GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

Peer Review Report Phase 2 Implementation of the Standard in Practice

GIBRALTAR

OECD

Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Gibraltar 2014

PHASE 2:
IMPLEMENTATION OF THE STANDARD IN PRACTICE

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(reflecting the legal and regulatory framework
as at August 2014)

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About the Global Forum

The Global Forum on Transparency and Exchange of Information for Tax Purposes is the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by over 120 jurisdictions, which participate in the Global Forum on an equal footing.

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

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

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

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

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

Executive Summary

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

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 (EOI) agreements that includes its key trading partners. As at 8 August 2014 it has signed bilateral EOI agreements with 27 jurisdictions, of which 23 have been brought into force. Gibraltar has taken all steps on its part which are necessary to bring the remaining four agreements into force. Gibraltar also exchanges tax information with EU jurisdictions under Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation, which came into force on 1 January 2013 and more widely under the Joint OECD/Council of Europe multilateral Convention on Mutual Administrative Assistance in Tax Matters (multilateral Convention) which was brought into force in Gibraltar on 1 March 2014. Gibraltar now has EOI relationships with 74 countries and territories. Gibraltar has also signed a Foreign Accounts Tax Compliance Act (FATCA)-style intergovernmental agreement (IGA) with the UK and has signed an IGA with the United States of America (USA) under FATCA. Gibraltar is also a part of the Early

Adopters Group which consists of 47 jurisdictions that have committed to the early adoption of the OECD Common Reporting Standard (CRS) for Automatic Exchange of Financial Account Information.

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 information requested by foreign counterparts, the International Co-operation (Tax Information) Act, the Income Tax Act which transposed Directive 2011/16/EU on administrative co-operation in the field of taxation into the laws of Gibraltar and the Taxation (Mutual Administrative Assistance) Act which gave effect to the multilateral Convention, gives Gibraltar's competent authorities 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. Gibraltar has made changes to its legal and regulatory framework to address recommendations made concerning the availability of ownership information with relation to share warrants to bearer. Private companies in Gibraltar that were previously allowed to issue share warrants to bearer are no longer allowed to issue those instruments. With regard to accounting information, all entities and arrangements are now required to keep accounting records and underlying documents for a period of 5 years.

8. In practice, Gibraltar has a comprehensive system of oversight and monitoring of companies and this same system is applied to trust and corporate services providers by the Financial Services Commission (FSC). However, there is no such system of oversight of compliance with the accounting obligations of partnerships. Where ownership information and accounting information has been requested Gibraltar has been able to gather and provide this information to its peers. However, while peers were satisfied with the accounting information provided during the three-year review period, the new obligations to maintain accounting records in accordance with the standard came into force in 2013 and therefore the effectiveness could not be assessed.

9. During the three year review period (1 January 2011 to 31 December 2013), Gibraltar received 96 requests from 12 EOI partners. Gibraltar has been able to provide information in response to 90 requests, 6 requests

remain outstanding and 10 declined for valid reasons. Gibraltar has indicated it was able to provide a final response within 90 days in respect of 55% of cases and 24% within 180 days. About 4% of the requests were processed in more than 180 days. Peers were generally satisfied with the quality of the responses from Gibraltar.

10. The Gibraltar competent authorities have broad powers to access information for EOI purposes. However, during the three-year period under review the Gibraltar authorities in gathering information systematically disclosed to third parties the identity of the person or entity specified in the EOI request, including in cases where this was not necessary for gathering the requested information. This is not in accordance with the principle that information contained in an EOI request should be kept confidential. Deficiencies were also identified in practice concerning communication with peers, providing status updates and instituting guidelines, manuals or other systems to ensure that EOI is dealt with effectively and efficiently.

11. Recommendations have been made where elements of Gibraltar's EOI regime have been found to be in need of improvement. Gibraltar has been assigned a rating for each of the 10 essential elements as well as an overall rating. The ratings for the essential elements are based on the analysis in the text of the report, taking into account the Phase 1 determinations and any recommendations made in respect of Gibraltar's legal and regulatory framework and the effectiveness of its EOI in practice. On this basis, Gibraltar has been assigned the following ratings: Compliant for elements A.1, A.3, B.1, B.2, C.1, C.2 and C.4 and Largely Compliant for elements A.2, C.3 and C.5. In view of the ratings for each of the essential elements taken in their entirety, the overall rating for Gibraltar is Largely Compliant.

Introduction

Information and methodology used for the peer review of Gibraltar

12. The peer review of Gibraltar has been undertaken across two assessments; the 2011 Phase 1 Report and the 2014 Phase 2 assessment. The assessment of the legal and regulatory framework and the implementation and effectiveness of this framework were 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*.

13. The 2011 Phase 1 report of Gibraltar, which was adopted and published by the Global Forum in October 2011, was based on the laws, regulations, and exchange of information (EOI) mechanisms in force or effect as at August 2011, other materials supplied by Gibraltar, information supplied by partner jurisdictions, and other relevant sources.

14. The Phase 2 assessment is based on the laws, regulations, and exchange of information mechanism in force or effective as at 8 August, 2014, Gibraltar's response to the Phase 2 questionnaires, supplementary questions, and other materials supplied by Gibraltar, information supplied by exchange of information partners and explanations provided by Gibraltar during the onsite visit that took place from 19-23 May 2014 in Europort, Gibraltar. During the onsite visit, the assessment team met with officials and representatives of the relevant government departments including the Finance Centre Director and other officials from the Finance Centre Department, the Commissioner of Income Tax and other officials from the Income Tax Office, a representative from the Attorney General's Chambers, regulatory officials from the Financial Services Commission and representatives from Companies House, the Society of Trust and Estate Practitioners and the Gibraltar Association of Compliance Officers (see Annex 4).

15. The following analysis reflects the 2011 Phase 1 and the Phase 2 assessments of the legal and regulatory framework of Gibraltar in effect as at 8 August, 2014 and the practical implementation and effectiveness of this framework in the three-year review period from 1 January 2011 to 31 December 2013.

16. 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.

17. In addition, to reflect the Phase 2 component, recommendations are made concerning Gibraltar's practical application of each of the essential elements and a rating of either: *(i)* compliant, *(ii)* largely compliant, *(iii)* partially compliant, or *(iv)* non-compliant is assigned to each element. An overall rating is also assigned to reflect Gibraltar's overall level of compliance with the standards.

18. The 2011 Phase 1 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.

19. The Phase 2 assessment was conducted by a team which consisted of two expert assessors and one representative of the Global Forum Secretariat: Mr. Tilo Welz, Executive Officer from the Federal Ministry of Finance, Germany; Ms. Ann O'Driscoll, Director of Tax Treaties Branch of the Office of the Revenue Commissioners, Ireland; and Ms. La Toya James from the Global Forum Secretariat. The assessment team examined the practical implementation of the legal and regulatory framework for transparency and exchange of information in Gibraltar.

Overview of Gibraltar

20. Gibraltar is a British Overseas Territory located at the southern tip of the Iberian Peninsula, bordering the Strait of Gibraltar, which links the Mediterranean Sea and the Atlantic Ocean.

21. 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).

22. Tourism, port operations and e-gaming each account for about 20% of Gibraltar's GDP. Gibraltar receives a total of about ten million visitors annually. Financial services accounts for approximately another 20% 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 2013, the total value of bank assets in Gibraltar was 7 billion (EUR 8.8 billion) and the total amount of funds under management was about GBP 8.1 billion (EUR 10.2 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 2012 Gibraltar's gross domestic product was approximately GBP 1.137 billion (EUR 1.434 billion), translating to a GDP per capita of about GBP 41 138 (EUR 51 897).[2]

Legal and taxation system

23. 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.

24. 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.

25. 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

1. Economic figures provided by Gibraltar.
2. Source: Gibraltar Abstract of Statistics Report 2009 Gibraltar Abstract of Statistics www.gibraltar.gov.gi/statistics/downloads.
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.

Coroner's Court) may have jurisdiction on taxation matters depending on the particular facts and circumstances.[4]

26. 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

27. 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 38). 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 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, where they are taxed according to income bands and at tax rates of 15% to 40%; and a gross income based system where they are taxed based on gross income bands and

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.
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.

tax rates ranging from 6% to 28%, with minimal allowance or relief entitlement. The maximum effective rate under this system is 25%.

28. Some classes of income are not chargeable to tax under the Income Tax Act 2010, e.g. bank interest (other than trading interest), intercompany loan interest under GBP 100 000 (EUR 126 155), income from debentures and dividends paid to companies and non-resident individuals. Under the Income Tax Act royalties received or receivable will be deemed to accrue and derive in Gibraltar where the company in receipt of the royalty is a company registered in Gibraltar. Capital gains, wealth and inheritance are not subject to tax under the Income Tax Act 2010.

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

30. 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 Gibraltar; and on the conditions that:

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

31. The International Co-operation (Tax Information) Act (ICA) is the legislation pursuant to which Gibraltar provides assistance under those EOI agreements that have been, by legal notice, scheduled to the ICA (scheduled agreements). These scheduled agreements become part of Gibraltar's domestic law upon ratification. Pursuant to the ICA, the Minister for Finance, or his authorised representative currently the Finance Centre Director, is the competent authority for exchange of information in tax matters.

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

- 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;
- Council Directive 2011/16/EU on administrative co-operation in the field of taxation which replaced the previous EU Mutual Assistance Directive 77/799/EEC – Gibraltar exchanges information on tax matters under the said directive;

- the OECD and Council of Europe multilateral Convention on Mutual Administrative Assistance in Tax Matters (multilateral Convention); and
- Council Directive 2003/48/EC on Taxation of Savings Income in the form of Interest Payments (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, with which an interim withholding tax system is in place).

Gibraltar's commercial laws and financial sector

33. 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.

34. Gibraltar's financial sector consists primarily of branches or subsidiaries of international firms. Out of the 19 authorised credit institutions in Gibraltar, 15 are branches or subsidiaries of international banks and 4 are e-money institutions. In addition there were 67 insurance companies, 40 insurance intermediaries, 31 investment firms and 8 insurance managers as of the end of March 2014.

35. There are approximately 260 lawyers who hold practising certificates issued by the Supreme Court. They are 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 10 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 51 statutory auditors and 17 audit firms approved under the Financial Services (Auditors) Act 2009, supervised and regulated by the Financial Services Commission. As of the end of March 2014 there were a total of 68 company manager/professional trustee groups.

36. 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.

37. 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 currently have its own stock exchange, although one is expected to be launched late in 2014.

38. Gibraltar had in the past provided for the incorporation of tax-exempt companies – companies that do not carry on 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 under the Taxation and Concession Act which was repealed as from 1 January 2011. Companies in Gibraltar are only taxable on their assessable income in Gibraltar. As at May 2014 there were 17 200 active companies registered in Gibraltar, 2 800 have assessable income and are registered with the Income Tax Office. The total number of companies in Gibraltar as at May 2014 is 19 000 (which includes active and inactive companies) which has decreased from 28 666 in 2013.

Recent developments

39. Since 2009, Gibraltar has rapidly established its network of EOI agreements and continues to do so. In addition to the transposition of Council Directive 2011/16/EU on Administrative Co-operation in the Field of Taxation and the extension of the multilateral Convention on Mutual Administrative Assistance in Tax Matters (multilateral Convention) to Gibraltar by the United Kingdom[8], Gibraltar has continued to negotiate and

8. Footnote by Spain:
Spain has issued a declaration in relation to the multilateral Convention available at www.conventions.coe.int/treaty/Commun/ListeDeclarations.asp?PO=SPA&NT=127&MA=999&CV=1&NA=&CN=999&VL=1&CM=5&CL=ENG.

sign bilateral EOI agreements as described in element C below. Gibraltar is also currently putting systems in place to enable all users to file documents electronically with Companies House and other Government agencies. This will be tested during the summer of 2014 beginning with the e-filing of accounts. Gibraltar has also in its Action Plan of 3 September 2013 outlined that it is currently laying the groundwork for the transposition of the draft 4th Anti-Money Laundering Directive, which implements and in some respects goes further than the revised FATF recommendations.

Compliance with the Standards

A. Availability of Information

Overview

40. 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.

41. 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. Previously, there was the possibility for companies to issue share warrants to bearer. However, only 17 companies had done so, and Gibraltar has now enacted legislation prohibiting the issuance of share warrants to bearer in the future and requiring existing share warrants to bearer to be exchanged for registered shares. Companies that fail to do so commit an offence. After the commencement of the amendment prohibiting the issuance of share warrants to bearer there were 15 companies remaining that had share warrants to bearer in issue.

Only 3 of those 15 companies have failed to comply with this requirement because they have been dormant for some time. The Registrar of Companies commenced striking off procedures for each of these 3 companies which was finalised on the 19 August 2014. In respect of trusts Gibraltar has amended its law to ensure that all trustees are required to record in writing information on the identity of the settlors, trustees and beneficiaries of the trusts they are managing and to maintain this information for a period of 5 years.

42. There were significant deficiencies in respect of the availability of accounting records, however, Gibraltar has enacted amending legislation to address these issues. Now all entities and arrangements are required to maintain accounting records and underlying documentation for at least five years in accordance with the standard. Penalties apply for the non-compliance with these obligations except in the case of partnerships that are not subject to tax.

43. 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)*

44. Gibraltar law provides for the incorporation of the following types of companies: There are approximately 17 200 active private limited companies, 60 public limited companies, 90 protected cell companies and no European Public Limited Liability Company (Societas Europaeas) have yet been incorporated.

Companies Act

45. 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

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

- restrict the rights to transfer its shares;

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

47. 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

48. 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 25 865).[12]

Protected Cell Companies Act

49. 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, collective investment schemes and special purpose vehicles and may only be incorporated with the written consent of the Financial Services Commission (FSC).[13] The regulations applicable to domestic companies under the Companies Act generally apply similarly to protected cell companies.[14]

European companies

50. 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 2005, allowing for the creation

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.

and management of companies with a European dimension and not strictly falling under 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.

Associations and Cooperatives

51. The laws of Gibraltar also provide for the formation of associations and co-operatives. 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

52. 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] Companies House has explained that in addition to keeping information in printed form all information is available online and can be accessed by members of the public. All up to date information concerning a company is available online in the form of a profile. The profile includes information such as the incorporation number of the company, the former names of the company, the date of the name change, the type of company, the status of the company, the date the last annual return was filed, the date the last accounts were filed, the number of shares, the name, address, occupation and nationality of the shareholders, the directors and secretaries. Gibraltar has confirmed that initially, only the profile and accounts were available online however in recent years Companies House has made all other public information such as the Memorandum and Articles of Association available online. Any interested person or competent authority can now register with Companies House online and a small fee of GBP 10 (EUR 12) is payable for each document downloaded.

