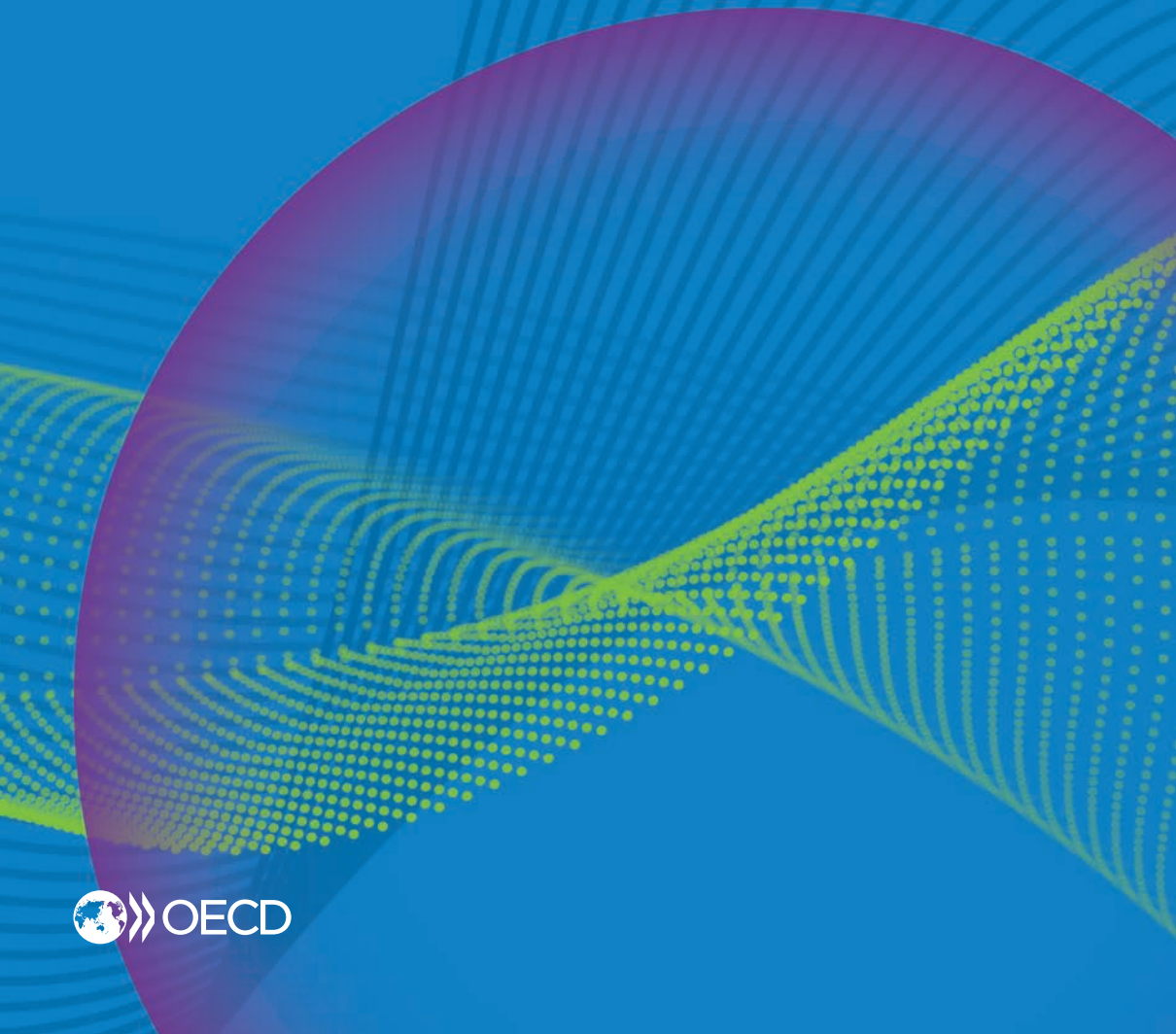
GLOBAL FORUM ON

TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

Peer Review Report on the Exchange of Information on Request

KENYA

2024 (Second Round, Combined Review)



OECD

Global Forum on Transparency and Exchange of Information for Tax Purposes: Kenya 2024 (Second Round, Combined Review)

PEER REVIEW REPORT ON THE EXCHANGE OF INFORMATION ON REQUEST

This peer review report was approved by the Peer Review Group of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) on 28 February 2024 and adopted by the Global Forum members on 27 March 2024. The report was prepared for publication by the Global Forum Secretariat.

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Note by the Republic of Türkiye
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. Türkiye recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Türkiye shall preserve its position concerning the "Cyprus issue".

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Reader's guide

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

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

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

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

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

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

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

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

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

Consideration of the Financial Action Task Force Evaluations and Ratings

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

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

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

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

More information

All reports are published once adopted by the Global Forum. For more information on the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes, and for copies of the published reports, please refer to www.oecd.org/tax/transparency and http://dx.doi.org/10.1787/2219469x.

Abbreviations and acronyms

2016 Terms of Reference	Terms of Reference related to EOIR, as approved by the Global Forum in October 2015 and amended in 2020
AML	Anti-Money Laundering
AML/CFT	Anti-Money Laundering and Combatting the Financing of Terrorism
BRS	Business Registration Service
CBK	Central Bank of Kenya
CBK/PG/08	Central Bank of Kenya Prudential Guidelines
CDD	Customer Due Diligence
CMA	Capital Markets Authority
DNFBP	Designated Non-Financial Businesses and Professions
DTC	Double Taxation Convention
EAC	East African Community
EOI	Exchange of information
EOIR	Exchange of Information on Request
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
EUR	Euro
FATF	Financial Action Task Force
Global Forum	Global Forum on Transparency and Exchange of Information for Tax Purposes
ITA	Income Tax Act 1973
KES	Kenyan Shilling

KRA	Kenya Revenue Authority
Multilateral Convention	Convention on Mutual Administrative Assistance in Tax Matters, as amended in 2010
PIN	Personal identification number
POCAMLA	Proceeds of Crime and Anti-Money Laundering Act
POCAML Regulations	Regulations made under the Proceeds of Crime and Anti-Money Laundering Act
TIEA	Tax Information Exchange Agreement
TPA	Tax Procedures Act 2015

Executive summary

1. This report analyses the implementation of the standard of transparency and exchange of information on request in Kenya on the second round of reviews conducted by the Global Forum. Due to the COVID-19 pandemic, the onsite visit that was scheduled to take place in the first half of 2021 could not take place. Consequently, the review of Kenya has been conducted in two phases, with a desk-based Phase 1 review leading to the adoption in November 2021 of the report assessing the legal and regulatory framework of Kenya against the 2016 Terms of Reference (Phase 1 report). The onsite visit to Kenya took place in February 2023 and the present review complements the first report with an assessment of the practical implementation of the standard, including in respect of exchange of information requests received and sent during the review period 1 July 2019 to 30 June 2022. Changes made to the legal framework between the Phase 1 review and 22 December 2023 have also been assessed.

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

Comparison of determinations and ratings of First and Second Round Reports

	Element	First Round Report (2016)	Second Round Report (2024)
A.1	Availability of ownership and identity information	Largely Compliant	Partially Compliant
A.2	Availability of accounting information	Largely Compliant	Largely Compliant
A.3	Availability of banking information	Compliant	Largely Compliant
B.1	Access to information	Compliant	Compliant
B.2	Rights and Safeguards	Compliant	Compliant
C.1	EOIR Mechanisms	Largely Compliant	Compliant
C.2	Network of EOIR Mechanisms	Partially Compliant	Compliant
C.3	Confidentiality	Compliant	Compliant
C.4	Rights and safeguards	Compliant	Compliant
C.5	Quality and timeliness of responses	Partially Compliant	Largely Compliant
	OVERALL RATING	**Largely Compliant**	**Largely Compliant**

Note: The four-scale ratings on compliance with the standard (capturing both the legal framework and practice) are Compliant, Largely Compliant, Partially Compliant, and Non-Compliant.

Progress made since previous review

3. The 2016 Report concluded that the legal and regulatory framework of Kenya was in place but needed improvement, with several recommendations made. Implementation was found to be largely compliant with the standard and some recommendations were also made in this regard.

4. Kenya has made progress on the transparency aspects and also on the exchange aspects. The Round 1 report noted delays in ratification of some agreements and a small number of agreements not in line with the standard (Element C.1), and a limited EOI network with lengthy negotiation periods for new agreements (Element C.2). Kenya became a Party to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the Multilateral Convention) in 2020, which significantly enhanced its EOI network. The recommendation in relation to the agreements not in line with the standard is consequently redundant and the recommendations in relation to Element C.2 are addressed.

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

6. Kenya made various amendments to the Companies Act and the Limited Liability Partnership Act with effect from 15 September 2023. These amendments addressed a recommendation made in the 2016 Report relating to a lack of obligations on nominees and also made improvements to company law requirements on beneficial ownership information and the ability of the regulator to enforce these in practice. Requirements for limited liability partnerships to ensure availability of beneficial ownership information were also introduced for the first time. Separately, in July 2023 tax law was amended to address a recommendation from the 2016 Report relating to accounting information requirements for trusts. New Regulations were issued under the Proceeds of Crime and Anti-Money Laundering Act with effect from 6 October 2023 that made changes to the requirements on the identification and verification of beneficial owners of legal entities and legal arrangements. Finally, Regulations were also issued under the Companies Act and under the Limited Liability Partnership Act each with effect from 19 October 2023 with changes related to nominees, ownership information and filing of annual returns adding to and clarifying the changes in the primary Acts.

Key recommendations

7. As noted above, Kenya has addressed some recommendations from the 2016 Report, however the recommendation related to ownership and identity records for trusts continues to apply. As the recommendations in relation to nominees and accounting records have only recently been addressed through changes in law, these areas are the subject of recommendations to ensure implementation in practice.

8. Additionally, the 2016 Terms of Reference contain added requirements in respect of the availability of beneficial ownership information. Kenya has a centralised register for collecting legal and beneficial ownership for companies and for limited liability partnerships, however improvement in the supervision and monitoring of compliance with the related legal and beneficial ownership information obligations is recommended. In this context it is noted that amendments in September 2023 to laws governing these entities put the Registrar of Companies and Limited Liability Partnerships in a better position to enforce requirements going forward. Improvement in supervision and monitoring of reporting institutions under the AML framework (including banks) by the authorities is also recommended. Amendments to the AML legal framework in September 2023 have introduced for the first time the ability to conduct simplified CDD, however there is a lack of clarity on what this means including whether identifying and verifying beneficial owners of customers subject to simplified CDD continues to be required in all cases. There is uncertainty on requirements for the frequency of updating of AML CDD information by banks and other AML-obliged persons and recommendations

have been made for Kenya to address this. Beneficial ownership information on trusts, general partnerships and limited partnerships may not be available in all cases and this is the subject of recommendations. Finally a recommendation has been made that the Kenya Revenue Authority make use of alternative sources of information in the event that difficulties arise in obtaining information from information holders.

Exchange of information in practice

9. Kenya can currently exchange information on request with 142 partners, through 15 double taxation conventions and the Multilateral Convention. The EOI mechanisms that Kenya has in place have no material deficiencies so no in-box recommendation has been made on the EOI framework in place. During the review period, Kenya received 124 EOI requests and sent 363 requests, with an increased volume since the Multilateral Convention entered into force. The main exchange partners have been France, India, Norway, the United Arab Emirates and the United Kingdom. The comments received from peers for this review indicate general satisfaction with the information provided by Kenya, although there was an issue with communication by post. Kenya has significantly improved its timeliness and status update practices for exchanges since the 2016 Report, when it only had records of one request being received despite peers reporting six had been sent to Kenya. In the current review period 63% of requests were finalised within 180 days and status updates provided in almost every case required. However, there is still some room for improvement on timeliness and Kenya should also consider making use of more than one possible source of information.

Overall rating

10. Kenya has achieved a rating of Compliant for six elements (B.1, B.2, C.1, C.2, C.3 and C.4) Largely Compliant for three elements (A.2, A.3 and C.5) and Partially Compliant for one element (A.1) In view of the ratings for each of the essential elements taken in their entirety, the overall rating for Kenya is Largely Compliant.

11. This report was approved by the Peer Review Group of the Global Forum on 28 February 2024 and was adopted by the Global Forum on 27 March 2024. A self-assessment report on the steps undertaken by Kenya to address the recommendations made in this report should be provided to the Peer Review Group in accordance with the methodology for enhanced monitoring as per the schedule laid out in Annex 2 of the methodology. The first such self-assessment report from Kenya will be expected in 2026, and thereafter, once every two years.

Summary of determinations, ratings and recommendations

Determinations	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that ownership and identity information, including information on legal and beneficial owners, for all relevant entities and arrangements is available to their competent authorities (Element A.1)		
The legal and regulatory framework is in place but needs improvement	Kenya relies on both tax law and the AML framework as the basis for availability of identity information on trusts, and solely on the AML framework for beneficial ownership information on trusts, however tax law only covers trusts chargeable for tax in Kenya and there is no requirement for trusts or trustees to engage with an AML-obliged person. Consequently beneficial ownership and identity information may not consistently be available with respect to all settlors, trustees, protectors (if any) and beneficiaries of all relevant trusts in Kenya.	Kenya is recommended to ensure that beneficial ownership and identity information is available for all relevant trusts in line with the standard.
	Kenya relies upon the AML framework as the basis for availability of beneficial ownership of general partnerships and limited partnerships, however there is no requirement for these partnerships to engage an AML-obliged person. A new option for conducting simplified CDD also leaves the possibility that beneficial ownership information may not be obtained or verified in all cases. Consequently, there may be situations where beneficial ownership of general partnerships and limited partnerships would not be available.	Kenya should ensure that beneficial ownership information in line with the standard is always available for all general partnerships and limited partnerships.

