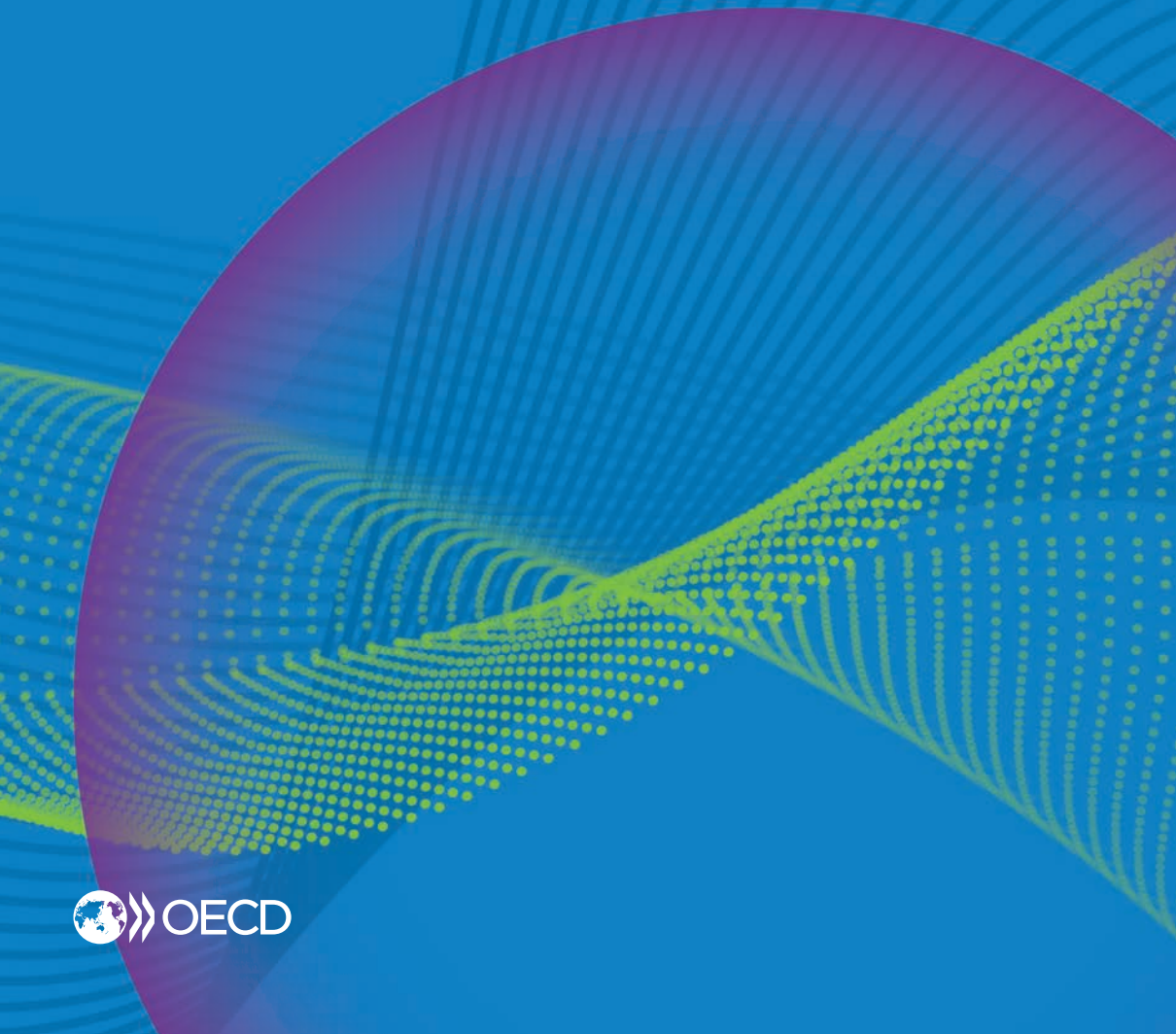
GLOBAL FORUM ON

TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

Peer Review Report on the Exchange of Information on Request

KENYA

2021 (Second Round, Phase 1)



OECD

Global Forum on Transparency and Exchange of Information for Tax Purposes: Kenya 2021 (Second Round, Phase 1)

PEER REVIEW REPORT ON THE EXCHANGE OF INFORMATION ON REQUEST



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Reader's guide

The Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum) is the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by over 160 jurisdictions that participate in the Global Forum on an equal footing. The Global Forum is charged with the in-depth monitoring and peer review of the implementation of the international standards of transparency and exchange of information for tax purposes (both on request and automatic).

Sources of the Exchange of Information on Request standards and Methodology for the peer reviews

The international standard of exchange of information on request (EOIR) is primarily reflected in the 2002 OECD Model Agreement on Exchange of Information on Tax Matters and its commentary, Article 26 of the OECD Model Tax Convention on Income and on Capital and its commentary and Article 26 of the United Nations Model Double Taxation Convention between Developed and Developing Countries and its commentary. The EOIR standard provides for exchange on request of information foreseeably relevant for carrying out the provisions of the applicable instrument or to the administration or enforcement of the domestic tax laws of a requesting jurisdiction. Fishing expeditions are not authorised but all foreseeably relevant information must be provided, including ownership, accounting and banking information.

All Global Forum members, as well as non-members that are relevant to the Global Forum's work, are assessed through a peer review process for their implementation of the EOIR standard as set out in the 2016 Terms of Reference (ToR), which break down the standard into 10 essential elements under three categories: (A) availability of ownership, accounting and banking information; (B) access to information by the competent authority; and (C) exchanging information.

The assessment results in recommendations for improvements where appropriate and an overall rating of the jurisdiction's compliance with the EOIR standard based on:

1. The implementation of the EOIR standard in the legal and regulatory framework, with each of the element of the standard determined to be either (i) in place, (ii) in place but certain aspects need improvement, or (iii) not in place.
2. The implementation of that framework in practice with each element being rated (i) compliant, (ii) largely compliant, (iii) partially compliant, or (iv) non-compliant.

The response of the assessed jurisdiction to the report is available in an annex. Reviewed jurisdictions are expected to address any recommendations made, and progress is monitored by the Global Forum.

A first round of reviews was conducted over 2010-16. The Global Forum started a second round of reviews in 2016 based on enhanced Terms of Reference, which notably include new principles agreed in the 2012 update to Article 26 of the OECD Model Tax Convention and its commentary, the availability of and access to beneficial ownership information, and completeness and quality of outgoing EOI requests. Clarifications were also made on a few other aspects of the pre-existing Terms of Reference (on foreign companies, record keeping periods, etc.).

Whereas the first round of reviews was generally conducted in two phases for assessing the legal and regulatory framework (Phase 1) and EOIR in practice (Phase 2), the second round of reviews combine both assessment phases into a single review. For the sake of brevity, on those topics where there has not been any material change in the assessed jurisdictions or in the requirements of the Terms of Reference since the first round, the second round review does not repeat the analysis already conducted. Instead, it summarises the conclusions and includes cross-references to the analysis in the previous report(s). Information on the Methodology used for this review is set out in Annex 3 to this report.

Consideration of the Financial Action Task Force Evaluations and Ratings

The Financial Action Task Force (FATF) evaluates jurisdictions for compliance with anti-money laundering and combating terrorist financing (AML/CFT) standards. Its reviews are based on a jurisdiction's compliance with 40 different technical recommendations and the effectiveness regarding 11 immediate outcomes, which cover a broad array of money-laundering issues.

The definition of beneficial owner included in the 2012 FATF standards has been incorporated into elements A.1, A.3 and B.1 of the 2016 ToR. The 2016 ToR also recognises that FATF materials can be relevant for carrying out EOIR assessments to the extent they deal with the definition of beneficial ownership, as the FATF definition is used in the 2016 ToR (see 2016 ToR, Annex 1, part I.D). It is also noted that the purpose for which the FATF materials have been produced (combating money-laundering and terrorist financing) is different from the purpose of the EOIR standard (ensuring effective exchange of information for tax purposes), and care should be taken to ensure that assessments under the ToR do not evaluate issues that are outside the scope of the Global Forum's mandate.

While on a case-by-case basis an EOIR assessment may take into account some of the findings made by the FATF, the Global Forum recognises that the evaluations of the FATF cover issues that are not relevant for the purposes of ensuring effective exchange of information on beneficial ownership for tax purposes. In addition, EOIR assessments may find that deficiencies identified by the FATF do not have an impact on the availability of beneficial ownership information for tax purposes; for example, because mechanisms other than those that are relevant for AML/CFT purposes exist within that jurisdiction to ensure that beneficial ownership information is available for tax purposes.

These differences in the scope of reviews and in the approach used may result in differing conclusions and ratings.

More information

All 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 reports, please refer to www.oecd.org/tax/transparency and http://dx.doi.org/10.1787/2219469x.

Abbreviations and acronyms

2016 ToR	Terms of Reference related to EOIR, as approved by the Global Forum in October 2015 and amended in 2020
AML	Anti-Money Laundering
AML/CFT	Anti-Money Laundering and Combatting the Financing of Terrorism
BRS	Business Registration Service
CBK	Central Bank of Kenya
CDD	Customer Due Diligence
CMA	Capital Markets Authority
DNFBP	Designated Non-Financial Businesses and Professions
DTC	Double Taxation Convention
EOI	Exchange of Information
EOIR	Exchange of Information on Request
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
FATF	Financial Action Task Force
Global Forum	Global Forum on Transparency and Exchange of Information for Tax Purposes
ITA	Income Tax Act 1973
KES	Kenyan Shilling
KRA	Kenyan Revenue Authority
Multilateral Convention	Convention on Mutual Administrative Assistance in Tax Matters, as amended in 2010

PIN	Personal identification number
POCAMLA	Proceeds of Crime and Anti-Money Laundering Act
POCAML Regulations	Regulations made under the Proceeds of Crime and Anti-Money Laundering Act
TIEA	Tax Information Exchange Agreement
TPA	Tax Procedure Act 2015

Executive summary

1. This report analyses the implementation of the standard of transparency and exchange of information on request in Kenya on the second round of reviews conducted by the Global Forum. Because of the COVID-19 pandemic, the onsite visit that was scheduled to take place in the first half of 2021 was cancelled. The present report therefore assesses the legal and regulatory framework in force as at 31 August 2021 against the 2016 Terms of Reference (Phase 1). The assessment of the practical implementation of the legal framework of Kenya will take place separately at a later time (Phase 2 review).

2. This report concludes that overall Kenya has a legal and regulatory framework in place but that needs improvement since it generally ensures the availability, access and exchange of all relevant information for tax purposes in accordance with the standard, but needs improvements in several areas.

3. In 2016, the Global Forum evaluated Kenya in a combined review against the 2010 Terms of Reference for both the legal implementation of the EOIR standard as well as its operation in practice. That report of that evaluation (the 2016 Report) concluded that Kenya was rated Largely Compliant overall (see Annex 3 for details).

Comparison of ratings and determinations for First Round Report and Second Round Report

	First Round Report (2016)		Second Round Report Phase 1 (2021)
Element	**Determinations**	**Ratings**	**Determinations**
A.1 Availability of ownership and identity information	Needs improvement	Largely Compliant	Needs improvement
A.2 Availability of accounting information	In place	Largely Compliant	In place
A.3 Availability of banking information	In place	Compliant	Needs improvement
B.1 Access to information	In place	Compliant	In place
B.2 Rights and Safeguards	In place	Compliant	In place
C.1 EOIR Mechanisms	Needs improvement	Largely Compliant	In place
C.2 Network of EOIR Mechanisms	Needs improvement	Partially Compliant	In place

Element	First Round Report (2016)		Second Round Report Phase 1 (2021)
	Determinations	Ratings	Determinations
C.3 Confidentiality	In place	Compliant	In place
C.4 Rights and safeguards	In place	Compliant	In place
C.5 Quality and timeliness of responses	Not applicable	Partially Compliant	Not applicable
OVERALL RATING	Largely Compliant		Not applicable

Note: The three-scale determinations for the legal and regulatory framework are In place, In place but certain aspects of the legal implementation of the element need improvement (needs improvement), and Not in place. The four-scale ratings on compliance with the standard (capturing both the legal framework and practice) are Compliant, Largely Compliant, Partially Compliant, and Non-Compliant.

Progress made since previous review

4. The 2016 Report concluded that the legal and regulatory framework of Kenya was in place but needed improvement, with several recommendations made. The issues related to: a lack of an obligation for all nominees to maintain relevant ownership and identity information when acting as legal owners on behalf of other persons (element A.1); the availability of ownership, identity and accounting information for trusts (elements A.1 and A.2); delays in ratification of some agreements and a small number of agreements not in line with the standard (element C.1); and a limited EOI network with lengthy negotiation periods for new agreements (element C.2).

5. Kenya has not made progress on the transparency aspects, but did on exchange. Kenya became a Party to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the Multilateral Convention) in 2020, which significantly enhanced its EOI network. The recommendation in relation to the agreements not in line with the standard is consequently redundant and the recommendations in relation to C.2 are addressed.

Key recommendations

6. As noted above, Kenya has addressed some recommendations, however the recommendations related to nominees and ownership and accounting records for trusts continue to apply. Accounting information may not always be available for trusts generally.

7. Additionally, the 2016 Terms of Reference contain added requirements in respect of the availability of beneficial ownership information.

Kenya has a centralised register for collecting legal and beneficial ownership for companies, however there is uncertainty on the interpretation of beneficial owners under companies law and anti-money laundering (AML) law, and the frequency of updating of AML information is also unclear. Beneficial ownership information on trusts and partnerships may not be available in all cases. An analysis including the practical aspects of the implementation of the standard by Kenya will be conducted in the "Phase 2" review at a later stage.

Exchange of information

8. Kenya can currently exchange information on request with 130 partners, through 15 double taxation conventions and the Multilateral Convention. The EOI mechanisms that Kenya has in place have no material deficiencies so no in-box recommendation has been made on the EOI framework in place. Over the last few years, Kenya received 69 EOI requests and sent 77 requests, with an increased volume recently, when the Multilateral Convention entered into force. The main exchange partners have been France, Germany, Norway, the United Arab Emirates and the United Kingdom. The comments received from peers for this review indicate general satisfaction with the information provided by Kenya, although there have been a small number of issues with receipt of inward communication. The assessment of EOI in practice is not covered by this report and will be subject to a future Phase 2 review, to be organised as soon as travel conditions allow the assessment team to conduct the on-site visit to Kenya.

Next steps

9. This review assesses only the legal and regulatory framework of Kenya for transparency and exchange of information on request. Kenya has achieved a determination of "in place" for elements A.2, B.1, B.2, C.1, C.2, C.3 and C.4 and "in place but needs improvement" for A.1 and A.3. The rating for each element and the Overall Rating will be issued once the Phase 2 review is completed.

10. This report was approved at the Peer Review Group of the Global Forum on 2 November 2021 and was adopted by the Global Forum on 18 November 2021. A follow up report on the steps undertaken by Kenya to address the recommendations made in this report should be provided to the Peer Review Group no later than 30 June 2022 and thereafter in accordance with the procedure set out under the 2016 Methodology, as amended in December 2020.

Summary of determinations, ratings and recommendations

Determinations	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that ownership and identity information, including information on legal and beneficial owners, for all relevant entities and arrangements is available to their competent authorities *(ToR A.1)*		
The legal and regulatory framework is in place but needs improvement	With respect to the anti-money laundering (AML) framework, while the principal elements required by the standard with respect to the identification of beneficial owner(s) of legal entities are present, the law does not specifically indicate that control includes any person who controls the company acting directly or indirectly, and acting individually or jointly.	Kenya should ensure that the definition of beneficial owner in the AML framework is in line with the standard.
	With respect to the companies law definition of beneficial owner, while the principal elements required by the standard with respect to the identification of beneficial owner(s) of legal entities are present, the law does not specifically indicate that control includes any person who controls the company acting individually or jointly. In addition, the requirement to identify persons holding a senior managerial position when the beneficial owner cannot be identified is not contemplated in the definition.	Kenya should ensure that the definition of beneficial owner for companies law purposes is in line with the standard.