15. Section 346 of the Companies Act.

53. 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]

54. All companies must file annual returns to the Registrar. Companies House has confirmed that 17 394 companies filed in 2011, 16 844 filed in 2012 and 15 609 filed in 2013. Additionally 1 651 companies were struck off the register for non-compliance in 2011, 3 405 in 2012 and 1 806 in 2013. The information to be contained in an annual return differs according to whether the company has share capital, and includes the following[18]:

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

55. 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.

56. 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

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.

- 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]

57. 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*.

58. 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:

- 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]

59. All foreign companies registered in Gibraltar have to update their statutory information annually, including shareholding information, via the filing of an annual return.[24] Companies House has indicated that all information filed is checked electronically and manually upon submission.

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.
23. Sections 388 to 392 of the Companies Act.
24. Sections 153 and 154 of the Companies Act.

This electronic system is set up to detect anomalies for example if a person appears as a director in a previously filed annual return but does not appear in the current annual return a query will be raised. A query will also be raised where a shareholder's name no longer appears in the annual return yet no transfer of shares to a new shareholder has been reported. In these cases, the information is checked and the necessary steps are taken to confirm and verify that the correct information is provided. All directors are given a Unique Identification number (UID) which allows searches to be conducted electronically. In accordance with Council Directive 2012/17/EU Gibraltar is currently putting systems in place to enable users to file documents electronically and to interconnect with central, commercial and companies registers across the EU. The former part of this system will be tested during the summer of 2014 beginning with the e-filing of accounts.

Income Tax Act

60. 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 an information power notice issued under the Income Tax Act 2010 where it is relevant for tax treatment purposes of that company.

61. Companies whose turnover exceeds GBP 500 000 (EUR 630 800) 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 disclosed irrespective of whether any transactions have taken place between the controlling parties and the reporting entity".[26]

62. The Income Tax Office keeps a database of all the persons who are required to file returns. As at May 2014 there were approximately 2 800 companies registered with the Income Tax Office. The Income Tax Office has

25. Section 30 of the Income Tax Act.

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.".

indicated that when a company is registered with it the information filed by that company is checked against the information already held on its files (which consists of information that the Income Tax Office has received from Companies House). All corporation tax returns are checked and scanned into the income tax database upon receipt. This database automatically detects incomplete returns, late filing, etc and penalties are issued. The detection and issuing of such penalties is called a "penalty run". In this penalty run, penalties are applied to all companies for failures identified. In 2012, a penalty of GBP 50 (EUR 62) per company was applied in 3 separate penalty runs. In 2013, the same penalty per company was applied in 9 separate penalty runs. Additionally in 2013, a penalty of GBP 300 (EUR 377) per company was applied in 12 separate penalty runs. The total number of penalties that were issued to companies during the three year review period was 3 835. In 2012 there were 991 penalties of GBP 50 (EUR 62) issued; in 2013, there were 1 278 penalties of GBP 50 (EUR 62) issued. There were no GBP 300 (EUR 377) penalties issued in 2012 (there was a moratorium in place) and in 2013, 1 566 penalties of GBP 300 (EUR 377) were issued. The Income Tax Office has also explained that some "runs" are not heavily populated given that at the particular month in which the "run" is being generated there may be few companies with a relevant filing date and/or a high level of tax filing compliance is being experienced during that period. In these cases the penalty run may be deferred to the next period.

Information required to be held by companies

63. 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]

64. 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

27. Section 144(1) of the Companies Act.

inspection.[28] Annually it is copied to Companies House in the form of an annual return and this is made available for public inspection. As of March 2014 approximately 19 000 companies in Gibraltar have a corporate and trust service provider who is responsible for the whole life cycle of the company including the maintenance of the share register.

Information held by service providers

65. 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[29] 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.

66. 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[30]:

- 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.

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

28. Sections 140 and 148 of the Companies Act.
29. For example, at the end of March 2014, 28 666 companies (of which 19 000 were Gibraltar companies) were managed by a Gibraltar company service provider. These company service providers are obliged entities under the CMLP Act and must identify the companies which are their customers.
30. Schedule 3 of the FS-IFS Act.

- 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
- 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.

68. 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.[31]

69. Customer due diligence measures must also be applied on existing customers on a risk-based approach. In general, these measures include:[32]

- 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.

70. 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:[33]

- 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

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

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;

- 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."

71. 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.

72. 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".[34]

73. The Financial Services Commission (FSC) is a sector wide regulator in charge of ensuring that company managers adhere to their obligations under financial services and AML laws. The FSC employs approximately 55 members of staff which includes administration. The FSC has both supervisory functions and operations functions (Finance, HR and IT). The Operations team is comprised of 13 individuals. The Supervisory function team is comprised of sector specific teams which include Audit Supervision (1 individual); Banking, E-Money & Investment Services Supervision (7 individuals); Enforcement (1 individual); Fiduciary and Pensions Supervision (7 individuals); Funds Supervision (6 individuals) and Insurance Supervision (13 individuals). Part of the FSC supervisory remit is to ensure licensees comply with financial services requirements. As part of its onsite risk assessment

34. Paragraph 7.2 of requirement 62 of the AML/CFT Guidance Notes.

work on all licensees, the FSC reviews client company files, including checking whether companies are up to date with their Companies House filing requirements to ensure that client companies are in good standing. The FSC uses the same procedures and criteria across the board for regulating and monitoring each sector. The FSC has confirmed that each sector is regulated based on the applicable EU Directive except for Trust and Corporate Services Providers which have been regulated since 1989 by domestic laws and rules.

74. The FSC carries out both desk based reviews and on-site visits. There are various elements involved in the desk based review, and the review is designed to ensure that company managers are complying with all of the requirements under applicable laws, including company law, trust law or other relevant obligations, and not only compliance with AML laws. It is applied according to a risk assessment methodology and followed by a self-assessment questionnaire. Risk assessment are usually carried out which will be followed up by an on-site visit. Once a supervisory mitigation programme has been set, the FSC will then arrive at a final risk profile of the firm which will determine the frequency of interfacing between the FSC and the firm. The FSC requires company managers to submit a "return of trusts and companies under management", which allows them to monitor the trends concerning the type and number of services the company managers are managing. The FSC has confirmed that there have been cases where deficiencies with the AML obligations have been identified including deficiencies with regard to the identification of customers.

75. The FSC confirms that in 2011 there were 68 licensed trust and corporate services providers, 67 in 2012 and 68 in 2013. A team of 8 persons conducts the monitoring of these firms. These firms are divided among 7 people within the team. The FSC has confirmed that they receive 3 returns on an annual basis, audited financial statements, statement of compliance and a return of the trusts and companies under management. The statement of compliance is submitted by the licensee and they need to comply with a series of requirements which are primarily drawn from a number of financial services law and the Crime (Money Laundering and Proceeds) Act 2007. These requirements centre on whether a firm has conducted business within the scope of its license, complied with client money and asset rules, AML requirements, corporate governance rules and capitalisation and finance resources rules. If the requirements are not complied with the FSC takes the necessary actions.

76. The FSC has confirmed that during the three year review period it have conducted 16 full risk assessment, 8 supervisory onsite visit and 4 focused onsite visits in 2011. In 2012 it conducted 24 full risk assessments, 12 supervisory onsite visits and 11 focused onsite visits and in 2013 it conducted 48 risk assessment reviews. The average number of reviews is approximately

21 focused reviews and 15 follow up supervisory visits. The risk based approach is used, and the risk classification of the firm is identified off-site. There are 3 main areas that must be verified during each on-site inspection, these are corporate governance, client monies and AML obligations. The on-site inspection is conducted by taking a sample which includes a subset of the clients of the firm and these files are inspected. In circumstances where the FSC deems there to be a certain risk they request the firm to commission a skilled persons report (usually conducted by an auditor) in which they must identify any deficiencies found. The skilled person reports directly to the FSC on the particular risks identified. If the review indicates that the deficiency is not a one off problem then the scope of the skilled persons review is extended to look at every single file or a much larger sample to see if there is a major issue. The FSC indicated that more often than not companies in Gibraltar will be registered with a licensed service provider and that they had 28 666 companies under the management of a licensed service provider in Gibraltar, of which 19 000 were Gibraltar companies.

77. The FSC also confirmed that during the three year review period the types of deficiencies identified included corporate governance arrangement deficiencies and deficiencies concerning reporting. The FSC has also confirmed that there have been cases where deficiencies with the identification of customers were identified. Where deficiencies are found they are highlighted to the firm and the firm is given the opportunity to address any statement of fact made. Following which a final letter will be issued in which the intended outcome of mitigation is outlined. The firm will be required to report on progress usually on a monthly or quarterly basis. Following this the FSC usually carries out further focused and onsite visits. In addition, the FSC has confirmed that in addition to applying penalties as described in paragraph 121 below, the FSC may also impose conditions on the license of the licensee for example prohibiting them from taking on new clients until the FSC is satisfied that the deficiencies have been identified. During the period under review the FSC revoked 2 licenses and two other firms voluntarily surrendered their license. The first case where the FSC revoked the license was in relation to deficiencies concerning the handling of client monies. The other was in relation to the fitness and propriety of the main principal of the firm. Additionally, during the three year review period there was one case were conditions/restrictions imposed on the licensee.

78. The FSC has also confirmed that there was an increase in the number of risk assessments due to a decision taken in 2010 to focus resources on assessing, primarily client money and AML risks. There was also a large increase in the number of focused and supervisory visits which was due to the increase in number of risk assessments during that year. All 68 trust and corporate services providers have been risk assessed during the three year period under review.

Nominee identity information

79. 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.[35] Therefore, monitoring as described above which is conducted by the FSC includes the monitoring conducted on nominee shareholders.

80. Under the Crime (Money Laundering and Proceeds) Act ("CMLP Act"), licensed nominee shareholders are one of the "relevant financial businesses"[36] 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) and verifying the customer's identity on the basis of documents, data or other information obtained from a reliable and independent sources.[37]

81. 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.

82. 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

35. 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.
36. Section 8 of the CMLP Act.
37. Section 10B of the CMLP Act and the AML/CFT Guidance Notes.

parties to the relationship have been identified and the nature of the business they expect to conduct has been established".[38]

83. 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.

84. 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.

85. The FSC has confirmed that it has not come across any situations where assets were held by nominees not acting by way of business. It has also confirmed that the FSC patrols the perimeter (which means that the enforcement team of the FSC constantly monitors whether activity which requires a license from them is being carried out in Gibraltar without such a license, this is done via open- and closed-source internet searches and new feeds), receives market intelligence and also information is usually provided to the FSC by other licensees. In addition to the 68 company managers providing nominee shareholding services there are 67 individual nominees in Gibraltar. During the three-year review period Gibraltar has confirmed that in virtually all the requests received the shareholder in question has been a nominee shareholder. In these cases the information was available and exchanged with its treaty partner.

Conclusion

86. 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.

38. Paragraph 7.2 of requirement R62 of the AML/CFT Guidance Notes.

87. During the three-year review period, the Gibraltar competent authorities have provided ownership information on companies identified in EOI requests. Approximately 72 requests included information in respect of the shareholders of a company. Peer input indicated that this information has been available and provided in a timely manner. The result of inspections conducted by the FSC confirms that company managers do comply with AML obligations and keep the required ownership information.

Bearer shares *(ToR A.1.2)*

88. Companies are not allowed to issue "bearer shares" and since 21 March 2013 Gibraltar has amended section 121 of the Companies Act which now abolishes these instruments. Therefore, no new share warrants to bearer can be issued. The amendment made to Gibraltar's law requires any company which had a share warrant to bearer in issue before the 21 March 2013 to, within a period of 9 months from such date, enter the bearer of the share warrant in the company's register of members. No rights attached to a share warrant may be exercised unless the bearer has been entered in the company's register of members. A company commits an offence if it fails to comply with section 121(6) of the Companies Act and is liable on summary conviction to a fine at level 5 on the standard scale.[39] As per schedule 9 of the Criminal Procedure and Evidence Act a level 5 fine on the standard scale of fines is GBP 10 000 (EUR 12 600).

89. Gibraltar's authorities advised that the use of these warrants was very limited – only 52 out of about 24 000 active companies in Gibraltar as at August 2011 had issued share warrants to bearer and such warrants were only in issue for 17 companies, all of which had their registered offices with licensed and regulated company managers who were therefore subject to AML obligations, including ongoing customer due diligence.

90. After the commencement of the amendments made to the Companies Act, Companies House has advised that 15 companies still had share warrants to bearer in issue. This represented 0.077% of the 19 458 active companies in Gibraltar in 2013. At May 2014, the Gibraltar authorities confirm that 12 of the remaining 15 companies had complied with the law and entered the name of the bearer into the company's register of members. The remaining three companies had not complied with the law. The Registrar advised that these companies had been inactive for many years and the company managers had confirmed that they had lost contact with these companies. Consequently, the company managers filed a notice with Companies House confirming that these companies were no longer authorised to keep their registered address with the relevant company managers. Therefore, the Registrar initiated the

39. Section 121 of the Companies Act.

process of striking the remaining companies off the Register. A notice was issued on the 21 May 2014 pursuant to section 331 of the Companies Act giving notice that the names of the three remaining companies would be struck off the register on the expiration of three months following the date of the notice (21 August 2014), unless cause could be shown to the contrary. The Registrar has explained that this will result in the concomitant cancellation of the share warrants to bearer and there will no longer be any share warrants to bearer in issue in Gibraltar. The Gibraltar authorities have advised that on 20 August 2014 the final notice of striking off was issued striking the three remaining companies from the Register of Companies with effect from the 19 August 2014. There are therefore no further share warrants to bearer in issue and companies are no longer allowed to issue these share warrants. In the three-year period under review, Gibraltar received 72 requests concerning ownership information. One of these cases concerned share warrant to bearers issued by a Gibraltar company and the competent authority was able to exchange this information.

Partnerships *(ToR A.1.3)*

91. 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.

92. 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[40]:

- 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

40. 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.

93. A GP may not have more than 20 partners.[41]

94. 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.[42]

Information required to be provided to government authorities

General partnerships

95. 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.[43]

96. Any changes in the above details must be advised to the Registrar within 14 days of the change happening.[44] In addition, every registered

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

partnership must renew its registration annually by submitting an annual 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

97. 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.[45]

98. Any changes in the partners or the names of any partner must be advised to the Registrar within seven days of the change.[46]

99. 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.[47]

Tax requirements

100. 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

45. Section 7 of the Limited Partnerships Act.
46. Section 8 of the Limited Partnerships Act.
47. Section 12 of the Limited Partnership Act.

income for the year, together with a copy of the partnership accounts. The Income Tax Office has confirmed that as at 21 May 2014 there were 2 partnerships registered with it, although they are not legally required to do so. As with companies when a partnership files documents with the Income Tax Office this information is also checked against the information already held on its files (which consists of information the Income Tax Office has received from Companies House).