Determinations	Factors underlying recommendations	Recommendations
	There is no specified frequency of updating beneficial ownership information by AML-obliged persons. While company law requires beneficial ownership information to be reviewed and updated from time to time, the frequency within which to do so is not specified. As a result, there could be situations where the available beneficial ownership information is not up to date.	Kenya is recommended to ensure that in all cases complete and up-to-date beneficial ownership information is available in line with the standard.
EOIR rating is Partially Compliant	Supervision and enforcement action by the Business Registration Service to ensure compliance by companies with requirements to maintain, register and update legal and beneficial ownership information is insufficient. A large proportion of registered companies appear to be inactive. Recent changes in company law in September and October 2023 have strengthened powers of enforcement and these need to be deployed in practice. New requirements on retention of records after a company is struck off as well as the practical implementation of the notices that companies may use to obtain beneficial ownership information also requires monitoring and enforcement. Supervision and enforcement is also insufficient to ensure compliance by limited liability partnerships with their obligations to maintain, register and update identity information, although tax law provides an alternative source for this information. Obligations on limited liability partnerships to maintain, register and update beneficial ownership information have only recently been introduced and supervision and enforcement is not yet established.	Kenya is recommended to ensure the availability of legal and beneficial ownership information on companies and beneficial ownership information on limited liability partnerships by carrying out adequate oversight and enforcement.

Determinations	Factors underlying recommendations	Recommendations
	Information may be available with banks and other AML-obliged persons as a secondary source to supplement information from the Business Registration Service; however, the limited supervision across AML-obliged persons also does not provide adequate assurance that information from these sources will be available and up to date.	
	Beneficial ownership information for general partnerships, limited partnerships and trusts may be available with banks and other AML-obliged persons. The AML framework is the sole source relied upon for such information, however, the limited supervision across AML-obliged persons does not provide adequate assurance that information from these sources will be available and up to date.	Kenya is recommended to ensure the availability of beneficial ownership information for general partnerships, limited partnerships and trusts by carrying out adequate oversight and enforcement.
	In September 2023, Kenya amended laws governing companies and limited liability partnerships and issued related regulations to impose obligations on nominee members and partners to disclose their status to the company or partnership respectively, with corresponding obligations on the companies and partnerships to include such information in their registers and file this information with the Registrar. As these obligations were introduced recently, it was not possible to assess their implementation in practice.	Kenya should monitor the implementation of the new obligations related to nominees to ensure these are effective in ensuring the availability of legal and beneficial ownership of all companies and limited liability partnerships.
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements (Element A.2)		
The legal and regulatory framework is in place		

Determinations	Factors underlying recommendations	Recommendations
EOIR rating is Largely Compliant	Over the review period, although there was a system of oversight in place by the tax authorities, this may not cover all relevant entities in Kenya. New requirements relating to accounting records for trustees of trusts not subject to tax in Kenya have also only recently been enacted and these need to be incorporated into tax compliance activities. In addition, the Registrar did not have a regular oversight programme in place to monitor the compliance of the accounting record keeping obligations under the entity Acts.	Kenya is recommended to implement a comprehensive oversight programme to supervise the compliance with accounting record requirements to ensure that accounting records for all relevant entities are available in practice.
Banking information and beneficial ownership information should be available for all account-holders (Element A.3)		
The legal and regulatory framework is in place but needs improvement	There is no specified frequency of updating beneficial ownership information; so there could be situations where the available beneficial ownership information is not up to date.	Kenya is recommended to ensure that in all cases complete and up-to-date beneficial ownership information for all bank accounts is available in line with the standard.
	Beneficial owner(s) of account holders may not be identified in cases where simplified CDD is performed. However, simplified CDD is allowed only in respect of customers representing low risk for AML purposes.	Kenya should ensure that beneficial owners of all account holders are required to be identified.
EOIR rating is Largely Compliant	Although the Central Bank has not found substantial noncompliance among banks when conducting its verification activities that would cause significant concerns on the availability of banking information and beneficial ownership information from banks, the level of supervision and in particular the scope of its coverage across banks does not provide sufficient assurance of compliance overall.	Kenya is recommended to strengthen its ongoing supervision of banks to ensure that banking information and accurate and up-to-date beneficial ownership information for all customers is maintained by all the banks in Kenya.

Determinations	Factors underlying recommendations	Recommendations
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) (Element B.1)		
The legal and regulatory framework is in place		
EOIR rating is 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 (Element B.2)		
The legal and regulatory framework is in place		
EOIR rating is Compliant		
Exchange of information mechanisms should provide for effective exchange of information (Element C.1)		
The legal and regulatory framework is in place		
EOIR rating is Compliant		
The jurisdictions' network of information exchange mechanisms should cover all relevant partners (Element C.2)		
The legal and regulatory framework is in place		
EOIR rating is Compliant		

Determinations	Factors underlying recommendations	Recommendations
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received (Element C.3)		
The legal and regulatory framework is in place		
EOIR rating is Compliant		
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties (Element C.4)		
The legal and regulatory framework is in place		
EOIR rating is Compliant		
The jurisdiction should request and provide information under its network of agreements in an effective manner (Element C.5)		
Legal and regulatory framework:	This element involves issues of practice. Accordingly, no determination on the legal and regulatory framework has been made.	
EOIR rating is Largely Compliant	A number of requests, including some still pending, have taken substantially longer than a year to process. Some were due to unresponsive taxpayers subject to an initial information request where there were delays before Kenya sought information from alternative sources.	Kenya is recommended to continue to improve the timeliness of responses including using all available access powers and sources of information where one source may not be responsive.

Overview of Kenya

12. This overview provides some basic information about Kenya that serves as context for understanding the analysis in the main body of the report. The Republic of Kenya (Kenya) is a country with a population of over 53 million that lies across the Equator on the east coast of Africa. The official currency is the Kenyan Shilling (KES). [1] It had a gross domestic product of KES 13.5 trillion (Euro (EUR) 84.9 billion) in 2022.[2]

Legal system

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

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

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

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

1. Exchange rate on 30 October 2023, 1 EUR = 159.09 KES; Source: Central Bank of Kenya Exchange Rates | CBK (centralbank.go.ke): https://www.centralbank.go.ke/category/exchange-rates/.
2. Source of the gross domestic product: Central Bank of Kenya.

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

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

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

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

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

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

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

Tax system

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

24. Kenya applies both a source and residency basis for the taxation of income. Residents (companies and individuals) are subject to income tax on all income that is accrued in or derived from Kenya. Where a resident person (company or individual) carries on a business partly within and partly outside Kenya, the whole of the gains or profits from that business is deemed to have accrued in or been derived from Kenya. Kenyan resident individuals are also subject to tax on all employment income whether or not the income was accrued or earned in Kenya. A resident company or individual is generally not otherwise subject to income tax on foreign source income, i.e. foreign non-business income or income from a business wholly carried on outside of Kenya. Non-resident companies and individuals are taxed only on Kenya-source income.

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

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

26. A "body of persons" is resident in Kenya for an income year if it is a company incorporated under the law of Kenya, or its management and control are exercised in Kenya at any time in the income year. The Minister of Finance may also declare a company to be a resident company for any year of income, however no companies were subject to such a declaration at the end of the review period.

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

28. Income tax is charged on the profits of companies at 30% for resident companies and 37.5% for non-resident companies. Withholding tax is applicable to interest, dividends, royalties, management fees and some

other payments. The rates of withholding tax vary and also depend on the residency status of the recipient. Capital gains tax is charged at 5% on gains made from the transfer of property.

Financial services sector

29. Kenya's financial and insurance sector contributed 7.5% of its national gross domestic product in 2022. It included 39 commercial banks and mortgage finance companies and 14 microfinance banks, with total net assets of KES 6 659 billion (EUR 41.9 billion).[3] There were also 10 representative offices of foreign banks, 72 forex bureaus, 19 money remittance providers, 57 insurers, 5 re-insurers and 3 credit reference bureaus. Kenya is not an international financial centre as the financial sector is primarily domestically oriented.

30. The financial sector is principally regulated and supervised by two authorities. The Central Bank of Kenya (CBK) and the Capital Markets Authority (CMA). The CBK is responsible for banks including microfinance banks. Foreign banks operate in Kenya through Kenyan subsidiaries and representative offices (branches). All banks must be licensed by the CBK and are subject to the Banking Law.

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

32. There is currently one securities exchange in Kenya – the Nairobi Securities Exchange (NSE). Securities traded on the NSE are shares, bonds, Exchange Traded Funds and Real Estate Investment Trusts (REITs). On 2 November 2023, there were 65 companies listed on the NSE. Any person intending to trade in shares that are listed on the NSE must open a central depository account.

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

Anti-Money Laundering Framework

33. The Kenyan Anti-Money Laundering and Combatting the Financing of Terrorism (AML/CFT) framework is based on the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) and Regulations made under that Act (POCAML Regulations), as well as the Prevention of Terrorism Act (POTA) and Regulations made under that Act (POT Regulations). These laws are complemented by other instruments including the Central Bank of Kenya Prudential Guidelines on Proceeds of Crime and Money Laundering (Prevention) and Combating the Financing of Terrorism (CBK/PG/08) and the Capital Markets Authority Guidelines on Prevention of Money Laundering and Terrorism Financing in the Capital Markets (CMA Guidelines 2015).

34. The Financial Action Task Force (FATF) and the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) jointly carried out a mutual evaluation review of the compliance of Kenya's financial sector with the AML/CFT standard which incorporated an onsite visit from 31 January to 11 February 2022 with the report published in September 2022.[4] The report rated Kenya as Partially Compliant on Recommendations 10 (customer due diligence by financial institutions), 24 (transparency of legal persons) and 25 (transparency of legal arrangements) and non-compliant with Recommendation 22 (customer due diligence by Designated Non-Financial Businesses and Professions, DNFBPs). The level of effectiveness for Immediate Outcome 5 (legal persons and arrangements) was rated "Low" and for Immediate Outcome 3 (supervision) and Immediate Outcome 4 (preventive measures) the level of effectiveness for each was also "Low". Among other things, it was noted that no sanctions had been applied to legal persons noncompliant with obligations to register beneficial ownership information, Customer due diligence by DNFBPs is weak and supervision of AML obligations by supervisors in this sector had not been carried out and there are no measures in place for the legal arrangement's regulator (Ministry of Lands) to obtain, record and keep details of beneficial owners and other required information, for purposes of transparency and timely access by competent authorities.

Recent developments

35. Kenya made various amendments to the Companies Act and the Limited Liability Partnership Act with effect from 15 September 2023. While this was after the end of the review period, it was before the cut-off date and so the effect of these amendments on the legal framework have,

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

where relevant, been reflected in this report. Supervision and enforcement of obligations introduced by these amendments and relevant to the report have either not commenced or not had sufficient time to be assessed for effectiveness.

36. The package of amendments to law in effect from 15 September 2023 also included amendments to the Proceeds of Crime and Anti-Money Laundering Act, 2009 (POCAMLA) and this was followed by the issuance of new Regulations under that Act that came into force from 6 October 2023. The relevant changes to the AML legal framework are analysed in this report, however the supervision and enforcement aspects of these changes have not had sufficient time to be assessed for effectiveness. New Regulations also followed under the Companies Act and Limited Liability Partnership Act in force from 19 October 2023 with changes related to nominees, ownership information and filing of annual returns adding to and clarifying the changes in the primary Acts.

Part A: Availability of information

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

A.1. Legal and beneficial ownership and identity information

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

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

39. In respect of the recommendation for nominees to maintain relevant ownership and identity information, this has been addressed. There is now an obligation upon nominees to disclose their status as a nominee and for the company to obtain, maintain and file information on the nominator to the Registrar.

40. The recommendation in relation to the availability of ownership and identity information for trusts has not been addressed, although some improvements have been made to AML requirements. The anti-money laundering framework was amended in 2018 to extend customer due diligence (CDD) obligations to trust and company service providers and further amendments in September 2023 extended CDD obligations to legal professionals who are often used at the formation of trusts, however there is no requirement for trusts to maintain an ongoing relationship with such service providers and the general practice is not to do so.

41. Not discussed in the 2016 Report, but now an integral part of the standard as strengthened in 2016, is the availability of beneficial ownership information on all relevant entities and arrangements. In Kenya, amendments to the Companies Act in 2019 require companies to keep a register of beneficial owners and lodge a copy with the Registrar of Companies. Initially the deadline to lodge was 31 January 2021, but this was extended to 31 July 2021. In relation to legal arrangements, gaps remain on the availability of beneficial ownership information for general partnerships, limited partnerships and trusts if not covered by the AML framework. Limited liability partnerships are now, from 15 September 2023, subject to substantially the same requirements as companies in respect of beneficial ownership information. Some improvements were made to the Companies Act at the same time to strengthen beneficial ownership information requirements, particularly at the time of registration for domestic companies and new requirements imposed on foreign companies.

42. The primary source of legal and beneficial ownership information on companies and limited liability partnerships is the Business Registration Service (BRS), however the proportion of companies that have linked to the online facility and provided their information is low and this causes doubts on whether information from this source will be up to date in all cases. While the companies and limited liability partnerships are also required to maintain this information themselves, there is a lack of supervision and monitoring of these obligations and the low rate of filing with the BRS does not give confidence that these records, particularly on beneficial ownership, have been compiled and maintained. Amendments to law in September 2023 strengthen the ability of the BRS to enforce obligations, including by providing more streamlined procedures for strike-off, however there has not yet been time to assess the implementation of this in practice.