Determinations	Factors underlying recommendations	Recommendations
The legal and regulatory framework is in place but needs improvement *(continued)*	In respect of the new obligations for companies to maintain a beneficial ownership register, there is no requirement for disclosure of nominee status to assist the company or Registrar to determine the beneficial ownership of companies. Other means of identifying persons on whose behalf nominees act also have incomplete coverage. Specifically, under the AML framework, only professional nominees and reporting institutions have an obligation to conduct CDD on their customers. The Income Tax Act requires nominees to provide beneficial ownership information to the Kenyan Revenue Authority in the case of a change to this information, however this requirement may not require nominees to have beneficial ownership available in all cases.	An obligation should be established for all nominees to maintain relevant ownership and identity information in line with the standard where they act as the legal owners on behalf of any other persons and disclose their nominee status to the company.
	Ownership and identity information may not consistently be available with respect to all settlors, trustees, protector (if any) and beneficiaries of all trusts in Kenya and there may be situations where beneficial ownership of trusts would not be available when a company holds any of those roles in relation to a trust.	Kenya should ensure that the availability of beneficial ownership and identity information in respect of trusts is in line with the standard.
	Kenya relies upon the AML framework as the basis for availability of beneficial ownership of partnerships, however there is no requirement for partnerships to engage an AML-obliged person. Furthermore, beneficial ownership information may not be available when a partner is a company. Consequently, there may be situations where beneficial ownership of partnerships would not be available.	Kenya should ensure that beneficial ownership information in line with the standard is always available for all partnerships.

Determinations	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements *(ToR A.2)*		
The legal and regulatory framework is in place	Trustees of Kenyan trusts and foreign trusts are only statutorily required to maintain accounting records where the trust derives income subject to tax in Kenya.	Kenya should ensure that trustees of all Kenyan and foreign trusts maintain accounting records even where the trust derives income not subject to tax in Kenya.
Banking information and beneficial ownership information should be available for all account-holders *(ToR A.3)*		
The legal and regulatory framework is in place but needs improvement	With respect to the anti-money laundering (AML) framework, while the principal elements required by the standard with respect to the identification of beneficial owner(s) of legal entities are present, the law does not specifically indicate that control includes any person who controls the company acting directly or indirectly, and acting individually or jointly.	Kenya should ensure that the definition of beneficial owner in the AML framework is in line with the standard.
	There is no specified frequency of updating beneficial ownership information; so there could be situations where the available beneficial ownership information is not up to date.	Kenya should ensure that up-to-date beneficial ownership information on all bank accounts in line with the standard is available at all times.
Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information) *(ToR B.1)*		
The legal and regulatory framework is in place		
The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information *(ToR B.2)*		
The legal and regulatory framework is in place		

Determinations	Factors underlying recommendations	Recommendations
Exchange of information mechanisms should provide for effective exchange of information *(ToR C.1)*		
The legal and regulatory framework is in place		
The jurisdictions' network of information exchange mechanisms should cover all relevant partners *(ToR C.2)*		
The legal and regulatory framework is in place		
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received *(ToR C.3)*		
The legal and regulatory framework is in place		
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties *(ToR C.4)*		
The legal and regulatory framework is in place		
The jurisdiction should request and provide information under its network of agreements in an effective manner *(ToR C.5)*		
Legal and regulatory framework	This element involves issues of practice. Accordingly, no determination on the legal and regulatory framework has been made.	

Overview of Kenya

11. This overview provides some basic information about Kenya that serves as context for understanding the analysis in the main body of the report. The Republic of Kenya (Kenya) is a country with a population of over 53 million that lies across the Equator on the east coast of Africa. It had a gross domestic product (GDP) of KES 9.7 trillion (EUR 85.9 billion) in 2019.[1] The official currency is the Kenyan Shilling (KES).[2]

Legal system

12. The Republic of Kenya is a unitary State divided into 47 counties. There are two levels of Government – the National Government and the 47 County Governments. Counties have some limited powers to make certain laws, though not with respect to taxation, the financial sector or corporate matters.

13. The Kenyan Constitution defines the country's main fundamental rights and guarantees, organisational structure, hierarchy of laws and separation of the government's autonomous powers into legislative, executive and judiciary powers, exercised at national and county levels.

14. The President, who is popularly and directly elected every five years, appoints the Cabinet of Ministers and together they exercise executive power. Legislative power is exercised by the Kenyan Parliament which is a bicameral house consisting of the National Assembly and the Senate.

15. The Kenyan Constitution is the supreme law and any other law that is inconsistent with the Constitution, shall, to the extent of the inconsistency, be null and void. Kenya is a common law jurisdiction which derives its laws from common law and Kenyan statutes. A national law will prevail over county legislation. A law which is later in time will revoke an older

1. Source of GDP: Central Bank of Kenya.
2. Exchange rate on 31 December 2019, EUR 1 = KES 113.37; Source: Central Bank of Kenya.

law of equal hierarchy. International treaties and conventions on tax matters will always prevail over domestic law, provided that they do not violate the Constitution or its complementary laws.

16. The Supreme Court of Kenya is the highest court. The Supreme Court receives appeals from the Court of Appeal in any case involving the interpretation or application of the Constitution and in any other case in which the Supreme Court, or the Court of Appeal, certifies that the matter involves an issue of general public importance.

17. The Court of Appeal is the second highest court. It considers appeals from the High Court. It has original jurisdiction to punish for contempt of court, and when staying executing orders of the High Court.

18. The High Court has original jurisdiction in criminal and civil matters and to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. It has jurisdiction to hear a question in respect of interpretation of the Constitution. It also has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

19. The jurisdiction of the subordinate courts is determined on a territorial and pecuniary basis. They are presided over by magistrates. The Magistrate's Courts are in order of hierarchy: The Chief Magistrate's Court; the Senior Principal Magistrate's Court; the Principal Magistrate's Court; the Senior Resident Magistrate's Court; the Resident Magistrate's Courts; and the District Magistrate's courts.

20. The legal system has also made for provision of Tribunals which are quasi-judicial bodies that hear matters specifically allocated to them. The Tax Appeals Tribunal (TAT) set up under the Tax Appeals Tribunal Act 2013 was specifically established to hear tax disputes, and effectively serves as the forum of first instance before tax litigation can commence on a tax dispute. Where a case is referred directly to the Courts, circumventing the pre-litigation procedure set out by the TAT, the Courts may refer that matter back to the TAT.

21. The principal pieces of legislation governing tax litigation are: the Tax Procedures Act; the Tax Appeals Tribunal Act; the Tax Appeals Tribunal (Appeals to the High Court) Rules 2015; the Tax Appeals Tribunal Procedure Rules 2015; and the Court of Appeal Rules. Depending on whether the matter is of a civil or criminal nature, the Civil Procedure Act or the Criminal Procedure Code will also apply.

Tax system

22. Kenya's national taxes include income tax, value-added tax (VAT), excise and customs duties. The Kenya Revenue Authority is charged with collecting revenue on behalf of the Government of Kenya.

23. Kenya applies both a source and residency basis for the taxation of income. Residents (companies and individuals) are subject to tax on all income that is accrued in or derived from Kenya. Where a resident company carries on business partly within and partly outside Kenya, all of that income is deemed to have accrued in or been derived from Kenya. Kenyan resident individuals are subject to tax on all employment income whether or not the income was accrued or earned in Kenya. Non-resident companies and individuals are taxed only on Kenya-source income.

24. The Kenya Income Tax Act defines individuals as resident for a year under consideration if they:

- have a permanent home in Kenya and were present in Kenya for any period in that year
- do not have a permanent home in Kenya but were present in Kenya for 183 or more days in the year; or
- do not have a permanent home in Kenya but were present in Kenya for more than 122 days on average over that year and the preceding two years.

25. A "body of persons" is resident in Kenya for an income year if it is a company incorporated under the law of Kenya, or its management and control are exercised in Kenya at any time in the income year. The Minister of Finance may also declare a company to be a resident company for any year of income.

26. Partnerships are considered tax transparent and tax is levied on the partners directly. Non-resident partners are taxable on certain income derived from Kenya. Trustees are subject to tax on income from the trust property and beneficiaries will also be subject to tax on any income received, with a credit for any tax paid by the trustee.

27. Income tax is charged on the profits of companies at 30% for resident companies and 37.5% for non-resident companies. Withholding tax is applicable to interest, dividends, royalties, management fees and some other payments. The rates of withholding tax vary and also depend on the residency status of the recipient. Capital gains tax is charged at 5% on gains made from the transfer of property.

Financial services sector

28. Kenya's financial sector contributed just under 5% of its national GDP in 2019. It included 39 commercial banks and mortgage finance companies and 13 microfinance banks, with total net assets of KES 4 832 billion (EUR 42.6 billion).[3] There were also 9 representative offices of foreign banks, 69 forex bureaus, 19 money remittance providers, 56 insurers, 5 re-insurers and 3 credit reference bureaus. Kenya is not an international financial centre as the financial sector is primarily domestically oriented.

29. The financial sector is principally regulated and supervised by two authorities. The Central Bank of Kenya (CBK) and the Capital Markets Authority (CMA). The CBK is responsible for banks, including microfinance banks and branches of foreign banks. All banks must be licensed by the CBK and are subject to the Banking Law.

30. The Capital Markets Authority (CMA) is responsible for licensing capital market institutions and market intermediaries, including securities exchanges, central depositories, investment banks, collective investment schemes, stockbrokers, fund managers, investment advisers, securities dealers and depositories (custodians). The CMA is established under the Capital Markets Act and the regulatory regime for capital market institutions and intermediaries is principally provided by that law. The CMA also regulates commodities exchanges, for example the Nairobi Coffee exchange.

31. There is currently one securities exchange in Kenya – the Nairobi Securities Exchange (NSE). Securities traded on the NSE are shares, bonds, Exchange Traded Funds and Real Estate Investment Trusts (REITs). On 30 July 2021, there were 62 companies listed on the NSE. Any person intending to trade in shares that are listed on the NSE must open a central depository account.

Anti-Money Laundering Framework

32. The Kenyan Anti-Money Laundering and Combatting the Financing of Terrorism (AML/CFT) framework is based on the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) and Regulations made under that Act (POCAML Regulations), as well as the Prevention of Terrorism Act (POTA) and Regulations made under that Act (POT Regulations). These laws are complemented by other instruments including the Central Bank of Kenya Prudential Guidelines on Proceeds of Crime and Money Laundering (Prevention) and Combating the Financing of Terrorism (CBK/PG/08) and the

3. On 31 December 2019. Source: Central Bank of Kenya.

Capital Markets Authority Guidelines on Prevention of Money Laundering and Terrorism Financing in the Capital Markets (CMA Guidelines 2015).

33. The Financial Action Task Force (FATF) and the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) review the compliance of Kenya's financial sector with the AML/CFT standard. The ESAAMLG undertook the last mutual evaluation of Kenya, which was adopted in September 2011.

34. Since then, Kenya has submitted several annual progress reports in line with the ESAAMLG post-evaluation procedures with the latest publicly available progress report[4] being for the year ending July 2018. That report examined progress with the six remaining Recommendations from previous reports that had a rating of NC or PC, namely Recommendations 12, 16, 21, 24, 33 and 34, as numbered at the time of the original mutual evaluation adopted in 2011.[5] All six Recommendations subject to review had a rating of NC and the report concluded that the recommendations had not been sufficiently addressed at that time. The outstanding recommendations of particular relevance to this report relate to what is now under the FATF Recommendations 2012 Recommendation 25 (Transparency and Beneficial Ownership of Legal Arrangements). The deficiencies identified relate to the lack of coverage of certain AML/CFT obligations in relation to Designated Non-Financial Businesses and Professionals (DNFBPs), specifically lawyers, notaries, certified public secretaries and other legal professionals, and a lack of a mechanism in place for accessing beneficial ownership information and control of trusts.

Recent developments

35. The Companies Act was amended in 2019 to make it mandatory for all companies registered in Kenya to keep a register of their beneficial owners. The Companies (Beneficial Ownership Information) Regulations were issued in February 2020 to require companies to lodge a copy of the register of beneficial ownership with the Registrar of Companies. A Bill to

4. Accessible here: https://www.esaamlg.org/index.php/Countries/readmore_members/Kenya.

5. Numbering based on the FATF Recommendations 2003. The corresponding FATF Recommendations 2012 are respectively Recommendation 22 (DNFBP – Customer Due Diligence), Recommendation 23 (DNFBPs – Other Measures), Recommendation 19 (Higher Risk Countries), Recommendation 28 (Regulatory Supervision of DNFBPs, Recommendation 24 (Transparency of Beneficial Ownership of Legal Persons) and Recommendation 25 (Transparency of Beneficial Ownership of Legal Arrangements).

amend the Limited Liability Partnerships law to require beneficial ownership information to be kept has been prepared but not yet submitted to Parliament.

36. Kenya deposited its instruments of ratification of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters on 22 July 2020. The Multilateral Convention entered into force in November 2020 in Kenya.

Part A: Availability of information

37. Sections A.1, A.2 and A.3 evaluate the availability of legal and beneficial ownership and identity information for relevant entities and arrangements, the availability of accounting information and the availability of banking information.

A.1. Legal and beneficial ownership and identity information

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

38. The 2016 Report concluded that Kenya's legal and regulatory framework generally ensured the availability of legal ownership and identity information for relevant entities and arrangements, but some aspects needed improvement. The 2016 Report noted that an obligation should be established for all nominees to maintain relevant ownership and identity information where they act as legal owners on behalf of other persons, and Kenya should ensure that the availability of ownership and identity information is available in respect of trusts in all cases.

39. In respect of the recommendation for nominees to maintain relevant ownership and identity information, this has not been addressed. While the introduction of requirements to maintain information on beneficial owners has the potential to improve the availability of information on nominee arrangements, there is no obligation upon nominees to disclose their status. A revised recommendation has therefore been retained.

40. The recommendation in relation to the availability of ownership and identity information for trusts has substantially not been addressed. The anti-money laundering framework was amended in 2018 to extend customer due diligence (CDD) obligations to trust and company service providers, however there is no requirement for trusts to maintain a relationship with such service providers and the general practice is not to do so.

41. Not discussed in the 2016 Report, but now an integral part of the standard as strengthened in 2016, is the availability of beneficial ownership information on all relevant entities and arrangements. In Kenya, amendments to the Companies Act in 2019 require companies to keep a register of beneficial owners and lodge a copy with the Registrar of Companies. Initially the deadline to lodge was 31 January 2021, but this was extended to 31 July 2021. In relation to legal arrangements, gaps remain on the availability of beneficial ownership information for partnerships and trusts.

42. The conclusions are as follows:

Legal and Regulatory Framework: in place, but certain aspects of the legal implementation of the element need improvement

Deficiencies identified/Underlying factor	Recommendations
With respect to the anti-money laundering (AML) framework, while the principal elements required by the standard with respect to the identification of beneficial owner(s) of legal entities are present, the law does not specifically indicate that control includes any person who controls the company acting directly or indirectly, and acting individually or jointly.	Kenya should ensure that the definition of beneficial owner in the AML framework is in line with the standard.
With respect to the companies law definition of beneficial owner, while the principal elements required by the standard with respect to the identification of beneficial owner(s) of legal entities are present, the law does not specifically indicate that control includes any person who controls the company acting individually or jointly. In addition, the requirement to identify persons holding a senior managerial position when the beneficial owner cannot be identified is not contemplated in the definition.	Kenya should ensure that the definition of beneficial owner for companies law purposes is in line with the standard.
In respect of the new obligations for companies to maintain a beneficial ownership register, there is no requirement for disclosure of nominee status to assist the company or Registrar to determine the beneficial ownership of companies. Other means of identifying persons on whose behalf nominees act also have incomplete coverage. Specifically, under the AML framework, only professional nominees and reporting institutions have an obligation to conduct CDD on their customers. The Income Tax Act requires nominees to provide beneficial ownership information to the Kenyan Revenue Authority in the case of a change to this information, however this requirement may not require nominees to have beneficial ownership available in all cases.	An obligation should be established for all nominees to maintain relevant ownership and identity information in line with the standard where they act as the legal owners on behalf of any other persons and disclose their nominee status to the company.

Deficiencies identified/Underlying factor	Recommendations
Ownership and identity information may not consistently be available with respect to all settlors, trustees, protector (if any) and beneficiaries of all trusts in Kenya and there may be situations where beneficial ownership of trusts would not be available when a company holds any of those roles in relation to a trust.	Kenya should ensure that the availability of beneficial ownership and identity information in respect of trusts is in line with the standard.
Kenya relies upon the AML framework as the basis for availability of beneficial ownership of partnerships, however there is no requirement for partnerships to engage an AML-obliged person. Furthermore, beneficial ownership information may not be available when a partner is a company. Consequently, there may be situations where beneficial ownership information of partnerships would not be available.	Kenya should ensure that beneficial ownership information in line with the standard is always available for all partnerships.

