GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

Peer Review Report Phase 1 Legal and Regulatory Framework

GIBRALTAR

OECD

Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Gibraltar 2011

PHASE 1

October 2011
(reflecting the legal and regulatory framework
as at August 2011)

Please cite this publication as:
OECD (2011), *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Gibraltar 2011: Phase 1: Legal and Regulatory Framework*, Global Forum on Transparency and Exchange of Information for Tax Purposes: Peer Reviews, OECD Publishing.
http://dx.doi.org/10.1787/9789264111943-en

ISBN 978-92-64-11193-6 (print)
ISBN 978-92-64-11194-3 (PDF)

Series: Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews
ISSN 2219-4681 (print)
ISSN 2219-469X (online)

Corrigenda to OECD publications may be found on line at: *www.oecd.org/publishing/corrigenda*.

Table of Contents

About the Global Forum

The Global Forum on Transparency and Exchange of Information for Tax Purposes is the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by over 100 jurisdictions, which participate in the Global Forum on an equal footing.

The Global Forum is charged with in-depth monitoring and peer review of the implementation of the international standards of transparency and exchange of information for tax purposes. These standards are primarily reflected in the 2002 OECD *Model Agreement on Exchange of Information on Tax Matters* and its commentary, and in Article 26 of the OECD *Model Tax Convention on Income and on Capital* and its commentary as updated in 2004. The standards have also been incorporated into the UN *Model Tax Convention*.

The standards provide for international exchange on request of foreseeably relevant information for the administration or enforcement of the domestic tax laws of a requesting party. Fishing expeditions are not authorised but all foreseeably relevant information must be provided, including bank information and information held by fiduciaries, regardless of the existence of a domestic tax interest or dual criminality.

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

All review reports are published once adopted by the Global Forum.

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

Executive Summary

1. This report summarises the legal and regulatory framework for transparency and exchange of information in Gibraltar.

2. The international standard which is set out in the Global Forum's Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information, is concerned with the availability of relevant information within a jurisdiction, the competent authority's ability to gain timely access to that information, and in turn, whether that information can be effectively exchanged with its exchange of information (EOI) partners.

3. Gibraltar is a British overseas territory located on the southern end of the Iberian Peninsula at the entrance of the Mediterranean Sea. Its economy is based primarily on tourism, financial services, port operations and online gaming. Its main trading partners are Spain and the United Kingdom (UK).

4. Gibraltar has worked with the OECD in respect of tax information exchange since 2002 and since 2006 has participated in all of the Global Forum's annual assessments. In 2009 it became a member of the Global Forum and committed to the international standard for transparency and exchange of information for tax purposes. Since then it has quickly built up a network of exchange of information agreements that includes its key trading partners. As at 12 August 2011 it has signed EOI agreements with 18 jurisdictions, of which 15 have been brought into force. Gibraltar has taken all steps on its part which are necessary to bring the remaining three agreements into force.

5. All of Gibraltar's EOI agreements allow Gibraltar to exchange information according to the international standard. They contain adequate safeguards to protect the rights of taxpayers and third parties, and these safeguards are consistent with the international standard. The EOI mechanisms also ensure the confidentiality of all information exchanged.

6. With regard to the authorities' powers to access to information requested by foreign counterparts, the International Co-operation (Tax Information) Act gives Gibraltar's competent authority broad powers to access all types of information from all persons for EOI purposes. The rights and safeguards that apply to persons in the requested jurisdiction should be compatible with effective exchange of information.

7. Gibraltar's laws generally impose obligations for legal entities and arrangements to have ownership information available, and for banks to have bank account information available. There are however some issues identified in this report with respect to the availability of ownership and accounting information.

8. Share warrants to bearer may be issued by private companies in Gibraltar and there are limited mechanisms in place to identify their owners. Currently such warrants are in issue for only 17 companies, all of which have their registered offices with licensed and regulated company managers who are therefore subject to AML obligations which require immobilisation so as to permit ongoing customer due diligence. In addition, information on settlors and beneficiaries is available in respect of all professionally managed trusts except where the trustee falls in the limited category who qualify for an exemption from this obligation.

9. With regard to accounting information, companies are obliged to keep accounting records that reflect their transactions and financial position, but not all underlying documents. There is no clear requirement for all relevant accounting records or underlying documents to be maintained for partnerships or trusts. In addition, for all entities and arrangement, only the records that need to be kept under the AML regime are subject to a minimum five year retention period. Such information may therefore not be available.

10. Recommendations have been made where elements of Gibraltar's EOI regime have been found to be in need of improvement. Gibraltar's progress in these areas, as well as its actual practice in exchange information with its EOI partners, will be considered in its Phase 2 review which is scheduled to commence in the first half of 2014.

Introduction

Information and methodology used for the peer review of Gibraltar

11. The assessment of the legal and regulatory framework of Gibraltar was based on the international standards for transparency and exchange of information as described in the Global Forum's *Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information for Tax Purposes*, and was prepared using the Global Forum's *Methodology for Peer Reviews and Non-Member Reviews*. The assessment was based on the laws, regulations, and exchange of information mechanisms in force or effect as at August 2011, other materials supplied by Gibraltar, and information supplied by partner jurisdictions.

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

13. The assessment was conducted by an assessment team, which comprised two expert assessors: Mr Tilo Welz, Executive Officer from the Federal Ministry of Finance, Germany: Ms. Marlene Parker, Director of Legislation and Treaty Services Unit, Jamaica; and one representative of the Global Forum Secretariat, Mr. Guozhi Foo. The assessment team assessed the legal and regulatory framework for transparency and exchange of information and relevant exchange of information mechanisms in Gibraltar.

Overview of Gibraltar

14. Gibraltar is a British overseas territory located at the southern tip of the Iberian Peninsula, bordering the Straits of Gibraltar, which links the Mediterranean Sea and the Atlantic Ocean.

15. Gibraltar has a diversified service-based economy. The principal contributors to Gibraltar's economic base are tourism, financial services, port operations and online gaming. Its main trading partners are Spain and the United Kingdom (UK).

16. Tourism accounts for about 30% of Gibraltar's GDP. Gibraltar receives a total of about ten million visitors annually. Financial services accounts for approximately another 30% of GDP and employs about 3 000 individuals. The principal types of financial services include banking, insurance, asset management, fund management as well as trust and company services. As at end-March 2011, the total value of bank assets in Gibraltar was 9 billion (EUR 10.3 billion) and the total amount of funds under management was about GBP 9.2 billion (EUR 10.5 billion). Shipping and port services is another significant contributor to the economy. Gibraltar is the largest bunkering port in the Mediterranean, providing some five million tons of fuel to vessels annually.[1] In the fiscal year ending in March 2010 Gibraltar's gross domestic product was approximately GBP 954 million (EUR 1 087 million), translating to a GDP per capita of about GBP 32 897 (EUR 37 503)[2]

Legal and taxation system

17. Gibraltar's political activity takes place within a framework of a parliamentary democracy. Gibraltar's legislative branch is represented by the 18-member Gibraltar Parliament comprising 17 elected members and one speaker. Representatives serve four-year terms. The head of government is the Chief Minister, who is the leader of the majority party with ten seats in parliament. A Council of Ministers appointed from the elected members of parliament forms the Cabinet. The head of state is Queen Elizabeth II who is represented by a Governor appointed by the Queen.

18. Gibraltar's statute law consists of Acts passed by the Gibraltar Parliament. The laws also include statute law and case law as decided by the courts. The hierarchy of laws in Gibraltar is based on the UK model and acts of Parliament take precedence over subsidiary legislation made there under. Statutory instruments include Regulations, Rules, Notices and Orders.

1. Economic figures provided by Gibraltar.
2. Source: Gibraltar Abstract of Statistics Report 2009.

19. The judiciary comprises the Court of First Instance, Coroner's Court and the Magistrates' Court for minor offences and the Supreme Court for major offences and appeals from the lower courts. Above the Supreme Court are the Court of Appeal and the Judicial Committee of the Privy Council in the UK.[3] Gibraltar is a common law jurisdiction that applies the principles of equity. All the courts mentioned above (with the notable exception of the Coroner's Court) may have jurisdiction on taxation matters depending on the particular facts and circumstances.[4]

20. The EU Treaties[5] apply to Gibraltar as a European territory for whose external relations a Member State is responsible.[6] EU legislation is applicable to Gibraltar with certain exceptions.

Tax system

21. Gibraltar has full autonomy with respect to domestic tax matters. In Gibraltar, companies and individuals are subject to income tax, levied under the Income Tax Act 2010. Income tax is levied on a territorial basis. The standard rate of corporation tax fell from 22% to 10% with effect from 1 January 2011, coinciding with the final termination of the historic Tax Exempt Company regime (see paragraph 32). A higher rate of 20% applies to utilities companies. Gibraltar determines the residence of companies using the control and management test. A company is resident in Gibraltar if (a) the

3. A decision of the Supreme Court of Gibraltar may be appealed to the Court of Appeal for Gibraltar which may in turn grant leave to appeal to the Privy Council in the UK.
4. The Magistrates' Court generally has jurisdiction on criminal tax matters, offences and compliance of procedural requirements specified in the Income Tax Act 2010 and the International Co-operation (Tax Information) Act 2009. The Income Tax Tribunal is an independent appellate body in relation to appeals brought against assessments to tax made under the Income Tax Act 2010 (with a further right of appeal to the Supreme Court of Gibraltar on point of law). The Supreme Court of Gibraltar has jurisdiction over specified criminal tax matters, offences and compliance with procedural requirements as prescribed in the Income Tax Act 2010 and the International Co-operation (Tax Information) Act 2009. The recovery of civil tax debts due under the Income Tax Act 2010 also fall under the ambit of the jurisdiction of the Supreme Court in accordance with civil procedural rules of court (including enforcement of judgment debts and company liquidations).
5. The Treaty on the European Union and the Treaty on the Functioning of the European Union.
6. Article 355(3) of the Consolidated Version of the Treaty on the Functioning of the European Union.

management and control of its business is exercised in Gibraltar; or (b) it carries on business in Gibraltar and the management and control of the business is exercised outside Gibraltar by persons ordinarily resident in Gibraltar.7 In the case of ordinarily resident individuals, worldwide income is taxable. Individuals may choose between the lower of an allowance-based system, whereby they are taxed according to income bands and at tax rates of 17% to 40%; and a gross-income based system whereby they are taxed based on gross income bands and tax rates ranging from 6% to 28%, with no allowance or relief entitlement. The maximum effective rate under this system is 25%.

22. Some classes of income are not chargeable to tax under the Income Tax Act 2010, *e.g.* interest (other than trading interest), income from debentures and dividends paid to companies and non-residents individuals and royalties. Capital gains, wealth and inheritance are not subject to tax under the Income Tax Act 2010.

23. The Income Tax Office under the Ministry of Finance administers the income tax regime in Gibraltar.

24. With regard to entering into international agreements, Gibraltar is entrusted by the UK Foreign & Commonwealth Office (FCO) to negotiate and conclude agreements that provide for the exchange of information on tax matters, as well as any ancillary agreements. Gibraltar's entrustment is given on the understanding that the UK remains responsible for the international relations of the Gibraltar; and on the conditions that:

- the Government of Gibraltar supply evidence to the FCO that the jurisdiction with which the Gibraltar is negotiating is content to conclude such an agreement directly with the Government of the Gibraltar; and
- the proposed final text of the agreement is submitted to the FCO in London for approval before signature.

25. The International Co-operation (Tax Information) Act ("ICA") is the legislation pursuant to which Gibraltar provides assistance under its EOI agreements. These EOI agreements become part of Gibraltar's domestic law upon ratification. Pursuant to the ICA, the Minister for Finance is the competent authority for exchange of information in tax matters.

26. The other avenues through which Gibraltar provides international co-operation in tax matters include:

7. A person is ordinarily resident in Gibraltar if he is in Gibraltar for at least 183 days in a tax year, or for more than 300 days over 3 consecutive tax years.

- the Evidence Act – the Evidence Act makes provision for Gibraltar to provide mutual legal assistance pursuant to a receipt of a letter of request in connection with civil or criminal proceedings;
- the EU Mutual Assistance Directive 77/799/EEC – Gibraltar is able to exchange information on tax matters under the said directive; and
- the EU Savings Directive (EU-SD) – under the EU-SD, Gibraltar sends and receives automatically on an annual basis information on interest payments received by natural persons from/to EU members (with the exception of UK, where a withholding tax system is in place).