Ownership and identity information required to be held by partnerships

General partnerships

101. 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

102. In addition 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.

In practice

103. In practice, the obligations placed on partnerships are monitored by Companies House and the tax obligations monitored by the Income Tax Office. As described above, Companies House checks all information filed electronically through a system designed to detect anomalies. Unlike companies, the majority of partnerships do not necessarily engage a trust and corporate services providers and so do not attract the oversight of the FSC. Therefore, apart from this electronic check by Companies House, there is no active monitoring or oversight programme in place. If the partnership has Gibraltar sourced income, then the partners will be subject to tax in Gibraltar. In these cases, the Income Tax Office checks information filed with them against information in their files, which generally consists of information received from Companies House. These partnerships would be subject to audit, however, this will not cover all partnerships relevant for the purpose of the Terms of Reference. Where a partnership proposes to carry on regulated activities it must seek the requisite license from the FSC and will be subject to

supervision and regulations in the same manner as a body corporate. The FSC has explained that in practice very few regulated entities are established as partnerships. Currently there is one such firm that carries on investment activity, and historically there have been a very small number of partnerships active in the regulated sector. The FSC licensed and regulated a professional trustee in the form of a partnership until its license was surrendered in April 2012.

Conclusion

104. 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 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.

105. While ownership and identity information of partnerships operating in Gibraltar is made available through a combination of obligations imposed under the Partnerships Act, the Partnerships and Unlimited Companies (Accounts) Regulations, the Limited Partnerships Act, the Business Names Registration Act and the Income Tax Act, in practice, there was only limited oversight of compliance with these obligations during the review period. One peer reported asking for information on the partners of partnerships and was satisfied with the information provided. No other peers have reported any issues in this regard. Nevertheless, it is recommended that Gibraltar enhance its monitoring of the compliance of the legal obligations to maintain ownership and identity information for all partnerships and exercise enforcement powers as appropriate to ensure that such information is available in practice.

Trusts *(ToR A.1.4)*

106. 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.[48] 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.[49]

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

Information required to be provided to government authorities

107. There is no obligation for express trusts to be registered in Gibraltar. However, trusts whose trust deeds require registration may choose to have 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.[50]

108. 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.[51] 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.[52] 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

109. 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 and the Trustees Act. 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.

110. Trustees should obtain "good receipt" from beneficiaries when they distribute trust property. This requires trustees inter alia to establish

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

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 (1886) 33 Ch D 552). In addition to the common law obligation, Gibraltar amended its Trustees Act in 2013 requiring all trustees (whether or not they are licensed) to record in writing information as to the identity of the settlors, trustees and beneficiaries of the trust and maintain such information for a period of 5 years. There are no specific penalties in the Trustees Act for failure to comply with these obligations. However, all professional trustees in Gibraltar are subject to licensing and oversight by the FSC. As detailed above under A.1.1, the FSC assesses compliance with all relevant legal obligations of their licensees. Consequently, failure to maintain information on settlors, trustees and beneficiaries would attract sanctions of the FSC, including fines, restrictions on permissible activities and ultimately a revocation of the license. Gibraltar is recommended to monitor the effectiveness of this in ensuring that identity information on trusts is maintained.

111. Further statutory requirements to keep ownership and identity information apply to professional trustees that act by way of business.[53] 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).[54] 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. However, section 8 of the CMLP Act,

53. 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.

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

specifies the following categories of designated non-financial businesses and professions as conducting "relevant financial business" and subject to the full obligations of the preventative measures and reporting obligations that also apply to the financial sector. These include:

- auditors, external accountants and tax advisors;
- real estate agents;
- notaries and other independent legal professionals, when they participate whether:
  - (i) by assisting in the planning and execution of transactions for their client concerning the:
    - (a) buying and selling of real property or business entities;
    - (b) managing of client money, securities or other assets;
    - (c) opening or management of bank, savings and securities accounts; or
- controlled activity under the Financial Services Ordinance 1989. These currently include: (1) company management; and (2) professional trusteeship;
- dealers in all high value goods whenever payment is made in cash and in an amount of EUR 15 000 or more; and
- casinos.

112. Additionally, lawyers in Gibraltar are licensed and subject to discipline pursuant to section 33 of the Supreme Court Act, which incorporates by reference the rules of court in force in England. Accordingly, Gibraltar lawyers are required to comply with England's Money-Laundering Regulations of 2003. These regulations apply, among other things, to "legal professionals acting on behalf of their clients in any financial or real estate transaction". This is defined to include legal transactional services, insolvency and tax services, financial services, and company and trust services. Where lawyers or other independent professionals perform company or trust management services (i.e. "controlled activities" under section 8 of the CMLP Act), they form legal entities for this purpose, and as such are regulated by the FSC.

113. 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 ;
- 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.[55]

114. 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.

115. 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. In addition, it is also conceivable that a local trust or a foreign trust may be administered by a non-professional trustee. In this case, the trustee would be subject to common law trust duties set out above and would only be likely to take on such duties if they personally knew the identity of the settlor and beneficiaries. As at March 2014, there were 4308 trusts in Gibraltar for which trustee services were provided by licensed entities in Gibraltar. The Gibraltar authorities indicated that the AML law requires these firms to keep information on the settlors and beneficiaries of the trusts and this information must be kept at a licensed firm. It is noted that where a lawyer or auditor provides trust services in an isolated case then that lawyer is not required to be licensed. However, if they

55. 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.

do it as business then they fall within the ambit in the IFS-FS and they will be required to be licensed. Even in circumstances where an auditor is not licensed under the IFS-FS he is still subject to AML.

116. In practice as with other licensed activities, the FSC is responsible for the monitoring and oversight of trust service providers. As the FSC applies the same system of monitoring and oversight across the board, the same comprehensive method as described above for companies is used in relation to trust business. Therefore, there are comprehensive requirements to keep ownership information in relation to all trusts, however, the monitoring of these obligations only extends to professional trustees. In Gibraltar there are currently 45 licensed professional trustee groups. One of these groups includes three licensed individual professional trustees and a further three firms have on individual professional trustee each. A relatively small gap remains concerning the monitoring of the obligations in relation to non-professional trustees. During the period under review the FSC conducted 127 desk-based reviews which included 84 professional trustees. All 127 desk-based reviews led to a risk assessment onsite visit. In addition to this, the FSC also conducts desk-based reviews through the scrutiny of the 3 returns (audited financial statements, a statement of compliance and a return of the trusts and companies under management) submitted by firms.

117. During the period under review Gibraltar received 1 request for information on the settlors, trustees and beneficiaries of trusts. Gibraltar was able to gather and exchange this information with its peer.

Conclusion

118. Identity information is readily available for all express trusts in Gibraltar. 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 conducted *upon distribution, all beneficiaries* need to be identified at the start of the relationship (R86 of the AML/CFT Guidance Notes). Further, requirements in the Trustees Act now require all trustees (whether or not they are licensed) to keep identity information of trusts. However, these requirements were introduced in 2013 in the last year of the three year review period and as such Gibraltar is recommended to monitor the practical implementation of the recently introduced requirements on trustees to keep comprehensive identity information on trusts. In practice, the FSC has oversight of trust services providers and professional trustees; however a small gap remains with relation to non-professional trustees who are not subject to oversight by the FSC.

Foundations (ToR A.1.5)

119. 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)

120. 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.

121. 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 630) and a further fine of GBP 150 (EUR 190) for each day the default continues;[56]
- 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 10 000 (EUR 12 600) (s. 189 and Schedule 9 of the Criminal Procedure and Evidence 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 1 260);[57]
- 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 126) for each day the default continues;[58]
- any licensed service provider (including licensed professional trustees and licensed nominee shareholders) that does not conduct the

56. Section 155(4) of the Companies Act.
57. Section 11 of the BNR Act.
58. Section 9 of the BNR Act.

relevant customer due diligence measures as required under the CMLP Act is liable upon summary conviction, to a fine not exceeding GBP 10 000 (EUR 12 600); and upon conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both;[59]

- 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 31 540).[60]
- 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 63), 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 378). Further default attracts a penalty of an amount up to 150% of the estimated tax payable;[61]
- 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[62]; 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 25) for each day the default continues;[63]

122. Gibraltar has confirmed that during the three year period under review criminal sanctions were not applied for failures identified under the relevant Acts. However, where Companies House received applications for late filing, these are subject to penalties and in 2011, 3 185 penalties were applied, in 2012, 3 106 penalties were applied and in 2013, 2 096 penalties were applied. Additionally, Companies House has confirmed that every three years companies are struck off the register for failure to fulfil their filing obligations. As described in element A.1.1, 1 651 companies were struck off in 2011, 3 405 were struck off in 2012 and 1 806 were struck off in 2013. Companies House has also explained that in the cases where companies have

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

not fulfilled their filing obligations, they are automatically not in good standing with Companies House and can be classified as inactive. Accordingly those companies will be subject to the striking off procedure conducted on a three year rolling basis. Also as described in element A.1.1, the Income Tax Office periodically highlights defaulters regarding tax filing compliance and has applied penalties in a "penalty run" during the years 2012 and 2013. The Income Tax Office also confirmed that the further variable penalty of up to 150% of the estimated tax payable has not been applied by the Income Tax Office.

Conclusion for Part A.1

123. Ownership and identity information of relevant entities and arrangements is available in Gibraltar through a combination of obligations imposed by the various laws on either the entity itself or its service provider.

124. In addition, the common law obligations and the new obligation placed on all trustees under the Trustees Act means that identity information on trusts in Gibraltar should be readily available, however the lack of sanctions and penalties in the Trustee Act may mean that this information may not be available in a small number of cases where the trustee is a non-professional. As described above, the FSC conducts extensive oversight activity in respect of its licensees. This programme encompasses obligations under company law, partnership law, trust law, AML law, business names registration and EU law. This is a very comprehensive system that includes both on and off-site reviews.

125. In respect of tax law obligations, taxable entities are subject to audit. However, the ownership and identity information that is maintained or relevant for tax purposes is the same information that would be held by Companies House or company managers in accordance with company law and is therefore already subject to the enforcement activity described above.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place

Phase 2 rating
Compliant

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

126. 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.[64]

127. 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.[65]

128. 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 and to have their accounts audited. Such companies are defined under the

64. Section 170 of the Companies Act.
65. Section 171 of the Companies Act.

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 8.09 million);
- its balance sheet total did not exceed GBP 3.26 million (EUR 4.06 million); or
- the average number of persons employed by the company did not exceed 50.[66]

129. At the time of the Phase 1 review, the Gibraltar authorities advise 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 was also the understanding held by the Gibraltar Society of Accountants. Formal advice received from Deloitte Gibraltar indicated that they interpreted "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.

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

131. In 2013, Gibraltar amended its laws to include a definition of "proper books of account". Section 2 of the Companies Act defines "proper books of account" as such books or accounts as are necessary to exhibit and explain the transactions and financial position of the trade or business of the company and includes books containing entries from day to day of all cash received and cash paid, statements of annual stocktaking, all goods sold and purchased showing sufficient detail to enable those goods, buyers and sellers to be identified and any contracts, invoices or other underlying documentation significant to the trade or business of the company. A further amendment to Section 170 of the Companies Act now requires proper books of account to be kept for a period of 5 years.

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

Companies (Accounts) Act

132. 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 year and a profit and loss account, with variations in the level of details.[67] 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.

133. 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. Companies House has explained that in addition to keeping information in printed form all information is also kept electronically and is available online. This information can therefore be accessed by members of the public. Any interested person or competent authority can now register with Companies House online and a small fee of GBP 10 (EUR 12) is charged for each document downloaded payable electronically. As described in A.1 above all information filed with Companies House is checked electronically. This electronic system is set up to detect anomalies for example if annual returns were filed for a previous year but none have been filed for the current year a query will be raised.

Income Tax Act

134. 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 1 000 (EUR 1 260). There is no guidance as to what would constitute records "adequate for the purposes of taxation".

67. Sections 4 and 9 of the Companies (Accounts) Act.

135. 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.[68] The Income Tax Office has stated that where information submitted contains accounts these are scrutinised. Reviews of accounting information are based on analytical review procedures, trend and ratio analyses combined with a general understanding of the business environment and economic climate.

Accounting records to be kept in respect of partnerships

136. 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". Additionally, section 29A of the Partnership Act now requires partners to maintain proper books of account in respect to *(a)* all sums of money received and expended by the partnership and the matters in respect of which the receipt and expenditure takes place; *(b)* all sales and purchases of goods by the partnership; and *(c)* the assets and liabilities of the partnership, for a period of 5 years. "Proper books of account" are defined as such books or accounts as are necessary to exhibit and explain the transaction and financial position of the trade or business of the partnership and includes books containing entries from day to day of all cash received and cash paid, statement of annual stocktaking, all goods sold and purchased, showing sufficient detail to enable those goods, buyers and sellers to be identified, and any contracts, invoices or other underlying documentation significant to the trade or business of the partnership. There are no sanctions or penalties mentioned in the law for failure to keep proper books of accounts.

137. 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[69], together with a copy of the partnership accounts, which include the annual accounts, the annual report and auditors' report.[70] The record keeping requirements under the Income Tax Act applicable to companies apply similarly to such partners.

68. Section 34 of the Income Tax Act.
69. Section 18 of the Income Tax Act and Section 30 and 31 of Partnership Act.
70. Section 2 of Partnerships and Unlimited Companies (Accounts) Regulations, 1999.

Accounting records to be kept in respect of trusts

138. 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).

139. 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.

140. AML obligations apply to all professional trustees. 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.

141. 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 Customer Due Diligence (CDD) obligations under the CMLP Act.

142. Further, Gibraltar amended the Trustees Act in 2013 to require a trustee to maintain "proper books of account" with respect to *(a)* all sums of money received and expended by the trust and the matters in respect of which the receipt and expenditure takes place; *(b)* all sales and purchases of goods by the trust; and *(c)* the assets and liabilities of the trust, for a period of 5 years. "Proper books of account" are also defined as such books or accounts as are necessary to exhibit and explain the transaction and financial position of the trade or business of the trust and includes books containing entries from day to day of all cash received and cash paid, statement of annual stocktaking, all goods sold and purchased, showing sufficient detail to enable those goods, buyers and sellers to be identified, and any contracts, invoices or other underlying documentation significant to the trade or business of the trust. There are no specific penalties in the Trustees Act for failure to comply with these obligations. However, all professional trustees in Gibraltar are subject to licensing and oversight by the FSC in the same

way as companies. As such the FSC will assess their compliance with all relevant obligations including their obligations to keep and maintain accounting records as detailed above under A.1.1. Consequently, failure to maintain accounting information in accordance with the Trustees Act would attract sanctions of the FSC, including fines, restrictions on permissible activities and ultimately a revocation of the license.