Practical Implementation of the Standard: The assessment team is not in a position to issue a rating on this element, as it involves issues of practice that are dealt with in the Phase 2 review.

The Phase 2 recommendations issued in the 2016 Report are reproduced below for the information of readers.

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

A.1.1. Availability of legal and beneficial ownership information for companies

43. The 2016 Report described the types of companies that may be incorporated under the Companies Act. On 30 June 2020 there were 592 557 private limited companies, 4 275 public limited companies and 1 480 companies limited by guarantee. In addition, there were 4 981 foreign companies who were registered with the Registrar of Companies, as is required when carrying on business in Kenya.

44. The 2016 Report concluded that legal ownership and identity information for domestic companies was generally ensured by the requirement for the company to keep an up-to-date register. A copy of this register is also required to be lodged with the Registrar.

45. Foreign companies wishing to carry on business in Kenya must register with the Registrar and provide a list of their shareholders, which is updated when annual returns are lodged. The availability of legal ownership and identity information on companies is complemented by tax registration requirements and the AML framework, which were also described in the 2016 Report and all of these requirements remain the case.

Legal Ownership and Identity Information Requirements

46. The following table shows a summary of the legal requirements to maintain legal ownership information in respect of companies:

Companies covered by legislation regulating legal ownership information[6]

Type	Company Law	Tax Law	AML Law
Private limited company	All	Some	Some
Public limited company	All	Some	Some
Company limited by guarantee	All	Some	Some
Foreign companies (tax resident)	All	Some	Some

6. The table shows each type of entity and whether the various rules applicable require availability of information for "all" such entities, "some" or "none". "All" means that every entity of this type created is required to maintain ownership information, whether or not the legislation meets the standard. "Some" means that an entity will be required to maintain information if certain conditions are met.

Companies Law requirements

47. Section 93 of the Companies Act continues to require domestic companies to keep a register of their members and lodge a copy with the Registrar. The company must keep the register at its registered office, the address of which is notified to the Registrar and for which any change in location must be notified within 14 days. Companies (other than public listed companies) must lodge a copy of any amendment to the register within 14 days. Failure to comply with any of these requirements is an offence, with the company and each officer of the company liable to a fine up to KES 500 000 (EUR 4 177), with further daily fines up to KES 50 000 (EUR 418) if the offence is not remedied. Entry in the register is prima facie evidence of being a shareholder and therefore being entitled to associated rights.

48. All companies must file an annual return with the Registrar. Companies must provide in the return a register of members including changes since the previous return (or in the case of a first return, changes since registration). In the case of a company with share capital, the return must include a statement of the capital paid up and the number of shares held by each member. Failure to comply with these updating requirements makes the company and each officer of the company liable to a fine up to KES 200 000 (EUR 1 671), with further daily fines up to KES 20 000 (EUR 167) until remedied.

49. The Companies Act sets a minimum period of 10 years for a company to retain ownership records, measured from the time that the relevant ownership ceases. The Companies Registrar must keep originals of documents lodged in hard copy form for at least three years after lodgement, or two years after dissolution in the case of a dissolved company. The records may only be destroyed after that time period if all of the information contained therein has been recorded in the Register. The Companies Registrar retains the underlying data in the Register indefinitely.

50. Section 974 of the Companies Act prohibits foreign companies from carrying on business in Kenya without having applied to be registered under the Act. The application must include details of the directors and shareholders. Any subsequent change in the details provided on application must be notified to the Registrar within one month. A registered foreign company must have a registered office in Kenya and notify any change within seven days. Failure to comply with these updating requirements is an offence, with the company and each officer of the company liable to a fine up to KES 200 000 (EUR 1 671), with further daily fines up to KES 20 000 (EUR 167) if the offence is not remedied.

51. A foreign company must appoint a local representative prior to registration and, in the event that such person ceases to be the local representative,

appoint another representative within 21 days. It is an offence for a registered foreign company to continue to carry on business for more than 21 days without a local representative and the company and each officer of the company will be liable to a fine up to KES 500 000 (EUR 4 177). The company may also be struck of the register.

52. The local representative is answerable for all things that the company is required to do under the Act and will be liable for any penalty imposed on the company if a Court is satisfied that they should be so liable. The local representative must notify the Registrar within one month if the registered foreign company ceases to carry on business in Kenya, has been dissolved or deregistered in its place of origin or has been placed in liquidation. In this case, the Registrar may, two years after the company ceases to be registered in Kenya, transfer its records to the Kenya National Archives where they are retained indefinitely.

53. As foreshadowed in the 2016 Report, the Business Registration Service (BRS) was created in November 2015 as an independent body to carry out various registration services including maintaining the Companies Register. The BRS administers the Companies Registry and the Companies Registrar is an official employed by the BRS. From May 2019 applications to register companies are done online through the BRS including all information required with the registration, such as ownership information.

Tax law requirements

54. The obligation for companies to register with the Kenya Revenue Authority (KRA) as described in the 2016 Report has in substance remained the same, however some legal provisions have been moved from the Income Tax Act to the Tax Procedures Act. The registration details captured by the BRS determine the relevant tax obligations of the company and since May 2019 the process has included issuance of a personal identification number (PIN) from KRA for tax obligations[7] upon successful registration at the BRS.

55. It is now section 8 of the Tax Procedures Act that imposes obligations to register for tax purposes. All companies liable to tax or who expect to be liable to tax (income tax or value added tax) must register.[8] A company that is tax resident in Kenya is liable to tax on income accrued in or derived from or deemed to be derived from Kenya and will therefore be required to be

7. Personal identification number is Kenya's term of Taxpayer Identification Number (TIN).
8. A company expecting to manufacture or import excisable goods or supply excisable services is also required to register.

registered with the KRA. A company is resident in Kenya if it is incorporated in Kenya or is managed and controlled in Kenya.

56. An application for tax registration by a company (either directly with the KRA or via the BRS) must be accompanied by a copy of the memorandum of the company which contains the names of the initial members and the number of shares owned. A company carrying on a business is required, under section 9 of the Tax Procedures Act, to notify the KRA of any change in shareholding of 10% or more within 30 days of the change. This obligation was introduced in 2014 and applies to both domestic and foreign companies carrying on business in Kenya. Ownership interests acquired prior to 2014 and changes in ownership not triggering the threshold since 2014 are not otherwise required to be notified to the KRA in a tax return or in any other notification.

57. A person registered for tax purposes is required to apply for deregistration within 30 days of ceasing to be required to register. A failure to register or deregister when required is liable to a penalty of KES 100 000 (EUR 835) for every month or part of a month of delay, up to a maximum of KES 1 000 000 (EUR 8 354).

58. As of 2020 there were 378 786 domestic companies and 1 413 foreign companies registered with the KRA, including inactive companies.

Anti-Money Laundering Law

59. Finally, legal ownership information is also maintained by reporting institutions pursuant to the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA). As described in the 2016 Report, all reporting institutions (banks, securities firms, insurance institutions and designated non-financial business or professions) are subject to the POCAMLA and must identify the true identity of their customers when entering into a business relationship or carrying out a transaction. In the case of a legal person or other body corporate, a reporting institution must identify the natural persons who manage, control or own the entity. This requirement will not capture all relevant companies as there is no obligation in Kenya to maintain a business relationship with a reporting institution.

60. The reporting institutions must maintain records for seven years after the date on which a relationship is terminated or a transaction is concluded, as the case may be. The POCAMLA was amended in 2018 to extend these CDD obligations to trust and company service providers. The Minister has the power to prescribe further persons as designated non-financial businesses or professionals but this power has not been used. More detail on the AML framework is provided in the context of beneficial ownership.

Inactive companies, companies that cease to exist, deregistration and reregistration

61. The Companies Act includes a definition of "dormant company" which is a company that has no significant accounting transactions. A significant accounting transaction is defined as a transaction that would be required to be entered into the company's accounting records. The Registrar has the power, since 2015, to strike off a company that is not carrying on business or is not in operation. No minimum period of dormancy has been specified in the Companies Act before this power can be used, however it is the Registrar's practice to use the power if the company has been inactive for five years or more. In using this power, the Registrar must give one month's notice by letter, followed by a second letter in the case of no response, giving a final notice of one month. Dormant companies remain subject to Companies Act obligations including lodging annual returns and updating ownership information. The Registrar's enforcement of the obligations of dormant companies and the use of the striking off power will be examined in the Phase 2 review (see Annex 1).

62. Companies may also be struck off the Register either upon application by the company or following liquidation procedures. Liquidators may be appointed voluntarily by members or creditors, or compulsorily by the court. Neither the Companies Act nor the Insolvency Act which governs liquidators imposes an obligation on liquidators to retain ownership records after liquidation.

63. In every case for striking off, a notice must be published in the Gazette providing a three month period to show cause to the contrary. The process concludes with a final notice in the Gazette stating that the company's name has been struck off the Register. On publication of this second notice, the company is dissolved. Despite dissolution, the liability (if any) of every officer and member of the company continues as if the company was not dissolved. The availability of ownership information required to be retained in relation to a struck-off company will be assessed in the Phase 2 review (see Annex 1).

64. The BRS is part way through an exercise called "Link A Business" under which companies must update their records in order to transfer to an electronic register. This exercise began in October 2020 and on 30 June 2021 around 45.4% of registered companies had linked. There were 349 919 registered companies that had not yet linked and it is expected that a significant number of these may be dormant. Kenya has not provided figures for dormant companies, but has stated that deregistration of companies will occur when the linking exercise has progressed further.

65. A company that has been struck off the register for inactivity or on application of the company may be restored to the Register on application by a former director or member of the company within six years of dissolution. This is conditioned on the Registrar being satisfied that:

- The company was carrying on business or in operation at the time of striking off.
- If any property had vested in the State on dissolution, the Attorney General consents to the restoration.
- The applicant has lodged all documents relating to the company as would be necessary to bring it up to date.

66. Alternatively, a company that has been struck off for inactivity, or on application of the company, or through liquidation, may be restored on application to the Court. A former director or member may apply, or various other persons with specified interests in claims against the company, or any person appearing to the Court to have an interest in the matter. The time limit within which to apply is six years from dissolution, except when the application is for the purpose of pursuing damages for personal injury or is made within 28 days of the Registrar refusing an earlier application for restoration. The Court may order restoration for any reason that it considers just and if restored, the company is taken to have continued in existence as if it had not been dissolved. The Court may direct the lodgement with the Registrar of such regulatory filings as would be necessary to bring it up to date. Kenya advised that during the review period there was one application, which was refused due to falling outside the six year time limit.

67. KRA has 203 230 inactive companies recorded on its systems. For this purpose "inactive" means a company that is not up to date with the filing of its tax returns.

Legal ownership information – Enforcement measures and oversight

68. The penalties for failing to keep or update a register of members, or failing to lodge or update the copy of the register with the Companies Registrar, were mentioned above. In addition, it is an offence to lodge false or misleading documents or to make false or misleading statements to the Registrar, and on conviction a person is liable to a fine up to KES 1 000 000 (EUR 8 354) or imprisonment for up to two years, or both.

69. The administrative penalties for failing to register or deregister with the KRA were also mentioned above. Furthermore, it is an offence to fail to register or deregister for tax purposes, fail to submit a tax return or other document, or deliberately make a false or misleading statement and on

conviction a person is liable to a fine up to KES 1 000 000 (EUR 8 354) or imprisonment for up to three years, or both.

70. Kenya has placed much reliance on the operationalisation of the BRS to enable compliance checks to be carried out. The process to register ownership records electronically as described in paragraph 64 was extended on two occasions with the last extension being until 30 June 2021. It had not been fully successful by that time. The impact of this on enforcement actions by the BRS will be reviewed in the Phase 2 review.

71. For its part, the KRA had a greater ability to enforce obligations through various requirements to be registered and have a PIN in order to carry out certain actions. The First Schedule of the Tax Procedures Act lists a range of transactions and actions for which a PIN is required. In addition to registering a company, a business name, motor vehicle or land title, a PIN is required to open an account with a financial institution, to import goods, to supply goods or services to government and public bodies, and for the stamping of instruments. The KRA may suspend or deactivate a PIN for failing to comply with its obligations, which would then prevent the company from carrying out the actions for which a PIN is required.

72. The supervisory measures and their adequacy in respect of all companies, including dormant and inactive companies will be examined in greater detail in the Phase 2 review (see Annex 1).

Availability of legal ownership information in EOIR practice

73. The implementation of the legal framework and the availability of legal ownership information on companies in practice will be examined during the Phase 2 review.

Availability of beneficial ownership information

74. The standard was strengthened in 2016 to require that beneficial ownership information be available on companies. Kenya collects some beneficial ownership information through its AML framework, but the main mechanism relied upon to meet the standard is through the Companies Registry. In order to comply with obligations under the Companies Act, domestic companies must keep beneficial ownership information and submit it and any changes to the information to the Companies Registrar. The tax law does not provide for the availability of beneficial ownership information in Kenya. The following table shows a summary of the legal requirements to maintain beneficial ownership information in respect of companies.

Companies covered by legislation regulating beneficial ownership information

Type	Company Law	Tax Law	AML Law
Private limited company	All	None	Some
Public limited company	All	None	Some
Company limited by guarantee	All	None	Some
Foreign companies (tax resident)[9]	None	None	All

Anti-Money laundering Law requirements

75. The AML framework is primarily provided by the POCAMLA and the regulations made under that Act. Section 45 of the POCAMLA requires reporting institutions to carry out CDD when entering into a business relationship or carrying out a transaction or series of transactions with an applicant. The POCAML Regulations set out further details of the due diligence requirements, including identifying the beneficial owners.

76. A reporting institution is defined to mean a financial institution and a designated non-financial business and profession. The definition of financial institution in the POCAMLA mirrors the definition contained in the standard,[10] and designated non-financial business and profession is defined to include, most relevantly:

- real estate agencies
- accountants who are sole practitioners, partners or employees within professional firms
- trust and company service providers.[11]

77. There is no obligation for all types of entities and arrangements to have a relationship with an AML obliged person. Such engagement in practice will occur through: i) banks, but there is no legal requirement to have a bank account in Kenya; and ii) the specified service providers, in the event that these are engaged. The coverage of CDD obligations therefore does not fully ensure that beneficial ownership will be available on all companies and

9. Where a foreign company has a sufficient nexus, then the availability of beneficial ownership information is required to the extent the company has a relationship with an AML-obligated service provider that is relevant for the purposes of EOIR. (Terms of Reference A.1.1 Footnote 9).
10. ToR Footnote 8, referring to FATF International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation.
11. Legal practitioners are not listed as a designated non-financial business and profession.

can only provide partial support to the Companies Law requirements that Kenya has introduced and upon which it now primarily relies for availability of beneficial ownership information. The actual coverage of the holding of bank accounts in practice will be assessed in Phase 2 of the review (see Annex 1).

78. The term "beneficial owner" is defined in the POCAML Regulations to mean:

> a person who ultimately owns or controls a customer or the person on whose behalf a transaction is being conducted, and any person who ultimately exercises effective control over a legal person or arrangement.

79. While the definition of beneficial owner refers to "person", it is clarified in Regulation 14(1)(d) that this means "natural persons". Guidelines issued by the Central Bank also confirm this meaning.[12] Regulation 14(1)(d) also requires the identification of the natural persons managing the legal person or body corporate.

80. There is no ownership threshold in the law and individuals having either ultimate ownership or control of the company through a means other than ownership appear to all be identified. This approach is consistent with the standard.

81. However, it is not clear whether "ultimately" is interpreted as meaning any person who controls the company acting directly or indirectly, and acting individually or jointly. Doubts may therefore arise as to whether beneficial ownership information is consistently obtained for all domestic and foreign companies undergoing CDD. **Kenya is recommended to ensure that the definition of beneficial owner is applied in accordance with the standard**.

82. Regulation 19 of the POCAML Regulations additionally requires the identification of natural persons having senior management positions in a legal person when carrying out CDD.

83. Regulations 12 and 14 of the POCAML Regulations require a reporting institution when entering into a business relationship with a company to identify and take reasonable measures to verify the identity of each beneficial owner including their name, date of birth, identity or passport number and address. The identity information must be verified using reliable, independent source documents, data or information.

12. Clause 5.14 of the Prudential Guidelines on Proceeds of Crime and Money Laundering (Prevention) and Combating the Financing of Terrorism (CBK/PG/08).