43. The AML framework is the sole source of beneficial ownership information on general partnerships, limited partnerships and trusts. It can provide a secondary source of information on companies and limited liability partnerships. While there is some supervision of the AML customer due diligence obligations of financial institutions by the Central Bank of Kenya (CBK) and this has improved after the end of the review period, supervision by other regulatory authorities is low or non-existent, so the AML framework is not assured to be a reliable source of legal and beneficial ownership information. In any case, the coverage of all relevant entities by the AML framework is incomplete as it is not required to have a relationship with an AML-obliged person in all cases.

44. The 2016 Report found that the legal framework needed improvement and Kenya was Largely Compliant with Element A.1. While improvements have been made since then, this report also finds some remaining deficiencies

in the legal framework such that it is in place but needs improvement. More significantly there are concerns over the level of supervision and the consequence of this on compliance rates for maintaining legal and beneficial ownership information. Kenya has therefore been rated as Partially Compliant with Element A.1 and is recommended to address the gaps identified.

45. During the review period, Kenya received 23 requests related to legal and beneficial ownership information, all of which related to companies. Kenya was able to provide the requested information in all cases, and peers did not raise any concerns about the information received.

46. The conclusions are as follows:

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

Deficiencies identified/Underlying factor	Recommendations
Kenya relies on both tax law and the AML framework as the basis for availability of identity information on trusts, and solely on the AML framework for beneficial ownership information on trusts, however tax law only covers trusts chargeable for tax in Kenya and there is no requirement for trusts or trustees to engage with an AML-obliged person. Consequently beneficial ownership and identity information may not consistently be available with respect to all settlors, trustees, protectors (if any) and beneficiaries of all relevant trusts in Kenya.	Kenya is recommended to ensure that beneficial ownership and identity information is available for all relevant trusts in line with the standard.
Kenya relies upon the AML framework as the basis for availability of beneficial ownership of general partnerships and limited partnerships, however there is no requirement for these partnerships to engage with an AML-obliged person. A new option for conducting simplified CDD also leaves the possibility that beneficial ownership information may not be obtained or verified in all cases. Consequently, there may be situations where beneficial ownership information of general partnerships and limited partnerships would not be available.	Kenya should ensure that beneficial ownership information in line with the standard is always available for all general partnerships and limited partnerships.
There is no specified frequency of updating beneficial ownership information by AML-obliged persons. While company law requires beneficial ownership information to be reviewed and updated from time to time, the frequency within which to do so is not specified. As a result, there could be situations where the available beneficial ownership information is not up to date.	Kenya is recommended to ensure that in all cases complete and up-to-date beneficial ownership information is available in line with the standard.

Practical Implementation of the Standard: Partially Compliant

Deficiencies identified/Underlying factor	Recommendations
Supervision and enforcement action by the Business Registration Service to ensure compliance by companies with requirements to maintain, register and update legal and beneficial ownership information is insufficient. A large proportion of registered companies appear to be inactive. Recent changes in company law in September and October 2023 have strengthened powers of enforcement and these need to be deployed in practice. New requirements on retention of records after a company is struck off as well as the practical implementation of the notices that companies may use to obtain beneficial ownership information will also require monitoring and enforcement. Supervision and enforcement is also insufficient to ensure compliance by limited liability partnerships with their obligations to maintain, register and update identity information, although tax law provides an alternative source for this information. Obligations on limited liability partnerships to maintain, register and update beneficial ownership information have only recently been introduced and supervision and enforcement is not yet established. Information may be available with banks and other AML-obliged persons as a secondary source to supplement information from the Business Registration Service; however, the limited supervision across AML-obliged persons also does not provide adequate assurance that information from these sources will be available and up to date.	Kenya is recommended to ensure the availability of legal and beneficial ownership information on companies and beneficial ownership information on limited liability partnerships by carrying out adequate oversight and enforcement.
Beneficial ownership information for general partnerships, limited partnerships and trusts may be available with banks and other AML-obliged persons. The AML framework is the sole source relied upon for such information, however, the limited supervision across AML-obliged persons does not provide adequate assurance that information from these sources will be available and up to date.	Kenya is recommended to ensure the availability of beneficial ownership information for general partnerships, limited partnerships and trusts by carrying out adequate oversight and enforcement.
In September 2023, Kenya amended laws governing companies and limited liability partnerships and issued related regulations to impose obligations on nominee members and partners to disclose their status to the company or partnership respectively, with corresponding obligations on the companies and partnerships to include such information in their registers and file this information with the Registrar. As these obligations were introduced recently, it was not possible to assess their implementation in practice.	Kenya should monitor the implementation of the new obligations related to nominees to ensure these are effective in ensuring the availability of legal and beneficial ownership of all companies and limited liability partnerships.

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

47. The Companies Act 2015 was enacted in September 2015, replacing the previous Companies Act (2009) and is the central piece of legislation governing the establishment of and further arrangements with respect to companies. Under the Companies Act, three types of companies may be incorporated (s. 5-7 Companies Act):

- Companies limited by shares: the liability of the members of this type of company is limited to the amount unpaid (if any) on their shares. These may be private companies, which are limited to no more than 50 members, or public companies who may exceed that number of members.
- Companies limited by guarantee: these companies can be formed with or without share capital and the liability of the members is limited to the amount defined in the memorandum of the company in excess of the company's assets in the event that the company is liquidated. Prior approval is required for incorporation whereby the Attorney-General must be satisfied that the company is formed for promoting commerce, art, science, religion, charity or for some other beneficial object.
- Unlimited companies: there is no limit on the liability of the members. Save for being exempt from annual filing of financial statements with the Registrar, unlimited companies have no other relevant differences from limited companies in requirements under the Companies Act.

48. On 30 June 2022 there were 652 604 private limited companies, 4 352 public limited companies, 2 240 companies limited by guarantee and 4 unlimited companies. In addition, there were 5 236 foreign companies who were registered with the Registrar of Companies, as is required when carrying on business in Kenya.

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

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

Legal Ownership and Identity Information

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

Companies covered by legislation regulating legal ownership information[5]

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

Companies Law requirements

52. Section 93 of the Companies Act requires domestic companies to keep a register of their members and lodge a copy with the Registrar. The company must keep the register at its registered office, the address of which is notified to the Registrar and for which any change in location must be notified within 14 days. Companies (other than public listed companies) must lodge a copy of any amendment to the register within 14 days. Failure to comply with any of these requirements is an offence, with the company and each officer of the company liable to a fine up to KES 500 000 (EUR 3 140), with further daily fines up to KES 50 000 (EUR 314) if the offence is not remedied. Entry in the register is prima facie evidence of being a shareholder and therefore being entitled to associated rights.

53. All companies must file an annual return with the Registrar. Companies must provide in the return a register of members including changes since the previous return (or in the case of a first return, changes since registration). In the case of a company with share capital, the return must include a statement of the capital paid up and the number of shares held by each member. The due date for filing the annual return initially due 28 days after the anniversary date of the company's creation, but thereafter the due date is 12 months from the date of filing of the most recent annual return. Failure to comply with these updating requirements makes the company and each officer of the company liable to a fine up to KES 200 000 (EUR 1 260), with further daily fines up to KES 20 000 (EUR 126) until remedied.

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

54. The Companies Act sets a minimum period of 10 years for a company to retain ownership records, measured from the time that the relevant ownership ceases. During the review period, the Companies Registrar was required to keep originals of documents lodged in hard copy form for at least three years after lodgement, or two years after dissolution in the case of a dissolved company. The Companies Act was amended with effect from 15 September 2023 to extend each of these periods to seven years. The Registrar has no mandate to destroy records itself, it can only dispose of records by transferring to the National Archives. It is not the practice of the Registrar to do this and there are no plans to do so in the future. The hard copy records may only be disposed of in this manner after seven years if all of the information contained therein has been recorded in the Register, i.e. electronically. The Companies Registrar would in any case retain electronically recorded data in the Register indefinitely.

55. Section 974 of the Companies Act prohibits foreign companies from carrying on business in Kenya without having registered under the Act. The application must include details of the directors and shareholders. Any subsequent change in the details provided on application must be notified to the Registrar within one month. A registered foreign company must have a registered office in Kenya and notify any change within seven days. Failure to comply with these updating requirements is an offence, with the company and each officer of the company liable to a fine up to KES 200 000 (EUR 1 260), with further daily fines up to KES 20 000 (EUR 126) if the offence is not remedied.

56. A foreign company must appoint a local representative prior to registration and, in the event that such person ceases to be the local representative, appoint another representative within 21 days. It is an offence for a registered foreign company to continue to carry on business for more than 21 days without a local representative and the company and each officer of the company will be liable to a fine up to KES 500 000 (EUR 3 140). The company may also be struck off the register.

57. The local representative is answerable for all things that the company is required to do under the Act and will be liable for any penalty imposed on the company if a Court is satisfied that they should be so liable. The local representative must notify the Registrar within one month if the registered foreign company ceases to carry on business in Kenya, has been dissolved or deregistered in its place of origin or has been placed in liquidation. In this case, the Registrar may, two years after the company ceases to be registered in Kenya, transfer its records to the Kenya National Archives where they are retained indefinitely. While the records referred to in this instance could be electronic or hard copy, the Registrar's practice has always been to retain records and not transfer to the National Archives.

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

Tax law requirements

59. The obligation for companies to register with the Kenya Revenue Authority (KRA) as described in the 2016 Report has in substance remained the same, however some legal provisions have been moved from the Income Tax Act to the TPA. The registration details captured by the BRS determine the relevant tax obligations of the company and since May 2019 the process has included issuance of a Personal Identification Number (PIN) from KRA for tax obligations[6] upon successful registration at the BRS.

60. It is now section 8 of the TPA that imposes obligations to register for tax purposes. All companies liable to tax or who expect to be liable to tax (income tax or value added tax) must register.[7] A company that is tax resident in Kenya is liable to tax on income accrued in or derived from or deemed to be derived from Kenya and will therefore be required to be registered with the KRA. A company is resident in Kenya if it is incorporated in Kenya or is managed and controlled in Kenya.

61. An application for tax registration by a company (either directly with the KRA or via the BRS) must be accompanied by a copy of the memorandum of the company which contains the names of the initial members and the number of shares owned. A company carrying on a business is required, under section 9 of the TPA, to notify the KRA of any change in shareholding of 10% or more within 30 days of the change. This obligation was introduced in 2014 and applies to both domestic and foreign companies carrying on business in Kenya. Ownership interests acquired prior to 2014 and changes in ownership not meeting the threshold since 2014 are not otherwise required to be notified to the KRA in a tax return or in any other notification. Therefore the information held by the KRA on legal ownership could comply with these tax law requirements but not be fully accurate for companies registered prior to 2014 when the shareholding changed before 2014, or for a company registered at any time when a shareholder's acquisition or change

6. Personal Identification Number is Kenya's term for a Taxpayer Identification Number (TIN).

7. A company expecting to manufacture or import excisable goods or supply excisable services is also required to register.

in interest is less than 10%. The KRA's information on shareholdings would necessarily only be a secondary source of information.

62. A person registered for tax purposes is required to apply for deregistration within 30 days of ceasing to be required to register. A failure to register or deregister when required is liable to a penalty of KES 100 000 (EUR 630) for every month or part of a month of delay, up to a maximum of KES 1 000 000 (EUR 6 300).

63. On 30 June 2022 there were 451 813 domestic companies and 1 778 foreign companies registered with the KRA, including both active and inactive companies.

Anti-money laundering law

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

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

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

66. The Companies Act includes a definition of "dormant company" which is a company that has no significant accounting transactions. A significant accounting transaction is defined as a transaction that would be required to be entered into the company's accounting records. Dormant companies must apply and be approved by the Registrar for such status and remain subject to Companies Act obligations, including lodging annual

returns and updating ownership information. So long as a dormant company complies with its obligations under the Companies Act, including filing annual returns, it would generally not be considered for strike off. The formal concept of dormancy is only relevant to qualifying for exemption from external audit under the Companies Act. Currently only two companies are approved as dormant companies.

67. For the Registrar, while referring to an "inactive" company may have some overlap with a dormant company, the term is not defined in the Companies Act and is used in a more general sense to refer to inactivity including, prima facie, failing to file returns. The Registrar has the power, since 2015, to strike off a company that is not carrying on business or is not in operation. No minimum period has been specified in the Companies Act before this power can be used, however it was the Registrar's practice during the review period to use the power if the company had been inactive for five years or more. The Companies Act was amended with effect from 15 September 2023 to codify this practice, specifying that grounds to believe a company is not carrying on business may include failure to file annual returns for a period of five years or more. In using this power, the Registrar must give one month's notice by letter, followed by a second letter in the case of no response, giving a final notice of one month.

68. Companies may also be struck off the Register either upon application by the company or following liquidation procedures. Liquidators may be appointed voluntarily by members or creditors, or compulsorily by the court. During the review period, neither the Companies Act, nor the Insolvency Act which governs liquidators, imposed an obligation on liquidators to retain ownership records after liquidation. The Companies Act was amended with effect from 15 September 2023, making it the duty of the officers, administrator or liquidator (as applicable) to maintain all records required to be kept by a company for at least seven years from the date of strike off, on pain of penalty of up to KES 500 000 (EUR 3 140). The amendment expanded the scope of the records required to be maintained and will now cover legal and beneficial ownership records. Previously, only accounting records were required to be maintained by officers and liquidators (see paragraph 187). There is no requirement that these persons retain the records in Kenya.

69. In every case for striking off, a notice must be published in the Gazette providing a three month period to show cause to the contrary. The process concludes with a final notice in the Gazette stating that the company's name has been struck off the Register. On publication of this second notice, the company is dissolved. Despite dissolution, the liability (if any) of every officer and member of the company continues as if the company was not dissolved.