143. Additionally, a beneficiary has the right to take legal action against a trustee who has failed to maintain the records necessary to meet the common law obligations. In practice the FSC has indicated that during its desk based reviews and on-site visits a check is done to ensure that proper accounting records and underlying documents are kept. It has confirmed that during the three year period under review there were no deficiencies identified with the keeping of these records.

Accounting records to be kept by service providers

144. The CMLP Act requires relevant licensed service providers and financial institutions to keep records pertaining to transactions carried out by their customers.[71]

145. 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

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

- 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.[72]

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

147. 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.[73] The Gibraltar authorities have indicated that these provisions mean that all underlying documents, including invoices and contracts, must be kept by licensed service providers and financial institutions for transactions conducted through them.

148. 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. In practice however, the FSC has indicated that during the three year period under review there were no deficiencies identified with the keeping of these records by service providers.

Conclusion

149. There had been deficiencies in Gibraltar's legal framework for the maintenance of accounting records. These deficiencies have, for the most part, been addressed with legal amendments that came into force in 2013, towards the end of the review period. A small gap remains only with respect to penalties for partnerships that fail to maintain accounting records, and moreover, partnerships are not subject to systematic oversight. While the requirement for trustees has a similar flaw in terms of penalties, these

72. Requirement 108 of the AML/CFT Guidance Notes.
73. Requirement 106 of the AML/CFT Guidance Notes.

trustees, when acting in a professional capacity are subject to oversight and licensing requirements, in which case failure to comply with the accounting rules can attract sanctions from the FSC. During the period under review there have been no requests for accounting records for partnerships.

150. However, peers have requested accounting information in 47 cases for other relevant entities (companies). At least 3 peers have indicated that in 32 cases they are satisfied with the answers provided. 4 cases are still pending and one peer reports having asked for financial statements in 11 cases and the response from Gibraltar was that such statements were not filed by the relevant entities. As described above, while Gibraltar law requires that companies must file certain accounting records with the Registrar under the Companies Act and the Companies Accounts Act these are not specifically "financial statements". It is not a requirement of the standard that financial statements must be available with the competent authority. However, while the standard does not require that relevant entities prepare financial statements in all cases, it does require that the entity maintain information that would allow such statements to be prepared. There is no evidence that accounting records were not being kept by the relevant entities rather, it is the case that the information filed was not in the form of a financial statement. In this regard, it is not clear that the competent authority communicated effectively with this partner to clearly identify the information required (see discussion under element C.5).

151. As the express requirements regarding the maintenance of accounting records are relatively new, Gibraltar should monitor that the new laws are complied with. Gibraltar has confirmed that the requirements of the new law concerning accounting records will apply to tax years commencing after the date of entry into force of the relevant legislative amendment.

Determination and factors underlying recommendations

Phase 1 determination	
The element is in place.	
Factors underlying recommendations	**Recommendations**
Partnerships are required to maintain accounting records in accordance with the standard; however, there is no penalty applicable for breach of this obligation.	Gibraltar should introduce appropriate sanctions for non-compliance with the obligation for partnerships to maintain full accounting records.

Phase 2 rating	
Largely Compliant	
Factors underlying recommendations	**Recommendations**
While accounting information was generally provided the obligations to maintain accounting records in accordance with the standard only came into force in 2013 and so their effectiveness could not be fully assessed.	Gibraltar should monitor the practical implementation of the new laws to ensure that all relevant entities and arrangements keep accounting records and underlying documentation in accordance with the standard.
Partnerships are not subject to systematic oversight of compliance with their accounting obligations.	Gibraltar should ensure that a regular system of oversight and monitoring of partnerships' obligations to maintain accounting records.

A.3. Banking information

Banking information should be available for all account-holders.

Record-keeping requirements (ToR A.3.1)

152. All "credit institutions"[74] and "financial institutions"[75] that carry on business from or within Gibraltar are subject to Gibraltar's AML law; the CMLP Act.

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

154. 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

74. 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.

75. 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.

accounts, and that this provision was put into the CMLP Act as a precautionary measure.

155. 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.[76] (see Part A of this report for the definition of "beneficial owner")

156. 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.

157. 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;
- 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.[77]

158. 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.[78]

76. Section 10M of the CMLP Act.
77. Section 10P of the CMLP Act, read together with Requirement 103 of the AML/CFT Guidance Notes.
78. Section 10P of the CMLP Act.

159. A bank that fails to meet its obligations under the CMLP Act is liable on summary conviction, to a fine not exceeding GBP 10 000 (EUR 12 600).[79] In practice, there are 15 banks (excluding the four e-money institutions) established in Gibraltar, some of which are branches. The FSC has oversight of all banks within Gibraltar. The FSC has confirmed that bank branches in Gibraltar are predominantly from the UK with one being a Jersey branch. 8 Gibraltar incorporated companies are licenced by the FSC as banks. These 8 banks can be divided into two sectors; one sector which provides services to the retail sector (the man on the street) and the others are investment related banks which carry out investment business. All banks in Gibraltar must comply with Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV) and Regulation (EU) No. 575/2013 on prudential requirements for credit institutions and investment firms (CRR). Any applicant making an application for a license from the FSC will be subject to a "fit and proper" test. The FSC considers that the basic elements relevant to an assessment as to the fitness and propriety of an applicant are:

- honesty, integrity and reputation;
- competence, ability to conduct business and organisation; and
- financial position.

These categories are not intended to be exhaustive or definitive.

160. In addition to this, the FSC considers principles such as "mind and management" and the "physical presence" test. The total assets of banks in Gibraltar were GBP 7.8 bn (EUR 9.8 bn) as at the end of March 2014. 505 persons were employed with the banks in Gibraltar as at the end of May 2014. The Banking and Investment Services Division is responsible for the oversight of banks in Gibraltar. The team consists of 8 persons. The oversight is conducted through a desk based review of financial data which is normally submitted on a quarterly basis (some information is submitted on monthly basis). Banks are required to submit returns on a quarterly basis that include information on the level of own funds, supervisory ratios, balance sheet including breakdown of assets and liabilities, and profit and loss. Further data regarding staff numbers, level of deposits, provisions for bad debts, loans and mortgages, and funds under management is also required. The FSC also requires banks to report the largest placements and exposures, liquidity, activity indicators, foreign exchange positions and figures relating to operational, credit and market risk in accordance with Basel III criteria. Monthly returns can include a subset of these as well as specific liquidity reporting under Capital Requirements Directive IV provisions. As with companies a

79. Section 20A of the CMLP Act.

risk assessment methodology, which includes a desk based review, is conducted and is then followed by a self-assessment questionnaire.

161. After the self-assessment questionnaire is submitted a risk assessment is done, which is followed by an on-site visit. Off-site assessments are done in order for the FSC to arrive at a final risk profile for the firm. This risk profile will determine the supervisory mitigation plan which specifies the deficiencies identified and the time scales provided to correct or address these deficiencies, among other things. This is done for all obligations placed on the banks. In the last three years the banks have all been assessed and the maximum cycle that a bank can be on is 3 years. The FSC has confirmed that the main deficiencies are related more to the investment side of the business or in some instances they have been about compliance handling and customer handling processes.

162. In order to rectify deficiencies when found, the banks are required to produce an action plan and the FSC determines if it is satisfactory or not. There are some penalties that can be applied in the form of fees. In addition to these monetary sanctions there are cases where the FSC can ultimately decide to withdraw the licence of the bank or to impose conditions on its licence, etc. The majority of banks in Gibraltar are a part of larger banking groups based elsewhere.

163. The FSC has confirmed that during the three year period under review there were no material deficiencies in AML obligations. There have been minor issues with the quality of documentation, but no material deficiencies. The FSC also indicated that introduced business is not a predominant feature of the industry, because local subsidiaries are based in Gibraltar to service Gibraltar. However, where business is introduced, the AML obligations must still be undertaken by the firm in Gibraltar and no reliance is placed on the introducer's AML obligations. Once the relationship has terminated the information must be kept for 7 years.

164. In the FSC the relevant supervisory team within the organisation is responsible for monitoring banks' compliance with their AML obligations. Within each team at the FSC there is at least one person who has experience in AML and the ongoing monitoring is undertaken at the team level. The general AML enforcement manager is available if the team needs to seek additional guidance; however he is not necessarily involved in the ongoing monitoring or system of oversight. As a part of its risk assessment, a firm is required to provide an indication of how it will mitigate or address any deficiencies or areas noted for improvement. During the three year review period 10 risk assessments were carried out on banks, 1 in 2011, 5 in 2012 and 4 in 2013. Respectively for each year the banks provided actions plans as required, 1 in 2011, 5 in 2012 and 4 in 2013. In all of these cases the FSC considered the submitted action plans to be satisfactory. There were no instances where

the FSC had to apply penalties in the form of monetary sanctions on a bank, nor did the FSC have to withdraw the licence of a bank. There were also no instances where the FSC decided to impose a condition on the licence of a bank.

Conclusion

165. There is a comprehensive programme of desk based reviews and on-site inspections to monitor the compliance of licensed banks with their obligations under regulatory and AML law. As with companies during these inspections, the FSC takes samples of customer files to verify whether sufficient information is being kept. Banks are subject to desk based reviews and on-site inspection at least every three years. The FSC reported that the compliance rate is generally high, and where deficiencies are detected these are resolved efficiently. During the three-year period under review, banking information was requested in 28 cases and Gibraltar was able to provide this information in all cases.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating
Compliant

B. Access to Information

Overview

166. 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.

167. Gibraltar has two competent authorities. The Minister for Finance or any other person(s) he may designate, is the competent authority for international requests for information in tax matters made under the International Co-Operation (Tax Information) Act and under the International Co-operation (Tax Information) Act has 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. The Finance Centre Director (FCD) who was designated as competent authority by the Minister for Finance under the ICA has not had to exercise his compulsory powers during the three year period under review. The Commissioner of Income Tax (the Commissioner) who is the competent authority for EOI under the EU Directive 2011/16/EU and the multilateral Convention has similarly not yet exercised his compulsory powers during the three year period under review.

168. To access information for EOI purposes, the FCD or the Commissioner (as the case may be) 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 FCD or the Commissioner under the Taxation (Mutual Administrative Assistance Act) 2014 (TMAA) 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. Additionally, the decision to issue a notice may also be subject to juridical review; however, no application for judicial review or formal appeals to the Court have been made during the three-year review period.

169. With the oversight of the court, each 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.

170. 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. However, the Gibraltar authorities have confirmed that in practice the scope of the legal privileged information does not go beyond the standard and that the communication between a client and other persons in connection with legal proceedings would not be covered by the scope of legal privilege under domestic law. In practice, no person has ever invoked legal privilege to refuse the production of information for EOI purposes as no requests have been sent directly to those persons who will be able to invoke legal privilege. Also, no issues were raised by peers in this regard.

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)

171. In Gibraltar the Minister with responsibility for Finance or the person or persons as may from time to time be designated by the Minister is named as the competent authority for exchange of information under agreements scheduled pursuant to the International Co-Operation (Tax Information) Act 2009 (ICA). Under section 4(2) of the ICA the Minister, by notice in the Gazette on 3 February 2011 designated the Finance Centre Director (FCD) to be the competent authority. The Commissioner of Income Tax (the Commissioner) is the competent authority for exchange of information under

EU Directive 2011/16/EU in accordance with the Income Tax Act and for exchange of information under the multilateral Convention in accordance with section 4 of the TMAA. FCD's powers to access and exchange information pursuant to its EOI agreements are found in the ICA. Under the ICA, the FCD 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.[80]

172. Under the Income Tax Act, the Commissioner has powers to access information by: *(a)* making administrative enquiries; *(b)* directly issuing notices to the holders of information to produce the information; and *(c)* entry with a warrant to obtain documents.[81] Under the TMAA the Commissioner has powers to access information by: *(a)* directly issuing notices to the holders of information to produce the information; *(b)* compel witnesses or for production of evidence under oath; *(c)* using search and seizure warrants; and *(d)* applying to the court for a production order.[82]

173. The competent authorities' 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.

174. The ICA, the TMAA and the Income Tax Act grant the competent authorities 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:

175. 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 FCD upon his request. In practice this request is not made by notice; it is expected that the government authorities would comply without the need to serve a notice. The FCD and the Commissioner have direct access to the database of Companies House and where requests are made to other government authorities there have been no cases where assistance has been denied. The FCD then transmits the information to the requesting state.[83]

80. Sections 8, 9, 10 and 11 of the ICA.
81. Sections 5, 6 and 9 of the Income Tax Act.
82. Sections 11, 12, 13 and 14 of the TMAA.
83. Section 7 of the ICA.

176. Where the requested information is not in the government's possession, the FCD will issue a notice requiring the person who has been identified to have possession or control of the information to deliver the requested information to the FCD.[84] 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 date and number of the legal notice in which the text of the relevant scheduled Agreement was published;
- the date on which the relevant scheduled Agreement came into operation;
- 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 FCD would therefore action such a request and the law permits him to do so);
- a statement that in the opinion of the FCD the request conforms to the relevant scheduled Agreement;
- details, sufficient to enable the person served with the notice to identify the information requested by the notice;
- 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. In practice, Gibraltar has confirmed that this may simply consist of the address of the registered office of the company, which usually coincides with that of the licensed company manager;
- the form and manner in which the information must be provided;
- details of the time, date and place where such information that must be provided and the manner in which it must be verified are authenticated; and

84. Section 8 of the ICA.

- details of any access required by the FCD to the original of any record or document, or to any electronic data storing device, such as to enable the FCD to verify the authenticity of any document or record provided or the accuracy or completeness of any information provided.[85]

177. 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.

178. 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 FCD, provide the requested information or any variation thereof within 10 days of receiving the competent authority's decision.

