



Exchange of Information on Request

HANDBOOK FOR PEER REVIEWS 2016-2020
2016 Note on assessment criteria

GLOBAL FORUM ON TRANSPARENCY
AND EXCHANGE OF INFORMATION FOR TAX PURPOSES



2016 Note on assessment criteria

Introduction

1. The Global Forum's Terms of Reference as updated for the second round of reviews to begin in 2016 (the 2016 Terms of Reference) are high level requirements that provide clear guideposts for jurisdictions to follow in implementing the international standard for exchange of information on request (EOIR). The G20 leaders have consistently encouraged a rapid implementation of the standard of EOI on Request and in 2014 adopted a new standard for automatic exchange of information (AEOI). The AEOI standard will be evaluated in accordance with its own dedicated Terms of Reference, Methodology and Schedule of Reviews.
2. The Global Forum's core mandate is to assess its members and relevant non-members through peer reviews to ensure a rapid implementation of the standards world-wide. The procedures that apply to these EOIR assessments are contained in the 2016 Methodology for Peer Reviews and Non-Member Reviews (the 2016 Methodology). The EOIR assessment criteria set out in this note provide the general form and content of the outcome of those assessments.
3. A variety of considerations have an impact on the choices made in designing an assessment system, from theoretical and substantive factors to practical concerns inherent in any undertaking of this nature. Consistency is of essence in ensuring the transparency and credibility of the Global Forum's peer review exercise, and the precedents established by the PRG and adopted by the Global Forum are a key component of any future results. Ultimately, the goal is to create a system that can be fairly and efficiently applied and which encourages continuing progress towards effective exchange of information across a broad universe of jurisdictions each having its own unique characteristics.

Background

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

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

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

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

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

1. Structure of the assessment system

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

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

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

Evaluation of a jurisdiction's legal and regulatory framework

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

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

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

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

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

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

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

Evaluating the effectiveness of EOIR in practice

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

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

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

Rating the individual elements

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

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

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

- i. The rating should take into account both the evaluation of the legal and regulatory framework (i.e. the determination of the element) and the effectiveness of EOIR in practice.
- ii. Where there are no in-box recommendations regarding EOIR in practice, a determination of In Place should generally be determinative and lead to a rating of Compliant for a particular element.
- iii. Where a determination of In Place is accompanied by in-box recommendations regarding EOIR in practice, then the rating will depend on the seriousness of the recommendations.
- iv. In the absence of any Phase 2 in-box recommendation, an element which had been determined *Not in Place* will generally be rated as *Non-Compliant* – a rating of *Partially Compliant* would only be justified where there is positive evidence that effective exchange of information was nonetheless occurring despite the particular legal and regulatory framework issues identified.

- v. An element determined as Needs Improvement would not be expected to lead to a rating of Non-Compliant where there are no in-box recommendations regarding major gaps in practical implementation.
- vi. In assigning ratings (particularly in relation to element C.5) attention must be paid to the nature, complexity and scale of information requests made or received by the jurisdiction.

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

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

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

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

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

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

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

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

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

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

Overall rating

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

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

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

- i. Where the ratings for individual elements are all Compliant this should lead to an overall Compliant rating.
- ii. Where one or more elements are rated as Non-Compliant it is expected that the overall rating would not be Compliant.
- iii. Where two or more elements are Largely Compliant, then generally the overall rating would not be higher than Largely Compliant.
- iv. Where three or more elements are Partially Compliant then generally the overall rating would not be higher than Partially Compliant.

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

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

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

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

Recommendations and the presentation of ratings and determinations

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

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

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

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

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

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

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

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

II. Guidance in addressing some structural and horizontal issues

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

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

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

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

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

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

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

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

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

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

Revisiting the outcomes of previous reviews

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

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

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

Jurisdiction's failure to respond to recommendations made

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

Monitoring recommendations

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

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

When to introduce monitoring recommendations

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

Monitoring recommendations for new laws or practices

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

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

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

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

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

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

How jurisdictions can satisfy a monitoring recommendation

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

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

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

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

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

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

Double-counting of deficiencies in different elements

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

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

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

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

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

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

The use of statistics as a measure of compliance

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

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

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

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

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

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

Evaluation of the requests made

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

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

Complexity of requests

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

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

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

Relevant taxes

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

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

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

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

Reasonable measures to ensure information on trusts

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

Weight given to peer comments

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

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

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