84. A reporting institution is required to conduct ongoing due diligence on its customers and develop risk based systems and procedures (Regulation 29) but the Regulations do not provide for simplified CDD. Regulation 12 of the POCAML Regulations requires a reporting institution to conduct ongoing due diligence on the business relationship although there is no specified frequency for carrying out updates. Kenya should ensure that sufficient guidance is issued to explain the meaning of ongoing CDD, particularly in relation to the timing of updates (see Annex 1). The steps that institutions take in practice to keep beneficial ownership information up-to-date and measures taken by Kenyan authorities to ensure that such information is up-to-date and accurate will be examined in Phase 2 of the review.

85. The reporting institution is required by section 46 of the POCAMLA to establish and maintain records of all transactions and copy or make a record of the information obtained when carrying out CDD. The transaction records required to be established and maintained are detailed at Element A.3.1. These records must be retained for seven years from the date of termination of the account or business relationship and made available to competent authorities on a timely basis. The retention period meets the requirements of the standard.

86. Regulation 17 of the POCAML Regulations permits a reporting institution to rely on the procedures carried out by an introducer and the documentation held by the introducer. A relevant introducer can only be either an eligible introducer or group introducer. An eligible introducer is one that is regulated under the POCAMLA or similar law in an equivalent jurisdiction, or is subject to rules of professional conduct relating to the prevention of money laundering; and is based either in Kenya or in an equivalent jurisdiction. A group introducer is one that is part of the same group as the reporting institution and is, for anti-money laundering purposes, subject to supervision or regulation by a regulator in Kenya or an equivalent jurisdiction. An equivalent jurisdiction must be specified in guidelines issued by Kenya's Financial Reporting Centre[13] and the jurisdiction must have anti-money laundering standards comparable to Kenya.

87. In order to rely upon the introducer's procedures, the reporting institution must be satisfied that these meet the requirements of the POCAMLA or any code or guidelines issued by a supervisory authority. The reporting institution is required to keep a copy of customer identification documentation held by an eligible introducer but is not required to keep a copy of the documentation held by a group introducer, so long as they are satisfied that they

13. It is unclear whether such guidelines have been issued. The Financial Reporting Centre has extensive powers under the POCAMLA. It may issue instructions, orders and directions, including to a specific reporting institution.

can obtain it from the group introducer upon request. The Central Bank has further clarified these requirements in Guideline CBK/PG/08 which sets that an institution can only rely on an introducer when: i) the relevant CDD information is immediately obtained; ii) copies of identity and other documentation will be made available on request and without delay; and iii) the institution ensures that the introducer is regulated, supervised or monitored by a competent authority and the introducer's CDD and record keeping is in line with international best practice. Ultimate responsibility remains with the reporting institution. The introduced business requirements appear to meet the standard.

Companies Law requirements

88. The Companies Act was amended in July 2019 to insert section 93A, which requires every company to keep a register of its beneficial owners. The company must also lodge a copy of the register with the Companies Registrar, and every company, other than a public listed company, must lodge a copy of any amendment to the register within 14 days of making the amendment

89. Regulations were issued in February 2020 to give further and fuller effect to these requirements. The Regulations require a company to take reasonable steps to identify its beneficial owners and obtain details including the following: full name; birth certificate number, national identity card number or passport number; PIN; nationality; date of birth; postal, business and residential address; the nature of the ownership or control; and the dates of beginning and ceasing to be a beneficial owner.

90. The Regulations also provide for a process for a company to obtain identity information on its beneficial owners. The company must give notice to a person that it knows or reasonably believes is a beneficial owner requiring the person to provide the information required to be held in the registry. The receiver of the notice has 21 days to comply. If there is a failure to comply, then a further warning notice must be issued, following which a continued failure will result in restrictions over the relevant interest in the company (the relevant interest is that which the company knows or reasonably believes is the subject of the beneficial ownership). The restrictions have the effect of making any transfer of the interest void and no payment, rights or issue of shares may occur in respect of the interest and the restrictions cannot be lifted until after there is compliance with the original notice. There is a partial mismatch between the subject of the notice and the persons whose rights can be suspended: while the subject of the company notice is a possible beneficial owner, the person whose rights would be suspended is the legal owner. Kenya states that the way that it is applied in practice is that the notice can be given to a legal owner to compel that legal owner to provide details of its beneficial owners. Kenya also indicate that the beneficial ownership of any company shareholder would be available with the Registrar; but this is only in

cases where the shareholder is another Kenyan company. This will be further discussed in Phase 2 (see Annex 1).

91. The definition of beneficial ownership in the Companies Act is as follows:

> means the natural person who ultimately owns or controls a legal person or arrangements or the natural person on whose behalf a transaction is conducted, and includes those persons who exercise ultimate effective control over a legal person or arrangement.

92. The Regulations reiterate the definition in the Act in Regulation 2. "Ultimately owns or controls" is also defined to mean a situation in which ownership is exercised through a chain of ownership or by means of control other than direct control.

93. However, Sub regulation 3(2) then states that:

> For the purpose of these Regulations, a beneficial owner of a company shall be a natural person who meets any of the following conditions in relation to the company:
>
> (a) holds at least ten percent of the voting right in the company either directly or indirectly;
>
> (b) exercises at least ten percent of the voting rights in the company either directly or indirectly;
>
> (c) holds a right, directly or indirectly, to appoint or remove a director of the company; or
>
> (d) exercises significant influence or control, directly or indirectly, over the company.

94. Sub regulation 3(2) therefore operates to clarify the definition of beneficial owner in the Act, including providing a threshold for ownership or control. It also makes it clear that ownership or control may be direct or indirect. While the definition contains the principal elements required by the standard, it is not clear that control will include a person acting individually or jointly.

95. It is also not clear whether a beneficial owner always needs to be identified, i.e. in case no person meets the definition. The definition does not contemplate the identification of the individuals holding a senior managerial position in cases where a beneficial owner cannot be identified. The Companies Act does not otherwise require the names of senior managers to be registered with the Registrar. This allows the possibility that no beneficial owner is identified in some cases. **Kenya is recommended to ensure that the definition of beneficial owner for the purposes of the company law register is in line with the standard**.

96. The Business Registration Services (BRS) by notice published on 13 October 2020 declared that the Registrar of Companies' Beneficial Ownership E-Register was operationalised with effect from that day. The notice required every company to comply with the Regulations by submitting a copy of their beneficial ownership register within 30 days. A further notice published on 30 October 2020 granted an extension until 31 January 2021. On 27 January 2021 the BRS issued a further extension, stated to be final, until 31 July 2021. As at 30 June 2021 there were 168 207 entities that had submitted beneficial ownership information out of 618 732 registered companies.

97. The retention periods for beneficial ownership information kept by a company and lodged with the BRS are as described in paragraph 49.

Nominees

98. Nominee shareholding is allowed in Kenya.

99. The 2016 Report identified a combination of requirements under the Income Tax Act, the POCAMLA and the Capital Market Licensing regulations that would ensure ownership information will be available in most cases where a nominee acts in a professional capacity.[14] From 2014, the Income Tax Act requires a person in receipt of income subject to tax in Kenya to disclose to the KRA *any changes* to the beneficial owner of a shareholding owned by a nominee, but nominee ownership is not required to be disclosed on initial filing of information with the KRA, nor is a change in the nominator or the nominee owner.

100. Professional nominees must maintain information on their nominator when they are reporting institutions under the POCAMLA or licensed by under the Capital Market Act. Under the AML framework, nominees that are reporting institutions are obliged to conduct CDD on their customers and thus maintain information on the persons on whose behalf they hold an interest in the company. Similarly, the Capital Market Licensing Regulations require that licensed persons, including professional nominees, maintain all ownership information on the client on whose behalf the nominee is acting.

101. In addition, under Section 45(4) of the POCAMLA, if it appears to a reporting institution that an applicant is acting on behalf of another person, the reporting institution must take reasonable measures to establish the true identity of a person on whose behalf or whose ultimate benefit the applicant may be acting, including as nominee.

102. Nevertheless it was concluded that ownership information may not be available in all cases and an in-box recommendation was made that an

14. Professional capacity means performing the function as a service for profit or gain.

obligation be established for all nominees to maintain relevant ownership and identity information where they act as legal owners on behalf of any other person.

103. Since the 2016 Report, Kenya has introduced to the Companies Act the beneficial ownership register requirements described from paragraph 88. However, nominees are not obliged to inform the company that their interest is held in a nominee capacity in all cases and therefore knowledge of the nominee status is not assured. In addition, since the beneficial owner would potentially only be identified if they hold at least 10% of the ownership interest, a nominee with less than 10% would not be looked through to identify the beneficial owner. A company could, if it became aware of the nominee status of a legal owner, use the notice procedure discussed in paragraph 90 to seek information on the beneficial owner and apply the restrictions on the interest held by the nominee if there is a failure to comply. However, the lack of information, with the company, on the nominee status of a legal owner leads to (a) a risk of identifying a natural person who acts as a nominee as the beneficial owner or (b) identifying the beneficial owner of a corporate nominee itself as the beneficial owner of shares, instead of the natural person who is the nominator, who ought to be identified as the real beneficial owner. The new beneficial ownership information obligations under the Companies Act do not overcome the incomplete coverage of the AML framework and the income tax law requirements described in the 2016 Report and summarised in this report at paragraphs 99 to 102, so it is therefore necessary to retain a recommendation. **An obligation should be established for all nominees to maintain relevant ownership and identity information in line with the standard where they act as the legal owners on behalf of any other persons and disclose their nominee status to the company**.

Beneficial ownership information – Enforcement measures and oversight

104. Failure to comply with the beneficial ownership information requirements of section 93A of the Companies Act is an offence for which, on conviction, the company and each officer of the company in default is liable to a fine of up to KES 500 000 (EUR 4 177). Continued failure after conviction is subject to a fine of up to KES 50 000 (EUR 418) per day of continued failure. Enforcement and oversight of the ownership information obligations in the Companies Act is the responsibility of the Registrar of Companies. The application of this in practice will be assessed in Phase 2 of the review (see Annex 1).

105. Overarching enforcement and oversight of reporting institutions under the AML framework is the responsibility of the Financial Reporting Centre. The Financial Reporting Centre has extensive powers under the POCAMLA. It may issue instructions, orders and directions, including to a

specific reporting institution. It may impose civil penalties for noncompliance of up to KES 5 000 000 (EUR 41 770) on a natural person and up to KES 25 000 000 (EUR 208 848) on a corporate body (section 24B). It may issue orders to competent authorities requesting suspension or revocation of a licence, registration, permit or authorisation. A reporting institution that fails to comply with the CDD obligations of the POCAMLA commits an offence (section 11). Upon conviction, a natural person is liable to imprisonment up to seven years or a fine up to KES 2 500 000 (EUR 20 885), or both. A body corporate is liable on conviction to a fine up to KES 10 000 000 (EUR 83 539) or the value of the property involved in the offence, whichever is higher. If a director, manager, secretary or other officer of the body corporate is involved in committing the offence then both that natural person and the body corporate may be prosecuted.

106. The Centre is supported in supervision and enforcement by the Central Bank of Kenya in respect to banks and microfinance banks and the Capital Markets Authority in respect to capital market participants. Both the CBK and the CMA have the power to carry out onsite and offsite inspections and are doing so. Other supervisory bodies have responsibility for certain business and professional sectors – such as the Insurance Regulatory Authority, the Institute of Certified Public Accountants and the Estate Agents Registration Board.

107. In the case of a bank, and separate to the sanctions above, under section 33 of the Banking Act the Central Bank may take a range of actions ranging from providing advice or recommendations to an institution, through to issuing directions to the institution. Failure to comply with a direction is an offence punishable by a fine of up to KES 100 000 (EUR 835) for a body corporate and in the case of an officer of the institution, a fine of up to KES 50 000 (EUR 418) or imprisonment up to two years, or both.

108. The application in practice will also be assessed in Phase 2 of the review (see Annex 1).

Availability of beneficial ownership information in EOIR practice

109. The implementation of the legal framework and the availability of legal ownership information on companies in practice will be examined during the Phase 2 review.

A.1.2. Bearer shares

110. As recorded in the 2016 Report, bearer shares were previously permitted in Kenya for public companies, but from September 2015 issuance was no longer permitted and any share issued in contravention is deemed

to be void. The 2016 Report found that while permitted, the Registrar of Companies reported that in a comprehensive search of public companies none were found to have provision for issuance of bearer shares in their Articles of Association. Nevertheless, Kenya was recommended to monitor the implementation of the prohibition introduced in 2015 to ensure that full ownership information is available for all companies.

111. Section 504 of the Companies Act was further amended in March 2020 to require any company in respect of which a bearer share is in issue to ensure that the share is converted into a registered share. Any right attached to a bearer share was rendered un-exercisable unless the bearer share was converted. A nine month transition period for conversion was provided, which ended on 20 December 2020. Companies were required to notify the Registrar of any conversion within 30 days of the conversion. After that time bearer shares are no longer valid. A company and each officer of the company that failed to comply with the requirement to convert a bearer share was deemed to have committed an offence liable on conviction to a fine of up to KES 500 000 (EUR 4 177), and up to KES 50 000 (EUR 418) per day for continued failure after the initial conviction.

112. Kenya reports that no conversions of bearer shares have been reported to the Registrar under the procedure required by the Companies Act, which it concludes is consistent with its search in 2015 that found no company had provided for their issuance. The effectiveness of the measures taken by Kenya to address the in-box recommendation in the 2016 Report will be examined in further detail in the Phase 2 review.

A.1.3. Partnerships

113. The 2016 Report found that the legal and regulatory framework in Kenya required the identification of partners of a partnership in accordance with the standard and that the legal framework had been adequately implemented in practice. There has been no change in the requirements.

Types of partnerships

114. Partnerships can be established under the Partnerships Act without legal personality (general partnerships and limited partnerships) or under the Limited Liability Partnership Act (limited liability partnerships, which are legal entities with legal personality). A general partnership is one where every partner is liable jointly with the other partner(s) for all debts and obligations of the partnership incurred while they are a partner. A limited partnership is constituted by one or more general partners (liable as in a general partnership) with one or more limited partners contributing capital whose liability is limited to the amount of the capital contributed. In the case

of a limited liability partnership, the partners are generally not liable for debts or obligations incurred by the partnership. Foreign partnerships created or governed under foreign laws can do business in Kenya.

Identity information

115. All limited partnerships and limited liability partnerships carrying on a business in Kenya must be registered with the Registrar[15] and upon registration, details of all partners must be submitted. At the end of 2019 there were nil limited partnerships and 696 limited liability partnerships registered. Limited liability partnerships are not recognised as such unless registered. A limited partner is only recognised as such if registered as such. Any changes in the ownership of limited partnerships and limited liability partnerships must be notified within 28 days. The Registrar has oversight and enforcement powers for limited partnership and limited liability partnership registration and identity information.

116. General partnerships may also register with the Registrar but there is no obligation to do so. At the end of 2019 there were no general partnerships registered.

117. Providing false information or causing false information to the Registrar is an offence subject to a fine up to KES 100 000 (EUR 835) or six years imprisonment or both. The Registrar must retain the originals of all documents

118. All forms of partnership in Kenya, as well as foreign partnerships deriving income in Kenya must be registered for tax purposes. Upon registration, all partners must be identified and the ITA requires the filing of an annual tax return with a schedule containing the names and addresses of the partners. The KRA will retain these records, at a minimum, for the period within which an assessment may be amended which is generally five years from submission of the return. Failing to register is an offence liable to sanction as described in paragraph 57 and failing to lodge a tax return or making a false statement including by omission are also offences subject to a fine of up to KES 1 000 000 (EUR 8 354) or imprisonment up to three years or both.

15. Under the Partnerships Act the Registrar of Companies is specified as the relevant Registrar for partnerships covered by that Act and under the Limited Liability Partnerships Act the Registrar of Companies is also specified as the Registrar of Limited Liability Partnerships.

Beneficial ownership

119. The standard requires that information in respect of each beneficial owner of a relevant partnership be available. Where any partner is a company or other entity or arrangement, information on the beneficial owners of that entity or arrangement should be available.

120. There is no obligation under tax law to report information on the beneficial ownership of partnerships to the KRA or BRS. Kenya's AML framework therefore provides the primary basis for the availability of beneficial ownership on partnerships.

121. The CDD requirements in Regulation 12 of the POCAML Regulations include, in relation to both legal persons and arrangements, a requirement to identify and take reasonable measures to verify the identity of their beneficial owner(s). The definition of beneficial owner was discussed from paragraph 78 and the deficiency described in paragraph 81 in the context of companies may also apply in the context of partnerships if a partner is a legal entity. Oversight and enforcement for beneficial ownership information on partnerships are similar to those described for the AML framework relevant to companies under A.1.1.