179. Under the TMAA, the Commissioner will use the same procedure as the FCD to execute a request. The notice under the TMAA must include prescribed details, including among other items:

- the identity of the requesting Party;
- the tax matters to which the request relates;
- the person or persons subject to such taxes or taxation matters; and
- the reasons for believing that the information requested is in the possession or control of the person served with the notice or is obtainable by that persons.[86]

180. Similarly, under section 6(4) of the Income Tax Act, the Commissioner is required to name the Taxpayer with whose liability the Commissioner is concerned. Section 6(5) clarifies that the person who may be treated as the Taxpayer for the purposes of section 6 includes a company or any other person that has ceased to exist or, in the case of a trust or settlement, has been determined and an individual who has died. However, section 6(6) of the Income Tax Act allows the Commissioner to give such a notice without naming the Taxpayer to whom the notice relates provided that he is satisfied:

- that the notice relates to a Taxpayer whose identity is not known to the Commissioner or to a class of Taxpayers whose individual identities are not so known;

85. Section 8(2) of the ICA, read with Schedule 2.
86. Section 11(2) of the TMAA, read with Schedule 2.

- that he believes that the Taxpayer or any of the class of Taxpayers to whom the notice relates may have failed or may fail to comply, with the provisions of the Income Tax Act;
- that any such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of tax; and
- that the information which is likely to be contained in the documents to which the notice relates is not readily available from another source.

181. The FCD has confirmed that the name of the taxpayer and the identity of the requesting party are systematically included in notices as it is a requirement of the law. There is no deviation from the list included in Schedule 2 and there are no exceptions or cases where the FCD can opt not to include this information. The Commissioner has not yet exercised his powers under the TMAA as no requests have been received pursuant to the multilateral Convention. However, the Commissioner has confirmed that in the exercise of his powers under the Income Tax Act, the name of the taxpayer and the identity of the requesting party are not included in the request as an EOI request concerns the tax liability of a taxpayer in the requesting jurisdiction and not in Gibraltar, therefore for the purposes of section 6(4) the Commissioner is not considered to be concerned with this tax liability and this is confirmed by the content of the template notice used in such cases.

182. In practice, both competent authorities have made use of the public information available via Companies House and information available in the Income Tax Office. For ownership information, this is usually requested from the service provider or the entity themselves. The competent authorities have also accessed information from the banks and where necessary the FSC.

183. The notices issued indicate a deadline; by the date specified in the notice, which is generally three weeks, in the case of the FCD and 30 days in the case of the Commissioner (under the Income Tax Act). The person may ask for an extension with valid reason and in both cases this has been done. In the case of the FCD the extension is given depending on the time needed by the holder to provide the information, in the case of the Commissioner the extension is never granted longer than the initial 30 day period. In no case during the three-year review period have these extensions caused information to be exchanged to a requesting jurisdiction beyond 180 days.

184. The FCD has issued notices in relation to 62 requests. The information has always been provided and peers have not cited any problems.

185. The Commissioner has received 31 requests during the period. Of these, 5 were governed by the old Directive (77/799) for which the Commissioner was only required to provide information already in the possession of the tax

authorities, and so did not require the Commissioner to exercise compulsory powers to gather information from third parties or other governmental agencies. Under the new Directive 2011/16/EU, there are 6 requests for information where the information holder has issued objections to the production of information. These requests were made in May and July of 2013 and are still pending. In each of these cases the Commissioner has requested further information from its partner in order to complete the requests. These cases are further analysed and evaluated under element C.5, as they raise issues of process and communication that are relevant for that section.

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

186. The information gathering powers of the competent authorities are not subject to Gibraltar requiring such information for its own tax purposes. The ICA, the TMAA and the Income Tax Act specifically empower the relevant competent authority to obtain and exchange information pursuant to a request from an EOI partner.[87] In practice, information has been obtained for EOI purposes pursuant to both the ICA and the Income Tax Act. No requests have been made yet under the multilateral Convention. As discussed above, there are 6 cases under the Directive where the information holder has objected to the production of the information, however, in no case has this objection been based on the absence of a domestic tax interest.

Compulsory powers (ToR B.1.4)

187. Where the FCD under the ICA and the Commissioner under the TMAA require any person to provide evidence by way of deposition or to produce information on oath, they 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]

188. After issuing a notice for information, the FCD under the ICA and the Commissioner under the TMAA may choose to reinforce the notice by applying to the Court for an order to produce the requested information. While the ICA and the TMAA do not spell out the circumstances under which the FCD or the Commissioner would do so, the Gibraltar authorities have advised that these powers are generally invoked when the FCD or the Commissioner, as the case may be, suspect reticence on the part of the

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

information holder in handing over the requested information. Under the ICA the Court may issue such an order if it is satisfied that:

- the competent authority (the FCD) 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 the EOI agreement or the ICA;
- the competent authority (the FCD) 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]

189. Similarly under the TMAA the Court may issue such an order if it is satisfied that:

- the competent authority (the Commissioner) has certified the request is in accordance with the Act;
- the information to which the application relates is in the possession or under the control of a person in Gibraltar (whether the information itself is or is not 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 Act;
- a notice in accordance with section 11 has been issued; and
- there are no reasonable grounds for not entertaining the request.[90]

190. The FCD or an authorised officer may apply to the Court[91] 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;

89. Section 11 of the ICA.
90. Section 14(5) of the TMAA.
91. Under Section 2 of the ICA "Court" refers to the Magistrates Court or any other court or tribunal as the Minister may designate.

- 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 placed beyond the access or control of that person or the competent authority (the FCD); or
- the government's ability to comply with a request in accordance with its obligations under a relevant EOI agreement so requires.[92]

191. 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.

192. Offenders are liable, upon summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding GBP 10 000 (EUR 12 600) or both; and on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine not exceeding GBP 10 000 (EUR 12 600).[93]

193. Similarly under the TMAA the Commissioner may apply to the Court for a search and seizure warrant. The Court must be satisfied that:

- a person who has been requested to provide testimony or information has failed to comply in whole or in part with the provisions of section 11 or 12 of the TMAA; or

92. Section 10 of the ICA.
93. Section 22 of the ICA, read together with Section 189 and Schedule 6 of the Criminal Procedure Act.

- if 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 placed beyond the access or control of that person or the competent authority (the Commissioner); or
- the Government's ability to comply with a request in accordance with its obligations under the TMAA so requires.[94]

194. Although there are no specific penalties or sanctions provided in the TMAA for failure to comply with a notice, the Commissioner may reinforce the notice by applying to the court for a production order for which there are relevant penalties and sanctions that will be applied by the court for failure to comply with same. Gibraltar has confirmed that when a notice has been issued and no response is given by the person in receipt of the notice the Commissioner will apply to the court for a production order.

195. The Income Tax Act also establishes offences where a person having been required to produce any information which is in his possession or under his control fails to do so. A person:

- will be liable to a penalty of GBP 200 (EUR 250) on the day the failure occurs, such penalty to be imposed automatically and without the need of determination of the penalty by the Commissioner;
- will be subject to a continuing daily penalty of up to GBP 500 (EUR 630) per day to be determined by the Commissioner by notice in writing and to be charged for each day from the date the failure occurs until the date that the Commissioner is satisfied that all the information or documentation requested by him has been received by him;
- will, if the failure to comply continues beyond a period of 3 months after the date of failure to comply, be guilty of an offence;

196. A person guilty of an offence under subsection 65(4)(c) of the ITA shall be liable:

- on summary conviction, to imprisonment for a term not exceeding six months; and
- on conviction on indictment, to imprisonment for a term not exceeding two years and to a fine or to a fine or to both.

197. In addition to any custodial sentence imposed by *(i)* or *(ii)* above, the person will be liable to a fine equivalent to:

94. Section 13 of the TMAA.

- in the case of a person who is guilty in respect of any offence arising from a notice under section 6(1) or section 32, the amount of the tax which would have been or was evaded by him by the offence;
- in the case of a person who is guilty in respect of an offence arising from a notice under section 6(2), the amount of tax which the court estimates may have been lost by the offence through the tax evasion of the third parties in respect of whom the notice was given.

198. In addition, the Commissioner has the power to apply to the Court for entry with a warrant to obtain documents under the Income Tax Act. If a Judge of the Supreme Court is satisfied on information on oath given by or on behalf of the Commissioner that there is reasonable grounds for suspecting that an offence involving serious fraud in connection with, or in relation to tax is being, has been or is about to be committed and that evidence of it is to be found on premises specified in the information, the judge may issue a warrant in writing authorising the Commissioner or any person authorised under section 2(3) to enter the premises, if necessary by force, at any time within 14 days from the time of issue of the warrant, and search them.[95]

199. Under section 8 of the Income Tax Act a person shall be guilty of an offence if he intentionally falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of, a document which he has been required to produce by a notice under section 6 of the Income Tax Act. A person guilty of an offence under section 8(1) shall be liable *(a)* on summary conviction, to imprisonment for a term not exceeding 6 months and to a fine or either, and *(b)* on conviction on indictment, to imprisonment for a term not exceeding five years and to a fine or either, *(c)* in addition to any custodial sentence or fine imposed by *(a)* or *(b)* above, the person will be liable to a fine equivalent to *(i)* in the case of a person who is guilty in respect of an offence arising from a notice under section 6(1), the amount of the tax which would have been or was evaded by him by the offence, *(ii)* in the case of a person who is guilty in respect of an offence arising from a notice under section 6(2), the amount of tax which the Court estimates may have been lost by the offence through the tax evasion of the third parties in respect of whom the notice was given.

200. In the three-year review period, Gibraltar has not applied any penalties for failure to produce information or any other compulsory power. Apart from the 6 pending cases there have not been any instances where information requested was not provided. In one case, the Finance Centre Director issued a notice for information and the information was not provided by the deadline. The information holder was contacted and reminded that failing to

95. Section 9(1) of the Income Tax Act.

provide the information constituted an offence under Gibraltar law and the information was promptly provided.

Financial institutions

201. 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.

202. 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."

203. In relation to banking information the competent authorities send the notices directly to the bank.

204. 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.

205. 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

206. 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
- 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.[96]

207. 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. Gibraltar authorities have confirmed that the scope of legal privileged information does not go beyond the standard and that the communication between a client and other persons in connection with legal proceedings would not be covered by the scope of legal privilege under the domestic law.

208. 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 27 TIEAs, only the TIEAs with Belgium, France, Germany, Ireland and Portugal do not define the scope of privileged information. The remaining TIEAs adopt the definition of legal privilege under the international standard. In practice, no person has ever invoked legal privilege to refuse the production of information for EOI purposes as no requests have been sent directly to those persons who will be able to invoke legal privilege. Also, no issues were raised by peers in this regard.

Conclusion

209. The Gibraltar competent authority's powers to obtain information for EOI purposes meet the requirements of the international standard.

96. Section 2 of the ICA.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating
Compliant

B.2. Notification requirements and rights and safeguards

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

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

210. As explained in element B.1 above, Gibraltar has two competent authorities who derive their powers to exchange information under different laws. The FCD exchanges information under the ICA and the Commissioner exchanges information in respect of the Directive under the Income Tax Act and with respect to the multilateral Convention under the TMAA.

The FCD

211. Whenever the FCD 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.[97] 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. In practice, Gibraltar has confirmed that they have not sent a copy of the notice to the taxpayer.

212. A recipient of a notice may within 10 days of the receipt, make a written submission to the FCD specifying any grounds which he wishes the FCD 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 FCD 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.[98]

97. Section 17 of the ICA.
98. Section 8 of the ICA.

213. 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 FCD 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 or subpoena relates is not in the possession or control or accessible to a person who is in Gibraltar;
- the notice or 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.

214. 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.

215. These appeals (both to the FCD 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 FCD's actions to obtain information for EOI purposes. In practice, the competent authorities have not yet felt the need to apply for a search warrant instead of issuing a notice.

The Commissioner

216. There is no prior notification procedure outlined under the Income Tax Act or the TMAA. However, under the Income Tax Act, where the Commissioner has issued a notice the recipient of a notice may object, within 30 days of the date of issue of the notice, to that notice on the ground that it would be onerous for him to comply with it. If the matter is not resolved by agreement, it shall be referred to the Income Tax Tribunal[99], who may confirm, vary or cancel that notice. Similarly under the TMAA a person served with a notice may within 10 days from the date of service of the notice, make

99. The Income TaxTribunal is an independent appellate body that was established to hear income tax matters.

written submissions to the Commissioner specifying any grounds which he wishes the Commissioner to consider in making a final determination as to whether or not the request is in compliance with the provision of the TMAA. Additionally, a recipient of a notice issued by the Commissioner may appeal such notice through the judicial review process, against the Commissioner's actions to obtain information for EOI purposes. Neither of these procedures has been availed of by information holders during the review period.

217. The Commissioner has advised that in reference to 6 cases the holder of the information has submitted questions concerning the validity of the requests received. However, these questions are not official objections under the Income Tax Act on the grounds that it would be too onerous to comply. The Commissioner has confirmed that he is still in the process of validating the requests for information and the holders have not invoked their rights and safeguards. These cases are described in detail in element C.5 below.

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).

Phase 2 rating
Compliant

C. Exchanging Information

Overview

218. 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.

219. 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 and the Finance Centre Director (FCD) was designated on 3 February 2011. Gibraltar also shares information with other jurisdictions pursuant to the Evidence Act (civil or criminal proceedings), the EU Directive on Administrative Co-operation in the Field of Taxation 2011/16/EU and EU Directive 2003/48/EC on Taxation of Savings Income in the form of Interest Payments, the multilateral Convention, which entered in force in Gibraltar on 1 March 2014 and Foreign Account Tax Compliance Act (FATCA) Inter Governmental Agreements (IGA) signed with the USA and a FATCA type agreement signed with the UK. Gibraltar is also a part of the Early Adopters Group initiative since its inception.

220. As of August 2014 Gibraltar has signed 27 EOI agreements (all TIEAs), of which 23 are in force (see Annex 2). All of Gibraltar's EOI agreements allow Gibraltar to exchange information according to the international standard. Gibraltar's EOI network now extends to 74 jurisdictions pursuant to 125 EOI instruments, including Directive 2011/16/EU and the multilateral Convention. 93 of the 125 EOI instruments are in force.

221. Gibraltar's network of EOI instruments covers all of its relevant partners and other major OECD/G20 jurisdictions.

222. 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.

223. 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.

224. There are no legal restrictions on the ability of Gibraltar's competent authorities 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. In a small number of cases exchange of information was delayed due to a divergence of interpretation of the entry into force article of one of Gibraltar's TIEAs in respect to criminal tax matters. However this issue was resolved by Gibraltar in January 2013, and Gibraltar was able to provide the requested information to its partner.

225. Additionally, during the three-year period under review Gibraltar systematically disclosed to third parties the identity of the person or entity specified in the EOI request, including cases where this was not necessary for the purposes of gathering information. This is not in accordance with the principle that information contained in EOI requests should be kept confidential, therefore Gibraltar should ensure that it does not disclose information that is not needed to gather information to third parties. In addition, it is noted that the Commissioner's relationship with an important exchange of information partner has suffered from a lack of communication which has caused delays in validating requests and has led to the Commissioner issuing notices that could have been better formulated.

