief Officer: Legal and Policy
Group Executive: Legislative Research & Development
Senior Manager: International Development & Treaties
Senior Manager: Enforcement
Senior Manager
Manager: International Development & Treaties
Team Leader: Collections Operations
Senior Specialist: Tax Researcher
Senior Specialist: Legal
Specialist: Corporate Income Tax Researcher
Specialist: International Tax
Specialist: Interpretation Tax
Specialist: Transfer Pricing

National Treasury

Two Directors: International Tax

Department of Justice and Constitutional Development

Chief Master of the High Court of South Africa
Deputy Master of the North Gauteng High Court, Pretoria

Department of Trade and Industry

Two Deputy Directors: Cooperatives

Commercial Law and Policy

Companies and Intellectual Property Commission

Specialist: Corporate Law

Senior Manager: Cooperatives

South African Reserve Bank

Two Senior Financial Surveillance Officers: Financial Surveillance Department

Financial Services Board

Head: Legal & Policy

Team Manager: Collective Investment Schemes

Senior Legal Advisor: Collective Investment Schemes

Senior Manager: Capital Markets

Manager: Capital Markets

Manager: FAIS Supervision

Head: Pensions Registration and licensing

Manager: Pensions Registration and licensing

Financial Intelligence Centre

Senior Manager: Legal & Policy

Senior Manager: Compliance & Prevention

Operations Manager: Monitoring & Analysis

Senior Legal & Policy Advisor

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Global Forum on Transparency and Exchange of Information for Tax Purposes

PEER REVIEWS, COMBINED: PHASE 1 + PHASE 2 SOUTH AFRICA

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 100 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.

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 plus Phase 2 – reviews. 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 visit ***www.oecd.org/tax/transparency*** and ***www.eoi-tax.org.***

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