Gibraltar's commercial laws and financial sector

27. The Financial Services Commission ("FSC"), an independent statutory body established by the Gibraltar Parliament, is the unified regulatory and supervisory authority for financial services in Gibraltar. The FSC is responsible for the authorisation and supervision of a wide range of service providers, including banks, investment businesses, insurance companies, investment services, company management, professional trusteeship, insurance management, insurance mediation, money transmitters, bureaux de change, occupational pensions schemes, auditors and collective investment schemes. The FSC was established under the Financial Services Commission Act of 1989 (FSCA), which has since been replaced with the Financial Services Commission Act 2007.

28. Gibraltar's financial sector consists primarily of branches or subsidiaries of international firms. Out of the 19 authorised credit institutions in Gibraltar, 18 are branches or subsidiaries of international banks. In addition there were 63 insurance companies, 28 insurance intermediaries, 24 investment firms and 7 insurance managers as of the end of March 2011.

29. There are 202 lawyers, regulated by the Chief Justice who is advised by the Admissions and Disciplinary Committee (chaired by the Attorney General with two other senior lawyers appointed by the Chief Justice) and 14 Public Notaries, appointed by the Faculty Office of the Archbishop of Canterbury and registered as such under the provisions of the Commissioners for Oaths and Public Notaries Act. There are 58 statutory auditors and 15 audit firms approved under the Financial Services (Auditors) Act 2009, supervised and regulated by the Financial Services Commission. As of the end of March 2011 there were a total of 72 company manager/professional trustee groups.

30. The provision of investment services is an important function conducted by the banks in Gibraltar. The banks provide various related services

for wealth/asset management. Business may be directed to the banks through independent asset managers either located in Gibraltar or overseas, or through the parent offices, or acquired through Gibraltar-based marketing efforts. Fiduciary deposits from parent banks are also common.

31. Gibraltar law provides for the creation of domestic companies, partnerships and trusts. The registration of these entities comes under the supervision of the Registrar of Companies. The Registrar of Companies is a Government official in the form of the Finance Centre Director. The daily administration and management of the Companies Registry has been outsourced to a private company, Companies House (Gibraltar) Limited, which acts as the Assistant Registrar of companies, trusts, limited partnerships and business names under the respective acts. Gibraltar companies can be listed on any stock exchange, subject to the respective countries' requirements. For example, a handful of Gibraltar companies are listed on the London Stock Exchange. Gibraltar does not have its own stock exchange.

32. Gibraltar had in the past provided for the incorporation of tax-exempt companies – companies that do not carry business in Gibraltar and whose beneficial owner does not reside in Gibraltar. Such companies enjoyed the certainty of tax exemption in Gibraltar. The tax-exempt company regime was phased out gradually from 2006 under the terms of an appropriate measures agreement with the European Commission, with the tax-exempt status of the last tax-exempt companies expiring on 31 December 2010. There are currently no longer any companies with tax-exempt status in Gibraltar as the relevant legislation was repealed as from 1 January 2011.

Recent developments

33. Since 2009, Gibraltar has rapidly established its network of EOI agreements and continues to do so. As of 12 August 2011 it has concluded EOI agreements with a total of 18 jurisdictions, of which 15 have been brought into force.[8] A new Mutual Assistance Directive was adopted by the European Council on 15 February 2011 and will come into force on 1 January 2013.

8. Gibraltar has completed all the necessary procedures on its part to bring the remaining three agreements into force.

Compliance with the Standards

A. Availability of information

Overview

34. Effective exchange of information requires the availability of reliable information. In particular, it requires information on the identity of owners and other stakeholders as well as accounting information on the transactions carried out by entities and other organisational structures. Such information may be kept for tax, regulatory, commercial or other reasons. If information is not kept or the information is not maintained for a reasonable period of time, a jurisdiction's competent authority may not be able to obtain and provide it when requested. This section of the report assesses the adequacy of Gibraltar's legal and regulatory framework on availability of information.

35. Ownership and identity information of legal persons in Gibraltar is generally made available through the requirements imposed on the entities to maintain information or submit it to the authorities as part of registration obligations. This is supported by obligations on service providers to maintain information in accordance with anti-money laundering (AML) legislation. These requirements have associated enforcement provisions. However, two deficiencies exist in respect of trusts and share warrants to bearer. Limited mechanisms exist to identify the owners of share warrants to bearer, although only 17 companies currently have share warrants to bearer. Gibraltar is committed to abolishing share warrants to bearer through legislative amendment. Further, information on settlors and beneficiaries may not be available in respect of all trusts.

36. Companies are obliged to keep accounting records that explain all their transactions and reflect their financial position. These records allow financial statements on these companies to be prepared. There is no statutory obligation on companies to maintain all relevant underlying documentation. There is also no clear requirement for relevant accounting records or underlying documents to be maintained for partnerships or trustees. However licensed service providers and financial institutions must, in accordance with AML obligations, keep records of transactions conducted through them for five years. In terms of retention of accounting records and underlying documents, for all entities and arrangements, only the records that need to be kept under the AML regime are subject to a minimum five year retention period.

37. Bank account information on transactions and the identity of customers is made available through Gibraltar's AML laws.

A.1. Ownership and identity information

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

Companies (ToR A.1.1)

38. Gibraltar law provides for the incorporation of the following types of companies: There are approximately 23 800 private limited companies, less than 100 public limited companies, 67 protected cell companies and no European Public Limited Liability Company (Societas Europaeas) have yet been incorporated.

Companies Act

39. The Companies Act provides for the incorporation of domestic companies whose liability may be limited by shares or guarantee, or be unlimited. Companies may be formed for any lawful purpose, and may choose to be public or private companies.

Private companies

40. A private company is a company that is limited by shares or guarantee, and whose articles:

- restricts the rights to transfer its shares;
- limits the number of its members to 50; not including persons who are in the employment of the company and persons who, having been

formerly in the employment of the company, were while in that employment and have continued after the determination of that employment to be, members of the company; and

- prohibits any invitation to the public to subscribe for any shares or debentures of the company.[9]

41. Private companies enjoy certain reporting exemptions under the Companies Act.[10] For example, they are not required to send copies of the company balance sheet and the auditor's report to shareholders before the annual general meeting.[11]

Public companies

42. A public company is a company whose articles do not include all the restrictions applicable to private companies. It may not have less than seven members, and the amount of share capital stated in its memorandum must not be less than GBP 20 500 (EUR 23 400).[12]

Protected Cell Companies Act

43. The Protected Cell Companies Act provides for the incorporation of protected cell companies – companies whose assets, equity and liabilities may be segregated into individual cells. Protected cell companies may only be used by insurers and collective investment schemes, which may only be incorporated with the written consent of the Financial Services Commission, and special purpose vehicles of which there are none, which may only be incorporated with the written consent of the Finance Centre Director.[13] The regulations applicable to domestic companies under the Companies Act generally apply similarly to protected cell companies.[14]

European companies

44. European companies are regulated by Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (Soceitas Europaea – "SE"), which was transposed into Gibraltar law by the European Public Limited Liability Company Act, allowing for the creation and management of companies with a European dimension and not strictly falling under

9. Section 40 of the Companies Act.
10. The exemptions are spelt out in 41(3) of the Companies Act.
11. Section 178(1) of the Companies Act.
12. Section 3 of the Companies Act.
13. Section 11 of the Protected Cells Companies Act.
14. Section 3(3) of the Protected Cell Companies Act.

the territorial scope of the domestic companies legislation in force in the country where they have been incorporated. Pursuant to Article 10 of the EU Regulation, the laws that apply to SEs are those that apply to public limited companies. Accordingly, the laws that apply to Gibraltar public limited companies apply to SEs.

45. The laws of Gibraltar also provide for the formation of associations and cooperatives. These entities are used primarily for the management of local housing areas or for trade unions, and are not relevant for the purposes of this review.

Information required to be provided to government authorities

46. A Government official in the form of the Finance Centre Director is the Registrar of Companies. The daily administration and management of the Companies Registry has been outsourced to a private company, Companies House (Gibraltar) Limited, which acts as the Assistant Registrar of companies, trusts, limited partnerships and business names under the respective Acts. Companies House may keep filed information in any form provided that it is possible to inspect the information and to produce a copy of it in printed form. The documents and information kept by Companies House are open for public inspection. The Companies Act specifies that the originals of documents delivered to the Registrar (in effect, Companies House) in printed form must be kept for a minimum of ten years, although in practice they are kept indefinitely.[15]

47. All companies in Gibraltar must register and provide their memorandum and articles of association to the Registrar of Companies at the time of their incorporation. The memorandum and articles of incorporation must include general information on the company such as name, objects, amount of share capital (for companies limited by shares) and number of members (for companies limited by guarantee)[16]. At the time of filing, the company must also provide to the Registrar the names of all the directors and their addresses.[17]

48. All companies must file annual returns to the Registrar. The information to be contained in an annual return differs according to whether the company has share capital, and includes the following[18]:

15. Section 346 of the Companies Act.
16. Sections 4 and 8 of the Companies Act.
17. Section 14 of the Companies Act.
18. Sections 153 and 154 of the Companies Act.

Company with share capital	Company without share capital
Address of registered office Name, address and occupation of all directors Name, address and occupation of all secretaries Name, address and occupation of all shareholders at the date of return	Address of registered office Name, address and occupation of all directors Name, address and occupation of all secretaries

Foreign companies

49. All companies that are incorporated outside of Gibraltar but carrying on a business in Gibraltar must within one month of establishing a place of business therein register with the Registrar of Companies.

50. In order to be registered, the foreign company must file certain information with the Registrar, which includes the following:

- a certified copy of the charter, statutes or memorandum and articles of the company, or other instruments constituting or defining the constitution of the company;
- a list of the directors of the company, containing such relevant particulars with respect to the directors; and
- the names and addresses of some one or more persons resident in Gibraltar authorised to accept on behalf of the company service of process and any notices required to be served on the company.[19]

51. Any changes to the above information must be advised to the Registrar within the prescribed period.[20] The Act does not prescribe a time limit under this; it is left to the discretion of the Registrar of Companies. [21] The Registrar has prescribed three months under this section, as notified in Companies House Circular No.9.[22] The above requirements do not apply to companies that are incorporated outside of the UK and Gibraltar and which carry on a business in Gibraltar *through a branch.*

52. A company that is incorporated outside of the UK and Gibraltar that *has a branch in Gibraltar* must register with the Registrar of Companies within one month of having opened the branch. The information that must be provided at the point of registration includes the following:

19. Section 358 of the Companies Act.
20. Section 359 of the Companies Act.
21. Section 359 of the Companies Act.
22. See Companies House website: *www.companieshouse.gi/publications/C0009.pdf*

- corporate name;
- if registered in the country of incorporation, the identity of the register and its registration number;
- a list of the company directors and secretary, specifying name, address and occupation, or in the case where a director or secretary is a corporation, its corporate name and the address of its registered or principal office;
- address of the branch;
- a list of the names and addresses of all persons resident in Gibraltar authorised to accept on the company's behalf service of process in respect of the business of the branch; and
- a list of the names and usual residential addresses of all persons authorised to represent the company as permanent representatives of the company for the business of the branch.[23]

53. All foreign companies registered in Gibraltar have to update their statutory information annually, including shareholding information, via the filing of an annual return.[24]

Income Tax Act

54. Companies that have assessable income in Gibraltar are required to file annual tax returns to the Gibraltar tax authorities. The tax returns need not include information on the owners of the company unless required by the Commissioner of Income Tax by way of information power notice issued under the Income Tax Act 2010 where it is relevant for tax treatment purposes of that company.

55. Companies whose turnover exceeds GBP 500 000 (EUR 570 000) over a 12 month period must submit audited accounts together with their returns.[25] A note to the audited accounts submitted to the Income Tax Office discloses the name of any legal or natural person who controls the company, as prescribed by Financial Reporting Standard 8 on "Related party disclosures": "When the reporting entity is controlled by another party, there should be disclosure of the related party relationship and the name of that party and, if different, that of the ultimate controlling party (but not the private individuals *e.g.*). If the controlling party or ultimate controlling party of the reporting entity is not known, that fact should be disclosed. This information should be

23. Sections 388 to 392 of the Companies Act.
24. Sections 153 and 154 of the Companies Act.
25. Section 30 of the Income Tax Act.

disclosed irrespective of whether any transactions have taken place between the controlling parties and the reporting entity".[26]

Information required to be held by companies

56. Every company that is incorporated in Gibraltar, or which is incorporated outside Gibraltar but registered therein must keep a register of its members/shareholders, and include the following particulars:

- the names and addresses, and occupations of the members, and in the case of a company having a share capital a statement of the shares held by each member, distinguishing each share by its number and of the amount paid or agreed to be considered as paid on the shares of each member;
- the date at which each person was entered in the register as a member; and
- the date at which any person ceased to be a member.[27]

57. This obligation is imposed on the company itself and not on the directors or the board. The register must be kept at the registered office of the company (which must be in Gibraltar) and must be made available for public inspection.[28] Annually it is copied to Companies House in the form of an annual return and this is made available for public inspection.