70. Kenya has not provided figures for inactive companies from a company law perspective (whether or not compliant with filing obligations under the Companies Act), however it believes that an indirect indication can be gained from the number of companies that have not updated their records through an online process. The BRS commenced an exercise called "Link A Business" in October 2020, under which companies must update their records including ownership records and any outstanding company law returns in order to transfer to an electronic register. By 30 June 2022 around 49.6% of registered companies had linked. There were 328 158 registered companies that had not yet linked and it is expected that a significant number of these may be inactive. A company that is not on the electronic register is denied access to government services, is unable to participate in government procurement activities and cannot open a bank account in Kenya. In the case of a company which already held a Kenyan bank account prior to the establishment of the electronic register, when updating the CDD for the account holder the bank is required to confirm the status of the company on the register and if not current the bank will commence procedures to terminate the account. Acquisition and disposal of some assets in Kenya, such as land, will also not be possible. While these limitations create pressure for many companies to update their records on the electronic register, it will not be persuasive in every case, such as for companies having no need for a bank account in Kenya and no relevant assets or dealings in Kenya. During the review period 7 170 companies were struck off as inactive, for which their failure to update their records was the identification factor leading to being determined as inactive. This represents only 2.2% of the number of companies that had not linked and may be inactive.

71. The KRA defines an "active" taxpayer as one who has filed a tax return for a tax obligation for the previous tax period. An inactive taxpayer is therefore one that has not filed a tax return for the previous tax period, even if there is or was an obligation to do so. At the end of the review period there were 277 690 companies classified by the KRA as inactive. Among these there were 214 074 companies with a more specific definition as "Perpetual Non-Filers" who have not filed for at least 6 months in relation to monthly tax obligations or at least two years for annual tax obligations. It has not been possible to fully reconcile the KRA registrations noted at paragraph 63 with BRS registrations noted at paragraph 48) although some part of the difference will be decades old registrations of companies that are long since defunct. The difference of 210 159 in registered companies between the BRS and the KRA registrations points to a large number of companies on the companies register as likely to be inactive, as does the large number who have not linked to the electronic register.

72. A company that has been struck off the register for inactivity or on application of the company may be restored to the Register on application

by a former director or member of the company within six years of dissolution. This is conditioned on the Registrar being satisfied that:

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

73. Alternatively, a company that has been struck off for inactivity, or on application of the company, or through liquidation, may be restored on application to the Court. A former director or member may apply, or various other persons with specified interests in claims against the company, or any person appearing to the Court to have an interest in the matter. The time limit within which to apply is six years from dissolution, except when the application is for the purpose of pursuing damages for personal injury or is made within 28 days of the Registrar refusing an earlier application for restoration. The Court may order restoration for any reason that it considers just and if restored, the company is taken to have continued in existence as if it had not been dissolved. The Court may direct the lodgement with the Registrar of such regulatory filings as would be necessary to bring it up to date. Kenya advised that during the calendar years 2019 to 2022 there were four requests for reinstatement, one of which was refused due to falling outside the six year time limit.

74. KRA has 277 690 inactive companies recorded on its tax systems. For this purpose, "inactive" means a company that is not up to date with the filing of its tax returns (including VAT returns) or payment of tax due.

Legal ownership information – Enforcement measures and oversight

75. The penalties on a company for failing to keep or update a register of members, or failing to lodge or update the copy of the register with the Companies Registrar, were mentioned above. In addition, it is an offence to lodge false or misleading documents or to make false or misleading statements to the Registrar, and on conviction a person is liable to a fine up to KES 1 000 000 (EUR 6 300) or imprisonment for up to two years, or both. The number of instances each year where sanctions for late filing of annual returns have been applied ranged from 27 804 to 38 562 for each of the calendar years through the review period. These are applied at, and in response to, the filing of a late return. More generally, Kenya has provided statistics on compliance rates for filing annual returns by entity type: 53% of

private companies, 25% of public companies, 96% of companies limited by guarantee, and 24% of foreign companies.[8]

76. Kenya has placed much reliance on the operationalisation of the BRS to enable compliance checks to be carried out. During the review period the BRS focussed its enforcement activities on ensuring that companies register their information on the electronic register. Fines were imposed for late filing but fines have generally not been applied or pursued for failing to file, failing to update legal ownership information or failing to maintain these records. The approach taken by the BRS has been to deny services to companies that had failed to initiate the linking process. This denial of service includes an inability to obtain a document proving their status, which renders the company unable to, among other things, open a bank account, obtain a bank loan, transfer property and engage in government procurement. While these limitations create pressure for many companies to update their records on the electronic register, it will not be persuasive in every case, see also paragraph 70. Following denial of service to non-filers, 73 806 companies had complied with their obligations by the end of 2022. As discussed at paragraph 70, failing to register information has been taken as an indicator that a company is inactive and 7 170 companies were struck off as inactive during the review period. No compliance activities such as field visits or inspections have been carried out to verify compliance by companies in maintaining their own ownership records.

77. While the focus of activity by the BRS, including denial of service and some strike off of companies, has led to around half of all companies providing legal ownership information for the electronic register, a substantial proportion of companies remain non-compliant. A large proportion of these are likely to be inactive. In addition, there is no verification of ongoing compliance by those companies who have registered their information. **Kenya is recommended to ensure the availability of legal ownership information on companies by carrying out adequate oversight and enforcement**.

78. The administrative penalties for failing to register or deregister with the KRA were also mentioned above. Furthermore, it is an offence to fail to register or deregister for tax purposes, fail to submit a tax return or other document, or deliberately make a false or misleading statement and on conviction a person is liable to a fine up to KES 1 000 000 (EUR 6 300) or imprisonment for up to three years, or both.

79. KRA has the ability to enforce obligations through various requirements to be registered and have a PIN for tax purposes in order to carry out

8. These figures are approximate due to a mismatch in timing of 6 months on number filed and number registered.

certain actions. The First Schedule of the TPA lists a range of transactions and actions for which a PIN is required. In addition to registering a company, a business name, motor vehicle or land title, a PIN is required to open an account with a financial institution, to import goods, to supply goods or services to government and public bodies, and for the stamping of instruments. The KRA may suspend or deactivate a PIN for failing to comply with its obligations, which would then prevent the company from carrying out the actions for which a PIN is required. Of the 277 690 companies considered to be inactive on 30 June 2022, 265 066 had their PINs suspended. Nevertheless, as described at paragraph 61, the tax law requirements will not result in complete or up to date information in all cases and so the KRA's information will at best be a secondary source. While the KRA carries out enforcement action generally to identify persons who have failed to register, no activities during the review period have been described by the KRA on verifying compliance with the obligations to register legal ownership information or notify the KRA of changes.

Nominees

80. Nominee shareholding is allowed in Kenya.

81. The 2016 Report identified a combination of requirements under the Income Tax Act, the POCAMLA and the Capital Market Licensing Regulations that would ensure ownership information will be available in most cases where a nominee acts in a professional capacity.[9] From 2014, the Income Tax Act requires a person in receipt of income subject to tax in Kenya to disclose to the KRA *any changes* to the beneficial owner of a shareholding owned by a nominee, but nominee ownership is not required to be disclosed on initial filing of information with the KRA, nor is a change in the nominator or the nominee owner.

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

83. In addition, under Section 45(4) of the POCAMLA, if it appears to a reporting institution that an applicant is acting on behalf of another person,

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

the reporting institution must take reasonable measures to establish the true identity of a person on whose behalf or whose ultimate benefit the applicant may be acting, including as nominee.

84. Nevertheless it was concluded that ownership information may not be available in all cases and an in-box recommendation was made that an obligation be established for all nominees to maintain relevant ownership and identity information where they act as legal owners on behalf of any other person.

85. In July 2019, Kenya introduced to the Companies Act the beneficial ownership register requirements described from paragraph 107. During the review period nominees were not obliged to inform the company that their interest is held in a nominee capacity in all cases and therefore knowledge of the nominee status was not assured. The beneficial owner would potentially only be identified if they hold at least 10% of the ownership interest, a nominee with less than 10% would not be looked through to identify the beneficial owner. A company would, if it became aware of the nominee status of a legal owner, use the notice procedure discussed in paragraph 109 to seek information on the beneficial owner and apply the restrictions on the interest held by the nominee if there is a failure to comply. However, the lack of information, with the company, on the nominee status of a legal owner leads to (a) a risk of identifying a natural person who acts as a nominee as the beneficial owner or (b) identifying the beneficial owner of a corporate nominee itself as the beneficial owner of shares, instead of the natural person who is the nominator, who ought to be identified as the real beneficial owner.

86. Amendments to the Companies Act with effect from 15 September 2023 introduced a requirement on companies to include in its register of members whether each member is a nominee and if so, details of the nominator. Under Regulations subsequently issued under that Act nominees are also obliged to inform the company that they act in a nominee capacity, whether acting formally or informally, and provide the particulars of their nominator. Failure to do so, or providing false information in this respect is subject to a penalty of up to KES 1 000 000 (EUR 6 300). The company must include the nominee status and details in the member register submitted to the Registrar, with sanctions for noncompliance being those described in paragraph 52. Effectively, by compelling the company to obtain such information from the nominee, the result is that the nominee must obtain such details from the nominator. Similar obligations in respect of limited liability partnerships were also introduced at the same time as described in paragraph 146. As all of these obligations were introduced after the end of the review period it was not possible to assess the implementation of these requirements or their interaction with the legal and beneficial ownership obligations of these entities, **Kenya should monitor the implementation**

of the new obligations related to nominees to ensure these are effective in ensuring the availability of legal and beneficial ownership of all companies and limited liability partnerships.

Availability of legal ownership information in EOIR practice

87. During the review period Kenya received 5 requests for legal ownership information. Peers expressed satisfaction with the responses from Kenya and raised no concerns.

Availability of beneficial ownership information

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

Companies covered by legislation regulating beneficial ownership information

Type	Company Law	Tax Law	AML Law
Private limited company	All	None	Some
Public limited company	All	None	Some
Company limited by guarantee	All	None	Some
Foreign companies (tax resident)	All[10]	None	All[11]

Anti-money laundering law requirements

89. The AML framework is primarily provided by the POCAMLA and the regulations made under that Act. Section 45 of the POCAMLA requires reporting institutions to carry out CDD when entering into a business

10. From 15 September 2023. Prior to that date there were no requirements covering foreign companies.

11. Where a foreign company has a sufficient nexus, then the availability of beneficial ownership information is required to the extent the company has a relationship with an AML-obligated service provider that is relevant for the purposes of EOIR. (Terms of Reference A.1.1 Footnote 9).

relationship or carrying out a transaction or series of transactions with an applicant. The POCAML Regulations set out further details of the due diligence requirements, including identifying the beneficial owners.

90. A reporting institution is defined to mean a financial institution and a designated non-financial business and profession. The definition of financial institution in the POCAMLA mirrors the definition contained in FATF Recommendations,[12] and designated non-financial business and profession is defined to include, most relevantly:

- real estate agencies, of which there are around 400
- accountants who are sole practitioners, partners or employees within professional firms, of which there are around 24 000
- trust and company service providers, of which there are around 1 500
- from 15 September 2023, advocates, notaries and other independent legal professionals, of which there are around 19 000.[13]

91. There is no obligation for all types of entities and arrangements to have a relationship with a reporting institution. Such engagement in practice will occur through: i) banks, but there is no legal requirement to have a bank account in Kenya; and ii) the specified service providers, in the event that these are engaged. Kenya advised that information on the extent to which entities or arrangements would have a relationship with a reporting institution is not available. The coverage of CDD obligations therefore does not fully ensure that beneficial ownership will be available on all companies and can only provide partial support to the Companies Law requirements that Kenya has introduced and upon which it now primarily relies for availability of beneficial ownership information.

92. Throughout the review period Regulations originally issued under the POCAMLA in 2013 were applicable. These were replaced by new Regulations in force from 6 October 2023. Analysis of relevant elements in each set of Regulations follows.

93. The term "beneficial owner" was defined in the 2013 POCAML Regulations to mean:

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

12. FATF International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation.
13. See further details at paragraph 162164.

94. While the definition of beneficial owner referred to "person", it was clarified in Regulation 14(1)(d) that this means "natural persons". Guidelines issued by the Central Bank also confirmed this meaning.[14] Regulation 14(1)(d) also required the identification of the natural persons managing the legal person or body corporate. The 2023 POCAML Regulations have retained the same definition of beneficial owner, except that the first three instances of "person" are replaced with "natural person".

95. There was no ownership threshold in the 2013 POCAML Regulations and individuals having either ultimate ownership or control of the company through means other than ownership were all required to be identified. This approach is consistent with the standard.

96. It was not clear whether "ultimately" was to be interpreted as meaning any person who controls the company acting directly or indirectly, and acting individually or jointly. Doubts could therefore arise as to whether beneficial ownership information was consistently obtained for all domestic and foreign companies undergoing CDD. However, representatives of the banking sector met at the onsite visit demonstrated a good understanding of requirements to identify beneficial owners, including beneficial owners having control by other means, and assured that this was applied in the sector in practice, although a legal source for the meaning of "ultimately" owning or controlling a company was not identified. The understanding and practices in non-bank sectors was not ascertained, although the KRA has almost no practice of using such sources for beneficial ownership information, whether for domestic or exchange purposes.

97. Notwithstanding that the definition of beneficial owner did not explicitly include senior managing officials under the former Regulations, Regulation 19 separately required the identification of natural persons having senior management positions in a legal person in all cases when carrying out CDD. The 2023 POCAML Regulations retain this requirement to identify senior managing officials in all cases (Regulation 22), however Regulation 16 has a new separate requirement when identifying beneficial owners that a senior managing official need only be identified at a cascading third step when no beneficial owner is identified under the preceding two steps (further described below). This apparent overlap in differing requirements in the new Regulations may be disregarded as the application of either of Regulations 16 or 22 would, at a minimum, result in the identification and verification of senior managing officials in circumstances required by the standard.