122. Regulation 15 provides for specific measures for identification of partnerships. Regulation 15 specifically provides that the reporting institution must obtain:

- the name of the partnership or its registered name
- the partnership deed
- its registered address or principal place of business or office
- its registration number
- the full names, date of birth, identity card number or passport number and address of every partner;
- the person who exercises executive control over the partnership
- the name and particulars of each natural person who purports to be authorised to establish a business relationship or enter into a transaction on behalf of the partnership
- unaudited financial statements.

123. The identity details for each partner of the partnership as required by Regulation 15 only applies when the partner is a natural person. In a case where a partner is a not a natural person, Regulation 12 will nevertheless apply to require identification of the beneficial owners holding an interest in the partnership through the partner that is a legal entity or arrangement.

124. The above provisions will only apply when a partnership engages an AML-obliged person. There is no legal requirement for a partnership to have a bank account, nor is there any other requirement to engage an AML-obliged person. Therefore in situations where a partnership has not engaged an AML-obliged person, beneficial ownership information would not be available, and in situations where an AML-obliged person has been engaged beneficial ownership information may not be complete for the reason noted in paragraph 121. **Kenya is recommended to ensure that beneficial ownership information in line with the standard is always available for all partnerships**.

Availability of identity information on partnerships in EOIR practice

125. The implementation of the legal framework and the availability of information on partnerships in practice will be examined during the Phase 2 review.

A.1.4. Trusts

126. Trusts are recognised in Kenya under both common law and statutory law. There are no prohibitions for a Kenyan resident to act as a trustee or otherwise in a fiduciary capacity in relation to a trust formed in Kenya or under foreign law.

Requirements to maintain identity information in relation to trusts

127. The findings in the 2016 Report in relation to identity information for trusts remains the same. The Report found that all Kenyan trusts and foreign trusts chargeable to tax in Kenya must be registered for tax purposes and file an annual tax return with the KRA detailing information in respect of the beneficiaries. On 31 December 2020 there were 1 372 trusts registered with the KRA. At the time of registration, the trust deed, which will contain information on the trustee, settlor and the beneficiaries, must be filed with the KRA. Since January 2015, any trust carrying on business in Kenya must notify the KRA of any change in particulars in the identity and address of trustees, settlors and beneficiaries. The KRA will retain these records, at a minimum, for the period within which an assessment may be amended which is generally five years from submission of a tax return to which the information relates. Under the AML framework, a reporting institution must determine for whom a trustee is acting and therefore information on the settlor, trustees, beneficiaries and any other natural person exercising ultimate effective control over the trust must be obtained; however there is no obligation for all trusts to engage in a relationship with an AML-obliged person. Finally, the fiduciary duties arising under common law should require the

trustee to have full knowledge of the beneficiaries and in certain cases the settlors.

128. However, the 2016 Report concluded that identity information in respect of trusts may not be available in all cases, particularly when a trust is not chargeable to tax in Kenya and the trustee does not transact with or engage an AML obliged person. This remains the case, especially as trustees do not need to be licensed and are not per se reporting institutions under Kenya's AML framework.

Beneficial ownership requirements for trusts

129. While the tax law requires the provision of information to the KRA on settlors, trustees and beneficiaries as described in the 2016 Report and summarised in paragraph 127, it does not provide an obligation to look through these persons to the underlying beneficial owners in the event that the person is a legal entity or arrangement. The tax law also does not require the identification of the protector(s) of a trust (if any) or any other natural person exercising ultimate effective control over the trust. Kenya's AML framework therefore provides the primary basis for the availability of beneficial ownership of trusts.

130. As discussed in paragraph 121, the CDD requirements in Regulation 12 of the POCAML Regulations include, in relation to both legal persons and arrangements, a requirement to identify and take reasonable measures to verify the identity of the beneficial owner of a legal person or arrangement. The deficiency described in paragraph 81 in the context of companies may also apply in the context of trusts if a person connected to a trust is a legal entity. Oversight and enforcement for beneficial ownership information on trusts are similar to those described for the AML framework relevant to companies under A.1.1.

131. Regulation 16 provides for specific measures for identification of trusts. Particulars that a reporting institution is required to obtain include:

- the trust deed
- the full names and details of any management company of the trust or legal arrangement
- names of the relevant persons having senior management positions in the trustees of the legal arrangement
- full names of the trustee, beneficiaries or any other natural person exercising ultimate effective control over the trust
- full names of the founder of the trust.

132. Regulation 19 reiterates that in relation to any legal person or arrangement, the reporting institution must identify and verify the natural persons behind the legal person or arrangement. Regulation 36 requires reporting institutions to retain records of CDD and the results of any inquiries and analysis undertaken for a minimum of seven years from the termination of an account or business relationship.

133. The POCAMLA was amended in 2018 to extend the definition of designated non-financial businesses or professions to include trust and company services providers, who as a consequence became AML-obliged persons. However, Kenya advises that lawyers are the main service providers for the creation of trusts and lawyers are not AML-obliged persons in Kenya.

134. Trustees generally not being AML-reporting entities themselves (unless they otherwise meet the definition of AML-reporting entity), the above provisions will only apply when a trustee engages an AML-obliged person. There is no legal requirement for a trustee to have a bank account, nor is there any other requirement to engage an AML-obliged person. Therefore in situations where an AML-obliged person has not been engaged beneficial ownership information would not be available and in situations where an AML-obliged person has been engaged beneficial ownership information may not be complete for the reason noted in paragraph 130. **Kenya is recommended to ensure that beneficial ownership information in line with the standard is always available for all trusts**.

Availability of trust information in EOIR practice

135. The implementation of the legal framework and the availability of information on trusts in practice will be examined during the Phase 2 review.

A.1.5. Foundations

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

Other relevant entities and arrangements

137. As described in the 2016 Report, co-operative societies can be established in Kenya under the Co-operative Societies Act, and there have been no changes to this law since the previous review. Co-operatives can fall into one or two categories:

- primary societies, where the membership is restricted to individual persons and must have at least ten members who are subject to qualification requirements

- co-operative unions, membership of which is restricted to primary societies.

138. A co-operative is only recognised as such if it is registered with the Commissioner for Co-operative Development. "Co-operative" must form part of the name. As noted in the 2016 Report, in order to qualify for membership in a primary society an individual must be in the employment, occupation or profession for which the co-operative is registered and must be resident within, or occupy land within, the society's area of operation.

139. All co-operatives are required to keep a list of their members at their registered office, open for inspection by any person. The register of members must contain details of the date of becoming a member, the date of cessation and the number of shares held.

140. As membership of a primary society is limited to individual persons who will, due to the factors and limitations described in paragraph 138 be expected to also be the beneficial owners, the beneficial ownership of the primary society will be recorded in both the registry held by the Commissioner for Co-operative Development and at the registered office of the co-operative. The Commissioner will also have information on the membership of primary societies in co-operative unions.

141. For tax purposes co-operatives are treated as companies. A co-operative that derives taxable income in Kenya is required to lodge a tax return and the tax return requires the members' ownership information.

142. As a result of these obligations, the legal and beneficial ownership of a co-operative is available in Kenya.

A.2. Accounting records

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

143. The 2016 Report concluded that the legal and regulatory framework on the availability of accounting records and underlying documentation was in place in respect of all relevant legal entities and arrangements.

144. However, the 2016 Report noted that trustees of Kenyan and foreign trusts were only statutorily required to maintain accounting records where the trust derives income subject to tax in Kenya. A recommendation was made that Kenya ensure that trustees of all Kenyan and foreign trusts maintain accounting records even where the trust derives income not subject to tax in Kenya. No changes have been reported by Kenya in response to this recommendation.

145. The conclusions are as follows:

Legal and Regulatory Framework: in place

Deficiencies identified/ Underlying factor	Recommendation
Trustees of Kenyan trusts and foreign trusts are only statutorily required to maintain accounting records where the trust derives income subject to tax in Kenya.	Kenya should ensure that trustees of all Kenyan and foreign trusts maintain accounting records even where the trust derives income not subject to tax in Kenya.

Practical Implementation of the Standard: The assessment team is not in a position to issue a rating on this element, as it involves issues of practice that are dealt with in the Phase 2 review.

The Phase 2 recommendations issued in the 2016 Report are reproduced below for the information of readers.

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

A.2.1. General requirements and A.2.2. Underlying documentation

146. In Kenya, the requirement to keep accounting records and their underlying documentation in the standard is ensured by a combination of obligations set in tax law and the specific laws governing each type of entity. The various legal regimes and their implementation in practice are analysed below.

Company Law

147. Every domestic company and every foreign company carrying on business in Kenya is required by section 628 of the Companies Act to keep proper accounting records. Accounting records are only proper if they show

and explain the transactions of the company and disclose with reasonable accuracy to the end of the previous three month period, the financial position of the company at that time. The accounting records must contain entries from day to day of all amounts received and spent by the company and the matters in respect of which the receipt and expenditure relates. Kenya states that the requirements of the Companies Act necessitate the maintenance of all underlying documentation such as invoices, contracts, etc.

148. The accounting records must comply with prescribed financial accounting standards. The prescribed standards are those issued by the Institute of Certified Public Accountant of Kenya in accordance with the Accountants Act.

149. Failing to keep proper accounting records is an offence for both the company and each officer of the company in default. The company is liable to a fine of up to KES 2 000 000 (EUR 16 708) and an officer may be fined up to KES 1 000 000 (EUR 8 354) or imprisoned for up to two years, or both.

150. The company must keep its accounting records at its registered office. The Companies Act requires a registered foreign company to have a registered office in Kenya. It is not explicitly required that a domestic company has their registered office located in Kenya, however the requirement is implicit and relevant registration and change of office address forms presume that the address is in Kenya. The operation of this in practice will be followed up in Phase 2 (see Annex 1). The company must preserve these records for at least seven years from when created. Section 630 allows for the possibility of a different retention period for a company in liquidation if any rules in force relating to such companies provide as such, but Kenya confirms that no such rules are in place.

151. Section 635 of the Companies Act requires the directors of a company to prepare financial statements for each financial year. Failure to do so renders each director liable to a fine of up to KES 1 000 000 (EUR 8 354). The directors may only approve a financial statement if satisfied that the statement gives a true and fair view of the assets, liabilities and profit or loss. A failure to fulfil this duty is liable to a fine of up to KES 500 000 (EUR 4 177). Section 638 requires that the financial statement comprise a balance sheet, a profit and loss account, a statement of cash flow and a statement of change in equity.

152. The financial statements required to be prepared must be audited, unless an exemption applies. An exemption is provided for dormant companies and qualified small companies. In general, a company is a qualified small company for a particular year if: i) its turnover is not more than KES 50 000 000 (EUR 417 700); and ii) its net assets in its balance sheet are not more than KES 20 000 000 (EUR 167 080).

153. In the case of a company that ceases to exist, the Companies Act requires the officers of the company responsible for the last accounting

records to ensure that these are preserved for seven years. In case a liquidator takes over the company, the liquidator becomes responsible. The availability of the records required to be retained in relation to a struck-off company will be assessed in the Phase 2 review (see Annex 1).

Partnerships

154. Every partner in a partnership (including a foreign partnership carrying on business in Kenya) has an obligation to ensure that accounting records of transactions affecting the partnership are properly kept (section 16 of the Partnerships Act).

155. In addition, all limited liability partnerships (including foreign limited liability partnerships carrying on business in Kenya) are required to maintain accounting records that must give a true and fair view of the state of the partnership's affairs (section 30 of the Limited Liability Partnerships Act). Section 2 defines accounting records to include invoices, receipts, orders for the payment of money, bills of exchange, promissory notes and vouchers; and such working papers and other documents as are necessary to explain the methods and calculations by which the accounts are made.

156. The partnership and every partner in a limited liability partnership that fails to keep proper books of accounts is liable on conviction to a fine of up to KES 100 000 (EUR 835) or to imprisonment up to one year, or both. General or limited partnerships that fail to maintain accounting records are subject to penalties under tax law (see paragraphs 159 and 163).

Trusts and co-operatives

157. Under common law, all trustees of Kenyan trusts have a fiduciary duty to keep proper records and accounts for their trusteeship. It is the duty of a trustee to keep clear and distinct accounts of the property administered. The accounts should be open for inspection by the beneficiaries and in the event of default, a beneficiary is entitled to seek remedy from the court. A court may impose liability for costs on the trustee and in certain cases remove the trustee. A trustee that breaches their obligations may be held personally liable for any loss. Under common law, the fiduciary obligation to keep and retain these records extends for the life of the trust, and this would be extended by the further period under which claims against the trustee may be made, generally six years under Kenya's Limitation of Actions Act. However, there is no enforcement role played by a government authority that ensures compliance with these fiduciary obligations and therefore no ongoing supervision.

158. Every co-operative society must ensure that proper books of account are kept which give a true and fair view of the state of the co-operative's affairs and explain its transactions (section 25 of the Co-operative Societies

Act). This includes all sums of money received and paid and the reasons thereto, all sales and purchases of goods and services, and all assets and liabilities of the co-operative. The books of account must be prepared in accordance with International Accounting Standards. The accounts must be maintained at the registered office of the co-operative society. The accounts must be audited annually and a copy filed with an annual return to the Commissioner for Co-operative Development. The auditor can require the production of any book or document relating to or belonging to the co-operative from any officer, agent, trustee or member having custody of such records.

Tax Law obligations

159. The 2016 Report described the record keeping requirements in the Income Tax Act and these remain the same, with the exception of the retention period which is discussed below. All persons carrying on business (including foreign companies that are managed and controlled in Kenya or with a permanent establishment in Kenya) must keep records of all receipts and expenses, goods purchased and sold, and accounts, books, deeds and vouchers which in the opinion of the Commissioner are adequate for the purpose of computing tax. Kenya states that this requires the maintenance of items such as invoices, vouchers and contracts. For this purpose, "carrying on business" includes any activity giving rise to income other than employment income. The record keeping requirement in the Income Tax Act is not explicitly limited to income subject to tax in Kenya, and therefore would apply to the non-Kenyan source income of a body of persons resident in Kenya (see paragraph 25) to the extent necessary to prove the income that is non-taxable. Failure to keep the required records is subject to a penalty of up to KES 20 000 (EUR 167). The person is required to file an annual tax return accompanied by a copy of the accounts relating to the income year.

160. As partnerships are considered transparent for tax purposes, the record keeping obligations are imposed on the partners. Partners who fail to keep the required records are liable to a fine of up to KES 100 000 (EUR 835) or imprisonment up to six months or both.

161. The trustee of a trust carrying on business in Kenya is subject to the Income Tax Act record keeping requirements to the same extent as for companies. However, as was found in the 2016 Report, trustees of Kenyan trusts and foreign trusts are only statutorily required to maintain accounting records where the trust derives income subject to tax in Kenya and **this remained the case during the review period**.

162. The Tax Procedures Act enacted in 2015 supplements the record keeping requirements described in the Income Tax Act. Section 23 of the Tax Procedures Act requires that when a tax law (which includes the Income Tax Act) requires a person to maintain any document, it must be retained for five

years from the end of the reporting period to which it relates. The retention period previously specified in the Income Tax Act has been deleted, along with the exception described in the 2016 Report relating to liquidators. As a consequence, the in-text recommendation in the 2016 Report concerning the potentially shorter period in liquidations has been addressed.

163. The Tax Procedures Act also provides a sanction for failing to keep, retain or maintain a document as required under a tax law. Section 82 provides for a penalty amount of either 10% of the tax payable to which the document relates, or if no tax payable relates to the failure, the penalty is KES 100 000 (EUR 835).

Oversight and enforcement of requirements to maintain accounting records

164. The KRA has oversight of the obligations to maintain accounting records under the tax laws. Enforcement occurs as part of its general enforcement of tax obligations. The Registrar of Companies has oversight of the accounting obligations of companies and, in their concurrent role as Registrar of Limited Liability Partnerships, also has oversight of the accounting obligations of limited liability partnerships. These aspects will be analysed under the Phase 2 review.

Availability of accounting information in EOIR practice

165. The implementation of the legal framework and the availability of accounting information in practice will be examined during the Phase 2 review.

A.3. Banking information

Banking information and beneficial ownership information should be available for all account holders.

166. The 2016 Report concluded that the legal and regulatory framework in Kenya requires the availability of banking information to the standard. Identity information on all account-holders and transaction records continue to be made available through AML obligations.