58. Where the company has issued a share warrant to bearer it shall strike out of the register of members the name of the member then entered therein as holding the shares specified in the warrant as if he had ceased to be a member. In respect of such share warrants the register of members must record the following information:

- the fact of the issue of the warrant;
- a statement of the shares included in the warrant, distinguishing each share by its number; and
- the date of the issue of the warrant.

26. As an example, the financial statements of Companies House (Gibraltar) Ltd contain the following note: "The share capital of the company is entirely owned by National Registries Ltd, which in turn is owned by private investors as at 31 March 2011. The directors consider that there is no single controlling party."
27. Section 144(1) of the Companies Act.
28. Sections 140 and 148 of the Companies Act.

59. The bearer of the share warrant will be entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members.[29]

Information held by service providers

60. The vast majority of legal persons and arrangements conducting business from or in Gibraltar will have some involvement with a licensed service provider or financial institution through either a one-off transaction or an ongoing business relationship[30] and it is through these activities that the relevant regulatory requirements under the AML guidelines are triggered and ownership information of relevant entities made available.

61. The regulation of corporate and trust service providers in Gibraltar is an important avenue through which identity and ownership information of relevant entities and arrangements can be made available. The provision of corporate and trust services in Gibraltar is a "controlled activity" under the FS-IFS Act. Persons that want to be in the business of such "controlled activities" must be licensed by the FSC. The scope of "controlled activities" is spelt out under the FS-IFS Act and includes, amongst others, the following[31]:

- company management – undertakings by way of business company or corporate administration including, any one or more of the following:
  - the formation, management or administration of companies, partnerships or other unincorporated bodies; and
  - the provision of directors, secretaries, partners, nominee services and registered offices to companies, partnerships or other unincorporated bodies.
- professional trusteeship – holding out as a professional trustee for profit or reward, or soliciting for business as such, in or from within Gibraltar.

62. Specifically excluded from the scope of "controlled activities" are:

- the holding by any person who is resident in Gibraltar of a directorship of not more than twelve companies all of which are registered in Gibraltar and all of which carry on business within Gibraltar; and

29. Section 147 of the Companies Act.
30. For example, as at July 2011, 22 331 of the approximately 24 000 companies in Gibraltar have company service providers who are providing them with registered offices. These company service providers are obliged entities under the CMLP Act and must identify the companies which are their customers.
31. Schedule 3 of the FS-IFS Act.

- the acting, by any person who is resident in Gibraltar, as a partner of not more than twelve partnerships all of which are registered in Gibraltar and all of which carry on business within Gibraltar.

63. Both the FS-IFS Act and the CMLP Act impose obligations on licensees to adhere to Gibraltar's AML/CFT guidelines. These guidelines are spelt out in the CMLP Act and supplemented by the AML/CFT Guidance Notes, which are legally binding as long as they do not go beyond the scope of the provisions in the CMLP Act. Licensees are required to apply appropriate customer due diligence measures when they:

- establish a business relationship;
- carry out an occasional transaction amounting to EUR 15 000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked;
- suspect money laundering or terrorist financing; or
- doubt the veracity or adequacy of documents, data or information previously obtained for the purposes of identification or verification.[32]

64. Customer due diligence measures must also be applied on existing customers on a risk-based approach. In general, these measures include:[33]

- identifying the customer and verifying the customer's identity on the basis of documents, data or other information obtained from a reliable and independent sources; and
- identifying, where applicable, the beneficial owner so that the firm is satisfied that it knows who the beneficial owner is.

65. The CMLP Act defines the term "beneficial owner" as the person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted and includes at least the following:[34]

- in the case of a corporate entity:
  - the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership or control over a sufficient percentage of the shares or voting rights in that legal entity, including through bearer share holdings; a share interest of greater than 25% is deemed to meet this criterion; and
  - the natural person(s) who otherwise exercises control over the management of a legal entity;

32. Section 10B of the CMLP Act.
33. Section 10A of the CMLP Act.
34. Section 6 of the CMLP Act.

- in the case of a legal entity, such as foundations, and legal arrangements such as trusts which administer and distribute funds:
  - where the future beneficiaries have already been determined, the natural person(s) who is the beneficiary of 25% or more of the property of a legal arrangement or entity; and
  - where the individuals that benefit from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates; the natural person(s) who exercises control over 25% or more of the property of a legal arrangement or entity."

66. In the case of partnerships and other unincorporated businesses whose partners/directors are not known to the institution, the service provider must identify at least two partners or equivalent as part of its customer due diligence measures.

67. In support of this CMLP Act obligation, the AML/CFT Guidance Notes states: "The overriding principle is that every institution must know who their customers are, and have the necessary customer identification documentation, or data to evidence this." Further, the AML/CFT Guidance Notes makes it clear that "generally, a firm should never establish a business relationship until *all* the relevant parties to the relationship have been identified and the nature of the business they expect to conduct has been established".[35]

Nominee identity information

68. The provision of nominee shareholders is a regulated business under the Financial Services (Investment and Fiduciary Services) Act ("FS-IFS Act"). Such service providers must be licensed under the FS-IFS Act unless they qualify for exemption.[36]

69. Under the Crime (Money Laundering and Proceeds) Act ("CMLP Act"), licensed nominee shareholders are one of the "relevant financial businesses"[37] and are required to develop and maintain "know your customer" policies and procedures that allow them to determine the true identities of their customers. These customer due diligence measures include identifying the customer (including the beneficial owner where applicable)

35. Paragraph 7.2 of requirement 62 of the AML/CFT Guidance Notes.
36. Sections 3 and 4, and Schedule 3 of the FS-IFS Act. Exempted persons are limited to government agencies, as well as entities that are separately licensed under another act.
37. Section 8 of the CMLP Act.

and verifying the customer's identity on the basis of documents, data or other information obtained from a reliable and independent sources. [38]

70. The term "beneficial owner" is defined under the CMLP Act as the person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted and includes at least, but not limited to, the following in the case of a corporate entity:

- the natural person(s) who ultimately own or control a legal entity through direct or indirect ownership or control over a sufficient percentage of the shares or voting rights in that legal entity, including through bearer share holdings, a share interest of greater than 25% is deemed to meet this criterion; and
- the natural person(s) who otherwise exercises control over the management of a legal entity.

71. The Gibraltar authorities have advised that in order to establish whether any single owner beneficially owns more than 25% of a legal entity, service providers would need to identify all the owners of a legal entity. Paragraph 7.0 of the AML/CFT Guidance Notes states: "The overriding principle is that every institution must know who their customers are, and have the necessary customer identification documentation, or data to evidence this." Further, the AML/CFT Guidance Notes makes it clear that "generally, a firm should never establish a business relationship until *all* the relevant parties to the relationship have been identified and the nature of the business they expect to conduct has been established".[39]

72. The CMLP Act requires licensed nominee shareholders to retain a copy of the evidence of the customer's identity for at least a period of five years from the date the business relationship ends.

73. Nominee shareholders that are not acting by way of business are not regulated. The Gibraltar authorities have advised that such nominees would comprise primarily persons performing services gratuitously or in the course of a purely private non-business relationship and are not expected to be significant in terms of number or the assets they hold. The Gibraltar authorities arrived at this conclusion through their consultations with the top law / fiduciary firms and accountants and Companies House in Gibraltar. Gibraltar's authorities have also advised that any person offering nominee services in any significant manner would most likely be considered as conducting a business and accordingly will be caught under Gibraltar's AML laws. The materiality of this gap in practice will be further examined in the course of Gibraltar's phase 2 review.

38. Section 10B of the CMLP Act and the AML/CFT Guidance Notes.
39. Paragraph 7.2 of requirement R62 of the AML/CFT Guidance Notes.

Conclusion

74. Ownership information on domestic companies and foreign incorporated companies (including those registered in the UK) carrying on a business in Gibraltar is available as all companies must maintain a register of shareholders in their registered office in Gibraltar. An additional source of ownership information is available for domestic companies and foreign companies having a place of business in Gibraltar that have share capital as such companies have to file an annual return to the Registrar of Companies containing a list of its shareholders. This is supported by AML obligations on service providers.

Bearer shares (ToR A.1.2)

75. Companies are not allowed to issue "bearer shares", but private companies whose share capital is divided into fifty or less shares may issue share warrants to bearer in respect of shares that have been fully paid up. A share warrant to bearer will state that the bearer of the warrant is entitled to the shares specified therein and may provide, by coupons or otherwise, for the payment of the future dividends on the shares included in the warrant. Ownership of shares stipulated in a share warrant to bearer may be transferred through delivery of the warrant.[40]

76. Gibraltar's authorities have advised that the use of these warrants is very limited – only 52 out of about 24 000 active companies in Gibraltar have had share warrants to bearer and currently such warrants are in issue for only 17 companies, all of which have their registered offices with licensed and regulated company managers who are therefore subject to AML obligations, including ongoing customer due diligence.

77. The AML/CFT Guidance Notes provide "Where the applicant for business is a body corporate, the firm must ensure that: (a) it fully understands the company's legal form; (b) it understands the company's structure and ownership." The Guidance Notes further specifically provide "Where a company has issued share warrants to bearer these must be kept immobilised under the control of a licensee. This is because the Guidance Notes cannot be complied with and due diligence in accordance with the Guidance Notes cannot be carried out, where beneficial ownership can change without the knowledge of the licensee."[41] Thus, in order for an entity obliged to conduct CDD under the Crime (Money Laundering and Proceeds) Act to accept a customer which is a legal person with share warrants to bearer, the company must have immobilised the share warrants to bearer (*e.g.* through depositing

40. Section 121 of the Companies Act.
41. *www.fsc.gi/amlgn/chapter06.htm* and *www.fsc.gi/amlgn/chapter07.htm*.

them with a custodian). As a result, all Gibraltar companies with share warrants to bearer (currently only 17) must, in order to conduct any financial activity in Gibraltar, have immobilised their shares.

78. The Gibraltar Government remains committed to abolishing the legislative provision for share warrants to bearer. The industry, via the Association of Trust and Company Managers (ATCOM), has been advised of this and has recently been reminded of this fact. Additionally, ATCOM was informed of the fact that Government's intention is to: (i) stop the issuance of any new share warrants to bearer by repealing the relevant sections; and (ii) provide for a period of, for example, six months for the existing 17 companies with share warrants to bearer to convert their shares to registered form. The Association was asked for comment and no objections have been received.

Partnerships (ToR A.1.3)

79. The laws of Gibraltar allow for the creation of general partnerships (GPs) and limited partnerships (LPs). There are also European Economic Interest Groupings (EEIGs) (Council Regulation (EEC) No.2137/85 of 25 July 1985 on the European Economic Interest Grouping), a form of association between companies and other legal bodies, firms or individuals from different EU countries who operate together across national frontiers. EEIGs must be registered in the EU state in which it has its official address by filing the EEIG contract at the appropriate registry. The contract must include the name, business name, legal form, permanent address or registered office, and the number and place of registration, if any, of each member of the grouping. The regulations governing EEIG apply across all EU member states and are not specific to Gibraltar.

80. GPs are governed by the Partnership Act. A GP arises when two or more persons carry on a business in common with a view of profit. The Partnership Act provides that[42]:

- unless the partnership agreement states otherwise, every partner is an agent of the firm and his other partners for purpose of the partnership business, and the acts of every partner who does any act for carrying on the business binds the firm and his partners;
- every partner is liable jointly with the other partners for all the debts and obligations of the firm incurred while he is a partner; and

42. Sections 7, 11, 14 of the Partnership Act.

- every partner is liable jointly with his co-partners and also severally for everything for which the firm becomes liable for in respect of wrongful acts or omissions.