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

98. The 2023 POCAML Regulations now supplement the application of the definition of beneficial owner of a legal person with new details on the CDD requirements for the identification and verification of such persons. Regulation 16(2) requires that:

> A reporting institution shall identify and take reasonable measures to verify the identity of a beneficial owner through the following information –
>
> (a) the identity of the natural person (if any) who ultimately has a controlling ownership interest in a legal person or arrangement; or
>
> (b) to the extent that there is doubt under (a) as to whether the person(s) with the controlling ownership interest is the beneficial owner(s) or where no natural person exerts control through ownership interests, the identity of the natural person(s) (if any) exercising control of the legal person or arrangement through other means; or
>
> (c) where no natural person is identified under (a) or (b) above, the identity of the relevant natural person who holds the position of senior managing official.

99. The definition of beneficial owner in the new Regulations along with the further details on the application of the definition aligns with the Standard in respect to beneficial owners of legal persons.

100. Regulations 12 and 14 of the 2013 POCAML Regulations required a reporting institution, when entering into a business relationship with a company, to identify and take reasonable measures to verify the identity of each beneficial owner including their name, date of birth, identity or passport number and address. The identity information must be verified using reliable, independent source documents, data or information. These requirements have been replicated and continue in the 2023 POCAML Regulations in Regulations 14 and 16 respectively, although the possibility of simplified CDD has been introduced, see paragraph 103. Beneficial ownership information held by the BRS is only available to competent authorities and therefore reporting institutions do not have access to this information for their due diligence procedures.

101. A reporting institution was required by the 2013 POCAML Regulations to conduct ongoing due diligence on its customers and develop risk based systems and procedures (Regulation 29). Regulation 12 of the 2013 POCAML Regulations also required a reporting institution to conduct ongoing due diligence on the business relationship although there was no specified frequency for carrying out updates in the Regulations or in any guidance issued by supervisory authorities of reporting institutions

that could give practical effect to these requirements and this remains the case. The 2023 POCAML Regulations carry over substantially the same requirements to Regulations 35 and 14 respectively, however the new Regulation 35 has additional detail that ongoing due diligence includes:

> ensuring that documents, data or information collected under the CDD process is kept up to date and relevant, by undertaking reviews of existing records, particularly for higher risk categories of customers

102. Representatives of the banking sector, including the Bankers Association of Kenya, met at the onsite visit stated that "ongoing" is understood to mean at least one, three or five years for high, medium and low risk customers respectively, and that this is comprehensively applied by banks in Kenya, although no source for the banks' understanding of these timeframes was identified. Practice for other reporting institutions has not been ascertained.

103. Scope for reporting institutions to conduct simplified due diligence was not provided under the 2013 POCAML Regulations, however the ability to do so was introduced in the 2023 POCAML Regulations. A reporting institution may apply simplified due diligence measures where lower risks have been identified and where the simplified measures are commensurate with the lower risk factors. This is subject to the further condition that such measures shall not be applied by a reporting institution whenever there is suspicion of money laundering, terrorism financing or proliferation financing, or specific higher risk scenarios apply. No further clarity or specification of simplified due diligence measures are provided in the regulations or in any guidance on these new measures issued to clarify that even where simplified due diligence is carried out, beneficial owners must still be identified before the customer relationship is established, even if verification of such information follows later. It is therefore possible that beneficial ownership information on a customer may not be fully obtained, verified or updated when customers are assessed as low risk, and this could apply to customers that are companies. Kenya should ensure that beneficial owners of companies are required to be identified in cases where simplified CDD is applicable (see Annex 1).

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

105. Regulation 17 of the 2013 POCAML Regulations permitted a reporting institution to rely on the procedures carried out by an introducer and the documentation held by the introducer and this Regulation is replicated without change as Regulation 19 under the 2023 POCAML Regulations. A relevant introducer can only be either an eligible introducer or group introducer. An eligible introducer is one that is regulated under the POCAMLA or similar law in an equivalent jurisdiction, or is subject to rules of professional conduct relating to the prevention of money laundering; and is based either in Kenya or in an equivalent jurisdiction. A group introducer is one that is part of the same group as the reporting institution and is, for anti-money laundering purposes, subject to supervision or regulation by a regulator in Kenya or an equivalent jurisdiction. An equivalent jurisdiction must be specified in guidelines issued by Kenya's Financial Reporting Centre (FRC)[15] and the jurisdiction must have anti-money laundering standards comparable to Kenya. No equivalent jurisdictions have been specified by the FRC.

106. In order to rely upon the introducer's procedures, the reporting institution must be satisfied that these meet the requirements of the POCAMLA or any code or guidelines issued by a supervisory authority. The reporting institution is required to keep a copy of customer identification documentation held by an eligible introducer but is not required to keep a copy of the documentation held by a group introducer, so long as they are satisfied that they can obtain it from the group introducer upon request. The Central Bank has further clarified these requirements in Guideline CBK/PG/08 which sets that an institution can only rely on an introducer when: i) the relevant CDD information is immediately obtained; ii) copies of identity and other documentation will be made available on request and without delay; and iii) the institution ensures that the introducer is regulated, supervised or monitored by a competent authority and the introducer's CDD and record keeping is in line with international best practice. Ultimate responsibility remains with the reporting institution. The introduced business requirements meet the standard.

Companies Law requirements

107. The Companies Act was amended in July 2019 to insert section 93A, which requires every company to keep a register of its beneficial owners. The company must also lodge a copy of the register with the Companies Registrar, and every company, other than a public listed company, must lodge a copy of any amendment to the register within 14 days of making the amendment. Prior to 15 September 2023 the location where the

15. The Financial Reporting Centre has extensive powers under the POCAMLA. It may issue instructions, orders and directions, including to a specific reporting institution.

register must be kept was not specified, however from that date it is required that the register be kept at the registered office of the company in Kenya.

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

109. The Regulations also provide for a process for a company to obtain identity information on its beneficial owners. According to the Regulations the company must give notice to a person that it knows or reasonably believes is a beneficial owner, requiring the person to provide the information required to be held in the register. The receiver of the notice has 21 days to comply. The process under which a company would necessarily be in a position to identify its beneficial owners to serve such a notice on when a shareholder is a legal entity is unclear, particularly as the example notice issued by the BRS in guidance[16] in 2023 is addressed to the "Member" and appears only to contemplate the situation where the member itself is a natural person beneficial owner. This is reinforced by the heading to the example notice: "Notice to Members identified as BOs to submit the required BO Information". While the example notice will gather additional information on whether the member is acting in the capacity of nominee or trustee and other content in the guidance is consistent with requirements to look through shareholders that are legal entities to identify beneficial owners through a chain of ownership or control, it is difficult to reconcile this with the design of the notice and the procedures.

110. If there is a failure to comply with the notice, then a further warning notice must be issued, following which a continued failure will result in restrictions over the relevant interest in the company (the relevant interest is that which the company knows or reasonably believes is the subject of the beneficial ownership). The restrictions have the effect of making any transfer of the interest void and no payment, rights or issue of shares may occur in respect of the interest and the restrictions cannot be lifted until after there is compliance with the original notice. The company is required to inform the Companies Registrar of the restriction within 14 days of putting it in place. In the Regulations there is a partial mismatch between the subject of the notice and the persons whose rights can be suspended in cases where the beneficial owner is a natural person whose interest in the company is indirect,

16. Guide on Beneficial Ownership Information Requirements: www.brs.go.ke/wp-content/uploads/2023/03/Guide-on-Disclosure-of-Beneficial-Ownership-Information.pdf.

such as through a legal entity: while the subject of the company notice is a possible beneficial owner, the person whose rights would be suspended is the legal owner. The BRS states that the way that it is applied in practice is that the notice is given to a legal owner to compel that legal owner to provide details of its beneficial owners. No notifications of restriction have been filed with the BRS, so the basis of its understanding of practices is unclear. The lack of compliance activities as described in paragraphs 127 to 129 also means that this understanding, as well as whether the operation of the procedures described in paragraph 109 are correctly identifying and obtaining beneficial ownership information in practice, has not been sufficiently determined and monitored in practice, **and the related recommendation at paragraph 130 is relevant**.

111. In addition to the mandatory notice requirements, the BRS has issued guidance which includes a non-exhaustive list of steps that a company may follow as reasonable steps, including reviewing documents in the company's possession, details of rights to dividends and distributions, and any evidence that may show interests or rights held through a variety of means may ultimately be controlled by the same person. The list is headed as: "Companies may identify their BO(s) by employing at least one or more of the following measures". Taken in the context of the guidance overall, this should be read as selecting all necessary measures to identify all beneficial owners required by the standard. **The operation of measures used by companies has not been sufficiently determined and monitored in practice, and the related recommendation at paragraph 130 is relevant**.

112. The definition of beneficial ownership under the Companies Act is as follows:

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

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

114. However, sub regulation 3(2) then states that:

> For the purpose of these Regulations, a beneficial owner of a company shall be a natural person who meets any of the

following conditions whether individually or jointly[17] in relation to the company –

(a) holds at least 10% of the voting right in the company either directly or indirectly;

(b) exercises at least 10% of the voting rights in the company either directly or indirectly;

(c) holds a right, directly or indirectly, to appoint or remove a director of the company; or

(d) exercises significant influence or control, directly or indirectly, over the company.

115. Sub regulation 3(2) therefore operates to clarify the definition of beneficial owner in the Act, including providing a threshold for ownership or control. It also makes it clear that ownership or control may be direct or indirect and that control will include a person acting individually or jointly.

116. The original definition did not directly specify a requirement for the identification of the individuals holding a senior managerial position in cases where a beneficial owner cannot be identified. However, in Guidance issued by the BRS in support of the Regulations, it was explained that where no natural person is identified under (a), (b) or (c) of the definition in the Regulations, the company should identify other natural persons exercising control including persons with control through positions held in the company. The requirement was subsequently reinforced by an amendment to the Regulations in October 2023 which define significant control to include control through positions held within a legal person including senior managing officials.

117. The BRS by notice published on 13 October 2020 declared that the Registrar of Companies' Beneficial Ownership E-Register was operationalised with effect from that day. The notice required every company to comply with the Regulations by submitting a copy of their beneficial ownership register within 30 days from completing its preparation. When read with the steps for completion of the Register as specified in the Regulations applicable before 19 October 2023, this could effectively allow for an indefinite timeframe as those Regulation did not specify times for completing the steps to gather information to prepare the register.[18] Notwithstanding this apparent

17. Sub regulation 3(2) was amended to add the words "whether individually or jointly" with effect from 24 February 2022.

18. Guidance described timeframes to be used in notices issued by the company to members in which members would be required to respond, but these would not constitute a timeframe within which the company must complete its preparation of the register.

anomaly, a further notice published on 30 October 2020 granted an extension until 31 January 2021. On 27 January 2021 the BRS issued a further extension, stated to be final, until 31 July 2021. On 30 June 2022 there were 233 002 entities that had submitted beneficial ownership information out of 659 196 registered companies, or in percentage terms 35.3%. According to the BRS the percentage had increased to 57.3% by October 2023.

118. The Companies Act was amended with effect from 15 September 2023. Section 93A was repealed and replaced, generally keeping the previous requirements introduced during the review period, with some additions and adjustments. The provision of beneficial ownership information is now a prerequisite to initial registration of a Kenyan company, which was not provided for prior to the amendments. New subparagraph 93A(3)(b) resolved the previous lack of required timeframe described in paragraph 117 by requiring that existing companies must comply with the requirements within 60 days of the provision coming into force, i.e. by 14 November 2023, although the Registrar could extend this by a further 30 days. Another change is that public companies are now required to inform the Registrar of any subsequent changes in their register of beneficial owners, although the time allowed is 30 days instead of 14 days for non-public companies.

119. While there is a timeframe within which the Registrar must be informed of changes to beneficial ownership information following the company updating its own register, until recently there were no requirements on the company that would prompt the identification of any changes necessary. The Company Regulations applicable from 19 October 2023 introduced a new requirement in Regulation 5A that a company shall, "from time to time, validate, review, verify and update information on its register of beneficial owners". No further specification or guidance has been issued on the frequency within which such review should occur and therefore, considering that the AML framework also does not specify a frequency of updating CDD by AML-obliged persons (see paragraph 101). **Kenya is recommended to ensure that in all cases complete and up-to-date beneficial ownership information is available in line with the standard**.

120. Foreign companies registering in Kenya are now also required to provide beneficial ownership information to the Registrar as a condition of registration, and those already registered at the time of enacting the new section 93A on 15 September 2023 must create a register of their beneficial owners and keep it up to date. The timeframe for foreign companies already registered is the same as for domestic companies as described in paragraph 118 (i.e. by 14 November 2023, with the possibility of a 30 day extension). However, unlike domestic companies, foreign companies are not required to update their register. As these changes were only introduced recently, no information is available on implementation.

121. The retention periods for beneficial ownership information kept by a company and lodged with the BRS are as described in paragraph 54.

Beneficial ownership information – Enforcement measures and oversight

Enforcement of the Anti-money laundering requirements

122. Overarching enforcement and oversight of reporting institutions under the AML framework is the responsibility of the Financial Reporting Centre. The Financial Reporting Centre has extensive powers under the POCAMLA. It may issue instructions, orders and directions, including to a specific reporting institution. It may impose civil penalties for noncompliance of up to KES 5 000 000 (EUR 31 400) on a natural person and up to KES 25 000 000 (EUR 157 000) on a corporate body (section 24B). It may issue orders to competent authorities requesting suspension or revocation of a licence, registration, permit or authorisation. A reporting institution that fails to comply with the CDD obligations of the POCAMLA commits an offence (section 11). Upon conviction, a natural person is liable to imprisonment up to seven years or a fine up to KES 2 500 000 (EUR 15 700), or both. A body corporate is liable on conviction to a fine up to KES 10 000 000 (EUR 63 000) or the value of the property involved in the offence, whichever is higher. If a director, manager, secretary or other officer of the body corporate is involved in committing the offence then both that natural person and the body corporate may be prosecuted.