167. Since the 2016 Report, the standard was strengthened in 2016 with an additional requirement of ensuring the availability of beneficial ownership information on all account holders. As discussed in A.1, there are two issues identified with respect to CDD which may impact on the availability of beneficial ownership in certain instances. One relates to a lack of clarity on the meaning of ultimate control. The second is an absence of any prescribed

frequency for updating CDD on existing customers. Kenya is recommended to take suitable actions to address these gaps in its legal framework.

168. The conclusions are as follows:

Legal and Regulatory Framework: in place, but certain aspects of the legal implementation of the element need improvement

Deficiencies identified/ Underlying factor	Recommendations
With respect to the anti-money laundering (AML) framework, while the principal elements required by the standard with respect to the identification of beneficial owner(s) of legal entities are present, the law does not specifically indicate that control includes any person who controls the company acting directly or indirectly, and acting individually or jointly.	Kenya should ensure that the definition of beneficial owner in the AML framework is in line with the standard.
There is no specified frequency of updating beneficial ownership information; so there could be situations where the available beneficial ownership information is not up to date.	Kenya should ensure that up-to-date beneficial ownership information on all bank accounts in line with the standard is available at all times.

Practical Implementation of the Standard: The assessment team is not in a position to issue a rating on this element, as it involves issues of practice that are dealt with in the Phase 2 review.

A.3.1. Record-keeping requirements

Availability of banking information

169. The 2016 Report concluded that Kenyan law requires banks to keep records in line with the standard. There has been no change to the relevant rules concerning record keeping since then.

170. Banks are subject to the accounting requirements as explained under A.2 and must keep proper accounting records that show and explain the transactions of the company. In addition, under the POCAMLA all banks are subject to AML obligations as reporting institutions. The Central Bank is the regulatory and supervisory body for banks operating in Kenya and is a supervisory body delegated by the Financial Reporting Centre to support the supervision of AML obligations of banks.

171. As reporting institutions, banks are required to keep records of all transactions for at least seven years from the date the relevant business or transaction was completed and make them available to competent authorities on a timely basis (section 46(4) of the POCAMLA). Section 46(3) requires reporting institutions to establish and maintain records including the following information in respect of all transactions:

- the name, physical and postal address and occupation (or business or principal activity) of the person conducting the transaction or on whose behalf the transaction is being conducted
- the nature, time and date of the transaction
- the type and amount of currency
- the type and number of any account with the reporting institution
- if the transaction involves a negotiable instrument other than currency, the name of the drawer of the instrument, the name of the institution on which it was drawn, the name of the payee, the amount and date of the instrument and any endorsements appearing on it
- the name and address of the reporting institution and of the officer, employee or agent who prepared the record.

172. Reporting institutions are prohibited from opening or maintaining anonymous or fictitious accounts (Regulation 11 of the POCAML Regulations). Numbered accounts are not explicitly prohibited under Kenyan law, however such accounts are made subject to AML identification and verification requirements by Regulation 30.

Beneficial ownership information on account holders

173. The standard was strengthened in 2016 to specifically require that beneficial ownership information be available in respect of all account holders.

174. As explained under Element A.1 with regard to the availability of beneficial ownership information for companies under AML law, the POCAMLA establishes the Kenyan AML legal framework. Banks are required, under that framework, to ensure that beneficial ownership information on all of their customers is obtained and verified in accordance with the prescribed CDD measures. These requirements apply for all customers – Kenyan or foreign – legal persons and arrangements including partnerships, trusts and foundations.[16]

16. As noted for Element A.1.5, Kenyan law does not provide for foundations, so this would only be relevant to foreign foundations.

175. The Central Bank is empowered by section 33(4) of the Banking Act to issue guidelines for AML purposes to be adhered to by institutions and has done so through Guideline CBK/PG/08 which takes account of and supports the requirements of the POCAML Act.

176. There are two issues identified with respect to CDD in the AML framework which may impact on the availability of beneficial ownership in certain instances. The first is that it is not clear whether the concept of ultimate control described in the definition of beneficial owner is interpreted as meaning any person who controls the company acting directly or indirectly, and acting individually or jointly. The second is that there is no prescribed frequency for how often CDD should be updated on existing customers, which could lead to situations where available beneficial ownership information may not be up-to-date. **Kenya is recommended to take suitable actions in order to have up-to-date beneficial ownership information available in line with the standard**.

Oversight and enforcement

177. The Central Bank has a range of supervisory and enforcement powers under the Banking Act. It has issued Guidelines on AML which banks must comply with, and it may issue directions to specific banks. Failure to comply with the Guidelines or a direction is an offence punishable by a fine of up to KES 100 000 (EUR 835) for a body corporate and in the case of an officer of the institution, a fine of up to KES 50 000 (EUR 418) or imprisonment up to two years, or both. In addition, the Central Bank may provide information on the findings of its investigations to the Financial Reporting Centre and the Centre may impose sanctions under the POCAMLA. Failure to keep the records required by the POCAMLA is an offence. Upon conviction, a natural person is liable to imprisonment up to seven years or a fine up to KES 2 500 000 (EUR 20 884), or both. A body corporate is liable on conviction to a fine up to KES 10 000 000 (EUR 83 539) or the value of the property involved in the offence, whichever is higher. The effectiveness of the sanctions and measures to enforce availability of banking information will be considered in the Phase 2 review.

Availability of banking information in EOIR practice

178. The implementation of the legal framework and the availability of banking information on companies in practice will be examined during the Phase 2 review.

Part B: Access to information

179. Sections B.1 and B.2 evaluate whether competent authorities have the power to obtain and provide information that is the subject of a request under an EOI arrangement from any person within their territorial jurisdiction who is in possession or control of such information, and whether rights and safeguards are compatible with effective EOI.

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).

180. The 2016 Report concluded that the Competent Authority in Kenya has broad access powers to obtain all types of relevant information, including ownership, accounting and banking information from any person, in order to comply with obligations under Kenya's EOI instruments. These access powers can be used regardless of domestic tax interest. In case of failure on the part of the information holder to provide the requested information, the Competent Authority has adequate powers to compel the production of information. Finally, secrecy provisions contained in Kenya's law are compatible with effective exchange of information.

181. The legal framework in respect of the access powers of the Competent Authority continues as before. There have been no administrative rulings or judicial decisions related to accessing information for exchange. No special procedures are required, the same powers and procedures are used as for accessing information for domestic purposes. During the review period there was no case where Kenya was unable to provide requested information due to an inability to access.

182. The conclusions are as follows:

Legal and Regulatory Framework: in place

No material deficiencies have been identified in the legislation of Kenya in relation to access powers of the competent authority.

Practical Implementation of the Standard: The assessment team is not in a position to issue a rating on this element, as it involves issues of practice that are dealt with in the Phase 2 review.

B.1.1. and B.1.2. Ownership, identity, accounting and banking information

Accessing information generally

183. Under Kenya's EOI agreements the specified competent authority is the Minister/Cabinet Secretary responsible for Finance or his/her authorised delegated representative. This authority in respect of all international tax agreements was delegated in November 2015 to the Kenya Revenue Authority headed by a Commissioner, being the authority responsible for tax administration.

184. As discussed in the 2016 Report (see paragraphs 225-231), the KRA had sufficiently broad access powers to obtain bank, ownership, and identity information and accounting records from any person for domestic tax purposes as provided for in five sections of the ITA, namely sections 52, 56, 69, 119 and 120. There were amendments to the ITA in 2015, not described in the 2016 Report but not affecting the conclusions in that report. Sections 56, 69, 119, and 120 of the ITA have been deleted from the ITA and corresponding powers have been transposed into the TPA under section 58 (Power to inspect records, access premises), section 59 (Powers to compel production of records), section 60 (Powers of search and seizure) and section 61 (Notice to appear before the Commissioner). The access powers that have moved to the TPA are exercisable for purposes related to any "tax law" which is defined in the TPA to include the ITA. Therefore, as determined in the 2016 Report, the KRA has the legal framework to exercise access powers in line with the Terms of Reference elements B.1.1 and B.1.2.

Accessing beneficial ownership information

185. Under Regulation 13 of the Companies (General) Regulations, information held by the Registrar relating to beneficial ownership may be made available to a competent authority upon written request. A competent authority is defined by the Regulations to include the KRA.

186. The KRA may also use the general powers described above to access the beneficial ownership information held by the company itself and service providers that are AML-obliged persons. Section 59(4) of the TPA provides that the power to compel production of records has effect despite any law relating to privilege or the public interest or any contractual duty of confidentiality.

Accessing banking information

187. The aforementioned powers of KRA in the TPA are also sufficient to effectively access banking information, as discussed in the 2016 Report (see paragraph 231).

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

188. 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 tax purposes. The standard requires a jurisdiction to be able to use its information gathering powers, notwithstanding that it may not need the information for its tax purposes.

189. In Kenya, a combination of the provisions of the Constitution (Article 2(6) which integrates treaties/conventions ratified by Kenya into the domestic law) and sections 41 and 41A of the ITA which integrate the treaties/conventions into the ITA, provide authority for the use of domestic powers. Section 41 provides the Minister the power to declare arrangements made with other governments to have effect notwithstanding anything to the contrary in the ITA or any other law. Section 41A provides for the same in relation to TIEAs. Further, as discussed in B.1.1, sections 59, 60, and 61 of the TPA provide the necessary access powers for EOI requests. Therefore, as discussed in detail in the 2016 Report (see paragraphs 233-239), there continue to be no domestic tax interest restrictions on the exercise of the access powers by KRA described in B.1.1.

B.1.4. Effective enforcement provisions to compel the production of information

190. As discussed above, the KRA has powers to compel the production of information including the search and seizure powers (Sections 59, 60). The TPA lays out various offences and sanctions for non-co-operation or lack of response to the exercise of access powers by the KRA in the course of an EOI request, which provides for effective enforcement powers in line with ToR B.1.4. They are briefly discussed below.

191. Section 93 of TPA states that a person commits an offence if the person fails to keep, retain or maintain a document that may be required to be kept, retained, or maintained under a tax law, without reasonable excuse during a reporting period.

192. Section 82 of the TPA allows imposing a penalty for failing to keep documents if a person who, without reasonable cause, fails to keep, retain, or maintain a document as required under a tax law without reasonable cause for a reporting period. The person is liable to a penalty equal to the higher of 10% of the amount of tax payable by the person under the tax law to which the document relates for the reporting period to which the failure relates; or KES 100 000 (EUR 835).

193. Section 99 of the TPA states that a person commits an offence when that person (a) fails to provide information or produce any document for examination as required by the KRA under section 59(l)(a) or (b); (b) fails to appear before the KRA as required under section 59(l)(c), or (c) fails to answer any question put to the person under section 59(l)(c). Further, a person is also held to commit an offence when the person, without reasonable excuse, fails to provide reasonable facilities and assistance as required by section 60(3)(d), (e), and (f), and section 60(6) in search and seizure procedures.

194. The TPA (Section 104) also provides that a person held to be committing an offence under the TPA is liable to a fine not exceeding KES 1 000 000 (EUR 8 354) or to imprisonment for a term not exceeding three years or to both.

B.1.5. Secrecy provisions

Bank secrecy

195. The 2016 Report noted (see paragraph 255) that under the Banking Act, no person shall disclose or publish any information which comes into his/her possession as a result of the performance of his/her duties or responsibilities under the Act (s. 31(2) Banking Act). Nevertheless, the secrecy as set out in the Banking Act is not absolute and while the provisions of the Banking act generally prevail over other written laws (s. 52A(1) Banking Act), there is an express exception in the case of the ITA and any law listed in the First Schedule of the Kenya Revenue Authority Act, which includes the TPA (s. 52A(2) Banking Act). Therefore, the confidentiality provisions under the Banking Act cannot prevent the furnishing of banking information in the case of an EOI request. This position continues in the current review period.

196. Furthermore, the access powers in the TPA under section 59 (Powers to compel production of records) and section 60 (Powers of search and seizure) have effect despite any law relating to privilege or the public interest

with respect to access to premises, or the production of any property or documents, including documents in electronic format; or any contractual duty of confidentiality. Therefore, banking secrecy is no impediment to access powers of KRA as required under the standard.

Professional secrecy

197. The 2016 Report noted that legal privilege (attorney-client privilege) exists in Kenya as under both common law and the Kenyan Evidence Act. At common law the privilege attaches to confidential written or oral communications between a professional legal adviser and their client, or any person representing the client, in connection with and in contemplation of, and for the purposes of legal proceedings or in connection with the giving of legal advice. Where an attorney acts in any capacity other than as an attorney, the privilege does not apply. Common law precedent has applied this principle in Kenya.

198. In addition, section 134 of the Evidence Act in Kenya restricts an advocate from disclosing, without client consent, any communication made to him/her in the course of his/her employment as an advocate by or on behalf of the client, or to state the contents or condition of any document or disclose any advice given to the client in the course and for the purpose of such employment.

199. As found in the 2016 Report, the scope of these restrictions are in line with the standard. Nevertheless, privilege is not an impediment to the exercise of access powers of KRA, particularly given the override in TPA under section 59 (Powers to compel production of records) and section 60 (Powers of search and seizure) which have effect despite any law relating to privilege or the public interest with respect to access to premises, or the production of any property or documents, including documents in electronic format; or any contractual duty of confidentiality.

B.2. Notification requirements, 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.

200. The 2016 Report found that there were no issues regarding prior notification requirements or appeal rights and the element was determined to be in place. This position continues to remain the same given no further changes to the legal framework since the 2016 Report.

201. The conclusions are as follows:

Legal and Regulatory Framework: in place

The rights and safeguards that apply to persons in Kenya are compatible with effective exchange of information.

Practical Implementation of the Standard: The assessment team is not in a position to issue a rating on this element, as it involves issues of practice that are dealt with in the Phase 2 review.

B.2.1. Rights and safeguards should not unduly prevent or delay effective exchange of information

202. As described in the 2016 Report (see paragraphs 267-270), there are no legal requirements for prior or post notification of a taxpayer or for providing a reason for asking information to the third-party/information holder to respond to an EOI request, under the Kenyan legal framework.

203. In respect of rights and safeguards for taxpayers and information holders, Kenyan Law allows any aggrieved person to appeal against the administrative action of a competent authority. An appeal can be lodged at the High Court of Kenya as an application for judicial review or to the Office of the Ombudsman for maladministration by government authorities.

204. Judicial review is an administrative law control mechanism by which the Judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. As per the Kenya Fair Administrative Action Act, 2015, judicial review applies to all state and non-state agencies, including any person exercising administrative authority; performing a judicial or quasi-judicial function under the Constitution or any written law, or whose action, omission, or decision affects the legal rights or interests of any person to whom such action, omission or decision relates. This covers the KRA.

205. The Commission on Administrative Justice, more commonly known as Office of the Ombudsman, is a constitutional commission established under Article 59(4) of the Constitution, and the Commission on Administrative Justice Act, 2011. The mandate of the Office of the Ombudsman is two-fold: tackling maladministration in the public sector; and overseeing and enforcing implementation of the Access to Information Act, 2016.[17]

17. Complaints to the Office of the Ombudsman can be made for free by visiting any of the Ombudsman offices in person; making a telephone call; sending a text message; writing a letter; writing an email; visiting a Huduma Centre outlet

206. While the practical aspects of these safeguards will be examined again in the Phase 2 review, Kenyan authorities reported that there were no appeals to High Court or the Ombudsman in EOI requests so far. Kenya advises that a court has the power to stay the processing of an EOI request, but it is of the view that the appellant would be required to satisfy the court that the KRA was exceeding the powers provided under tax law. It is also noted that Kenyan law does not require the KRA to notify the person who is the subject of the request nor disclose the purpose for which information is requested. In summary, the Kenyan legal framework is determined to be in place for ToR B.2.1.

where officers from the Ombudsman are stationed, or filing an online complaint form found on the Ombudsman website.

Part C: Exchanging information

207. Sections C.1 to C.5 evaluate the effectiveness of Kenya's network of EOI mechanisms – whether these EOI mechanisms provide for exchange of the right scope of information, cover all Kenya's relevant partners, whether there were adequate provisions to ensure the confidentiality of information received, whether Kenya's network of EOI mechanisms respects the rights and safeguards of taxpayers and whether Kenya can provide the information requested in an effective manner.

C.1. Exchange of information mechanisms

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

208. The 2016 Report concluded that this element was in place but needed improvement, with two in-box recommendations made. The first recommendation related to three Double Taxation Conventions (DTCs) found not to be fully in line with the standard in relation to the provision for exchange of information (Germany, Sweden and the United Kingdom). The second recommendation advised that Kenya should ensure the ratification of all EOI arrangements signed with counterparts expeditiously.