81. A GP may not have more than 20 partners.[43]

82. LPs are governed by the Limited Partnerships Act. They are also governed by the Partnership Act insofar as it is not inconsistent with the express provisions of the Limited Partnerships Act. An LP must consist of one or more general partners, who are liable for all debts and obligations of the firm, and one or more limited partners, who at the time of entering into an LP contribute capital. It may not consist of more than 20 persons. Limited partners are not liable for the debts or obligations of the firm beyond the amount contributed.[44]

Information required to be provided to government authorities

General partnerships

83. Every partnership that carries on a business in Gibraltar and whose business name does not consist of: (a) the true surnames of all partners who are individuals; and (b) the corporate names of all partners who are corporations, without any addition other than the true first names of individual partners or initials of such first names, are required under the Business Names Registration Act (BNR Act) to register with Registrar of Business Names. At the point of registration, the partnership must provide, amongst other information, the following details:

- the business name;
- the general nature of the business;
- the principal place of business; and
- the present first name and surname, any former first name or surname, the nationality, the usual residence, and the other business occupation (if any) of each of the individuals who are partners, and the corporate name and registered or principal office of every corporation which is a partner.[45]

84. Any changes in the above details must be advised to the Registrar within 14 days of the change happening.[46] In addition, every registered partnership must renew its registration annually by submitting an annual

43. Section 369 of the Companies Act.
44. Section 3 of the Limited Partnership Act.
45. Section 5 of the Business Names Registration Act.
46. Section 8 of the Business Names Registration Act.

declaration to the Registrar stating that the information supplied at the time of the application for registration remains true, or in the event of a change in any of that information, a declaration containing details of the changes.

Limited partnerships

85. The registration requirements under the Business Names Registration Act apply similarly to LPs. The LP Act places additional registration requirements on LPs. All LPs, including those that have registered under the Business Names Registration Act, must register themselves with the Registrar of Limited Partnerships and at the point of registration provide particulars of the LP, stipulating:

- the firm name;
- the general nature of the firm's business;
- the principal place of business;
- the full name of each of the partners;
- the term, if any, for which the LP is entered into, and the date of commencement;
- a statement that the partnership is limited and an indication of which are the partners with limited liability; and
- the sum contributed by each limited partner and whether paid in cash or otherwise.[47]

86. Any changes in the partners or the names of any partner must be advised to the Registrar within seven days of the change.[48]

87. The Registrar is required to keep a register and an index of all limited partnerships registered and all of the statements registered in relation to such partnerships.[49]

Tax requirements

88. Partnerships are tax transparent entities in Gibraltar and partners are taxed individually on their share of their partnership profits. All partners of a partnership that derives Gibraltar-sourced income are required under the Income Tax Act to file annual returns stating their share of the partnership income for the year, together with a copy of the partnership accounts.

47. Section 7 of the Limited Partnerships Act.
48. Section 8 of the Limited Partnerships Act
49. Section 12 of the Limited Partnership Act.

Ownership and identity information required to be held by partnerships

General partnerships

89. The Business Names Registration Act imposes an implicit obligation on registered GPs to maintain and update information on the identities of its partners as it requires GPs to update the Registrar of Business Names of any changes in the partners within 14 days of the change happening.

Limited partnerships

90. In additional to the implicit obligations imposed by the Business Names Registration Act, all LPs need to maintain sufficient relevant information on its partners to meet its obligation under the LP Act to update the Registrar of any changes to the partners or names of any partner within seven days of the change happening.

Conclusion

91. Ownership information on relevant partnerships in Gibraltar is available as partnerships have to meet their registration obligations under the Business Names Registration Act and as well tax filing requirements under the Income Tax Act. In addition, limited partnerships are must submit timely information on the identities of its partners to the Registrar of Limited Partnerships. The above requirements are supplemented by the CMLP Act, which requires that service providers of partnerships identify at least two partners in the partnership.

Trusts (ToR A.1.4)

92. As a common law jurisdiction, the equitable principles of trust law are all applicable in Gibraltar and it is possible to create a trust via a trust deed, a declaration of trust, a will or through an operation of law (*i.e.* implied trusts). Gibraltar is also a signatory to the Hague Convention on the Law Applicable to Trusts and on their Recognition.[50] The Trustees Act spells out the requirements for the appointment of trustees and the powers available to them. Trusts are limited to 100 years in duration.[51]

Information required to be provided to government authorities

93. There is no obligation for express trusts to be registered in Gibraltar. However, trusts whose trust deeds require registration may choose to have

50. *www.hcch.net/index_en.php?act=conventions.text&cid=59.*
51. The Perpetuities and Accumulations Act.

their trust deeds registered under the Registered Trust Act. Under the Registered Trust Act the Registrar of Registered Trusts must keep an index of the names of all registered trusts, and include therein details of the name of the trust; the date of its creation; the amount of the initial settlement; the date of its registration; the name(s) of the trustee(s); and the address for service in Gibraltar.[52]

94. All trusts that have income assessable to tax in Gibraltar must file an annual income tax return with the Commissioner of Income Tax, specifying the full names and addresses of all the trustees and beneficiaries of the trust.[53] In addition, all beneficiaries who are ordinarily resident in Gibraltar and who are in receipt of such trust income must declare the trust income in their personal income tax returns.[54] As Gibraltar operates a territorial system of taxation, this would relate to income from only trusts which derive Gibraltar-sourced income. For such trusts, the tax requirement ensures that trust beneficiaries who have received disbursements from the trust during the year are readily identifiable. No tax filing obligations apply where trust income is derived from outside Gibraltar.

Information required to be held by the trustees

95. The obligations on the trustee of an express trust to maintain information on the trust beneficiaries and settlors arise from the requirements of common law. The case laws of the UK are applicable in Gibraltar in this regard. Under common law, for a non-charitable trust to be valid, the trust needs to meet the three certainties: the certainty of intention, the certainty of subject matter and the certainty of object. This means that a trust is only valid if evidenced by a clear intention on behalf of the settlor to create a trust, clarity as to the assets that constitute the trust property and identifiable beneficiaries (Knight v. Knight (1849) 3 Beav 148). A written declaration of trust may not exist or not identify the settlor on the face of the document. However, trustees have a duty of care to act in accordance with the wishes of the settlor. As a matter of good practice trustees would keep sufficient records to enable them to perform their duties.

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

52. Section 4 of the Registered Trusts Act.
53. Sections 28 and 30 of the Income Tax Act, read together with forms ITT-A and ITT-B issued by the Income Tax Office.
54. Section 12 of the Income Tax Act.

(1886) 33 Ch D 552). An in-depth assessment of the effectiveness of this common law regime will be conducted as part of the Gibraltar's phase 2 review.

97. Statutory requirements to keep ownership and identity information apply to professional trustees that act by way of business.[55] All professional trustees are required to be licensed under the FS-IFS Act unless they are specifically exempted. The FS-IFS Act specifically exempts professional trustees who are (a) barristers or solicitors admitted and enrolled under the Supreme Court Act; or (b) to a person whose name, address and qualifications are contained in Part I, II or III of the Register maintained under the provisions of the Auditors Approval and Registration Act (*i.e.* registered approved auditors).[56] The Gibraltar authorities have advised that the industry practice is for such exempted persons to offer their trustee services under a licensed arm (*i.e.* for lawyers to offer trustee services as professional trustees rather than as lawyers). Nevertheless, it remains legally possible for such exempted persons to provide trustee services on a professional basis outside of the regulatory framework and in such instances information on the trust beneficiaries and settlors may not be available.

98. Licensed professional trustees are required to comply with Gibraltar's AML laws as prescribed under the CMLP Act. The FS-IFS Act and the CMLP Act require professional trustees to maintain the following information with regard to the trusts for which they act as trustees for:

- full name of the trust;
- nature and purpose of the trust (*e.g.* discretionary, testamentary, bare);
- country of establishment;
- identity of the settlor or grantor;
- identity of all trustees;

55. The provision of corporate and trust services in Gibraltar is a "controlled activity" under the FS-IFS Act. The scope of "controlled activities" is spelt out under the FS-IFS Act and includes, amongst others, the following:

- company management – undertakings by way of business company or corporate administration including, any one or more of the following:
  - the formation, management or administration of companies, partnerships or other unincorporated bodies; and
  - the provision of directors, secretaries, partners, nominee services and registered offices to companies, partnerships or other unincorporated bodies.
- professional trusteeship – holding out as a professional trustee for profit or reward, or soliciting for business as such, in or from within Gibraltar.

56. Section 3, read together with Paragraph 2, Schedule 3 of the FS-IFS Act.

- identity of any protector;
- where the beneficiaries have already been determined, the identity of the natural person(s) who is the beneficiary of 25% or more of the property; and
- where the individuals that benefit from the legal arrangement have yet to be determined, the class of persons in whose main interest the arrangement is set up.[57]

99. The AML/CFT Guidance Notes make an important distinction between identification and due diligence. R86 of the AML/CFT Guidance Notes requires that the identity of settlor, grantor, trustees and protectors be recorded when the business relationship is established and that due diligence is conducted on the same. Full due diligence on beneficiaries who will receive 25% or more of the trust disbursements need only be conducted upon distribution but they all need to be identified at the start of the relationship, which includes any possible change in beneficiaries once that relationship has been established as new beneficiaries constitute the start of a new relationship. Higher risk trusts, however, must be subject to more rigorous due diligence requirements as set out in R87 and R88. Thus, the 25% threshold applies for due diligence but not for the initial identification.

100. In addition to the gap identified above, it is conceivable that a trust could be created which has no connection with Gibraltar other than that the settlor chooses that the trust will be governed by the laws of Gibraltar. In that event there may be no information about the trust available in Gibraltar.

101. There are no specific obligations applicable to trustees in Gibraltar of foreign trusts. The obligations on trustees of domestic trusts are equally applicable when they act for foreign trusts.

Conclusion

102. Identity information may not be readily available for all express trusts in Gibraltar. A licensing exemption is available to certain categories of professional trustees and such professional trustees are not subject to any statutory obligation to maintain information on the trust settlors and beneficiaries. Tax requirements are only applicable to trusts which have taxable income in Gibraltar, and even for such trusts information on the settlors need not be provided. For trusts that are managed by licensed professional trustees, although full due diligence on beneficiaries who receive 25% or more of the trust disbursements need only be

57. Paragraph 7.7.1.6 of the AML/CFT Guidance Notes, read together with Regulation 7 of the Schedule to the Financial Services (Conduct Of Fiduciary Services Business) Regulations and Section 10A of the CMLP Act.

conducted *upon distribution, all beneficiaries* need to be identified at the start of the relationship (R86 of the AML/CFT Guidance Notes).

Foundations (ToR A.1.5)

103. The laws of Gibraltar do not include the concept of a foundation and it is therefore not possible to create a foundation in Gibraltar.

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

104. The existence of appropriate penalties for non-compliance with key obligations is an important tool for jurisdictions to effectively enforce the obligations to retain identity and ownership information. Non-compliance affects whether the information is available to Gibraltar to respond to a request for information by its EOI partners in accordance with the international standard.

105. In Gibraltar, where an obligation to retain relevant information exists, it is supported by an enforcement provision to address the risk of non-compliance. The relevant enforcement provisions are set out below:

- if a company fails to submit an annual return that complies with the requirements of the Companies Act, the company and every officer of the company who is in default are guilty of offences and are liable on summary conviction to a fine of GBP 500 (EUR 570) and a further fine of GBP 150 (EUR 170) for each day the default continues;[58]
- section 144(2) of the Companies Act provides that the company and every officer that is in default of the requirement to maintain a register of members are guilty of offences and are liable on summary conviction to default fines; up to a maximum of GBP 5 000 (EUR 5 700) (s.189 and Schedule 6 of the Criminal Procedure Act)
- any person that submits false information to the Registrar of Business Names is liable upon summary conviction to imprisonment for three months and to a fine of GBP 1 000 (EUR 1 140);[59]
- a partnership that fails to inform the Registrar of Business Names of any changes in its partners or the names of its partners within 14 days of the change happening is liable on summary conviction to a fine of GBP 100 (EUR 114) for each day the default continues;[60]

58. Section 155(4) of the Companies Act.
59. Section 11 of the BNR Act.
60. Section 9 of the BNR Act.

- any licensed service provider (including licensed professional trustees and licensed nominee shareholders) that does not conduct the relevant customer due diligence measures as required under the CMLP Act is liable upon summary conviction, to a fine not exceeding GBP 5 000 (EUR 5 700); and upon conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both;[61]
- any service provider that is in the business of a "controlled activity" under the FS-IFS Act without a license (and who is not exempted under the FS-IFS Act) is liable on conviction on indictment, to imprisonment for a term not exceeding seven years or to a non limited fine or to both; or on summary conviction, to a fine not exceeding GBP 25 000 (EUR 28 500).[62]
- any taxable entity that fails to file an income tax return with the Commissioner of Income Tax is liable to a penalty of GBP 50 (EUR 57), and if this failure to comply continues for a further three months the taxable entity shall be liable to a further penalty of GBP 300 (EUR 340). Further default attracts a penalty of an amount up to 150% of the estimated tax payable;[63]
- any taxable entity that submits an incorrect return to the Commissioner of Income Tax is liable to penalty of up to 150% of the tax undercharged as a result of the incorrect return[64]; and
- a limited partnership that fails to update any changes to its partners or the names of any partner to the Registrar of Limited Partnerships within seven days of the change occurring is liable upon summary conviction a fine of GBP 20 (EUR 23) for each day the default continues.[65]

106. The effectiveness of the enforcement provisions which are in place in Gibraltar is an issue of practice and will be considered as part of its Phase 2 review.