226. Finally, the overall processes and procedures of the Commissioner in handling requests was not sufficient to ensure that EOI requests were dealt with effectively and efficiently and Gibraltar has not provided status updates to its EOI partners where it was unable to provide information in 90 days.

C.1. Exchange of information mechanisms

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

227. The ICA applies to those EOI Agreements that have been signed by Gibraltar and given the force of law once a legal notice has been issued under the ICA and following the exchange of notification letters with the relevant

treaty country. The date of entry into force of the scheduled agreement is inserted in Schedule 1 of the ICA. The ICA provides that where a scheduled agreement is in conflict with the ICA, the provisions of the scheduled agreement prevails.

228. The EOI network of Gibraltar has rapidly expanded over the past few years. Gibraltar has confirmed that they usually approached other jurisdictions to negotiate bilateral agreements and have also confirmed that they have been in contact with some jurisdiction to negotiate DTAs. Gibraltar currently has a draft model TIEA which is shared with the interested jurisdiction for their comments and review. As this model TIEA generally follows the wording of the OECD Model TIEA, these negotiations usually take place via email correspondence.

229. Certain practical arrangements regarding the exchange of information are agreed between Gibraltar and the majority of its TIEA partners in a Protocol or Memorandum of Understanding to the TIEAs. Commonly, such arrangements cover cost issues, in which language the communication should be conducted and in which form the EOI requests should be provided. Gibraltar has not to date issued any EOI requests.

Foreseeably relevant standard (ToR C.1.1)

230. 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".

231. 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.

232. 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".

233. 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.

234. In practice, Gibraltar did not seek clarifications regarding the foreseeable relevance of requests received under its TIEA with Germany in relation to whether the case was "concrete" or whether there was a "serious possibility", which confirms that the interpretation of the language contained in the protocol to TIEA with Germany does not represent an obstacle to exchange of information.

In respect of all persons (ToR C.1.2)

235. 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.

236. All of Gibraltar's EOI agreements provide for EOI in respect of all persons. In practice, Gibraltar's authorities advised that no issues have arisen regarding the jurisdictional scope in relation with an EOI request.

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

237. 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.

238. 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. In practice, no request for information has been declined solely because it was held by a bank or other financial institution.

Absence of domestic tax interest (ToR C.1.4)

239. 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.

240. All of Gibraltar's TIEAs contain provisions similar to the Article 5(2) of the 2002 Model Agreement on EOI for Tax Matters[100], 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. The EU Directive provides that a requested party can decline to provide information if the information relates to periods prior to 1 January 2011 and the request could have been declined under Directive 77/799/EEC. Under the earlier Directive, Gibraltar was not obliged to provide information which was not available for its own domestic tax purposes. Under the new Directive, Gibraltar has received 10 requests that met the criteria set out in Article 18.3 of the new Directive. In these cases, Gibraltar has provided information already in its possession, as well as an explanation as to the reasons for not providing more. Otherwise, no situation of domestic tax interest has occurred in relation to Gibraltar's ability to exchange information, as the laws in effect for current periods are specifically designed for EOI purposes. Moreover, all but two EU members (Bulgaria and Cyprus[101 102]) are also signatories to the

100. 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".

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

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

multilateral Convention, and requests under that mechanism are not restricted by a domestic tax interest for any period.

Absence of dual criminality principles (ToR C.1.5)

241. 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.

242. All of Gibraltar's TIEAs contain provisions similar to Article 5(1) of the 2002 Model Agreement on EOI for Tax Matters[103], 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 and in practice no issue linked to dual criminality have arisen.

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

243. 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").

244. All of Gibraltar's EOI agreements provide for exchange of information in both civil and criminal tax matters. In practice, during the three year review period, the majority of requests processed by Gibraltar related to criminal tax matters. Gibraltar has provided information in response to EOI requests for both civil and criminal tax matters. An issue regarding the application period of TIEAs to requests concerning criminal tax matters is described under section C.1.9 below.

103. 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".

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

245. 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.

246. This is also reinforced under the ICA and the TMAA, which empowers the Gibraltar competent authorities to obtain information in any form, including dispositions of witnesses and authenticated copies of original records.[104] In practice, Gibraltar provides information in the form requested by the peer. One peer requests that affidavits be provided along with the requested information and Gibraltar has been able to provide the information in that format. The peer input confirms that information has been provided in the appropriate form.

In force *(ToR C.1.8)*

247. 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. In practice, Gibraltar arranges for the entry into force almost immediately after signing and has in majority of cases sent a notification confirming that all processes to bring the agreement into force have been completed in Gibraltar.

248. The Finance Centre Director is responsible for the negotiation of TIEAs. Once the text of the agreement has been initialled, the agreement must be sent to HM Treasury London for review and approval as per the letters of entrustment. The FCO generally needs two weeks to complete this process. Following its approval, Gibraltar will make arrangements for the signing to take place.

249. Gibraltar's EOI agreements that are brought into force once they are published in the Schedule to the ICA, require a legal notice to the ICA to be published, following which the entry into force date of the agreement is inserted in Schedule 1 of the ICA. This is a swift and straightforward process that only requires legal drafting, the Minister's approval and publications in the Gibraltar gazette. Gibraltar has brought all its EOI agreements into force expeditiously. It completed all the steps necessary to bring all its EOI agreements

104. Section 9(7) of the ICA and section 12 of the TMAA.

(signed prior to the enactment of the ICA) into force within two months of passing the ICA in December 2009. Out of the 27 bilateral EOI agreements that Gibraltar has concluded, 23 are in force as of 8 August 2014.[105] In respect of the other 4 agreements, Gibraltar is awaiting its EOI partners to complete their internal procedures to bring the agreements into force.

38Be given effect through domestic law (ToR C.1.9)

250. 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 by a legal notice.[106] As noted in Part B of this report, Gibraltar's domestic laws provide the powers for the Gibraltar competent authorities to access all information necessary to comply with these EOI agreements.

251. One peer had commented that during 2011 there were delays experienced due to the divergence of interpretation of the entry into force Article of the TIEA. Gibraltar has confirmed that they always held the same interpretation concerning the entry into force Article as its peer. However due to uncertainty within the industry[107] of Gibraltar concerning the interpretation of this Article Gibraltar decided to take the proactive step of changing its law so as to remove any doubt concerning the applicability of this Article in reference to criminal tax matters.

252. The international standards provide for exchange of past information which relates to a taxable period following the effective date, but the Terms of Reference do not require that information must be provided that relates to a taxable period before the entry into force of an information exchange agreement. Accordingly, what applies in a particular case depends on the wording of the relevant provisions of the agreement. Nevertheless, Gibraltar amended its law in 2012, which came into effect on 3 January 2013, to enable it to obtain and exchange information in criminal tax matters that relates to a period before the entry into force of the relevant exchange of information agreement. By passing this amendment, Gibraltar has resolved the uncertainty as described in the previous paragraph.

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105. The agreements that have been brought into force are the agreements with Australia, Austria, Belgium, Denmark, the Faroe Islands, Finland, France, Germany, Greenland, Guernsey, Iceland, India, Ireland, Malta, the Netherlands, New Zealand, Norway, Poland, Portugal, South Africa, Sweden, the United Kingdom and the United States.
106. Section 3(3) of the ICA.
107. Gibraltar has clarified that industry here refers to those holders of information that receive a notice from a competent authority in Gibraltar.

253. The uncertainty meant that the peer experienced delays in the response to one request. However, Gibraltar was able to provide the requested information as soon as the amendment came into effect.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating
Compliant

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

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

254. 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.

255. Gibraltar has rapidly built up its EOI network since 2009 and currently has EOI mechanisms with 74 jurisdictions (93 of which are in force). Out of the 74 jurisdictions:

- 33 are OECD countries;
- 19 are G20 countries;
- 28 are in the European Union; and
- 62 are Global Forum members.

256. 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. Conclusively, Gibraltar's network of information exchange mechanisms covers all relevant partners.

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.

Phase 2 rating
Compliant

C.3. Confidentiality

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

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

257. 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.

258. 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)*

259. 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.

260. 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.

Ensuring confidentiality in practice

The Finance Centre Director

261. The competent authorities in Gibraltar are housed in different locations. The FCD is located on the 6th Floor of Europort, a building which also houses other Government departments as well as private entities. The 6th Floor is divided and the FCD is in its own dedicated space.

262. The FCD has confirmed that requests are usually received in hard copy, by courier or post, by encrypted emails and by fax (only from one country). Incoming requests are entered into a spreadsheet log and maintained by the staff of the FCD. Paper files are kept in a secure filing cabinet within the office of one of the officers within the FCD's office. The key is held by the senior EOI officer and the spare key is held by another authorised officer within the Office of the FCD.

263. The notice to produce information is hand-delivered by an officer within the office of the FCD. Written confirmation of the service of the notice is signed by the recipient and placed on the file within the EOI unit. The receiver is asked to deliver the information to the office of the FCD. The FCD has indicated that generally the recipient of a notice is instructed that they are not allowed to tell any other person about the notice. A standard confidentiality clause is included in each notice with the following wording "In particular, you are instructed under section 19(1) of the International Co-operation (Tax Information) Act 2009 in respect of this request for information to treat all particulars and matters as confidential. Under no circumstances can any such particular or matter to which this request for information relates be disclosed to your client or any other person." There is a possibility that the Director(s) of a company will be the taxpayer under investigation by the requesting jurisdiction. In those situations the FCD will advise the requesting competent authority of this and the requesting jurisdiction is asked for its consent for Gibraltar to proceed with issuing the notice to the said Director(s). The FCD has confirmed that during the three year period under review this happened in 3 cases in 2012 and 2 cases and 2013. The requesting competent authority was advised and the FCD was able to gather and exchange in the information. The peer was satisfied with the information received.

264. The FCD has indicated that the information provided in a notice is minimal, however, as much information as is necessary to convince the person reading the notice that it is not a fishing expedition is given. Additionally, section 8(2) of the ICA states that a notice issued by the FCD shall include at least the particulars specified in Schedule 2 to the ICA. The

FCD has confirmed that these particulars must be included in the notices as they are stated in law. The information to be disclosed in the notice as set out in Schedule 2 of the ICA are outlined in element B.1 above.

265. Specific reference is made to the requirement to provide a reference to the person or persons subject to such taxes or taxation matters. Gibraltar has confirmed that this may sometimes be the date of birth of the taxpayer or the TIN number. The standard requires that the only information disclosed is that information necessary in order to obtain the information requested. Although this taxpayer information may form part of the minimum information that needs to be disclosed in order to enable the person who is served the notice to locate and produce the information sought, it is important to note that the amount of information that needs to be provided may vary depending on the circumstances of each case. More specifically, it may not be necessary for a person who is served with a notice to know the identity of the EOI partner's taxpayer in all cases in order to produce the information sought, for instance when accounting records of an entity are requested. Therefore, the systematic disclosure of such information, which is not otherwise public information, is therefore not in accordance with the standard. Similar caution should be taken with respect to other information lifted from a request for example the identification of the requesting Partner, for instance the name and address of the competent authority of the requesting partner. However, Gibraltar has confirmed that they do not provide the name or other details of the competent authority but merely the name of the jurisdiction from which the request was received. It is recommended that the Gibraltar authorities ensure that the confidentiality of information contained in an EOI request is adequately protected.

266. In sending information to the requesting jurisdiction, consideration is given to the volume of the information to be sent. If the information consists of a few pages, it will normally be sent by encrypted email to the requesting jurisdiction. The FCD has confirmed that they use encrypted winzip files. When using winzip the password is sent in a separate email to the requesting jurisdiction. Where the documents are voluminous then the information is sent via courier. The FCD has confirmed that they always use courier services because some countries omit to confirm receipt of packages and with the courier service they can track the shipment and print out a receipt when the package has been delivered. When a package is sent an email is sent to the requesting jurisdiction indicating that the package has been sent and the courier tracking number is quoted. Copies of these cases are kept indefinitely in the secure cabinets of the FCD. The FCD keeps all electronic files on a dedicated network drive that is only accessible by authorised officers within the FCD who are responsible for EOI. Hard copies of all documents are kept in a locked cabinet in the EOI unit office at all times, when not in use. Redundant copies are shredded using the dedicated shredder in the EOI office. The last employee leaving the EOI office at the end of the working day is required

to ensure that the EOI unit office cabinet is securely locked and that no EOI related documents are left on desk or elsewhere within the office.

The Commissioner of Income Tax

267. The Income Tax Office is housed in another location on the Main Street of Gibraltar and its 70 staff members have exclusive use of a secure dedicated building. As mentioned above the Commissioner of Income Tax is the competent authority named under the EU Directive and under the multilateral Convention. As the Commissioner receives his power to gather information under each mechanism by different laws, the processes in gathering and exchanging that information are different.

268. In practice, to facilitate EOI under the EU Directive a dedicated post box system was established in the United Kingdom. The EU member states would address the request to the Gibraltar Commissioner of Income Tax and this is delivered to the Commissioner through this dedicated post box system. The information is then received in Gibraltar in a diplomatic bag that is opened by the legal department or the central government office. This department oversees all the requests received under the EU Directive and the letter (request) is then sent directly to the Income Tax Office.

269. When requests are received they are given an internal reference number, scanned and stored on the server of the Income Tax Office. The information is then entered into a database. This information can only be accessed by officers within the Income Tax Office responsible of EOI. All hard copies are stored in a locked fire proof cabinet within the Office of the Commissioner.

270. If the information is not held within the files within the Income Tax Office, then a notice is sent to 3rd Parties to request the information. Similar to the notice issued by the FCD, the Commissioner has similar requirements under the Income Tax Act which are described in element B.1 above. The Commissioner has confirmed that enough information is given to allow the information holder to identify the information required to be produced. If the requesting jurisdiction indicates that the information should not be shared then that statement from the requesting jurisdiction is copied into the notice. The Commissioner has developed a template notice which does not include the information as outlined in the Income Tax Act and confirms that the identity of the taxpayer is not systematically included in a notice.

271. The Gibraltar authorities explained that the system for receiving requests and sending information under the multilateral Convention is an extension of the system used for EOI under Directive 2011/16/EU. The TMAA under section 11(2) requires that certain particulars are specified in the notice as outlined in the Schedule to the TMAA. These particulars are:

- The identity of the requesting Party;

- The tax matters to which the request relates;
- The person or persons subject to such taxes or taxation maters;
- A statement that in the opinion of the Commissioner the request conforms with the provisions of the TMAA;
- Details, sufficient to enable the person served with the notice to identify the information requested by the notice;
- 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;
- The form and manner in which the information must be provided;
- Details of time, date and place where such information must be delivered;
- Details of any copies of the relevant information that must be provided and in the manner in which it must be verified or authenticated;
- Details of any access required by the Commissioner to the original of any record or document, or to any electronic data storing device, such as to enable the Commissioner to verify the authenticity of any document or record provided or the accuracy or completeness of any information provided.