209. Kenya signed the Convention on Mutual Administrative Assistance in Tax Matters (Multilateral Convention) on 8 February 2016 and it entered into force in Kenya on 1 November 2020. The entry into force of the Multilateral Convention allows for full exchange with Germany, Sweden and the United Kingdom and therefore effectively addresses the first recommendation.

210. The second recommendation has been directly addressed in part by the subsequent ratification of 5 of the 10 EOI arrangements that were signed but not ratified at the time of approval of the 2016 Report. Of the 5 remaining EOI arrangements identified in the 2016 Report as signed but still not ratified, 4 exchange partners are covered by the Multilateral Convention and these relationships are in force from 1 November 2020. The fifth EOI arrangement signed but not in force is the regional East African Community

(EAC) tax treaty with four other members of the EAC, three of whom are not signatories to the Multilateral Convention (Burundi, Rwanda, Tanzania) and one is (Uganda). Kenya advised in the 2016 Report that it had completed all necessary notifications for the agreement to come into force in Kenya.

211. Kenya's EOI network now covers 147 jurisdictions, with 130 relationships based on instruments in force and 17 based on instruments signed but not yet in force. The bilateral agreement with a jurisdiction that was entered into since the 2016 Report for which the jurisdiction is not otherwise covered by the Multilateral Convention is in line with the standard.[18]

212. The conclusions are as follows:

Legal and Regulatory Framework: in place

No material deficiencies have been identified in the EOI mechanisms of Kenya.

Practical Implementation of the Standard: The assessment team is not in a position to issue a rating on this element, as it involves issues of practice that are dealt with in the Phase 2 review.

Other forms of exchange of information

213. Kenya received seven spontaneous exchanges from five jurisdictions during the review period. Kenya has committed to commence Automatic Exchange of Information on Financial Accounts from 2022.

C.1.1. Foreseeable relevance standard

214. The 2016 Report concluded that the text of the DTC with Germany was restrictive and did not meet the standard and therefore should be amended.

215. Kenya now has full exchange with Germany through the Multilateral Convention which is in force in respect to Kenya and Germany.

216. The new EOI arrangements that Kenya has signed since the 2016 Report include the term "foreseeably relevant" in their EOI Article, with the exception of the renegotiated DTC with India signed in July 2016 which retained the wording "necessary". The DTCs with Canada, Denmark, Italy, Norway, South Africa, Sweden, the United Kingdom and Zambia and

18. New DTCs have been entered into with Barbados, Botswana, China, India, Italy, Mauritius, Portugal and Singapore. All of these jurisdictions are also covered by the Multilateral Convention, except Botswana.

the regional agreement under the East African Community (EAC) also have EOI Articles that provide for the exchange of information that is "necessary" for carrying out the provisions of the Convention or similar wording. Kenya's authorities have reaffirmed that Kenya interprets these alternative formulations as equivalent to the term "foreseeably relevant". As a result, these agreements also meet the standard of foreseeable relevance.

217. The EOI office of the KRA has a procedure manual which includes a section on Guidelines for Establishing Foreseeable Relevance. The Guidelines advise staff to establish foreseeable relevance by identifying certain information in the request including:

- the tax purpose for which the information is sought
- an indication of the reasonable possibility that the requested information will be relevant to the requesting competent authority
- the grounds for believing that the information requested is held in Kenya or is in the possession or control of a person within Kenya's jurisdiction
- a statement that if the requested information was within the jurisdiction of the requesting Party, then the competent authority of that Party would be able to obtain it under its laws
- a statement that the requesting Party has pursued all means available to obtain the information, except those that would give rise to disproportionate difficulties.

218. The peer input received for the current review did not raise any concerns with Kenya's interpretation or practices with foreseeable relevance of requests made by peers. One peer mentioned seeking additional information for foreseeable relevance of a request made by Kenya and was satisfied with the clarifications.

Group requests

219. Kenya's EOI agreements and domestic law do not contain language prohibiting group requests. While Kenya did not receive any group requests during the review period, it has documented procedures for responding to group requests that are consistent with those applicable to ordinary, non-group requests.

C.1.2. Provide for exchange of information in respect of all persons

220. The 2016 Report determined that 9 of Kenya's DTCs did not explicitly provide that the EOI provision was not restricted by Article 1 of the Model Tax Convention.[19] The DTCs with these jurisdictions provide for the exchange of information as is necessary for carrying out the provisions of the domestic laws of the Contracting States, or similar language. To the extent that the domestic tax laws are applicable to non-residents as well as to residents, information under these agreements can be exchanged in respect of all persons and the agreements meet the standard. Moreover, 8 of the 9 jurisdictions are also signatories to the Multilateral Convention, which explicitly provides for EOI in respect of all persons.[20]

221. EOI agreements entered into since the 2016 Report allow for EOI with respect to all persons.[21]

C.1.3. Obligation to exchange all types of information

222. Exchange of information mechanisms should not permit the requested jurisdiction to decline to supply information solely because the information is held by a financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

223. The 2016 Report indicated that as some of Kenya's agreements were concluded before the update of the OECD Model Tax Convention in 2005, those agreements do not contain a provision corresponding to Article 26(5) which was introduced at that update.[22] Nevertheless, the 2016 Report noted that this absence did not automatically create restrictions on exchange of bank information. Kenya's domestic laws allow it to access and exchange bank information even in the absence of such provision in the DTCs as long as reciprocity is applied, i.e. depending on the domestic limitations (if any) in the laws of these treaty partners. Since then, the Multilateral Convention has entered into force in respect to Kenya and the absence of the updated EOI article in the respective DTCs will not impact the exchange of information with other signatories in line with the standard.

224. One of Kenya's exchange partners with a pre-2005 DTC is not a signatory to the Multilateral Convention and also has not been assessed for

19. Canada, Denmark, Germany, India, Italy, Norway, Sweden, the United Kingdom and Zambia.
20. The exception is Zambia.
21. Including the renegotiated DTC with India.
22. Canada, Denmark, Germany, Norway, Sweden, the United Kingdom and Zambia. The DTC with Iran was concluded after 2005 and also does not contain a provision corresponding to Article 26(5) of the OECD Model Tax Convention.

compliance with the standard (Zambia). It remains unclear whether Zambia would have restrictions on the access of bank information in their domestic law. As Kenya reported that it was renegotiating its DTC with Zambia at the time of the 2016 Report, the Report included an in-text recommendation that Kenya should include a provision similar to Article 26(5) of the OECD Model Tax Convention. The DTC has not been renegotiated and negotiations are not currently active.

225. The DTC with Iran was not in force at the time of the 2016 Report, coming into force on 13 July 2017. It does not include language equivalent to Article 26(5) of the OECD Model Tax Convention. Iran is not a signatory to the Multilateral Convention and has not been assessed for compliance with the standard and so it is therefore unclear whether Iran would have restrictions on the access of bank information in their domestic law. In view of the circumstances of the Iranian and Zambian agreements and the uncertainty over whether those jurisdictions would have any restrictions on accessing bank information under their respective laws, the previous recommendation in relation to renegotiating the Zambian agreement is therefore replaced with a recommendation that Kenya should ensure that these EOI relationships meet the standard (see Annex 1).

226. All agreements concluded after the 2016 Report have provisions in line with the standard.

C.1.4. Absence of domestic tax interest

227. 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. An inability to provide information based on a domestic tax interest requirement is not consistent with the standard. The 2016 Report concluded that the text of the DTCs with Sweden and the United Kingdom were restrictive in this respect and did not meet the standard.

228. Kenya now has full exchange with Sweden and the United Kingdom through the Multilateral Convention, which is in force between Kenya and these jurisdictions.

229. All agreements concluded after the 2016 Report have provisions in line with the standard.

C.1.5. and C.1.6 Civil and criminal tax matters

230. Kenya's network of agreements provide for exchange in both civil and criminal matters, with no dual criminality restriction.

C.1.7. Provide information in specific form requested

231. Kenya's network of agreements have no restrictions that would prevent it from providing information in a specific form.

C.1.8 and C.1.9. Signed agreements should be in force and be given effect through domestic law

232. The 2016 Report noted that Kenya had 9 DTCs signed but not in force. Four of those are still not in force (Italy, Kuwait, Mauritius and the Netherlands) although Kenya signed renegotiated agreements with Italy and Mauritius in March 2016 and April 2016 respectively. In addition, the EAC agreement is not yet in force although Kenya had completed all processes on its part to bring it into force, as explained in the 2016 Report.

233. Since the 2016 Report, Kenya has signed 5 new DTCs and another DTC that replaced an existing DTC with India. Only the Indian agreement has been brought into force.

234. Kenya signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters on 8 February 2016 and deposited its instruments of ratification of the Multilateral Convention on 22 July 2020. The Convention entered into force on 1 November 2020 in Kenya.

235. The 2016 Report made two recommendations in relation to EOI agreements. The first related to three agreements that were not in line with the standard. As discussed at paragraphs 215 and 228, these issues have been resolved with the entry into force of the Multilateral Convention and so the recommendation is removed.

236. The second recommendation was for Kenya to ensure that EOI arrangements signed with counterparts are ratified expeditiously. Almost all of the agreements signed by Kenya are now either in force or have EOI arrangements covered by the Multilateral Convention, and while the agreement with Botswana remains outstanding, the Multilateral Convention will come into force in relation to Botswana from 1 October 2021. As Kenya continues to have extended delays in its ratification procedures, the second recommendation is retained. Kenya should ensure the ratification of EOI arrangements signed with counterparts expeditiously (see Annex 1).

237. Kenya has in place domestic legislation necessary to give effect to the terms of its EOI instruments, as described in paragraphs 317-318 in the 2016 Report.

EOI mechanisms

Total EOI relationships, including bilateral and multilateral or regional mechanisms	147
In force	130
In line with the standard	128
Not in line with the standard	2
Signed but not in force	17
In line with the standard	17
Not in line with the standard	-
Total bilateral EOI relationships not supplemented with multilateral or regional mechanisms	2
In force	2 [Iran, Zambia]
In line with the standard	-
Not in line with the standard	2
Signed but not in force	-
In line with the standard	-
Not in line with the standard	-

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

The jurisdiction's network of information exchange should cover all relevant partners, meaning those jurisdictions who are interested in entering into an information exchange arrangement.

238. The 2016 Report noted some delays in concluding certain bilateral EOI agreements, a situation that was also noted would be overcome by Kenya proceeding with joining the Multilateral Convention which Kenya had requested to join but had not yet signed. The 2016 Report recommended that Kenya continue to develop its EOI network with all relevant partners and complete negotiations for an EOI agreement expeditiously when requested by partner jurisdictions.

239. Kenya signed the Multilateral Convention on 8 February 2016 and it entered into force on 1 November 2020. The number of exchange relationships has increased from 15 in force prior to the Multilateral Convention, to 130 in force at the cut-off date for this report. No Global Forum members indicated, in the preparation of this report, that Kenya refused to negotiate or sign an EOI instrument with it. As the standard ultimately requires that jurisdictions establish an EOI relationship up to the standard with all partners who are interested in entering into such relationship, the in-box recommendations are removed. However, Kenya provided information on jurisdictions with whom it has commenced negotiations but not yet concluded an agreement. Kenya should continue to conclude EOI agreements with any relevant partner who would so require (see Annex 1).

240. The conclusion is as follows:

Legal and Regulatory Framework: in place

The network of information exchange mechanisms of Kenya covers all relevant partners.

Practical Implementation of the Standard: The assessment team is not in a position to issue a rating on this element, as it involves issues of practice that are dealt with in the Phase 2 review.

C.3. Confidentiality

The jurisdiction's information exchange mechanisms should have adequate provisions to ensure the confidentiality of information received.

241. The 2016 Report concluded that the confidentiality provisions in Kenya's EOI instruments and domestic laws were in line with the standard. This continues to be the case. All of the new EOI mechanisms entered into by Kenya since the 2016 Report are also in line with the standard.

242. The conclusions are as follows:

Legal and Regulatory Framework: in place

No material deficiencies have been identified in Kenya's legal and regulatory framework in relation to ensuring the confidentiality of information received.

Practical Implementation of the Standard: The assessment team is not in a position to issue a rating on this element, as it involves issues of practice that are dealt with in the Phase 2 review.

C.3.1. Information received: disclosure, use and safeguards

243. All of Kenya's DTCs have confidentiality provisions to ensure that the information exchanged will only be disclosed as authorised by the DTCs. While the wording varies, these provisions contain all of the required elements of Article 26(2) of the OECD Model Tax Convention and specifically spell out to whom the information exchanged can be disclosed and the purposes for which the information can be used.

244. Treaty obligations are complemented by Kenya's domestic legislation that contains relevant confidentiality provisions. Section 41 of the Income Tax Act gives effect to DTCs under that Act and provides primacy of the DTC over that Act and any other laws. Section 41A achieves the same for

EOI agreements and section 6A of the Tax Procedures Act was added with effect from 1 July 2021 to provide the same for multilateral tax agreements. Section 6(1) of the Tax Procedures Act then requires authorised officers administering a tax law (including the Income Tax Act) to protect the confidentiality of documents or information obtained in the course of administering the tax law. Section 6(4) preserves this obligation after the employment or engagement ends. Section 6(3) extends this obligation to any other person who, under permitted circumstances, receives documents or information. A breach of section 6 is an offence and a person convicted is liable to a fine of up to KES 1 000 000 (EUR 8 354) or imprisonment up to 3 years or both.

245. Section 6(2) of the Tax Procedures Act provides for permitted disclosures to other specified government bodies and institutions. However, for any information received under an EOI agreement it is subject to the terms of the agreement and in case of any conflict, the disclosure is overridden by section 41(1) in the case of a DTC and section 41A(1) in the case of a TIEAs. Section 6A(2) of the Tax Procedures Act now also provides for all international tax agreements including the Multilateral Convention, information obtained must not be disclosed except in accordance with the conditions specified in the relevant agreement.

246. Kenya's Constitution provides citizens with the right to access information, however the Constitution also provides for the limitation of such rights in accordance with law when reasonable and justifiable. The provisions of the Tax Procedures Act mentioned in paragraph 245 is such a law, and in particular section 6A(2) will constrain access to EOI information only to those permitted by the relevant agreement. Furthermore, this restriction of access is compatible with the Access To Information Act under which access is subject to specified limitations including limitation for reasons of national security. That Act explicitly defines national security to include matters relevant to foreign relations, as well as information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime and enforcement of any law. On this basis, the competent authority does not give access to the EOI files.

247. Kenya's internal policies and procedures set out the obligations upon staff to ensure confidentiality in handling EOI matters. New employees sign an oath of secrecy and must adhere to a KRA Code of Conduct and Ethics, for which training is provided on induction and it includes confidentiality requirements. Information security training is regularly provided to employees through online and face-to-face sessions. Contractors sign non-disclosure agreements as part of their contract. The confidentiality provisions protecting tax information in Kenya's domestic laws are therefore adequate and are supported by sanctions in case of a breach.

248. The Terms of Reference, as amended in 2016, clarified that although it remains the rule that information exchanged cannot be used for purposes other than tax purposes, an exception applies where the EOI agreement provides for the authority supplying the information to authorise the use of information for purposes other than tax purposes and the tax information may be used for other purposes in accordance with their respective laws. Kenya has advised that there are no provisions in the domestic legal framework preventing the Competent Authority from granting authorisation to use the information for other purposes if a requesting partner seeks Kenya's consent. During the review period there were no cases where a requesting partner sought Kenya's consent to use the information for non-tax purposes and likewise there were no cases where Kenya requested such consent from a partner.

C.3.2. Confidentiality of other information

249. The confidentiality provisions in Kenya's EOI agreements and domestic laws do not draw a distinction between information received in response to requests and information forming part of the requests themselves. All other information, such as background documents, communications between the requesting and requested jurisdictions and within the tax authorities, are treated confidentially. The Kenyan authorities indicate that EOI data is treated separately from the rest of the tax data and stored separately. The practical implementation of confidentiality provisions will be assessed in the Phase 2 review.

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

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

250. The standard allows requested parties not to supply information in response to a request in certain identified situations where an issue of trade, business or other legitimate secret arises.

251. Kenya's EOI instruments ensure that the parties are not obliged to provide information which would disclose any trade, business, industrial, commercial or professional secret or information the disclosure of which would be contrary to public policy (*ordre public*), in a manner consistent with Article 26(3)(c) of the Model Tax Convention.