Conclusion for Part A.1

107. Ownership and identity information of relevant entities and arrangements is generally available in Gibraltar through a combination of obligations imposed by the various laws on either the entity itself or its service provider. However, a gap exists in respect of share warrants to bearer which may be issued by companies incorporated under the Companies Act. There are

61. Section 20A of the CMLP Act.
62. Section 49of the FS-IFS Act.
63. Section 65 of the Income Tax Act.
64. Section 66 of the Income Tax Act.
65. Section 8(2) of the LP Act.

limited mechanisms available which would ensure that the owners of these share warrants can be identified. The Government of Gibraltar have advised that currently only 17 companies have to bearer in issue and that it is committed to repealing the legislation provision for such instruments.

108. In addition, identity information on trusts in Gibraltar may not be readily available in all instances. Certain categories of professional trustees are exempted from licensing and, correspondingly, statutory AML requirements to identify the settlors and beneficiaries of the trusts for whom they act as trustees for, although the number of trusts managed by exempted trustees is likely very low. While Gibraltar tax law requires trusts to file income tax returns identifying the trustees and beneficiaries, this is limited to categories of trusts which have taxable income in Gibraltar, and even for trusts that file income tax returns, information on the settlors need not be provided. For trusts that are managed by licensed professional trustees, although full due diligence on beneficiaries who will receive 25% or more of the trust need only be conducted upon distribution, they all need to be identified at the start of the relationship.[66]

Determination and factors underlying recommendations

Phase 1 determination	
The element is in place, but certain aspects of the legal implementation of the element need improvement.	
Factors underlying recommendations	**Recommendations**
While currently only 17 companies have share warrants to bearer and financial institutions and service providers can only accept companies which have share warrants to bearer as customers if these share warrants are immobilised, ownership and identity information may not be available in all instances in the case of share warrants to bearer held by a foreign custodian.	Gibraltar should either take necessary measures to ensure that the owners of share warrants to bearer can be identified in all instances or should abolish such shares.
Identity and ownership information may not be available on all express trusts due to a licensing exemption available to certain categories of persons offering trustee services.	An obligation should be established for all trustees resident in Gibraltar to maintain information on the settlors, trustees and beneficiaries of their trusts.

66. Requirement 86 of the AML/CFT Guidance Notes.

A.2. Accounting records

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

General requirements (ToR A.2.1), Underlying documentation (ToR A.2.2) and 5-year retention standard (ToR A.2.3)

Accounting records to be kept in respect of companies

Companies Act

109. Every company that is incorporated under the Companies Act or is a foreign-incorporated company that is registered under the Companies Act is required to keep "proper books" of account with respect to:

- all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;
- all sales and purchases of goods by the company; and
- the assets and liabilities of the company.[67]

110. Except for a case where a private company has by special resolution dispensed with the holding of annual general meetings, the directors of every company are required to prepare the following accounts at least once every calendar year for the purpose of the company's general meeting:

- a profit and loss account or, in the case of a company not trading for profit, an income and expenditure account; and
- a balance sheet as at the date to which the profit and loss account, or the income and expenditure account, as the case may be, is made up.[68]

111. Under Section 180 of the Companies Act, every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting. Section 182 further requires auditors to report to the shareholders of Gibraltar companies if, in the opinion of the auditor, the company has not kept proper accounting records or if the auditor has not received all the information and explanations required for the audit. Section 178 also entitles any member or holder of debentures of the company the right to receive copies of balance sheets and auditors' report. Small companies are exempted from the above requirements to appoint auditors

67. Section 170 of the Companies Act.
68. Section 171 of the Companies Act.

and to have their accounts audited. Such companies are defined under the Companies (Accounts) Act as private companies that meet at least two of the following conditions in the relevant financial year(s):

- the amount of the company's net turnover did not exceed GBP 6.5 million (EUR 7.4 million);
- its balance sheet total did not exceed GBP 3.26 million (EUR 3.7 million); or
- the average number of persons employed by the company did not exceed 50.[69]

112. The Gibraltar authorities have advised that in order for the books of account to be considered "proper" as required under the Companies Act, such books would necessarily have to include underlying documents such as invoices and contracts relating to such accounts. According to the Gibraltar authorities, this is also the understanding held by the Gibraltar Society of Accountants. Formal advice received from Deloitte Gibraltar indicates that they interpret "proper books of account" in the Companies Act, to include not just technical accounting records but also all supporting documents that may exist, including bank statements, sales invoices, expense invoices, agreements and contracts).

113. Notwithstanding the interpretation by the Gibraltar authorities and the Gibraltar Society of Accountants, no case law or other authoritative sources have been provided to support this interpretation and in the absence of an express statutory provision, it remains unclear whether companies in Gibraltar are obliged to keep underlying documentation. This is especially so for small companies, who are not required to have their accounts audited.

114. The Companies Act is silent as to how long the accounting records must be kept by the company.

Companies (Accounts) Act

115. The Companies (Accounts) Act which derives from the EU 4th and 7th company law Directives, requires all companies to deliver in respect of each financial year a copy of the company's annual accounts accompanied by an auditor's report to the Registrar of Companies. The extent of documents that must be filed as part of the annual accounts differs according to the size of the company as determined by the size of its turnover, balance sheet and number of employees. In general, the reporting requirements of smaller companies are less comprehensive in terms of the details required. The annual accounts generally comprise a balance sheet as at the last day of the financial

69. Section 11 and Schedule 1 of the Companies (Accounts) Act.

year and a profit and loss account, with variations in the level of details.[70] For example, small companies need not break down the various balance sheet items (*e.g.* intangible assets) into individual components (*i.e.* the goodwill, development costs, licenses, patents *etc.* that make up intangible assets). Small companies also do not need to have their accounts audited.

116. The Companies (Accounts) Act is silent on how long the Registrar of Companies must keep the filed accounts. However, under section 346(2) of the Companies Act all documents filed with the Registrar must be kept for a minimum of ten years by the Registrar and this includes accounts. In practice, the documents are kept indefinitely.

Income Tax Act

117. Section 63 of the Income Tax Act provides that if a person fails or refuses to keep accounting records, books or accounts which in the opinion of the Commissioner of Income Tax are adequate for the purposes of taxation, the Commissioner may by notice in writing require him to do so. Failure of a company to comply with such a notice within one month of its issue may result in a summary conviction punishable by fine of GBP 500 (EUR 570). There is no guidance as to what would constitute records "adequate for the purposes of taxation".

118. The Income Tax Act does not prescribe the retention period of the accounting records that must be kept under the Act. It does, however, allow the Commissioner of Income Tax to raise an assessment six years after the end of an accounting period.[71]

Accounting records to be kept in respect of partnerships

119. Section 30 of the Partnership Act requires all partners of a partnership to render "true accounts and full information of all things affecting the partnership to any partner or his legal representative".

120. Partnerships are tax transparent entities in Gibraltar and partners are taxed individually on their share of their partnership profits. All partners of a partnership that derives Gibraltar-sourced income are required under the Income Tax Act to file annual returns stating their share of the partnership income for the year[72], together with a copy of the partnership accounts, which

70. Sections 4 and 9 of the Companies (Accounts) Act.
71. Section 34 of the Income Tax Act.
72. Section 18 of the Income Tax Act and Section 30 and 31 of Partnership Act.

include the annual accounts, the annual report and auditors' report.[73] The record keeping requirements under the Income Tax Act applicable to companies apply similarly to such partners.

Accounting records to be kept in respect of trusts

121. Under common law, all trustees resident in Gibraltar are subject to a fiduciary duty to keep accounts of the trusts and to allow the beneficiaries to inspect them as requested (Pearse v. Green (1819) 1 Jac & W 135). Further, trustees should obtain "good receipt" from beneficiaries when they distribute trust property (Evans v. Hickson (1861) 30 Beav 136 and Re Hulkes (1886) 33 Ch D 552).

122. Trustees of trusts that are subject to tax in Gibraltar (see Part A.1.4 of this report, on trusts) must file an annual tax return, and are subject to the same Income Tax Act record keeping requirements that are applicable to companies and partners.

123. AML obligations apply to all professional trustees, with the exception of those lawyers which undertake this role as lawyers rather than as trustees (see previously, Part A.1.4 of this report). As detailed below, these AML obligations require maintenance of transaction records, and these transaction records must be sufficient for reconstruction of the transactions. The AML/CFT Guidance Notes also provide some guidance on the nature of the underlying documents to be kept for these transaction records. These records must be retained for at least five years after the business relationship or one-off transaction, as the case may be, ends.

124. With respect to the trust assets, Gibraltar's authorities advise that the majority of trusts in Gibraltar have their assets held by a holding company (or companies). This practice exists for a number of reasons. A trustee is afforded more protection from a liability point of view if assets are distanced from him or herself via a corporate vehicle. Also, financial institutions are not comfortable with accepting trust assets if they are not held via a holding company due to their CDD obligations under the CMLP Act.

Accounting records to be kept by service providers

125. The CMLP Act requires relevant licensed service providers and financial institutions to keep records pertaining to transactions carried out by their customers. [74]

73. Section 2 of Partnerships and Unlimited Companies (Accounts) Regulations, 1999.

74. Section 10P of the CMLP Act, read together with Requirement 103 of the AML/CFT Guidance Notes.

126. The precise nature of the transaction records required is not specified in the CMLP Act, but the objective is to ensure, in so far as is practicable, that in any subsequent investigation the company/business can provide the authorities with its section of the audit trail. The AML/CFT Guidance Notes requires relevant financial businesses to give consideration to retaining for each transaction it conducts:

- the name and address of its customer;
- the name and address (or identification code) of its counterparty;
- what the transaction was used for, including price and size;
- whether the transaction was a purchase or a sale;
- the form of instruction or authority;
- the account details from which the funds were paid (including, in the case of cheques, sort code, account number and name);
- the form and destination of payment made by the business to the customer; and
- whether the investments, etc. were held in safe custody by the business or sent to the customer or to his/her order and, if so, to what name and address.[75]

127. Records must be retained for at least five years after the business relationship or one-off transaction, as the case may be, ends.

128. The nature of underlying documents for these transactions which must be kept is not provided in the CMLP Act and not expressly provided in the AML/CFT Guidance Notes. The AML/CFT Guidance Notes require that the records prepared and maintained by licensed service providers and financial institutions on its customer relationships and transactions should be such that: (i) requirements of legislation are fully met; (ii) competent third parties will be able to assess the institution's observance of money laundering policies and procedures; (iii) any transactions effected via the institution can be reconstructed; and (iv) the institution can satisfy within a reasonable time any enquiries or court orders from the appropriate authorities as to disclosure of information. Further these obliged entities must maintain a record that: (i) indicates the nature of the evidence obtained; and (ii) comprises either a copy of the evidence or (where this is not reasonably practicable) contains such information as would enable a copy of it to be obtained. [76] The Gibraltar authorities have indicated that these provisions mean that all underlying

75. Requirement 108 of the AML/CFT Guidance Notes.
76. Requirement 106 of the AML/CFT Guidance Notes.

documents, including invoices and contracts, must be kept by licensed service providers and financial institutions for transactions conducted through them.

129. In any case, these requirements apply only to the many business transactions that are made through financial institutions and other AML regulated businesses. The record retention requirements under Gibraltar's AML regime will therefore not cover all transactions for all relevant legal persons and arrangements.

Conclusion

130. There is neither clear obligation for partnerships and trustees to maintain all relevant accounting records, nor for all legal persons and arrangements to maintain all relevant underlying documents. The Income Tax Act does not specify the nature or scope of the records which must be kept. The CMLP Act requires all financial institutions and service providers to maintain transaction records for a minimum of five years.