272. As described above the systematic disclosure of such information, which is not otherwise public information, is therefore not in accordance with the standard.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating	
Largely Compliant	
Factors underlying recommendations	**Recommendations**
The systematic disclosure to third parties of the identity of the person or entity specified in the EOI request, including in cases where this is not necessary for gathering the requested information, is not in accordance with the standard.	Gibraltar should not disclose to third parties information that is not needed to obtain the information requested.

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.

273. 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.

274. 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)

275. 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.

276. The scope of attorney-client privilege is defined in most of Gibraltar's EOI agreements[108] and the definitions included therein are fully consistent with the international standard. With regard to Gibraltar's EOI agreements with Belgium, 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.

277. In practice, the attorney-client privilege has never been invoked during the three-year period under review as no requests have been sent directly to those persons who will be able to invoke legal privilege. More broadly, no issues in relation to the rights and safeguards of taxpayers and

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

third parties have been encountered in practice, nor have they been raised by any of Gibraltar's exchange of information partners.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating
Compliant

C.5. Timeliness of responses to requests for information

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

Responses within 90 days (ToR C.5.1)

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

279. There appears to be no legal restrictions on the Gibraltar competent 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.[109]

280. During the three year period under review ending 31 December, 2013, Gibraltar has received a total of 96 requests for information from 12

109. 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.

partners. A request is regarded as a single request irrespective of the number of subjects involved for which information is requested. Where a supplementary request is received in connection to an original request (i.e. where the original request was not fully satisfied, or where other elements have arisen based on the information provided by Gibraltar to the partner), this is viewed as a request that forms part of the original request.

281. Of the 96 requests received, Gibraltar has indicated that it was able to provide a final response within 90 days in respect of 55% of cases and 24% within 180 days. About 4% of the requests were processed in more than 180 days. 6 requests remain outstanding and 10 requests were declined for valid reasons.

Number of requests received by Gibraltar during the review period

		2011 (from 01/01)		2012		2013 (till 31/12)		total	Average
		Num.	%	Num.	%	Num.	%	Num.	%
Total number of requests received*	(a+b+c+d+e)	15	100	18	100	63	100	96	100
Full response**: ≤90 days		6	40	8	44	36	57	53	55
≤180 days (cumulative)		11	74	15	83	50	79	76	79
≤1 year (cumulative)	(a)	11	74	15	83	50	79	76	79
1 year+	(b)	3	20	1	6	0	0	4	4
Declined for valid reasons	(c)	1	06	2	11	7	11	10	11
Failure to obtain and provide information requested	(d)	0	0	0	0	0	0	0	0
Requests still pending at date of review	(e)	0	0	0	0	6	10	6	6

* Gibraltar counts each written request from an EOI partner as one EOI request even where there is more than one subject of inquiry and/or more than one piece of information is requested.

** The time periods in this table are counted from the date of receipt of the request to the date on which the final and complete response was issued.

282. In the small number of cases where requests were answered in more than one year, Gibraltar explained that this was due to the change made to its law concerning access to information concerning criminal tax matters. Gibraltar has also confirmed that during the beginning of the review period the FCD was new to EOI and as such it took some time to adjust to the processes of gathering information.

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

283. As described above Gibraltar has two competent authorities responsible for EOI depending on the agreement or arrangement. The FCD has been designated by the Minister with the responsibility for Finance as the

competent authority of EOI under the TIEAs, the Commissioner is the competent authority for EOI under EU Council Directive 2011/16/EU of 15 February 2011 and the multilateral Convention.

Organisational processes of the Finance Centre Director

284. The current organisational process of the FCD is found in the EOI practice manual updated in March, 2014. This practice manual was original created after Gibraltar signed its first EOI agreement and is updated from time to time, as deemed necessary. The FCD does not use templates and checklists in processing requests and providing information. This practice manual is a tool which outlines the process to be used from the time of a request up to the time of the delivery of the information to the requesting partner.

285. When a request is received for information, the authorised officer within the FCD is responsible for acknowledging receipt of the request. At the same time public information accessible directly from the website of Companies House is sent to the requesting party, this information is in the form of the company profile which usually includes information such as balance sheets for the last three years etc. After this information is sent the details of the request are logged in the Register, including the date received and the details of the public information sent to the requesting jurisdiction. To monitor the progress and timeliness the authorised officer uses a diary where the information is logged and tracked manually and daily. As the FCD only received 65 requests during the three-year period under review and there is one authorised officer who manages EOI daily this method of tracking requests is effective, although the FCD draws on two other officers as and when required. This method may not be as effective if the number of incoming requests increase or if there is an increase in staff. The FCD should monitor that this system continues to be effective, particularly if the volume of requests increases in the future.

286. The request is then scanned and saved on the separate server of the FCD which is accessible only by the officers responsible for EOI within the FCD. In accordance with section 7 of the ICA an email to the Minister of Finance should be prepared in which any suspected issues of public policy arising in the request would be provided. The FCD has confirmed that so far no such issues have been identified in the emails prepared to the Minister of Finance. To this email as per section 7 of the ICA a copy of the request and all other information in the possession of the FCD relating to the request is sent to the Minister. After receiving confirmation from the Minister, which usually takes 24 hours, the notice is prepared. The FCD as the designated competent authority signs all notices sent out.

287. Before issuing a notice the FCD and the authorised officer have an editorial meeting to discuss the request and decide on the content of the notice. If there are any concerns as to the validity of the request or where information is missing from the request the FCD requests clarification from the requesting jurisdiction. This is usually done by email. The authorised officer will then determine what other information is required to be sent to the requesting jurisdiction and also determines who the notice should be issued to in order for the information to be gathered.

288. The notices are hand-delivered by an officer within the FCD. The officer receives a signed receipt of delivery. The person or entity served with a notice is generally given 10 days to comply with the notice. If an extension is requested, the Finance Centre Director will give an extension depending on the circumstances and the time the person or entity needs to provide the information according to the notice. In practice, an extension has been given for as long as three weeks, the reason being the person who held the information was not in Gibraltar at the time. However, the Gibraltar competent authority was still able to provide the requested information within 90 days.

289. The requested information is delivered to the FCD. The authorised officer is required to check all information thoroughly to ensure that it responds to the questions asked. If required the authorised officer may ask the person who sent the information for clarification e.g. where a bank may have inadvertently missed out certain years of statements requested. After ensuring that the information obtained meets the requirement of the request, a cover letter is prepared and the information is sent, this is done via courier or by winzip encrypted email (depending on the type and volume of information).

Resources of the Office of the Finance Centre Director

290. The Office of the FCD is responsible for exchange of information on request since exchange of information began in Gibraltar under the first TIEA signed with the United States. In addition the FCD is supported by a Senior EOI Officer and two further Executive Officers. Gibraltar has indicated that the current resource levels are appropriate to deal with the information exchange requests received.

291. Training currently mainly takes the form of on the job training. The FCD and the Senior EOI officer have regular internal meetings with support staff when necessary, to ensure that obligations are being met and that the level of efficiency of responding to requests is sufficient, as well as ensuring confidentiality obligations such as email encryption, security of filing etc. are being followed. The Finance Centre Director has attended Global Forum Competent Authority meetings and workshops in Scandinavia and Madrid in recent years,

together with the Commissioner of Income tax and the Crown Counsel within the Income Tax Office. All staff are required to adhere to the guidelines contained in the "Keeping it Safe – Joint OECD/Global Forum Guide on the Protection of Confidentiality of Information Exchange for Tax Purposes" and the International Standards on Data Safeguards and Infrastructure.

Organisational processes of the Commissioner of Income Tax

292. As the multilateral Convention has recently been extended to Gibraltar no requests have yet been received. The processes and manuals currently used to respond to EOI requires under Directive 2011/16/EU will be replicated for use with requests received under the Convention. The current organisational process of the Commissioner concerning EOI under the Directive is found in a Protocol last amended in March, 2014. The Commissioner does not use templates and checklists in processing requests and providing information, except for the template notice created. The Protocol outlines the process to be used from the time of the receipt of a request to the time of delivery of the information to the requesting partner.

293. The Gibraltar authorities have confirmed that in reference to one EOI partner requests under the Directive are received via the UK Government's Foreign & Commonwealth Office to the Chief Secretary's Office through the special post box system set up to receive these requests. The Chief Secretary's Office then forwards the request for information to the Income Tax Office and requests an acknowledgement of receipt. When a request is received by the Commissioner it is reviewed and accepted and acknowledgement of receipt is signed and dated. As well as the acknowledgement of receipt sent to the Chief Secretary's Office, the Commissioner also confirms receipt directly with the requesting authority electronically. For other partners the same post box system was used initially as the United Kingdom is responsible for the external relations of Gibraltar. However, in practice, it varies and some partners send requests under the Directive directly to the Commissioner and the acknowledgement of receipt is sent directly back to the partner where the Commissioner receives the request directly.

294. The request is then scanned and saved on the separate server of the Commissioner which is only accessible by members of the Income Tax Office's senior management team and the case officers and advisors dealing with the request for information. Scanned requests are then filed. Requests are processed by the Commissioner in batches as they are received. To process a request a consultation process is done by the Income Tax Office as to the validity of the request for information, including an assessment of additional information required, line of enquiry to be undertaken and any issues identified. This consultation process is done on the basis of the response prepared by the case officer.

295. The case officer then commences gathering information under the request. They first identify whether the information is held in the Income Tax Office, if the information is on the files of the Income Tax Office then this information is collated and used as the basis for preparing a response. If the information is not held on the files of the Income Tax Office then an administrative enquiry under section 5 of the Income Tax Act is carried out. Information received is reviewed and authorised by the Commissioner of Income Tax.

296. The notice is then sent by the Income Tax Office to the Chief Secretary's office for onward transmission to the requesting authority via the post-box arrangement in place. Copies of the responses are also filed.

297. The Commissioner has received 31 requests for information during the period under review. Of these, 10 were declined for valid reasons (see analysis under element C.1.4) 1 was answered in due course and 1 peer has indicated that partial responses were provided in the other 14 cases. The peer has indicated that the information provided by Gibraltar was not specific enough with regards to tax information, with regards to ownership and identity information the information given was not enough for the peer to learn the relevant changes in the ownership of the company and with regard to accounting information financial statements were not provided, however this issue has been discussed above in element A.2. However, Gibraltar has indicated that in 10 of the 14 cases they had provided full responses based on the questions given by the peer and in 4 cases the information was not available because the requests concerned entities that had been struck off the companies register more than 5 years ago and information was no longer available. The statistics in the table show that these 14 cases were responded to within 180 days as the peers consider these requests to be closed. There was no further communication with Gibraltar and its peer concerning completeness of the responses provided.

298. For six requests, notices have been issued to the holders of information in Gibraltar, but objections to these notices have been made. These requests were received in May and July of 2013 and have not progressed beyond the notice stage. The Commissioner has requested further information from the requesting partner in each of these cases and has also sought legal advice both internally and from external counsel, and so the requests have not been answered in a timely manner. The delays in these cases appear to be the result of both the lack of a systematic and comprehensive process of validating and responding to requests and a lack of communication with the partner.

299. In relation to the 6 cases, the Commissioner issued notices with a deadline of 30 days. Within that deadline the holders of information indicated that they did not feel it was appropriate to respond and would seek further

counsel. Formal objections to the notice were only made some 6 months later. The objections in the 6 cases can be summarised as follows:

300. 4 cases involve requests for ownership and identity information and the holder has objected on a series of grounds related to the validity of the request, including whether

- the request is issued by the appropriate authority,
- the request is addressed to the proper authority,
- the request was made in all respects in the proper form,
- all usual sources of information have been fully exhausted by the partner jurisdiction,
- all efforts were made to clarify the relevance of the requested information, and
- all efforts were made to seek the identity of the taxpayer under investigation in the requesting jurisdiction.

- One of the cases was objected to on the grounds that the information requested was to identify the "partners in a company", and
- One of the cases was objected to on the ground of whether it was good policy to pursue exchange of information with the requesting jurisdiction given alleged violations in EU law.

301. For all of the six cases, Gibraltar has sought legal advice in respect of foreseeable relevance and has sought further information from its partner in order to validate the request. However, the clarification sought from the treaty partner was sought after the challenge was received from the holder of the information. Requests to the requesting jurisdiction for further information in order to validate the requests were sent early in 2014.

302. The advice provided to the Commissioner in respect of these cases affirms his information gathering powers, although it is recognised that there may have been some deficiencies in the incoming requests. The Commissioner has also utilised these powers in other cases.

303. Many of the objections raised in the first 4 cases described may have been avoided if the competent authority had validated the requests received, as the information holder is simply raising basic points that are required by the law and the standard. The Commissioner has considered the foreseeable relevance of the requests and has confirmed that he is satisfied that the request meets the standard under the EOI mechanism. Moreover, there is no requirement in the Income Tax Act that the identity of the taxpayer under investigation be provided in the notice issued.

304. The case regarding a request to know the "partners in a company" should have been corrected with the requesting jurisdiction before the notice was issued. The competent authority confirms that this problem had been identified prior to issuing the notice. The last case does not seem to raise any valid objection in light of the access powers under the Income Tax Act.

305. During the 3 year period the Commissioner has had limited communication with this partner and this may also have led to the Commissioner issuing notices that could have been better formulated and therefore delays could have been avoided or lessened. Overall, it appears that the relative inexperience of the EOI team has led to delay. Ultimately, while objections have been raised, no official legal challenge to the Commissioner's authority has been issued because the Commissioner is still trying to validate the requests a year after they have been received. Although the existing practice was outlined in a protocol instituted in March 2014, it does not adequately deal with the substantive issues involved with validating a request and formulating a notice. It is recommended that the Commissioner improves and utilises his existing guidelines and manuals to ensure that EOI requests are dealt with effectively and efficiently.

Resources of the Commissioner of Income Tax

306. The Commissioner has always been responsible for EOI under the Directive and has recently been identified as the competent authority for EOI under the multilateral Convention (designated as the competent authority under section 4 of the Taxation (Mutual Administrative Assistance) Act 2014, which came into operation on 1 March 2014. Gibraltar has indicated that the current resource levels are appropriate to deal with the information exchange requests received.

307. The Commissioner has advised that regular meetings are being held on essential processes needed to deal with the provisions of exchange of information under the Directive and, in the future, also the multilateral Convention. Additionally, there is frequent liaison with the Chief Legal Advisor, European Union and International Department, HM Government of Gibraltar, who provides specialist advice on EU law and directives as relevant and necessary.