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

124. In the case of a bank, and separate to the sanctions above, under section 33 of the Banking Act the Central Bank may take a range of actions ranging from providing advice or recommendations to an institution, through to issuing directions to the institution. Failure to comply with a direction is an offence punishable by a fine of up to KES 100 000 (EUR 630) for a body corporate and in the case of an officer of the institution, a fine of up to KES 50 000 (EUR 314) or imprisonment up to two years, or both.

125. As noted at paragraph 34, a mutual evaluation review (MER) of the compliance of Kenya's financial sector with the AML/CFT standard was published in September 2022 and its review period covered most of the same

review period of this report, except for the final six months. At the onsite visit for this report, meetings were held with the Central Bank, representatives of financial institutions and other AML-obliged persons. While the information gathered included statistics on supervisory activities and enforcement by the CBK and other supervisors for this peer review period that extended beyond that reviewed in the MER, there was no material change in activities through the years. While the CBK has a good understanding of beneficial ownership and carries out some inspections each year, the coverage across all banks is small, being only four in each of the years 2020 to 2022 and which was not dissimilar to previous years. The CMA carried out prudential onsite inspections although these also have limited coverage, do not necessarily include review of AML obligations and are insufficient to understand or ensure compliance across the sector that it supervises. It remains the case that DNFBPs have not been subject to any supervisory activities on the AML obligations of their regulated persons.

Enforcement of the Company Law requirements

126. Enforcement and oversight of the ownership information obligations in the Companies Act is the responsibility of the Registrar of Companies. From introduction of the beneficial ownership requirements in 2020 and until 15 September 2023, failure to comply with the beneficial ownership information requirements of section 93A of the Companies Act was an offence for which, on conviction, the company and each officer of the company in default was liable to a fine of up to KES 500 000 (EUR 3 140). Continued failure after conviction was subject to a fine of up to KES 50 000 (EUR 314) per day of continued failure. The Act was amended to repeal and replace section 93A with effect from 15 September 2023 and could be described as a "reset" to both encourage compliance and to increase the options available to the BRS to enforce obligations. It now provides for a series of sanction possibilities that begin with an administrative penalty of KES 2 000 (EUR 13) on the company and each officer of the company, with a further KES 100 (EUR 0.6) for each day of default. If a company had not complied by 15 November 2023, it is an offence for which, upon conviction, the company and each officer of the company is liable to a penalty of KES 500 000 (EUR 3 140) and on further conviction for remaining in default, KES 50 000 (EUR 314) for each continuing day of default. Alternatively, and not limited by whether penalties have been imposed, the Registrar may issue a direction to comply within 14 days, failing which it will commence strike off procedures.

127. As described at paragraph 76, Kenya has placed much reliance on the operationalisation of the BRS as a precursor to enable compliance checks to be carried out and the approach taken by the BRS has been to deny services to companies that fail to provide their information to the BRS.

In June 2022 the BRS issued compliance notices to more than 89 000 companies that had linked prior to the introduction of the beneficial ownership requirements in September 2020, however there has not yet been substantial enforcement action against companies who failed to act on these notices.

128. No compliance activities such as field visits or inspections have been carried out to verify compliance by companies in maintaining their own beneficial ownership records. Around half of registered companies have not registered electronically with the BRS through the Link a Business programme and not all of those who have done so have notified their beneficial ownership information. Beneficial ownership information is therefore not available for significantly more than half of all companies. It is possible that compliance action by the BRS has been limited to striking off a small proportion of these noncompliant companies, as inactive.

129. In addition, there is no verification of ongoing compliance by those companies who have registered their information. Recent amendments to company law will enhance the Registrar's ability to enforce compliance.

130. In conclusion, while a foundation has been laid for the BRS to ensure the availability of beneficial ownership with company law requirements providing the primary source for such information, enforcement to ensure compliance with these requirements is incomplete. Information may be available with banks and other AML-obliged persons as a secondary source to supplement information from the BRS, however the limited supervision across AML-obliged persons does not provide adequate assurance of this. The inadequate monitoring also casts doubt on whether customer due diligence would be sufficiently up to date, particularly for nonbank reporting institutions – see paragraph 101). **Kenya is recommended to ensure the availability of beneficial ownership information on companies by carrying out adequate oversight and enforcement**.

Availability of beneficial ownership information in EOIR practice

131. During the review period Kenya received 18 requests for beneficial ownership information. There were 2 requests where the information was not held by the BRS and the KRA obtained it from the companies concerned. Peers expressed satisfaction with the responses from Kenya and raised no concerns.

A.1.2. Bearer shares

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

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

133. Section 504 of the Companies Act was further amended in March 2020 to require any company in respect of which a bearer share is in issue to ensure that the share is converted into a registered share. Any right attached to a bearer share was rendered un-exercisable unless the bearer share was converted. A nine month transition period for conversion was provided, which ended on 20 December 2020. Companies were required to notify the Registrar of any conversion within 30 days of the conversion. After that time bearer shares are no longer valid. A company and each officer of the company that failed to comply with the requirement to convert a bearer share was deemed to have committed an offence liable on conviction to a fine of up to KES 500 000 (EUR 3 140), and up to KES 50 000 (EUR 314) per day for continued failure after the initial conviction.

134. Kenya reports that no conversions of bearer shares have been reported to the Registrar under the procedure required by the Companies Act, which it concludes is consistent with its search in 2015 that found no company had provided for their issuance. The Kenyan authorities believe that the finality of the conversion requirement in 2020 closed any possibility of bearer shares or rights in connection with such shares being restored if they had ever existed, and no evidence of their existence has ever been found. The authorities also state that given the conversion procedure that was available, no Court would entertain any subsequent action for restoration of rights. The recommendation is therefore removed on the basis that in the event that any bearer shares previously existed, these have been irrevocably extinguished.

A.1.3. Partnerships

135. The 2016 Report found that the legal and regulatory framework in Kenya required the identification of partners of a partnership in accordance with the standard and that the legal framework had been adequately implemented in practice. There has been no change in the tax law requirements upon which that conclusion was based, however new requirements have been enacted for limited liability partnerships as described below.

Types of partnerships

136. Partnerships can be established under the Partnerships Act without legal personality (general partnerships and limited partnerships) or under the Limited Liability Partnership Act (LLPA) (limited liability partnerships, which are legal entities with legal personality). A **general partnership** is one where every partner is liable jointly with the other partner(s) for all debts and obligations of the partnership incurred while they are a partner. A **limited partnership** is constituted by one or more general partners (liable as in a general partnership) with one or more limited partners contributing capital whose liability is limited to the amount of the capital contributed. In the case of a **limited liability partnership**, the partners are generally not liable for debts or obligations incurred by the partnership. Foreign partnerships created or governed under foreign laws can do business in Kenya.

Identity information

137. All limited partnerships and limited liability partnerships carrying on a business in Kenya must be registered with the Registrar[19] and upon registration, details of all partners must be submitted. At June 2022 there were nil limited partnerships and 2 688 limited liability partnerships registered. Limited liability partnerships are not recognised as such unless registered. A limited partner is only recognised as such if registered as such. Any changes in the ownership of limited partnerships must be notified within 28 days. The Registrar has oversight and enforcement powers for limited partnership and limited liability partnership registration and identity information.

138. General partnerships may also register with the Registrar but there is no obligation to do so. On 30 June 2022 there were no general partnerships registered.

139. The LLPA was amended with effect from 15 September 2023 to introduce a range of new record keeping and filing obligations. A limited liability partnership must keep at its registered office a copy of the partnership agreement and any change to it, and also keep a register of the name and address of each partner and the manager of the partnership. The registered office must be in Kenya. These must be kept for a minimum of seven years. It must lodge a copy of the partnership register with the Registrar upon initial registration or, if in existence at the time of effect of the amendment to the

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

Act, within 30 days. Subsequently, in the event of any change in the details registered with the Registrar, it must lodge a statement detailing the change and the date of effect of the change within 14 days. Any failure to comply is subject to a penalty up to KES 500 000 (EUR 3 140). The identity of the partners must also be included in an annual return.

140. A foreign limited liability partnership is not permitted to carry on business unless registered as a foreign limited liability partnership. Contravention by a person is an offence liable to a penalty of up to KES 250 000 (EUR 1 570). A foreign limited liability partnership is subject to the same requirements on records and filing as described in paragraph 139 for domestic limited liability partnerships, including having a registered office in Kenya. In addition, it must appoint at least one local representative who must be either a permanent resident or a Kenyan citizen who ordinarily resides in Kenya.

141. Providing false information or causing false information to the Registrar is an offence subject to a fine up to KES 100 000 (EUR 630) or six years imprisonment or both. The Registrar must retain the originals of all documents

142. All forms of partnership in Kenya, domestic or foreign, deriving income subject to tax in Kenya must be registered for tax purposes. On 30 June 2022 there were 51 666 partnerships registered with the KRA. Registration does not distinguish between domestic or foreign. Upon registration, all partners must be identified and the ITA requires the filing of an annual tax return with a schedule containing the names and addresses of the partners for every subsequent year from registration. There is no income threshold for this requirement. The KRA will retain these records, at a minimum, for the period within which an assessment may be amended which is generally five years from submission of the return. Failing to register is an offence liable to sanction as described in paragraph 62 and failing to lodge a tax return or making a false statement including by omission are also offences subject to a fine of up to KES 1 000 000 (EUR 6 300) or imprisonment up to three years or both. During the review period 52 partnerships were sanctioned for failing to register, 18 219 were sanctioned for failing to file a tax return (a number that was boosted by a voluntary disclosure programme in 2021), and 950 were sanctioned for making false statements.

Beneficial ownership

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

144. The amendments to the LLPA with effect from 15 September 2023 also introduced requirements to identify beneficial owners of limited liability partnerships. A definition of beneficial owner was added through reference to the meaning of the term under the Companies Act, which will also incorporate the further details in the Regulations made under that Act. The definition is described at paragraphs 112 to 115. An obligation on the limited liability partnership to maintain a register of its beneficial owners was also introduced, and this must be filed with the Registrar upon initial registration or, for existing limited liability partnerships, within 60 days of the amendment coming into effect. Any change in details in the register must be lodged with the Registrar within 14 days of the change. These new requirements on limited liability partnerships are provided in section 31B of the LLPA and mirror the requirements on companies as amended from 15 September 2023 and described at paragraphs 118 to 121, including application to foreign limited liability partnerships registered in Kenya and the applicability of penalties as described in paragraph 126. A record of the details of a beneficial owner must be retained for at least ten years after ceasing to be a beneficial owner. No procedure has been specified under the LLPA on how the partnership should obtain or compel the provision of information from partners. Noncompliance is subject to an initial administrative penalty up to KES 2 000 (EUR 13) on the partnership and each manager of it, with further daily penalties applicable and higher amounts applicable on conviction. The Registrar is also authorised to strike off a limited liability partnership that fails to comply within 14 days of a direction to do so.

145. While the definition of beneficial owner in the Companies Act and relied upon by the LLPA by cross reference does not explicitly include a senior managing official in default of any other person being identified as a beneficial owner, the Guidance issued by the BRS as described in paragraph 116 may be read as requiring the same interpretation for limited liability partnerships. In any case the LLPA has the requirement that at least one natural person resident in Kenya is notified to the Registrar on registration as being a manager of the limited liability partnership and which must be recorded, filed, updated and retained under the same requirements as described at paragraph 139. Therefore, beneficial ownership information is required to be available through a combination of legal requirements.

146. At the same time as the beneficial ownership obligations were introduced to the LLPA, a further obligation to maintain a register of nominee partners was introduced. This requires a record identifying when a partner is acting as a nominee and the name and address of their nominator and the filing and updating requirements are the same as described at paragraph 144. Under regulations subsequently issued under the amended LLPA, nominees are also obliged to inform the partnership that they act in a nominee capacity. A record retention period has not been imposed on

the limited liability partnership, although filed records will be held by the Registrar indefinitely. A penalty of up to KES 2 000 (EUR 13) applies to non-compliance, with the partnership and the manager(s) each separately liable.

147. There is no obligation under tax law to report information on the beneficial ownership of partnerships to the KRA or BRS. Kenya's AML framework therefore provided the basis for the availability of beneficial ownership on general partnerships, limited partnerships and limited liability partnerships during the review period and this remains the case, except that it will become a secondary source of information for limited liability partnerships following the implementation of the requirements in the LLPA as described in paragraphs 144 to 146.

148. The CDD requirements in Regulation 12 of the 2013 POCAML Regulations (now substantially transposed to Regulation 14 of the 2023 POCAML Regulations) include, in relation to both legal persons and arrangements, a requirement to identify and take reasonable measures to verify the identity of their beneficial owner(s). Oversight and enforcement for beneficial ownership information on partnerships are similar to those described for the AML framework relevant to companies under A.1.1.

149. The POCAML Regulations (formerly Regulation 15, now Regulation 17) provide for specific measures for identification of partnerships. Regulation 15 specifically provides that the reporting institution must obtain:

- the name of the partnership or its registered name
- the partnership deed
- its registered address or principal place of business or office
- its registration number
- the full names, date of birth, identity card number or passport number and address of every partner
- the person who exercises executive control over the partnership
- the name and particulars of each natural person who purports to be authorised to establish a business relationship or enter into a transaction on behalf of the partnership
- unaudited financial statements.[20]

150. The identity details for each partner of the partnership as required by Regulation 15 (now 17) only applies when the partner is a natural person. In a case where a partner is a not a natural person, Regulation 12 (now 14)

20. The 2023 Regulations now allow for an exemption from providing financial statements if the partnership has existed for less than a year.

will nevertheless apply to require identification of the beneficial owners holding an interest in the partnership through the partner that is a legal entity or arrangement.