Determination and factors underlying recommendations

Phase 1 determination	
The element is not place.	
Factors underlying recommendations	**Recommendations**
Companies are not required to maintain relevant underlying documentation.	Gibraltar should introduce binding requirements on companies to maintain relevant underlying documentation for at least five years.
There is no clear requirement for accounting records which correctly explain all transactions and enable the financial position of partnerships or trusts to be determined or underlying documents to be maintained for these entities.	Gibraltar should introduce binding requirements on partnerships and trustees to maintain full accounting records, including underlying documentation, for at least five years.
For companies, partnerships and trusts, only the records that need to be kept under the AML regime are subject to a minimum five year retention period.	Gibraltar should ensure that all relevant accounting records and underlying documentation are kept for all relevant entities for at least five years.

A.3. Banking information

Banking information should be available for all account-holders.

Record-keeping requirements (ToR A.3.1)

131. All "credit institutions"[77] and "financial institutions"[78] that carry on business from or within Gibraltar are subject to Gibraltar's AML law; the CMLP Act.

132. Under the CMLP Act, credit institutions are prohibited from setting up an anonymous account or an anonymous passbook for any new or existing customer.

133. As soon as reasonably practicable on or after 15 December 2007 all credit and financial institutions carrying on business in Gibraltar must apply customer due diligence measures to, and conduct ongoing monitoring of, all anonymous accounts and passbooks in existence on that date and in any event before such accounts or passbooks are used. The Gibraltar authorities have advised that Gibraltar has never permitted the setting up of anonymous accounts, and that this provision was put into the CMLP Act as a precautionary measure.

134. The required customer due diligence measures include:

- identifying the customer and verifying the customer's identity on the basis of documents, data or other information obtained from a reliable and independent sources; and
- identifying, where applicable, the beneficial owner so that the firm is satisfied that it knows who the beneficial owner is.[79] (see Part A of this report for the definition of "beneficial owner")

135. Credit and financial institutions must retain a copy of the evidence of the customer's identity for a minimum of five years after the business relationship ends.

136. The CMLP Act requires all credit and financial institutions to maintain records of all transactions undertaken in respect of banking business. The records include:

- the name and address of its customer;
- the name and address (or identification code) of its counterparty;

77. A credit institution means an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account.
78. The scope of businesses covered by the term "financial institutions" is spelt out under Section 6 of the CMLP Act and covers lending, financial leasing, payment services, portfolio management and advice.
79. Section 10M of the CMLP Act.

- what the transaction was used for, including price and size;
- whether the transaction was a purchase or a sale;
- the form of instruction or authority;
- the account details from which the funds were paid (including, in the case of cheques, sort code, account number and name);
- the form and destination of payment made by the business to the customer; and
- whether the investments, etc were held in safe custody by the business or sent to the customer or to his/her order and, if so, to what name and address.[80]

137. These transaction records must be maintained for five years from the date on which the business relationship ends, or if they relate to a particular transaction, five years from the date on which the transaction is completed.[81]

138. A bank that fails to meet its obligations under the CMLP Act is liable on summary conviction, to a fine not exceeding GBP 5 000 (EUR 5 700).[82]

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

80. Section 10P of the CMLP Act, read together with Requirement 103 of the AML/CFT Guidance Notes.
81. Section 10P of the CMLP Act.
82. Section 20A of the CMLP Act.

B. Access to information

Overview

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

140. Gibraltar's Minister for Finance and any other persons he may designate, are the competent authorities for international requests for information in tax matters (EOI requests) and under the International Co-operation (Tax Information) Act have powers to obtain relevant information from any person within its jurisdiction for EOI purposes. The competent authority's access powers may be exercised independently of whether the EOI request relates to a domestic tax matter.

141. To access information for EOI purposes, the competent authority may directly issue a notice to any person requesting the production of any information, or where testimony is required, appoint a Special Examiner who may compel testimony through a subpoena. The competent authority may also apply to the Magistrates Court (or any other court the Minister may prescribe) for a production order under certain circumstances. Non-compliance with a notice, subpoena or production order is an offence and carries upon summary conviction significant penalties.

142. With the oversight of the court, the competent authority also has the power to search premises and seize information where there is a reasonable doubt that the production of relevant information will be endangered. The International Co-operation (Tax Information) Act provides that a person that complies with a notice to provide information has an absolute defence to any claim brought against him in respect of any action taken in respect of that notice.

143. The scope of information that may be obtained and exchanged may be restricted in some instances by Gibraltar's domestic definition of legally privileged information, which is wider in scope than the definition under the international standard.

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).

Ownership and identity information (ToR B.1.1) and Accounting records (ToR B.1.2)

144. The competent authority's powers to access and exchange information pursuant to its EOI agreements are found in the Gibraltar International Co-Operation (Tax Information) Act 2009 (ICA). Under the ICA, the competent authority has powers to access information by: (a) directly issuing notices to the holders of information to produce the information; (b) compelling testimony from relevant persons; (c) applying to the court for a production order; and (d) using search and seizure warrants.[83]

145. The competent authority's powers to obtain relevant information to respond to an EOI request are applicable regardless of the type of information sought (*i.e.* whether it is ownership, bank or accounting information) or the person from whom the information is sought (*i.e.* bank, company, individual etc). These powers may also be exercised independently of where the information is held, as long as it is in the possession or control of a person within Gibraltar's territorial jurisdiction.

146. The ICA grants the competent authority compulsory powers to obtain information necessary to comply with a valid EOI request. The procedure to execute a request in Gibraltar under the ICA is outlined below:

147. In the case where the requested information is held by a government body, the ICA requires the relevant government body to deliver the information to the competent authority upon his request. The competent authority then transmits the information to the requesting state.[84]

148. Where the requested information is not in the government's possession, the competent authority will issue a notice requiring the person who has

83. Sections 8, 9, 10 and 11 of the ICA.
84. Section 7 of the ICA.

been identified to have possession or control of the information to deliver the requested information to the competent authority.[85] The notice must specify the timeframe and manner in which the information must be delivered, and must include certain prescribed details, including among other items:

- the identity of the requesting party (On the basis that a request is not a fishing expedition the use of the word "identity" in a TIEA (in accordance with paragraphs 57 and 58 in the Commentary to the OECD TIEA Model Agreement) does not necessarily mean the name of a person);
- the tax matter to which the request relates (*i.e.* whether it is a criminal or civil tax matter);
- the person or persons subject to such taxes or taxation matters; (Schedule 2, paragraph 5 of the International Co-operation (Tax Information) Act 2009 does not require the name of the person to be specified as long as there is a unique identifying characteristic such as a credit card or account number or similar. The competent authority would therefore action such a request and the law permits him to do so); and
- the reason for believing that the information requested is in the possession or control of the person served with the notice or is obtainable by that person.[86]

149. Gibraltar's authorities have confirmed that the prescribed details relating to the "person or persons subject to such taxes or taxation matters" does not need to include the name of the person(s); this condition can be satisfied as long as there is a unique identifying characteristic such as a credit card or account number or similar.

150. A notice recipient may seek a review of the notice either directly with the competent authority or through a judicial process (see Part B.2 of this report for the relevant procedures). Otherwise the recipient of the notice must provide the requested information by the date specified in the notice, or where he has made a written submission to the competent authority, provide the requested information or any variation thereof within 10 days of receiving the competent authority's decision.

85. Section 8 of the ICA.
86. Section 8(2) of the ICA, read with Schedule 2.

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

151. The information gathering powers of the competent authority are not subject to Gibraltar requiring such information for its own tax purposes. The ICA specifically empowers the competent authority to obtain and exchange information pursuant to a request from an EOI partner.[87]

Compulsory powers (ToR B.1.4)

152. Where the competent authority requires any person to provide evidence by way of deposition or to produce information on oath, he may appoint a Special Examiner who is empowered to issue subpoenas and exercise any other powers available to the Supreme Court for the purpose of compelling testimony and the production of information.[88]

153. After issuing a notice for information, the competent authority may choose to reinforce the notice by applying to the Court for an order to produce the requested information. While the ICA does not spell out the circumstances under which the competent authority would do so, the Gibraltar authorities have advised that these powers are generally invoked when the competent authority suspects reticence on the part of the information holder in handing over the requested information. The Court may issue such an order if it is satisfied that:

- the competent authority has certified the request is in accordance with the relevant EOI agreement;
- the information to which the application relates is in the possession or under the control of a person in Gibraltar;
- the information to which the application relates does not include items subject to legal privilege or items subject to protection as secret, pursuant to the terms of a the EOI agreement or the ICA;
- the competent authority has issued a notice for information; and
- pursuant to the terms of the relevant EOI agreement there are no reasonable grounds for not entertaining the request.[89]

87. Sections 5 and 6 of the ICA.
88. Section 9 of the ICA.
89. Section 11 of the ICA.

154. The competent authority or an authorised officer may apply to the Court[90] for a search and seizure warrant to enforce a notice or subpoena. The Court may issue the warrant if it is satisfied that:

- a person who has been required to provide testimony or information has failed to comply in whole or in part with the relevant provisions of the ICA;
- if a notice is given to the person who has, or is believed to have, the required information in his possession or control, there is a reasonably foreseeable possibility that it might be tampered with, removed from Gibraltar, destroyed, or place beyond the access or control of that person or the competent authority; or
- the government's ability to comply with a request in accordance with its obligations under a relevant EOI agreement so requires.[91]

155. The ICA establishes offences where a person having been required to produce any information which is in his possession or under his control:

- without lawful excuse fails so to do within such time as may be specified by any notice or order issued under the ICA;
- intentionally alters, suppresses, destroys or places beyond his reach or access any document, including a document in electronic form, which he has been required to produce;
- by furnishing any estimate, return or other information required of him, or otherwise in purported compliance with a requirement under the ICA, furnishes information or makes any statement which he knows to be false or misleading in a material particular, or recklessly furnishes information or makes a statement which is false or misleading in a material particular; or
- with intent to avoid detection of an offence or liability to a penalty removes from Gibraltar, destroys, conceals or fraudulently alters any books or papers including any material held electronically; or
- when required so to do in accordance with the instructions given by the Court or pursuant to any subpoena issued under the ICA, refuses or fails to attend as required or to provide testimony in response to a request.

90. Under Section 2 of the ICA "Court" refers to the Magistrates Court or any other court or tribunal as the Minister may designate.
91. Section 10 of the ICA.

156. Offenders are liable, upon summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding GBP 5 000 (EUR 5 700) or both; and on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine not exceeding GBP 5 000 (EUR 5 700).[92]

Secrecy provisions (ToR B.1.5)

Financial institutions

157. There is no statutory banking secrecy in Gibraltar. Banking confidentiality is governed by the general common law applicable in the UK, where a bank owes a legal duty of confidentiality to its client arising from a contract. The duty is not absolute and is qualified by overriding duties, one of which is the duty of a bank to comply with the law.

158. This common law of confidentiality is specifically overridden by section 12(3) of the ICA, which states that: "the obligation of persons to provide testimony and information under this Act [the ICA] shall have effect notwithstanding any obligation as to confidentiality or other restriction upon the disclosure of information contained in any enactment or the common law or in any other relationship."

159. Section 12(4) of the ICA further states that any person who pursuant to the ICA provides testimony or information subject to any obligation as to confidentiality shall be immune to suit from any other person arising from the provision of such information.

160. The above provisions also override any professional privileges that are not explicitly excluded by the ICA. This would include any relevant confidentiality provisions relating to accounts, tax advisors and auditors.

Legal professional privileges

161. Legal professional privilege is defined under the ICA as:

- communications between counsel and his client or any person representing his client made in connection with the giving of legal advice to the client;
- communications between counsel and his client or any person representing his client or between counsel or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and

92. Section 22 of the ICA, read together with Section 189 and Schedule 6 of the Criminal Procedure Act.

- items enclosed with or referred to in such communications and made
  - in connection with the giving of legal advice; or
  - in connection with, or in contemplation of, legal proceedings and for the purposes of such proceedings, when they are in the possession of a person who is entitled to possession of them, but items held with the intention of furthering a criminal purpose are not subject to legal privilege.[93]

162. The ICA does not allow exchange of information subject to legal professional privilege. The definition of information subject to legal professional privilege under the ICA is strictly limited to communication made in connection with the giving of legal advice to the client or with legal proceedings. However, the definition appears to include not only information enclosed within a communication between an attorney/admitted legal representative and client but also within a communication between a client and any other person in connection with those proceedings, which is beyond the exemption for legal professional privilege under the international standards.