252. Communication between an attorney or other legal representative and a client is privileged under section 134 of the Evidence Act, but only to the extent that the attorney or other legal representative was acting in his or her

capacity as an attorney or other legal representative (see also element B.1.5). The scope of this privilege is subject to, and is narrowed by, the requirements of Kenya's EOI agreements which are incorporated into Kenyan law and given primacy over other laws including the Evidence Act through the provisions described in paragraph 244. As was described in the 2016 Report, the EOI agreements concluded by Kenya at that time met the standards for the protection and rights of taxpayers and third parties. This remains the case with EOI agreements concluded since then. This protection of the rights and safeguards of taxpayers and third parties is in accordance with the standard and does not inhibit access for EOI purposes.

253. The conclusions are as follows:

Legal and Regulatory Framework: in place

No material deficiencies have been identified in the information exchange mechanisms of Kenya in respect of the rights and safeguards of taxpayers and third parties.

Practical Implementation of the Standard: The assessment team is not in a position to issue a rating on this element, as it involves issues of practice that are dealt with in the Phase 2 review.

C.5. Requesting and providing information in an effective manner

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

254. The 2016 Report assessed the practice of exchange of information of Kenya for the period 1 July 2011-30 June 2014 and rated it as Partially Compliant with the standard. It noted that there were internal issues with the delegation of the competent authority power in Kenya, there was significant delay in the provision of information for one request, and status updates were not provided. Exchange of information operated on an ad hoc basis during the review period, but a formal EOI unit was created soon after the end of the review period.

255. The implementation of this aspect of the standard is primarily based on practice and will be assessed in the Phase 2 of the review with a new review period.

Legal and Regulatory Framework

This element involves issues of practice. Accordingly, no determination has been made.

Practical Implementation of the Standard: The assessment team is not in a position to issue a rating on this element, as it involves issues of practice that are dealt with in the Phase 2 review.

The Phase 2 recommendations issued in the 2016 Report are reproduced below for the information of readers.

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

C.5.1. Timeliness of responses to requests for information

256. Initial peer inputs received and statistics provided suggest that Kenya is responsive and timely in providing information. A full evaluation of the timeliness of responses for requests for information, involves issues of practice that will be dealt with in the Phase 2 review of Kenya.

C.5.2. Organisational processes and resources

257. The Cabinet Secretary, National Treasury and Planning is the competent authority for Kenya. The Cabinet Secretary has delegated this authority to the Commissioner General of the KRA. The details of the delegated competent authorities are published on the secure site of Global Forum and direct communication is done to treaty partners who are not Global Forum members. The details are also listed on the KRA website.

258. Kenya's EOI unit sits within the Intelligence and Strategic Operations Department of the KRA. It comprises six staff. A tracking system has been implemented to log requests and record the validation and work carried out on the requests. An EOI manual is in place to guide the procedures for handling requests including target timeframes for staff to complete each step. There were 69 EOI requests received during the period 1 July 2017 to 30 June 2020. The EOI manual also includes procedures for responding to group requests, although none have been received in the mentioned three year period. A dedicated email facility has been created, to which only competent authority staff have access.

259. The 2016 ToR includes an additional requirement to ensure the quality of requests made by assessed jurisdictions. During the period 1 July 2017 to 30 June 2020, Kenya made 77 outbound EOI requests, most of which occurred in 2020. Outbound requests are co-ordinated through the EOI unit, with documented procedures included in the EOI manual. The manual includes a template which must be used by other areas of the KRA when submitting requests to the EOI unit.

260. An analysis of the organisational process and resources implemented by Kenya in practice, including whether any unreasonable, disproportionate, or unduly restrictive conditions exist in practice, will be carried out during the Phase 2 review.

C.5.3. Unreasonable, disproportionate or unduly restrictive conditions for EOI

261. There are no factors or issues identified in Kenya that impose unreasonable, disproportionate or unduly restrictive conditions.

Annex 1: List of in-text recommendations

The Global Forum 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, the circumstances may change and the relevance of the issue may increase. In these cases, a recommendation may be made; however, it should not be placed in the same box as more substantive recommendations. Rather, these recommendations can be stated in the text of the report. A list of such recommendations is reproduced below for convenience.

- **Element A.1:** Kenya should ensure that sufficient guidance is issued to explain the meaning of ongoing CDD, particularly in relation to the timing of updates (para. 84).
- **Element C.1:** Kenya should include a provision similar to Article 26(5) of the OECD Model Tax Convention through renegotiation of the DTCs with Zambia and Iran (para. 225).
- **Element C.1:** Kenya should ensure the ratification of EOI arrangements signed with counterparts expeditiously (para. 236).
- **Element C.2:** Kenya should continue to conclude EOI agreements with any new relevant partner who would so require (para. 239).

In addition, the Global Forum may identify aspects of the legal and regulatory framework that require follow-up in Phase 2. A non-exhaustive list of these aspects is reproduced below for convenience.

- **Element A.1:** The existence and nature of any guidelines issued by the Financial Reporting Centre (Footnote 13).
- **Element A.1:** Enforcement and oversight of the ownership information obligations in the Companies Act by the Registrar of Companies will be assessed in Phase 2 of the review (para. 61 and 104).
- Elements A.1 and A.2: The retention and availability of records of a company after it is struck off (para. 63 and 153).

- **Element A.1:** The supervisory measures and their adequacy in respect of all companies, including dormant and inactive companies will be examined in greater detail in the Phase 2 review (para. 72).
- **Element A.1:** The coverage of the holding of bank accounts, in the context of engaging an AML-obliged person (para. 77).
- **Element A.1:** The operation of the process for a company to obtain identity information on its beneficial owners by issuing a notice (para. 90).
- **Element A.1:** The application in practice of supervision of the CDD requirements of reporting institutions (para. 108).
- **Element A.2:** The operation in practice of the implied requirement that the registered office of domestic companies is in Kenya (para. 150).
- **Element A.2:** The Registrar's oversight of the accounting obligations of limited liability partnerships (para. 164).

Annex 2: List of Kenya's EOI mechanisms

Bilateral international agreements for the exchange of information

	EOI partner	Type of agreement	Signature	Entry into force
1	Barbados	DTC	11 Dec 2019	Not in force
2	Botswana	DTC	23 July 2019	Not in force
3	Canada	DTC	27 April 1983	8 Jan 1987
4	China (People's Republic of)	DTC	21 Sept 2017	Not in force
5	Denmark	DTC	13 Dec 1972	24 March 1987
6	France	DTC	4 Dec 2007	1 Nov 2010
7	Germany	DTC	17 May 1977	17 July 1980
8	India	DTC	11 July 2016	30 Aug 2017
9	Iran	DTC	29 May 2012	13 July 2017
10	Italy	DTC	3 March 2016	Not in force
11	Korea	DTC	8 July 2014	3 April 2017
12	Kuwait	DTC	12 Nov 2013	Not in force
13	Mauritius	DTC	10 April 2019	Not in force
		Protocol	16 Oct 2019	Not in force
14	Netherlands	DTC	22 July 2015	Not in force
15	Norway	DTC	13 Dec 1972	10 Sept 1973
16	Portugal	DTC	10 June 2018	Not in force
17	Qatar	DTC	23 April 2014	25 June 2015
18	Seychelles	DTC	17 March 2014	1 April 2015
19	Singapore	DTC	12 June 2018	Not in force
20	South Africa	DTC	26 November 2010	19 June 2015
21	Sweden	DTC	28 June 1973	28 Dec 1973

	EOI partner	Type of agreement	Signature	Entry into force
22	United Arab Emirates	DTC	21 November 2011	22 Feb 2017
23	United Kingdom	DTC	31 July 1973	30 Sept 1977
24	Zambia	DTC	8 Aug 1969	1 April 1964

Convention on Mutual Administrative Assistance in Tax Matters (as amended)

The Convention on Mutual Administrative Assistance in Tax Matters was developed jointly by the OECD and the Council of Europe in 1988 and amended in 2010 (the Multilateral Convention).[23] The Multilateral Convention is the most comprehensive multilateral instrument available for all forms of tax cooperation to tackle tax evasion and avoidance, a top priority for all jurisdictions.

The original 1988 Convention was amended to respond to the call of the G20 at its April 2009 London Summit to align it to the standard on exchange of information on request and to open it to all countries, in particular to ensure that developing countries could benefit from the new more transparent environment. The Multilateral Convention was opened for signature on 1 June 2011.

The Multilateral Convention was signed by Kenya on 8 February 2016 and entered into force on 1 November 2020 in Kenya. Kenya can exchange information with all other Parties to the Multilateral Convention.

The Multilateral Convention is in force in respect of the following jurisdictions: Albania, Andorra, Anguilla (extension by the United Kingdom), Antigua and Barbuda, Argentina, Armenia, Aruba (extension by the Netherlands), Australia, Austria, Azerbaijan, Bahamas, Bahrain, Barbados, Belgium, Belize, Bermuda (extension by the United Kingdom), Bosnia and Herzegovina, Brazil, British Virgin Islands (extension by the United Kingdom), Brunei Darussalam, Bulgaria, Cabo Verde, Cameroon, Canada, Cayman Islands (extension by the United Kingdom), Chile, China (People's Republic of), Colombia, Cook Islands, Costa Rica, Croatia,

23. The amendments to the 1988 Convention were embodied into two separate instruments achieving the same purpose: the amended Convention (the Multilateral Convention) which integrates the amendments into a consolidated text, and the Protocol amending the 1988 Convention which sets out the amendments separately.

Curaçao (extension by the Netherlands), Cyprus,[24] Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador, El Salvador, Estonia, Eswatini, Faroe Islands (extension by Denmark), Finland, France, Georgia, Germany, Ghana, Gibraltar (extension by the United Kingdom), Greece, Greenland (extension by Denmark), Grenada, Guatemala, Guernsey (extension by the United Kingdom), Hong Kong (China) (extension by China), Hungary, Iceland, India, Indonesia, Ireland, Isle of Man (extension by the United Kingdom), Israel, Italy, Jamaica, Japan, Jersey (extension by the United Kingdom), Kazakhstan, Korea, Kuwait, Latvia, Lebanon, Liechtenstein, Lithuania, Luxembourg, Macau (China) (extension by China), Malaysia, Malta, Marshall Islands, Mauritius, Mexico, Moldova, Monaco, Mongolia, Montenegro, Montserrat (extension by the United Kingdom), Morocco, Namibia, Nauru, Netherlands, New Zealand, Nigeria, Niue, North Macedonia, Norway, Oman, Pakistan, Panama, Peru, Poland, Portugal, Qatar, Romania, Russia, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Saudi Arabia, Senegal, Serbia, Seychelles, Singapore, Sint Maarten (extension by the Netherlands), Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, Turks and Caicos Islands (extension by the United Kingdom), Uganda, Ukraine, United Arab Emirates, United Kingdom, Uruguay and Vanuatu.

In addition, the Multilateral Convention was signed by the following jurisdictions, where it is not yet in force: Benin, Botswana (entry into force on 1 October 2021), Burkina Faso, Gabon, Jordan (entry into force on 1 December 2021), Liberia (entry into force on 1 December 2021), Maldives, Mauritania, Papua New Guinea, Paraguay (entry into force on 1 November 2021), Philippines, Rwanda, Thailand, Togo, United States (the original 1988 Convention is in force since 1 April 1995, the amending Protocol was signed on 27 April 2010).[25]

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24. 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 Island. 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".

Note by all the European Union Member States of the OECD and the European Union: 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.

25. Since the United States is a Party to the original Convention but only a signatory to its Protocol, the Convention does not apply between the United States and Parties to the amended Convention that are not OECD or Council of Europe members, which is the case for Kenya.

East African Community Income Tax Treaty

Kenya is a signatory to the EAC regional DTC signed on 30 November 2010 (not yet in force), which provides for the necessary legal basis to enhance co-operation and EOI among the five revenue authorities of Kenya, Uganda, Burundi, Rwanda, Tanzania, under Article 27. Furthermore, a "Memorandum of Understanding on the Exchange of Information on Tax Expertise and Other Related Matters" (MoU) was signed on 10 November 2010 by the five revenue authorities, which provides for detailed rules and procedures for EOI on tax matters, in line with the 2002 OECD Model TIEA.

Annex 3: Methodology for the review

The reviews are based on the 2016 Terms of Reference and are conducted in accordance with the 2016 Methodology for peer reviews and non-member reviews, as amended in December 2020, and the Schedule of Reviews.

The evaluation is based on information available to the assessment team including the exchange of information arrangements signed, laws and regulations in force or effective as at 31 August 2021, Kenya's responses to the EOIR questionnaire, and inputs from partner jurisdictions. Since this assessment was launched in the final quarter of 2020, peer review contributions were received for the period 1 July 2017 to 30 June 2020. Although implementation in practice is not assessed in this report, the assessment team has considered these contributions to confirm the compliance of the legal and regulatory framework.

Review	Assessment team	Period under review	Legal Framework as of	Date of adoption by Global Forum
Round 1 Phase 1	David Smith, United Kingdom; Antonio Nikolakopoulos, San Marino; and Mary O'Leary from the Global Forum Secretariat	Not applicable	27 August 2013	November 2013
Round 1 Phase 2		1 July 2011 to 30 June 2014	18 December 2015	March 2016
Round 2 Phase 1	Jolanda Roelofs (Netherlands); Mukhta Toofanee (Mauritius); Ricky Herbert (Global Forum Secretariat)	Not applicable	31 August 2021	18 November 2021

List of laws, regulations and other materials received

Constitution

Companies Act and Regulations made under that Act (Companies Regulations)

Partnerships Act

Limited Liability Partnership Act

Income Tax Act

Tax Procedures Act

Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) and Regulations made under that Act (POCAML Regulations)

Prevention of Terrorism Act (POTA) and Regulations made under that Act (POT Regulations)

Central Bank of Kenya Prudential Guidelines on Proceeds of Crime and Money Laundering (Prevention) and Combating the Financing of Terrorism (CBK/PG/08)

Capital Markets Act and Capital Markets Authority Guidelines on Prevention of Money Laundering and Terrorism Financing in the Capital Markets (CMA Guidelines 2015)

Co-operative Societies Act

Access to Information Act

Limitation of Actions Act

Kenyan Revenue Authority Act

Evidence Act

Annex 4: Kenya's response to the review report[26]

Kenya thanks the Global Forum Secretariat, the Peer Review Group and the assessment team for their dedication and commitment during the Phase 1 review of Kenya. Their professionalism during the assessment resulted in a successful Phase 1 review for Kenya despite the challenges brought about by the global pandemic.

Kenya is in agreement with the report and is pleased to note that the report recognizes the efforts Kenya has made to improve its legal framework in order to enhance compliance to the international standards of transparency and exchange of information. One of the key achievements was the ratification of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters in July 2020. The Convention significantly enhanced the available EOIR mechanisms and provided for effective exchange of information.

The areas for improvement identified during the review have been noted for implementation. Kenya looks forward to the launch of Phase 2 of the review process where the assessment team will conduct an assessment of the implementation of the standard in practice.

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

GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

Peer Review Report on the Exchange of Information on Request KENYA 2021 (Second Round, Phase 1)

The Global Forum on Transparency and Exchange of Information for Tax Purposes is a multilateral framework for tax transparency and information sharing, within which over 160 jurisdictions participate on an equal footing.

The Global Forum monitors and peer reviews the implementation of international standard of exchange of information on request (EOIR) and automatic exchange of information. The EOIR provides for international exchange on request of foreseeably relevant information for the administration or enforcement of the domestic tax laws of a requesting party. All Global Forum members have agreed to have their implementation of the EOIR standard be assessed by peer review. In addition, non-members that are relevant to the Global Forum's work are also subject to review. The legal and regulatory framework of each jurisdiction is assessed as is the implementation of the EOIR framework in practice. The final result is a rating for each of the essential elements and an overall rating.

The first round of reviews was conducted from 2010 to 2016. The Global Forum has agreed that all members and relevant non-members should be subject to a second round of review starting in 2016, to ensure continued compliance with and implementation of the EOIR standard. Whereas the first round of reviews was generally conducted as separate reviews for Phase 1 (review of the legal framework) and Phase 2 (review of EOIR in practice), the EOIR reviews commencing in 2016 combine both Phase 1 and Phase 2 aspects into one review. Final review reports are published and reviewed jurisdictions are expected to follow up on any recommendations made. The ultimate goal is to help jurisdictions to effectively implement the international standards of transparency and exchange of information for tax purposes.

This publication contains the 2021 Second Round Peer Review Report on the Exchange of Information on Request of Kenya. It refers to Phase 1 only (Legal and Regulatory Framework).

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