151. The above provisions will only apply when a partnership engages an AML-obliged person. It is also unclear whether and how the new possibility for simplified CDD available under the AML framework will apply to partnerships. (see paragraph 104). There is no legal requirement for a partnership to have a bank account, nor is there any other requirement to engage an AML-obliged person. Therefore in situations where a partnership has not engaged an AML-obliged person, beneficial ownership information would not be available, and while the changes to the LLPA have introduced requirements that will resolve this for limited liability partnerships (as described in paragraphs 144 to 146) the reliance on the AML framework will remain the case in respect of general partnerships and limited partnerships. **Kenya is recommended to ensure that beneficial ownership information in line with the standard is always available for all general partnerships and limited partnerships**.

Oversight and enforcement

152. The KRA has actively enforced registration and filing obligations on partnerships (see paragraph 142), which covers all forms of partnership in Kenya and this supports tax law as providing a source of identity information on partners for all partnerships. No information has been provided on compliance levels or enforcement activities by the Registrar in relation to the obligation on limited liability partnerships to keep identity information filed with the Registrar up to date. The beneficial ownership obligations in the LLPA were introduced recently and these obligations will be the primary source of beneficial ownership information going forward, however there has not yet been time for these to be monitored by the Registrar for compliance. **Kenya is recommended to ensure the availability of beneficial ownership information on limited liability partnerships by carrying out adequate oversight and enforcement**.

153. The AML framework was the only source of available information on beneficial ownership of all partnerships during the review period and will remain so for general partnerships and limited partnerships. However, the level of supervision by reporting institutions ranges from insufficient in the case of banks to non-existent in the case of DNFBPs (see paragraph 125). **Kenya is recommended to ensure the availability of beneficial ownership information on general partnerships and limited partnerships by carrying out adequate oversight and enforcement**.

Availability of identity information on partnerships in EOIR practice

154. Kenya did not receive any requests for information in relation to partnerships during the review period.

A.1.4. Trusts

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

Requirements to maintain identity information in relation to trusts

156. The findings in the 2016 Report in relation to identity information for trusts remains the same. The Report found that all Kenyan trusts and foreign trusts chargeable to tax in Kenya must be registered for tax purposes and file an annual tax return with the KRA detailing information in respect of the beneficiaries. On 30 June 2022 there were 1 983 trusts registered with the KRA. At the time of registration, the trust deed, which will contain information on the trustee, settlor and the beneficiaries, must be filed with the KRA. Since January 2015, any trust carrying on business in Kenya must notify the KRA of any change in particulars in the identity and address of trustees, settlors and beneficiaries. The KRA will retain these records, at a minimum, for the period within which an assessment may be amended, which is generally five years from submission of a tax return to which the information relates. Under the AML framework, a reporting institution must determine for whom a trustee is acting and therefore information on the settlor, trustees, beneficiaries and any other natural person exercising ultimate effective control over the trust must be obtained; however there is no obligation for all trusts to engage in a relationship with an AML-obliged person. Finally, the fiduciary duties arising under common law should require the trustee to have full knowledge of the beneficiaries and in certain cases the settlors.

157. The 2016 Report concluded that identity information in respect of trusts may not be available in all cases, particularly when a trust is not chargeable to tax in Kenya and the trustee does not transact with or engage an AML-obliged person. This remained the case during the review period, especially as trustees do not need to be licensed and at least until recently have not been reporting institutions under Kenya's AML framework (however see paragraphs 164 to 165 concerning legal professionals and the uncertainty over their relevance to trusts in the future).

Beneficial ownership requirements for trusts

158. While the tax law requires the provision of information to the KRA on settlors, trustees and beneficiaries as described in the 2016 Report and summarised in paragraph 156, it does not provide an obligation to look through these persons to the underlying beneficial owners in the event that the person is a legal entity or arrangement. The tax law also does not require the identification of the protector(s) of a trust (if any) or any other natural person exercising ultimate effective control over the trust. Kenya's AML framework therefore provides the primary basis for the availability of beneficial ownership of trusts. Throughout the review period Regulations originally issued under the POCAMLA in 2013 were applicable. These were replaced by new Regulations in force from 6 October 2023. The application of both are discussed below.

159. As discussed in paragraph 148, the CDD requirements in Regulation 12 (now 14) of the POCAML Regulations include, in relation to both legal persons and arrangements, a requirement to identify and take reasonable measures to verify the identity of the beneficial owner of a legal person or arrangement. Oversight and enforcement for beneficial ownership information on trusts are similar to those described for the AML framework relevant to companies under A.1.1.

160. Regulation 16 of the 2013 POCAML Regulations provided for specific measures for identification of trusts. Particulars that a reporting institution is required to obtain include:

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

161. Regulation 16 of the 2013 POCAML Regulations used the word "names" instead of "identities" in relation to identifying persons associated with the trusts, which may result in a lower standard of knowledge of these persons, for example by only obtaining a name that is a relatively common name. Regulation 19 further reiterated that in relation to any legal person or arrangement, the reporting institution must be *able* to identify (rather than explicitly identify) and take reasonable measures to verify the natural persons behind the legal person or arrangement, leaving open the

possibility that the reporting institution would not conduct the identification and verification when required.

162. The 2023 POCAML Regulations have made improvements in relation to CDD for trusts, with the former requirements described above retained in the new Regulation 18 but supplemented and clarified by additional requirements. Trustees are required to disclose their status to the reporting institution when forming a relationship. The reporting institution is under an obligation to identify and verify the identity of an applicant seeking to enter into the business relationship and take reasonable measures to verify the true identity of existing customers. Regulation 18 also goes on to require the reporting institution to identify and take reasonable measures to verify the identity of beneficial owners as follows:

- for trusts, the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust including through a chain of control or ownership;
- for other types of legal arrangements, the identity of persons in equivalent or similar positions.

163. Regulation 36 of the 2013 POCAML Regulations required reporting institutions to retain records of CDD and the results of any inquiries and analysis undertaken for a minimum of seven years from the termination of an account or business relationship. These requirements are retained in Regulation 42 of the 2023 POCAML Regulations.

164. The POCAMLA was amended in 2018 to extend the definition of designated non-financial businesses or professions to include trust and company services providers (TCSPs), who as a consequence became reporting institutions. While the name of this profession includes reference to trusts, in Kenya TCSPs are generally certified secretaries providing services to companies. Kenya advises that lawyers are the main service providers for the creation of trusts and lawyers were not reporting institutions in Kenya during the review period. The POCAMLA was amended in January 2022 to add legal professionals to the definition of designated non-financial businesses or professions, however this was challenged and the Kenyan High Court issued an order staying the amendment from taking effect. Around the time of, and in connection with, amendments to the POCAMLA in force from 15 September 2023 the court case and the related order were withdrawn and the Law Society of Kenya was designated as the AML supervisor of lawyers, notaries and other independent legal practitioners by those amendments. Supervisory arrangements in this regard are yet to be put in place.

165. Trustees generally not being AML-obliged persons themselves (unless they otherwise meet the definition of reporting institution), the above provisions will only apply when a trustee engages an AML-obliged person. While legal professionals engaged at the creation of trusts may be a source of information on trusts in the future, the relevant obligations imposed on them have only recently been introduced and it is not yet possible to assess implementation of this in practice. The extent to which legal professionals would have an ongoing relationship with a trust after its creation and update the CDD is also unknown, and trusts created before these obligations were imposed on legal professionals would not be covered if no ongoing relationship exists. There is no legal requirement for a trustee to have a bank account, nor is there any other requirement to engage an AML-obliged person. Therefore in situations where an AML-obliged person has not been engaged beneficial ownership information would not be available. **Kenya is recommended to ensure that beneficial ownership and identity information is available for all relevant trusts in line with the standard**.

Oversight and enforcement

166. No information has been provided in relation to compliance levels or enforcement activities by the KRA in relation to the obligations on trusts (trustees) to register and keep identity information up to date. Under Guidelines issued by the Central Bank, trusts in all cases are to be treated as high risk and therefore banks may hold reasonably up to date information on trusts to the extent that a bank account is maintained in connection with a trust. As trusts are always required to be treated as high risk, the new simplified CDD available under the AML framework (see paragraph 104) would not be applicable to trusts. However, the level of supervision by AML-obliged persons ranges from insufficient in the case of banks to non-existent in the case of DNFBPs (see paragraph 125). **Kenya is recommended to ensure the availability of beneficial ownership information on trusts by carrying out adequate oversight and enforcement**.

Availability of trust information in EOIR practice

167. Kenya did not receive any requests for information in relation to trusts during the review period.

A.1.5. Foundations

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

Other relevant entities and arrangements

169. As described in the 2016 Report, co-operative societies can be established in Kenya under the Co-operative Societies Act, and there have been no changes to this law since the previous review. All co-operatives must be registered and may do so only when they have as their objective the promotion of the welfare and economic interests of their members in accordance with the co-operative principles. At June 2023 there were 26 174 co-operatives registered with the Commissioner for Co-operative Development. Co-operatives can fall into one of two categories:

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

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

171. All co-operatives are required to keep a list of their members at their registered office, open for inspection by any person. The register of members must contain details of the date of becoming a member, the date of cessation and the number of shares held. Inspections of co-operatives are conducted from time to time by local county authorities. Annual returns must also be filed with the State Department for Co-operatives and this authority conducts annual compliance checks in each of the 47 counties in Kenya to verify the activity status of co-operatives and compliance with requirements to prepare annual audited accounts. Statistics on these activities are not available.

172. As membership of a primary society is limited to individual persons who will, due to the factors and limitations described in paragraph170 be expected to also be the beneficial owners, the beneficial ownership of the primary society will be recorded in both the registry held by the Commissioner for Co-operative Development and at the registered office of the co-operative. The Commissioner will also have information on the membership of primary societies in co-operative unions.

173. For tax purposes co-operatives are treated as companies. A co-operative that derives taxable income in Kenya is required to register with the KRA and lodge tax returns. On 30 June 2023 there were 696 co-operatives registered with the KRA and 576 of these had filed tax returns for the

prior year. Information on the members of the co-operative is provided at registration and is verified with supporting documents, however subsequent tax returns do not include the members' ownership information.

174. Considering the structure and use of co-operatives in Kenya and their related obligations, the legal and beneficial ownership of a co-operative is available in Kenya. No requests for information on co-operatives were received during the review period.

A.2. Accounting records

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

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

176. The 2016 Report noted that trustees of Kenyan and foreign trusts were only statutorily required to maintain accounting records where the trust derives income subject to tax in Kenya. A recommendation was made that Kenya ensure that trustees of all Kenyan and foreign trusts maintain accounting records even where the trust derives income not subject to tax in Kenya. The recommendation was addressed through amendments in July 2023.

177. Supervision of accounting and record keeping obligations to ensure availability of records has mainly fallen to the KRA, which the 2016 Report concluded was comprehensive and this remains the case. Some reliance may also be placed on the Registrar of companies and limited liability partnerships as a source of information in some cases. Supervision and monitoring by the Registrar is not sufficient to assure the availability of these records, and the recommendation made in the 2016 Report relating to oversight is retained.

178. During the review period, Kenya received 45 requests for accounting information. No issues were reported by Kenya or its peers in obtaining such information in practice.

179. The conclusions are as follows:

Legal and Regulatory Framework: in place

No material deficiencies have been identified in the legislation of Kenya in relation to the availability of accounting information.

Practical Implementation of the Standard: Largely Compliant

Deficiencies identified/Underlying factor	Recommendation
Over the review period, although there was a system of oversight in place by the tax authorities, this may not cover all relevant entities in Kenya. New requirements relating to accounting records for trustees of trusts not subject to tax in Kenya have also only recently been enacted and these need to be incorporated into tax compliance activities. In addition, the Registrar did not have a regular oversight programme in place to monitor the compliance of the accounting record keeping obligations under the entity Acts.	Kenya is recommended to implement a comprehensive oversight programme to supervise the compliance with accounting record requirements to ensure that accounting records for all relevant entities are available in practice.

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

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

Company Law

181. Every domestic company and every foreign company carrying on business in Kenya is required by section 628 of the Companies Act to keep proper accounting records. Accounting records are only proper if they show and explain the transactions of the company and disclose with reasonable accuracy to the end of the previous three month period, the financial position of the company at that time at the end of that quarter. The accounting records must contain entries from day to day of all amounts received and spent by the company and the matters in respect of which the receipt and expenditure relates. Kenya states that the requirements of the Companies Act necessitate the maintenance of all underlying documentation such as invoices, contracts, etc.

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

183. Failing to keep proper accounting records is an offence for both the company and each officer of the company in default. The company is liable to a fine of up to KES 2 000 000 (EUR 12 600) and an officer may be fined up to KES 1 000 000 (EUR 6 300) or imprisoned for up to two years, or both.

184. The company must keep its accounting records at its registered office. The Companies Act requires a registered foreign company to have a registered office in Kenya. It is not explicitly required that a domestic company has its registered office located in Kenya, however the requirement is implicit and relevant registration and change of office address forms presume that the address is in Kenya. The company must preserve these records for at least seven years from when created. Section 630 allows for the possibility of a different retention period for a company in liquidation if any rules in force relating to such companies provide as such, but Kenya confirms that no such rules are in place. Kenyan law does not provide for re-domiciliation of companies.

185. Section 635 of the Companies Act requires the directors of a company to prepare financial statements for each financial year. Failure to do so renders each director liable to a fine of up to KES 1 000 000 (EUR 6 300). The directors may only approve a financial statement if satisfied that the statement gives a true and fair view of the assets, liabilities and profit or loss. A failure to fulfil this duty is liable to a fine of up to KES 500 000 (EUR 3 140). Section 638 requires that the financial statement comprise a balance sheet, a profit and loss account, a statement of cash flow and a statement of change in equity.