163. It should be noted, however, that the ICA also provides that should any EOI agreement contain different provisions in respect of legal or other privilege, the provisions in the EOI agreement would override the definition provided for under the ICA. This means that the issue of an overly wide definition of legal professional privilege is limited to the EOI agreements that either do not define legal professional privilege, or whose definitions do not conform to the international standard. Out of Gibraltar's 18 TIEAs, only the TIEAs with Belgium, France, Germany, Ireland and Portugal and do not define the scope of privileged information. The other 13 TIEAs adopt the definition of legal privilege under the international standard. Whether the issue in relation to the other 5 TIEAs impedes EOI in practice will be examined during Gibraltar's Phase 2 review.

Conclusion

164. The Gibraltar competent authority's powers to obtain information for EOI purposes generally meet the requirements of the international standard, with the exception of the scope of legal professional privilege in some cases.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

93. Section 2 of the ICA.

B.2. Notification requirements and rights and safeguards

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

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

165. Whenever the competent authority issues a notice to a holder of information pursuant to an EOI request, he is obliged to send a copy of the same notice to the taxpayer concerned if he is aware of the taxpayer's address and that the taxpayer resides in Gibraltar. This requirement is only lifted where the EOI request relates to a criminal tax matter or an alleged criminal tax matter.[94] There are no other exceptions to the prior notification process. It is recommended that Gibraltar amend its legislation to introduce additional relevant exceptions to the prior notification procedure.

166. A recipient of a notice may within 10 days of the receipt, make a written submission to the competent authority specifying any grounds which he wishes the competent authority to consider in making a final determination as to whether not the request is in compliance with the relevant EOI agreement or the ICA. The competent authority must consider any such written submission and make a decision whether to confirm, vary or withdraw the notice. There is no timeframe specified for the competent authority to reach such a decision.[95]

167. The recipient may also seek a review of the notice through a judicial process; section 14 of the ICA provides that any person issued a notice by the competent authority to produce information, or who is the subject of a subpoena to give evidence or produce information may appeal to the Court on the following grounds:

- the notice issued is not in conformity with the ICA requirements (*e.g.* it does not contain the prescribed details of the request);
- the information to which the notice of subpoena relates is not in the possession or control or accessible to a person who is in Gibraltar;
- the notice of subpoena includes or relates to items subject to legal professional privilege, provided that if and to the extent that this ground is relied upon, the appeal may relate only to such items, and the notice or subpoena remains extant, valid and binding on that person in every other respect; or
- the request manifestly falls outside the scope of the EOI agreement under which the request was made.

94. Section 17 of the ICA.
95. Section 8 of the ICA.

168. A recipient of a production order from the Court or the concerned taxpayer may also file an appeal against the production order; the circumstances under which he may do so are not spelled out under the ICA and will depend on the Rules of Court applicable to the relevant court.

169. These appeals (both to the competent authority and through the judicial process) suspend the EOI process relating to the portion of the EOI request that is being appealed. Gibraltar's authorities have advised that to date, no appeal has been made, whether directly or through the judicial process, against the competent authority's actions to obtain information for EOI purposes.

Determination and factors underlying recommendations

Phase 1 determination	
The element is in place.	
Factors underlying recommendations	**Recommendations**
The prior notification procedure in civil tax matters only allows for an exception when the whereabouts of the taxpayer are not known to the competent authority or when the taxpayer does not reside in Gibraltar.	It is recommended that wider exceptions from prior notification be permitted in civil tax matters (*e.g.* in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of the success of the investigation conducted by the requesting jurisdiction).

C. Exchanging information

Overview

170. Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanism for doing so. In Gibraltar, the legal authority to exchange information is derived from its EOI agreements as well as from domestic law. This section examines whether Gibraltar has a network of information exchange that would allow it to achieve effective EOI in practice.

171. Pursuant to the ICA, the Minister for Finance is Gibraltar's competent authority for international exchange of information in tax matters. The Minister may also designate other persons to be competent authorities. Gibraltar also shares information with other jurisdictions pursuant to the Evidence Act (civil or criminal proceedings), the EU Mutual Assistance Directive 77/799/EC and the EU Savings Directive.

172. As of 12 August 2011 Gibraltar has signed 18 EOI agreements (all TIEAs), of which 15 are in force (see Annex 2). All of Gibraltar's EOI agreements allow Gibraltar to exchange information according to the international standard. Gibraltar is currently in the process of negotiating a number of other EOI agreements, all of which will incorporate provisions that allow Gibraltar to exchange information according to the international standard. These agreements can take both the form of DTCs and TIEAs.

173. Gibraltar's network of EOI agreements covers most of its major trading partners and other major OECD/G20 jurisdictions.

174. All of Gibraltar's EOI agreements contain confidentiality provisions to ensure that the information exchanged will be disclosed only to authorised persons. While the articles in these EOI agreements might vary slightly in wording, these provisions generally contain all of the essential aspects of Article 8 of the OECD Model TIEA and Article 26(2) of the OECD Model Tax Convention. This is further reinforced in Gibraltar's domestic legislation through the ICA.

175. Gibraltar's EOI agreements ensure that the contracting parties are not obliged to provide information which would disclose trade, business, industrial, commercial or professional secrets or information which is the subject of legal professional privilege or to make disclosures which would be contrary to public policy.

176. There are no legal restrictions on the ability of Gibraltar's competent authority to respond to requests within 90 days of receipt by providing the information requested or by providing an update on the status of the request.

C.1. Exchange of information mechanisms

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

177. The EOI agreements signed by Gibraltar are given the force of law once they are published in the Schedule to the ICA. The ICA provides that where a scheduled agreement is in conflict with the ICA, the provisions of the scheduled agreement prevail.

Foreseeably relevant standard (ToR C.1.1)

178. The international standard for exchange of information envisages information exchange on request to the widest possible extent, but does not allow speculative requests for information that have no apparent nexus to an open inquiry or investigation. The balance between these two competing considerations is captured in the standard of "foreseeable relevance". It does not allow "fishing expeditions".

179. All of Gibraltar's TIEAs provide for the exchange of information that is "foreseeably relevant" to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered in the TIEAs. This scope is set out in Article 1 of all of Gibraltar's TIEAs.

180. However, the Protocol to Gibraltar's TIEA with Germany narrows the scope of data that would be considered "foreseeably relevant" for the purposes of the Gibraltar – Germany TIEA. Paragraph 2(c) of the Protocol states that data is only "foreseeably relevant" if "*in the concrete case at hand there is the serious possibility that the other Contracting Party has a right to tax and there is nothing to indicate that the data are already known to the competent authority of the other Contracting Party or that the competent authority of the other Contracting Party would learn of the taxable object without the information*".

181. The requirements that a case must be "concrete" and that there must be a "serious possibility" appear to be more stringent than the standard of foreseeably relevance envisaged under the international standard. Indeed,

paragraph 4 of the commentary to the OECD Model TIEA states that the standard of foreseeable relevance is meant to ensure that information requests may not be declined in cases where a definite assessment of the pertinence of the information to an on-going investigation can only be made following the receipt of the information.

182. Whether the above restrictions have any practical impact on EOI between Germany and Gibraltar will examined in the course of Gibraltar's phase 2 review.

In respect of all persons (ToR C.1.2)

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

184. All of Gibraltar's EOI agreements provide for EOI in respect of all persons.

Exchange of information held by financial institutions, nominees, agents and ownership and identity information (ToR C.1.3)

185. Jurisdictions cannot engage in effective exchange of information if they cannot exchange information held by financial institutions, nominees or persons acting in an agency or a fiduciary capacity. Both the OECD Model Tax Convention and the OECD Model TIEA, which are the authoritative sources of the standards, stipulate that bank secrecy cannot form the basis for declining a request to provide information and that a request for information cannot be declined solely because the information is held by nominees or persons acting in an agency or fiduciary capacity or because the information relates to an ownership interest.

186. All of Gibraltar's TIEAs provide for the exchange of information held by financial institutions, nominees and agents. All provide for the exchange of ownership and identity information.

Absence of domestic tax interest (ToR C.1.4)

187. The concept of "domestic tax interest" describes a situation where a contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes. A refusal to provide information based on a domestic tax interest requirement

is not consistent with the international standard. EOI partners must be able to use their information gathering measures even though invoked solely to obtain and provide information to the requesting jurisdiction.

188. All of Gibraltar's TIEAs contain provisions similar to the Article 5(2) of the 2002 Model Agreement on EOI for Tax Matters[96], which obliges the Contracting Parties to use their information gathering measures to obtain and provide information to the requesting jurisdiction even in cases where the requested Party does not have a domestic interest in the requested information.

Absence of dual criminality principles (ToR C.1.5)

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

190. All of Gibraltar's TIEAs contain provisions similar to Article 5(1) of the 2002 Model Agreement on EOI for Tax Matters[97], which obliges Contracting Parties to exchange information without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Contracting Party.

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

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

96. Article 5(2) of the 2002 Model Agreement reads "*If the information in possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, that Party shall use all relevant information gathering measures to provide the applicant Party with the information requested, notwithstanding that the requested Party may not need such information for it owns tax purposes*".

97. Article 5(1) of the 2002 Model Agreement reads "*The competent authority of the requested Party shall provide upon request information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party*".

192. All of Gibraltar's EOI agreements provide for exchange of information in both civil and criminal tax matters.

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

193. There are no restrictions in Gibraltar's domestic laws that would prevent it from providing information in a specific form, so long as this is consistent with its own administrative practices. This is reinforced in all of Gibraltar's TIEAs, which contain provisions similar to Article 5(3) of the 2002 Model Agreement on EOI for Tax Matters. Article 5(3) obliges Contracting Parties to provide, on request, information in the form of dispositions of witnesses and authenticated copies of original records to the extent allowable under domestic law.

194. This is reinforced under the ICA, which empowers the Gibraltar competent authority to obtain information in any form, including dispositions of witnesses and authenticated copies of original records.[98]

In force (ToR C.1.8)

195. Exchange of information cannot take place unless a jurisdiction has exchange of information agreements in force. The international standard requires that jurisdictions take all steps necessary to bring information agreements that have been signed into force expeditiously.

196. Gibraltar's EOI agreements are brought into force once they are published in the Schedule to the ICA. The publication of an EOI agreement in the Schedule is a swift and straightforward process that only requires the Minister's approval. Gibraltar has brought all its EOI agreements into force expeditiously. It completed all the steps necessary to bring all its EOI agreements (signed prior to the enactment of the ICA) into force within two months of passing the ICA in December 2009. Out of the 18 EOI agreements that Gibraltar has concluded, 15 are in force as of 24 June 2011.[99] In respect of the other 3 agreements, Gibraltar is awaiting its EOI partners to complete their procedures to bring the agreements into force.

98. Section 9(7) of the ICA.

99. The agreements that have been brought into force are the agreements with Australia, Austria, Denmark, the Faroe Islands, Finland, France, Germany, Greenland, Ireland, New Zealand, Norway, Portugal, Sweden, the United Kingdom and the United States.

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

197. For information exchange to be effective the parties to an EOI arrangement need to enact any legislation necessary to comply with the terms of the arrangement. Gibraltar's EOI agreements are given the force of law once they are published in the Schedule to the ICA.[100] As noted in Part B of this report, Gibraltar's domestic laws provide the powers for the Gibraltar competent authority to access all information necessary to comply with these EOI agreements.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

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

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

198. Ultimately, the international standard requires that jurisdictions exchange information with all relevant partners, meaning those who are interested in entering into an information exchange arrangement. Agreements cannot be concluded only with counterparties without economic significance. If it appears that a jurisdiction is refusing to enter into agreements or negotiations with partners, in particular ones that have a reasonable expectation of requiring information from that jurisdiction in order to properly administer and enforce its tax laws, it may indicate a lack of commitment to implement the standards.

199. Gibraltar has rapidly built up its EOI network since 2009 and currently has EOI agreements with 18 jurisdictions (15 of which are in force). Out of the 18:

- 16 are OECD countries;
- 5 are G20 countries;
- 11 are in the European Union; and
- 16 are Global Forum members.

200. Gibraltar's EOI network covers most of Gibraltar's biggest trading partners, including the UK, France and Germany.

100. Section 3(3) of the ICA.

201. Comments were sought from the jurisdictions participating in the Global Forum in the course of the preparation of this report, and no jurisdiction advised the assessment team that Gibraltar had refused to negotiate or conclude an EOI agreement with it.