Conclusion

308. The Commissioner's responsibilities as outlined in the protocol, in reference to the Commissioner, and the EOI practice manual for the FCD appear to be sufficient to handle incoming requests in a timely manner. The resources currently allocated to both Competent Authorities also seem sufficient to deal with the present workload.

309. In terms of timeliness, the statistics show that a final response was provided within 90 days in 55% of cases, and in another 79% of the cases within 180 days. However, during the three-year review period, it was not standard practice by the Commissioner to send a status update where the information could not be provided within 90 days. The FCD has mostly provided information within 90 days and in most cases has provided status updates to the peers. Although the established procedures should ensure that status updates are being sent systematically, it is recommended that Gibraltar monitor that its competent authorities send status updates to the requesting jurisdiction in case a response takes more than 90 days.

Absence of unreasonable, disproportionate or unduly restrictive conditions on exchange of information *(ToR C.5.3)*

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

311. There are no specific aspects of Gibraltar's laws and practice in place which impose additional restrictive conditions on Gibraltar's exchange of information practice.

Determination and factors underlying recommendations

Phase 1 determination
This element involves issues of practice that are assessed in the Phase 2 review. Accordingly, no Phase 1 determination has been made.

Phase 2 rating	
Largely Compliant	
Factors underlying recommendations	**Recommendations**
The Commissioner's relationship with an important exchange of information partner has suffered from a lack of communication which has led to the issuing of notices that could have been better formulated and delays in validating requests.	Gibraltar should work with this partner to improve communication and ensure effective exchange of information.

Phase 2 rating	
Largely Compliant	
Factors underlying recommendations	**Recommendations**
Although Gibraltar has recently established new procedures to provide status updates to its treaty partners, they should monitor that its competent authorities send status updates to its treaty partners in all cases.	Gibraltar should monitor that status updates are sent to its treaty partners in all cases.
It is recommended that the Commissioner improves and utilises his existing guidelines and manuals to ensure that EOI requests are dealt with effectively and efficiently.	Gibraltar should improve its systems to ensure that EOI requests are dealt with effectively and efficiently, in all cases.

Summary of Determinations and Factors Underlying Recommendations

Overall Rating
LARGELY COMPLIANT

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities. *(ToR A.1)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant		
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements. *(ToR A.2)*		
Phase 1 determination: The element is in place.	Partnerships are required to maintain accounting records in accordance with the standard; however, there is no penalty applicable for breach of this obligation.	Gibraltar should introduce appropriate sanctions for non-compliance with the obligation for partnerships to maintain full accounting records.
Phase 2 rating: Largely Compliant	While accounting information was generally provided, the obligations to maintain accounting records in accordance with the standard only came into force in 2013 and so their effectiveness could not be fully assessed.	Gibraltar should monitor the practical implementation of the new laws to ensure that all relevant entities and arrangements keep accounting records and underlying documentation in accordance with the standard.

Determination	Factors underlying recommendations	Recommendations
Phase 2 rating: Largely Compliant *(continued)*	Partnerships are not subject to systematic oversight of compliance with their accounting obligations.	Gibraltar should ensure that a regular system of oversight and monitoring of partnerships' obligations to maintain accounting records.
Banking information should be available for all account-holders. *(ToR A.3)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant		
Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information). *(ToR B.1)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant		
The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information. *(ToR B.2)*		
Phase 1 determination: 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).
Phase 2 rating: Compliant		
Exchange of information mechanisms should allow for effective exchange of information. *(ToR C.1)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant		

Determination	Factors underlying recommendations	Recommendations
The jurisdictions' network of information exchange mechanisms should cover all relevant partners. *(ToR C.2)*		
Phase 1 determination: The element is in place.		Gibraltar should continue to develop its exchange of information network with all relevant partners.
Phase 2 rating: Compliant		
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received. *(ToR C.3)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: Largely Compliant	The systematic disclosure to third parties of the identity of the person or entity specified in the EOI request, including in cases where this is not necessary for gathering the requested information, is not in accordance with the standard.	Gibraltar should not disclose to third parties information that is not needed to obtain the information requested.
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties. *(ToR C.4)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant		
The jurisdiction should provide information under its network of agreements in a timely manner. *(ToR C.5)*		
This element involves issues of practice that are assessed in the Phase 2 review. Accordingly, no Phase 1 determination has been made.		

Determination	Factors underlying recommendations	Recommendations
Phase 2 rating: Largely Compliant	The Commissioner's relationship with an important exchange of information partner has suffered from a lack of communication which has led to the issuing of notices that could have been better formulated and delays in validating requests.	Gibraltar should work with this partner to improve communication and ensure effective exchange of information.
	Although Gibraltar has recently established new procedures to provide status updates to its treaty partners, they should monitor that its competent authorities' sends status updates to its treaty partners in all cases.	Gibraltar should monitor that status updates are sent to its treaty partners in all cases.
	It is recommended that the Commissioner improves and utilises his existing guidelines and manuals to ensure that EOI requests are dealt with effectively and efficiently.	Gibraltar should improve its systems to ensure that EOI requests are dealt with effectively and efficiently, in all cases.

Annex 1: Jurisdiction's response to the review report[110]

HM Government of Gibraltar would like to express it's appreciation to the assessment team for their hard work and dedication as regards the compilation of this very detailed report.

We have found it to be a taxing but rewarding exercise. Where Gibraltar has been judged to be compliant we are pleased and where there are recommendations the Government is determined to implement these swiftly and expeditiously.

HM Government of Gibraltar would also like to thank all other parties that were involved in the report including all relevant Government Departments and Agencies as well as the Peer Review Group of the Global Forum.

110. 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 exchange of information mechanisms

Gibraltar exchanges information with EU members under:

- 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 repealed 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 were required to transpose it into national legislation by 1 January 2013. The current EU members, covered by this Council Directive, are: Austria, Belgium, Bulgaria, Croatia, Cyprus[111], the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, the Slovak Republic, Slovenia, Spain, Sweden, the 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.

Multilateral and bilateral exchange of information agreements

- In a letter received by the Depositary of the Convention on 13 November 2013, the United Kingdom declared that its ratification of the multilateral Convention as amended by the Protocol shall be

111. See footnotes 101 and 102.

extended to the territory of Gibraltar. In accordance with the relevant Articles, the multilateral Convention entered into force for the territory of Gibraltar on 1 March 2014. The status of the multilateral Convention and its amending 2010 Protocol as at May 2014 is set out in the below table.[112] For multilateral instruments, the date of the entry into force in the table is the latest date, among the two dates of entry into force in the two partners.

- Gibraltar has signed 27 TIEAs, 4 of which are not in force (see the table below).

Table of Gibraltar's exchange of information relations

The table below summarises Gibraltar's EOI relations with individual jurisdictions established through multilateral or bilateral EOI agreements or the EU Council Directive 2011/16/EU.

	Jurisdiction	Type of EOI arrangement	Date signed	Date in force
1	Albania	Multilateral Convention	Signed	1-Mar-2014
2	Andorra	Multilateral Convention	Signed	Not yet in force in Andorra
3	Argentina	Multilateral Convention	Signed	1-Mar-2014
4	Aruba*	Multilateral Convention	Signed	1-Mar-2014
5	Azerbaijan	Multilateral Convention (Original)	Signed	1-Mar-2014
6	Australia	Taxation information exchange agreement (TIEA)	26-Aug-2009	26-Jul-2010
		Multilateral Convention	Signed	1-Mar-2014
7	Austria	TIEA	17-Sep-2009	1-May-2010
		EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	Not yet in force in Austria

112. The chart of signatures and ratification of the Multilateral Convention is available at www.oecd.org/ctp/eoi/mutual.

	Jurisdiction	Type of EOI arrangement	Date signed	Date in force
8	Belgium	TIEA	16-Dec-2009	17-Jun-2014
		EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	Not yet in force in Belgium
9	Belize	Multilateral Convention	Signed	1-Mar-2014
10	Brazil	Multilateral Convention	Signed	Not yet in force in Brazil
11	Bulgaria	EU Council Directive 2011/16/EU	N/A	01-Jan-2013
12	Cameroon	Multilateral Convention	Signed	Not yet in force in Cameroon
13	Canada	Multilateral Convention	Signed	1-Mar-2014
14	Chile	Multilateral Convention	Signed	Not yet in force in Chile
15	China	Multilateral Convention	Signed	Not yet in force in China
16	Colombia	Multilateral Convention	Signed	1-July-2014
17	Costa Rica	Multilateral Convention	Signed	1-Mar-2014
18	Croatia	EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Jun-2014
19	Curacao*	Multilateral Convention	Signed	1-Mar-2014
20	Cyprus [113]	EU Council Directive 2011/16/EU	N/A	01-Jan-2013
21	Czech Republic	EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Mar-2014
22	Denmark	TIEA	2-Sep-2009	13-Feb-2010
		EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Mar-2014
23	Estonia	EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	Not yet in force in Estonia

113. See footnotes 101 and 102.

	Jurisdiction	Type of EOI arrangement	Date signed	Date in force
24	Faroe Islands**	TIEA	20-Oct-2009	8-Jun-2011
		Multilateral Convention	Signed	1-Mar-2014
25	Finland	TIEA	20-Oct-2009	6-May-2010
		EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Mar-2014
26	France	TIEA	22-Sep-2009	9-Dec-2010
		EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Mar-2014
27	Gabon	Multilateral Convention	Signed	Not yet in force in Gabon
28	Georgia	Multilateral Convention	Signed	1-Mar-2014
29	Germany	TIEA	13-Aug-2009	4-Nov-2010
		EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	Not yet in force in Germany
30	Ghana	Multilateral Convention	Signed	1-Mar-2014
31	Greece	TIEA	31-Jan-2013	
		EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Mar-2014
32	Greenland**	TIEA	20-Oct-2009	24-Dec-2009
		Multilateral Convention	Signed	1-Mar-2014
33	Guatemala	Multilateral Convention	Signed	Not yet in force in Guatemala
34	Guernsey	TIEA	22-Oct-2013	12-Mar-2014
35	Hungary	EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	Not yet in force in Hungary
36	Iceland	TIEA	16-Dec-2009	
		Multilateral Convention	Signed	1-Mar-2014
37	India	TIEA	1-Feb-2013	11-Mar-2013
		Multilateral Convention	Signed	1-Mar-2014

	Jurisdiction	Type of EOI arrangement	Date signed	Date in force
38	Indonesia	Multilateral Convention	Signed	Not yet in force in Indonesia
39	Ireland	TIEA	24-Jun-2009	25-May-2010
		EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Mar-2014
40	Italy	TIEA	2-Oct-2012	
		EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Mar-2014
41	Japan	Multilateral Convention	Signed	1-Mar-2014
42	Kazakhstan	Multilateral Convention	Signed	Not yet in force in Kazakhstan
43	Korea	Multilateral Convention	Signed	1-Mar-2014
44	Latvia	EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Mar-2014
45	Liechtenstein	Multilateral Convention	Signed	Not yet in force in Liechtenstein
46	Lithuania	EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Jun-2014
47	Luxembourg	EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	Not yet in force in Luxembourg
48	Malta	TIEA	24-Jan-2012	1-April-2012
		EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Sep-2014
49	Mexico	TIEA	29-Nov-2012	
		Multilateral Convention	Signed	1-Sep-2014
50	Moldova	Multilateral Convention	Signed	1-Sep-2014
51	Morocco	Multilateral Convention	Signed	Not yet in force in Morocco

	Jurisdiction	Type of EOI arrangement	Date signed	Date in force
52	Netherlands	TIEA	23-Apr-2010	1-Dec-2011
		EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Mar-2014
53	New Zealand	TIEA	13-Aug-2009	13-May-2011
		Multilateral Convention	Signed	1-Mar-2014
54	Nigeria	Multilateral Convention	Signed	Not yet in force in Nigeria
55	Norway	TIEA	16-Dec-2009	8-Sep-2010
		Multilateral Convention	Signed	1-Mar-2014
56	Poland	TIEA	31-Jan-2013	5-Dec-2013
		EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Mar-2014
57	Portugal	TIEA	14-Oct-2009	24-Apr-2011
		EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	Not yet in force in Portugal
58	Romania	EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	Not yet in force in Romania
59	Russian Federation	Multilateral Convention	Signed	Not yet in force in Russia
60	San Marino	Multilateral Convention	Signed	Not yet in force in San Marino
61	Saudi Arabia	Multilateral Convention	Signed	Not yet in force in Saudi Arabia
62	Singapore	Multilateral Convention	Signed	Not yet in force in Singapore
63	Sint Maarten*	Multilateral Convention	Signed	1-Mar-2014
64	Slovak Republic	EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Mar-2014

	Jurisdiction	Type of EOI arrangement	Date signed	Date in force
65	Slovenia	EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Mar-2014
66	South Africa	TIEA	2-Feb-2012	21-Jul-2013
		Multilateral Convention	Signed	1-Mar-2014
67	Spain	EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Mar-2014
68	Sweden	TIEA	16-Dec-2009	3-Jul-2010
		EU Council Directive 2011/16/EU	N/A	01-Jan-2013
		Multilateral Convention	Signed	1-Mar-2014
69	Switzerland	Multilateral Convention	Signed	Not yet in force in Switzerland
70	Tunisia	Multilateral Convention	Signed	1-Mar-2014
71	Turkey	TIEA	4-Dec-2012	
		Multilateral Convention	Signed	Not yet in force in Turkey
72	Ukraine	Multilateral Convention	Signed	1-Mar-2014
73	United Kingdom	TIEA	27-Aug-2009	15-Dec-2010
		EU Council Directive 2011/16/EU	N/A	01-Jan-2013
74	United States	TIEA	31-Mar-2009	22-Dec-2009
		Multilateral Convention	Signed	Not yet in force in the United States

* Extension by the Netherlands.

** Extension by Denmark.

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

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

Annex 4: Persons visisted during the on-site visit

The assessment team met with representatives of the following entities:

- Ministry of Financial Services, Finance Centre Department
- Ministry of Finance, Income Tax Office
- Financial Services Commission
- Companies House
- Finance Centre Council
- Gibraltar Association of Compliance Officers
- Attorney General's Chambers
- Society of Trust and Estate Practitioners

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Global Forum on Transparency and Exchange of Information for Tax Purposes

PEER REVIEWS, PHASE 2: GIBRALTAR

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

The Global Forum on Transparency and Exchange of Information for Tax Purposes is the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by over 120 jurisdictions which participate in the work of the Global Forum on an equal footing.

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

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

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