Determination and factors underlying recommendations

Phase 1 determination	
The element is in place.	
Factors underlying recommendations	**Recommendations**
	Gibraltar should continue to develop its exchange of information network with all relevant partners and take all steps necessary to bring concluded agreements into effect as quickly as possible.

C.3. Confidentiality

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

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

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

203. All Gibraltar's EOI agreements have confidentiality provisions to ensure that the information exchanged will be disclosed only to persons authorised by the agreements. While each of the articles might vary slightly in wording, these provisions contain all of the essential aspects of Article 8 of the OECD Model TIEA.

All other information exchanged (ToR C.3.2)

204. Confidentiality rules should apply to all types of information exchanged, including information provided in a request, information transmitted in response to a request and any background documents to such requests.

205. All of Gibraltar's EOI agreements contain confidentiality provisions similar to Article 8 of the OECD Model TIEA, which specify that the confidentiality rules spelt out in the EOI agreement apply to all information received under the agreement.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

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

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

206. The international standard allows requested parties not to supply information in response to a request in certain identified situations where an issue of trade, business or other secret may arise, or where the disclosure of information would be contrary to public policy. Among other reasons, an information request can be declined where the requested information would disclose confidential communications protected by legal professional privilege.

207. Communications between a client and an attorney or other admitted legal representative are only privileged to the extent that, the attorney or other legal representative acts in his or her capacity as an attorney or other legal representative. Where attorney-client privilege is more broadly defined it does not provide valid grounds on which to decline a request for EOI. To the extent, therefore, that an attorney acts as a nominee shareholder, a trustee, a settlor, a company director or under a power of attorney to represent a company in its business affairs, EOI resulting from and relating to any such activity cannot be declined because of legal professional privilege.

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

208. All of Gibraltar's TIEAs ensure that the Contracting Parties are not obliged to provide information which would disclose any trade, business, industrial, commercial or professional secret, information which is subject to

legal professional privilege, or information the disclosure of which would be contrary to public policy.

209. The scope of attorney-client privilege is defined in most of Gibraltar's EOI agreements[101] and the definitions included therein are fully consistent with the international standard. With regard to Gibraltar's EOI agreements with France, Germany, Ireland and Portugal, privileged information is not defined therein and therefore follows the definition under domestic law. It is noted that the practical implementation of the legal privilege pursuant to Gibraltar law might in some respect go beyond the standard. This issue will be followed up in Phase 2 of the review process.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

C.5. Timeliness of responses to requests for information

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

Responses within 90 days (ToR C.5.1)

210. There appears to be no legal restrictions on the Gibraltar tax authorities' ability to respond to EOI requests within 90 days of receipt by providing the information requested or providing an update on the status of the request. Most of Gibraltar's TIEAs contain provisions similar to Article 5(6) of the 2002 Model Agreement on EOI on Tax Matters, which obliges Contracting Parties to forward the requested information as promptly as possible to the applicant party.[102]

211. A review of Gibraltar's ability to respond to requests in a timely manner will be conducted in the course of its Phase 2 review.

101. The exceptions are the TIEAs with France, Germany, Ireland and Portugal.

102. Under this Article, Contracting Parties are required to confirm receipt of a request in writing to the applicant Party and notify the applicant Party of deficiencies in the request, if any, within 60 days of the receipt of the request. The requested Party is also required to inform the applicant Party if it is unable to obtain and provide the information within 90 days of receipt of the request, and explain the reasons behind the delay. All of Gibraltar's TIEAs contain this article with the exception of its TIEAs with Austria, Belgium, Germany Portugal, Ireland, UK and the US.

Organisational process and resources (ToR C.5.2)

212. Gibraltar's competent authority for its EOI agreements is the Minister with the responsibility for Finance or any other person designated by him.

213. A review of Gibraltar's organisational process and resources will be conducted in the context of Gibraltar's Phase 2 review.

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

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

215. There are no aspects of Gibraltar's domestic laws that appear to impose additional restrictive conditions on exchange of information.

Determination and factors underlying recommendations

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

Summary of Determinations and Factors Underlying Recommendations

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities. *(ToR A.1)*		
The element is in place, but certain aspects of the legal implementation of the element need improvement.	While currently only 17 companies have share warrants to bearer and financial institutions and service providers can only accept companies which have share warrants to bearer as customers if these share warrants are immobilised, ownership and identity information may not be available in all instances in the case of share warrants to bearer held by a foreign custodian.	Gibraltar should either take necessary measures to ensure that the owners of share warrants to bearer can be identified in all instances or should abolish such shares.
	Identity and ownership information may not be available on all express trusts due to a licensing exemption available to certain categories of persons offering trustee services.	An obligation should be established for all trustees resident in Gibraltar to maintain information on the settlors, trustees and beneficiaries of their trusts.

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements. *(ToR A.2)*		
The element is not in place.	Companies are not required to maintain relevant underlying documentation.	Gibraltar should introduce binding requirements on companies to maintain relevant underlying documentation for at least five years.
	There is no clear requirement for accounting records which correctly explain all transactions and enable the financial position of partnerships or trusts to be determined or underlying documents to be maintained for these entities/arrangements.	Gibraltar should introduce binding requirements on partnerships and trustees to maintain full accounting records, including underlying documentation, for at least five years.
	For companies, partnerships and trusts, only the records that need to be kept under the AML regime are subject to a minimum five year retention period.	Gibraltar should ensure that all relevant accounting records and underlying documentation are kept for all relevant entities for at least five years.
Banking information should be available for all account-holders. *(ToR A.3)*		
The element is in place.		
Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information). *(ToR B.1)*		
The element is in place.		

Determination	Factors underlying recommendations	Recommendations
The rights and safeguards (*e.g.* notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information. *(ToR B.2)*		
The element is in place.	The prior notification procedure in civil tax matters only allows for an exception when the whereabouts of the taxpayer are not known to the competent authority or when the taxpayer does not reside in Gibraltar.	It is recommended that wider exceptions from prior notification be permitted in civil tax matters (*e.g.* in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of the success of the investigation conducted by the requesting jurisdiction).
Exchange of information mechanisms should allow for effective exchange of information. *(ToR C.1)*		
The element is in place.		
The jurisdictions' network of information exchange mechanisms should cover all relevant partners. *(ToR C.2)*		
The element is in place.		Gibraltar should continue to develop its exchange of information network with all relevant partners and take all steps necessary to bring concluded agreements into effect as quickly as possible.
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received. *(ToR C.3)*		
The element is in place.		
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties. *(ToR C.4)*		
The element is in place.		

Determination	Factors underlying recommendations	Recommendations
The jurisdiction should provide information under its network of agreements in a timely manner. *(ToR C.5)*		
The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review.		

Annex 1: Jurisdiction's Response to the Review Report[103]

Gibraltar would like to thank the assessment team for their considerable efforts in compiling the report as well as the Peer Review Group for their input. Gibraltar's approach to international reviews of this kind is to cooperate fully and to dedicate as much resource as is necessary to ensure that the information we provide is of the highest quality possible. Additionally and most importantly, the mindset we employ – as to any resulting recommendations – is to welcome them and look to address them via, inter alia, the necessary legislative amendments.

Gibraltar is pleased with the results of the report and we believe that it demonstrates our firm commitment to transparency and exchange of information. We will continue to update the Secretariat and the Global Forum, on a regular basis, as to Gibraltar's further progress in this field.

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

Annex 2: List of all Exchange-of-Information Mechanisms in Force

EU regulation

Gibraltar exchanges information under:

- the new EU Council Directive 2011/16/EU of 15 February 2011 on administrative co operation in the field of taxation. This Directive is in force since 11 March 2011. It repeals Council Directive 77/799/EEC of 19 December 1977 and provides inter alia for exchange of banking information on request for taxable periods after 31 December 2010 (Article 18). All EU members are required to transpose it into national legislation by 1 January 2013. The current EU members, covered by this Council Directive, are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom;
- EU Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments. This Directive aims to ensure that savings income in the form of interest payments generated in an EU member state in favour of individuals or residual entities being resident of another EU member state are effectively taxed in accordance with the fiscal laws of their state of residence. It also aims to ensure exchange of information between member states.

Bilateral agreements

	Jurisdiction	Type of EOI arrangement	Date signed	Date in force
1	Australia	Taxation information exchange agreement (TIEA)	26-Aug-2009	26-Jul-2010
2	Austria	TIEA	17-Sep-2009	1-May-2010
3	Belgium	TIEA	16-Dec-2009	
4	Denmark	TIEA	2-Sep-2009	13-Feb-2010
5	Faroe Islands	TIEA	20-Oct-2009	8-Jun-2011
6	Finland	TIEA	20-Oct-2009	6-May-2010
7	France	TIEA	22-Sep-2009	9-Dec-2010
8	Germany	TIEA	13-Aug-2009	4-Nov-2010
9	Greenland	TIEA	20-Oct-2009	24-Dec-2009
10	Iceland	TIEA	16-Dec-2009	
11	Ireland	TIEA	24-Jun-2009	25-May-2010
12	Netherlands	TIEA	23-Apr-2010	
13	New Zealand	TIEA	13-Aug-2009	13-May-2011
14	Norway	TIEA	16-Dec-2009	8-Sep-2010
15	Portugal	TIEA	14-Oct-2009	24-Apr-2011
16	Sweden	TIEA	16-Dec-2009	3-Jul-2010
17	United Kingdom	TIEA	27-Aug-2009	15-Dec-2010
18	United States	TIEA	31-Mar-2009	22-Dec-2009

Annex 3: List of all Laws, Regulations and Other Relevant Material

Commercial Laws

Companies Act

Companies (Accounts) Act 1999

Protected Cell Companies Act 2001

European Public Limited Liability Company Act 2005

Partnership Act

Partnership and Unlimited Companies (Accounts) Regulations 1999

Limited Partnerships Act

Trustees Act

Registered Trust Act 1999

Perpetuities and Accumulations Act 1986

Business Names Registration Act

Taxation Laws

Income Tax Act 2010

International Cooperation (Tax Information) Act 2009

Banking Laws

Financial Services (Banking) Act

Financial Services (Investment and Fiduciary Services) Act

Anti-Money Laundering Laws

Crime (Money Laundering and Proceeds) Act 2007

Gibraltar AML Guidance Notes

Gibraltar's laws can be found online at *www.gibraltarlaws.gov.gi/full_index.php.*

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

The OECD is a unique forum where governments work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD member countries are: Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The European Union takes part in the work of the OECD.

OECD Publishing disseminates widely the results of the Organisation's statistics gathering and research on economic, social and environmental issues, as well as the conventions, guidelines and standards agreed by its members.

OECD PUBLISHING, 2, rue André-Pascal, 75775 PARIS CEDEX 16
(23 2011 53 1 P) ISBN 978-92-64-11193-6 – No. 59639 2011

Global Forum on Transparency and Exchange of Information for Tax Purposes

PEER REVIEWS, PHASE 1: GIBRALTAR

The Global Forum on Transparency and Exchange of Information for Tax Purposes is the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by over 100 jurisdictions which participate in the work of the Global Forum on an equal footing.

The Global Forum is charged with in-depth monitoring and peer review of the implementation of the standards of transparency and exchange of information for tax purposes. These standards are primarily reflected in the 2002 OECD *Model Agreement on Exchange of Information on Tax Matters* and its commentary, and in Article 26 of the OECD *Model Tax Convention on Income and on Capital* and its commentary as updated in 2004, which has been incorporated in the UN *Model Tax Convention*.

The standards provide for international exchange on request of foreseeably relevant information for the administration or enforcement of the domestic tax laws of a requesting party. "Fishing expeditions" are not authorised, but all foreseeably relevant information must be provided, including bank information and information held by fiduciaries, regardless of the existence of a domestic tax interest or the application of a dual criminality standard.

All members of the Global Forum, as well as jurisdictions identified by the Global Forum as relevant to its work, are being reviewed. This process is undertaken in two phases. Phase 1 reviews assess the quality of a jurisdiction's legal and regulatory framework for the exchange of information, while Phase 2 reviews look at the practical implementation of that framework. Some Global Forum members are undergoing combined – Phase 1 plus Phase 2 – reviews. The ultimate goal is to help jurisdictions to effectively implement the international standards of transparency and exchange of information for tax purposes.

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

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

Please cite this publication as:

OECD (2011), *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Gibraltar 2011: Phase 1: Legal and Regulatory Framework*, OECD Publishing.
http://dx.doi.org/10.1787/9789264111943-en

OECD*publishing*
www.oecd.org/publishing

ISBN 978-92-64-11193-6
23 2011 53 1 P

9 789264 111936