186. The financial statements required to be prepared must be audited, unless an exemption applies. An exemption is provided for dormant companies and qualified small companies. In general, a company is a qualified small company for a particular year if: i) its turnover is not more than KES 50 000 000 (EUR 314 000); and ii) its net assets in its balance sheet are not more than KES 20 000 000 (EUR 126 000).

187. In the case of a company that ceases to exist, section 904A of the Companies Act requires the officers of the company responsible for the last accounting records to ensure that these are preserved for seven years. In case a liquidator takes over the company, section 904A also ensures that the liquidator remains responsible for seven years after strike-off of the company. There is no requirement that these persons retain the records in Kenya.

Partnerships

188. Every partner in a partnership (including a foreign partnership carrying on business in Kenya) has an obligation to ensure that accounting records of transactions affecting the partnership are properly kept (section 16 of the Partnerships Act). The Partnerships Act does not specify a retention period, so this may apply indefinitely including after cessation of the partnership, however it may be expected that partners would retain

records for at least as long as claims in respect of each other could be made. Under the Limitation of Actions Act this would generally be six years, but may be longer when involving interests in land.

189. In addition, all limited liability partnerships (including foreign limited liability partnerships carrying on business in Kenya) are required to maintain accounting records that must give a true and fair view of the state of the partnership's affairs (section 30 of the Limited Liability Partnership Act). Section 2 defines accounting records to include invoices, receipts, orders for the payment of money, bills of exchange, promissory notes and vouchers; and such working papers and other documents as are necessary to explain the methods and calculations by which the accounts are made. In the case of limited liability partnerships ceasing to exist, section 33G was added to the LLPA with effect from 15 September 2023 requiring a manager of a limited liability partnership to keep records for at least seven years after strike off.[21]

190. The partnership and every partner in a limited liability partnership that fails to keep proper books of accounts is liable on conviction to a fine of up to KES 100 000 (EUR 630) or to imprisonment up to one year, or both. General or limited partnerships that fail to maintain accounting records are subject to penalties under tax law (see paragraphs 194 and 197).

Trusts and co-operatives

191. Under common law, all trustees of trusts (whether created in Kenya or outside Kenya) have a fiduciary duty to keep proper records and accounts for their trusteeship. It is the duty of a trustee to keep clear and distinct accounts of the property administered. The accounts should be open for inspection by the beneficiaries and in the event of default, a beneficiary is entitled to seek remedy from the court. A Kenyan court with jurisdiction over a trustee or trust may impose liability for costs on the trustee and in certain cases remove the trustee. A trustee that breaches these obligations may be held personally liable for any loss. Under common law, the fiduciary obligation to keep and retain these records extends for the life of the trust, and this would be extended by the further period under which claims against the trustee may be made, generally six years under Kenya's Limitation of Actions Act. However, there is no enforcement role played by a government authority that ensures compliance with these fiduciary obligations and therefore no ongoing supervision. In addition to these common law obligations, there are obligations on trustees under the tax law (see paragraph 195).

21. A manager, in relation to a limited liability partnership, means a person who is concerned with, or takes part in, the management of the partnership.

192. Every co-operative society must ensure that proper books of account are kept which give a true and fair view of the state of the co-operative's affairs and explain its transactions (section 25 of the Co-operative Societies Act). This includes all sums of money received and paid and the reasons thereto, all sales and purchases of goods and services, and all assets and liabilities of the co-operative. The books of account must be prepared in accordance with International Accounting Standards. The accounts must be maintained at the registered office of the co-operative society. The accounts must be audited annually and a copy filed with an annual return to the Commissioner for Co-operative Development. The auditor can require the production of any book or document relating to or belonging to the co-operative from any officer, agent, trustee or member having custody of such records. In the event that a co-operative is wound up, the liquidator must file periodic statements to the Commissioner for Co-operative Development. A record keeping requirement on wind up is not specified in the Co-operative Societies Act, however it may be expected that the liquidator will retain records as evidence of the performance of their duties if questioned by the Commissioner or a member of the former co-operative for at least so long as is necessary for that purpose. Under the Limitation of Actions Act this would generally be six years, but may be longer when involving interests in land.

Tax Law obligations

193. The 2016 Report described the record keeping requirements in the Income Tax Act and these remain the same, with the exception of the retention period which is discussed below. All persons carrying on business (including foreign companies that are managed and controlled in Kenya or with a permanent establishment in Kenya) must keep records of all receipts and expenses, goods purchased and sold, and accounts, books, deeds and vouchers which in the opinion of the Commissioner are adequate for the purpose of computing tax. Kenya states that this requires the maintenance of items such as invoices, vouchers and contracts. For this purpose, "carrying on business" includes any activity giving rise to income other than employment income. The record keeping requirement in the Income Tax Act is not explicitly limited to income subject to tax in Kenya, and therefore would apply to the non-Kenyan source income of a body of persons resident in Kenya (see paragraph 26) to the extent necessary to prove the income that is non-taxable. Failure to keep the required records is subject to a penalty of up to KES 20 000 (EUR 126). The person is required to file an annual tax return accompanied by a copy of the accounts relating to the income year.

194. As partnerships are considered transparent for tax purposes, the record keeping obligations are imposed on the partners. Partners who

fail to keep the required records are liable to a fine of up to KES 100 000 (EUR 630) or imprisonment up to six months or both.

195. The trustee of a trust carrying on business in Kenya is subject to the Income Tax Act record keeping requirements to the same extent as for companies. As was found in the 2016 Report and remained the case through the review period, trustees of Kenyan trusts and foreign trusts were only statutorily required to maintain accounting records where the trust derives income subject to tax in Kenya. If a trust is a foreign trust (registered outside Kenya) with a trustee resident in Kenya and the income generated is not subject to tax in Kenya, for example, because it is not derived from carrying on a business at least partly in Kenya, it would not have been covered during the review period. However the TPA was amended with effect from 1 July 2023 to require any trustee resident in Kenya to maintain and avail to the Commissioner records required under a tax law, whether income is subject to tax in Kenya or not. In practice, tax law is therefore now to be primarily relied upon for the availability of accounting information.

196. The TPA enacted in 2015 supplements the record keeping requirements described in the Income Tax Act. Section 23 of the TPA requires that when a tax law (which includes the Income Tax Act) requires a person to maintain any document, it must be retained for five years from the end of the reporting period to which it relates. The retention period previously specified in the Income Tax Act has been deleted, along with the exception described in the 2016 Report relating to liquidators. As a consequence, the in-text recommendation in the 2016 Report concerning the potentially shorter period in liquidations has been addressed.

197. The TPA also provides a sanction for failing to keep, retain or maintain a document as required under a tax law. Section 82 provides for a penalty amount of either ten per cent of the tax payable to which the document relates, or if no tax payable relates to the failure, the penalty is KES 100 000 (EUR 630).

Oversight and enforcement of requirements to maintain accounting records

198. The KRA has oversight of the obligations to maintain accounting records under the tax laws. Enforcement occurs as part of its general enforcement of tax obligations. It has a risk-based approach to compliance activities, which are well established and have continued to improve outcomes over many years, including since the 2016 Report.

199. A significant volume of audits and reviews were conducted in each of the years under review. In each of the first two years, which were impacted by the pandemic, the KRA carried out more than 26 000 audits

and reviews where recordkeeping would have been part of the verification activities carried out. In the year ending 30 June 2022, which was the final year of the review period, more than 36 000 such cases were conducted. The KRA has not provided comprehensive figures on recordkeeping deficiencies found or sanctions imposed for such deficiencies, as in many cases these are incorporated in total assessment figures and Kenya has not been able to extract specific figures on recordkeeping penalties from these assessments. However on occasion record keeping penalties are issued on a separate notice which are more readily identifiable and 70 such instances were identified as imposed in the review period with a total value of KES 1.6 million (EUR 10 060) imposed.

200. Every person (individual, legal entity or legal arrangement) with a PIN is required to file a tax return. The KRA has provided income tax return filing statistics for companies, partnerships and trusts for the year ending 30 June 2021 as shown in the table below, noting that the annual return must be accompanied by a copy of the accounts for the year. There are no income thresholds below which a tax return is not required. The filing figures include late filing. The KRA understands that most non-filers are economically inactive. Some inactive taxpayers may also file tax returns, so filing or non-filing status does not necessarily reflect activity status.

Taxpayer type	No. registered on 30 June 2021	No. filed	Filing (%)
Domestic companies	407 603	271 254	66.5%
Foreign companies	1 569	1 090	69.5%
Partnerships	47 378	23 137	48.8%
Trusts	1 775	1 175	66.2%
Total	458 325	296 656	64.7%

201. The KRA imposes penalties for non-filing and late filing, the latter being based on 5% of the tax payable or KES 20 000 (EUR 126), whichever is higher. For the 2021 tax year penalties of KES 998 million (EUR 6.27 million) has been imposed.

202. The Registrar of Companies has oversight of the accounting obligations of companies and, in their concurrent role as Registrar of Limited Liability Partnerships, also has oversight of the accounting obligations of limited liability partnerships, both over the filing of financial statements and the requirements for these to be prepared, supported by accounting records and retained by regulated entities. Kenya has not provided information on the extent to which activities were carried out by the Registrar during the review period to verify and enforce these obligations to file financial statements. Financial statements are not necessarily due or filed at the same time as

annual returns, the latter being a separate obligation to file certain details about the company and its owners as described in paragraph 53. However, when filing an annual return a copy of the most recent financial statements sent to members of the company must be attached to the return. Statistics on sanctions for failing to file financial statements have not been provided by Kenya, however it has provided statistics on sanctions for failing to file annual returns. The number of instances each year where sanctions for late filing of annual returns have been applied ranged from 27 804 to 38 562 for each of the calendar years through the review period.

203. In practice, the legal requirements to maintain accounting information are supervised by the KRA and the Registrar of Companies and Limited Liability Partnerships. While there is a substantial oversight programme of audits and reviews carried out by the KRA, the supervision and monitoring by the Registrar is not sufficient to assure the availability of these records. Taxpayers with Kenya sourced income will be subject to the KRA's scrutiny, as well as taxpayers resident in Kenya receiving certain foreign sourced income (see paragraph 24), however there may be a small number of cases where entities are not subject to annual filing and therefore would not be subject to scrutiny for recordkeeping, although in these cases in effect some record keeping obligation remains in order to evidence to the KRA that such income is not taxable (see also paragraph 185). In a small number of cases, taxpayers with certain foreign source income will also be subject to a requirement to be registered with the KRA (those deriving foreign income from employment, pensions, exchange gains and income where a business is carried on partly in Kenya, for which all such foreign source income will also be deemed to be income derived from Kenya). While cases escaping the scrutiny of the KRA would be further reduced by the requirements on companies and limited liability partnerships to maintain and file accounting records and more generally the obligations across all such entities would provide a second source of information, no compliance activity other than issuing penalties for late filing has been identified as carried out by the Registrar during the review period. The lack of monitoring and action on inactive companies by the Registrar (see paragraphs 71 and 76) also hampers the ability to ensure availability of accounting information. The Registrar was nonetheless used as a source of information for some EOI cases during the review period. Finally, the new requirements on recordkeeping for trusts extending to those without Kenyan source income were only recently enacted and monitoring of this is a matter for the future. **Kenya is recommended to implement a comprehensive oversight programme to supervise the compliance with accounting record requirements to ensure that accounting records for all relevant entities are available in practice**.

Availability of accounting information in EOIR practice

204. During the review period Kenya received 45 requests for accounting information. Peers expressed satisfaction with the responses from Kenya and raised no concerns, although financial records from one company were only provided after significant delay and several attempts.

A.3. Banking information

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

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

206. Since the 2016 Report, the standard was strengthened in 2016 with an additional requirement of ensuring the availability of beneficial ownership information on all account holders. As discussed in A.1, there are two issues identified with respect to CDD which may impact the availability of beneficial ownership in certain instances. One relates to a the recent introduction of the ability to conduct simplified CDD, for which the parameters have not been specified and so leads to doubt on whether beneficial owners will be identified in all cases. The second is an absence of any specified frequency for updating CDD on existing customers. Kenya is recommended to take suitable actions to address these gaps in its legal framework.

207. During the review period, Kenya received 24 requests related to banking information and no issues were raised by peers in obtaining such information in practice.

208. The conclusions are as follows:

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

Deficiencies identified/Underlying factor	Recommendations
There is no specified frequency of updating beneficial ownership information; so there could be situations where the available beneficial ownership information is not up to date.	Kenya is recommended to ensure that in all cases complete and up-to-date beneficial ownership information for all bank accounts is available in line with the standard.

Deficiencies identified/Underlying factor	Recommendations
Beneficial owner(s) of accountholders may not be identified in cases where simplified CDD is performed. However, simplified CDD is allowed only in respect of customers representing low risk for AML purposes.	Kenya should ensure that beneficial owners of all account holders are required to be identified.

Practical Implementation of the Standard: Largely Compliant

Deficiencies identified/Underlying factor	Recommendations
Although the Central Bank has not found noncompliance among banks when conducting its verification activities that would cause significant concerns on the availability of banking information and beneficial ownership information from banks, the level of supervision and in particular the scope of its coverage across banks does not provide sufficient assurance of compliance overall.	Kenya is recommended to strengthen its ongoing supervision of banks to ensure that banking information and accurate and up-to-date beneficial ownership information for all customers is maintained by all the banks in Kenya.

A.3.1. Record-keeping requirements

Availability of banking information

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

210. Banks are subject to the accounting requirements as explained under A.2 and must keep proper accounting records that show and explain the transactions of the company. In addition, under the POCAMLA all banks are subject to AML obligations as reporting institutions. The Central Bank is the regulatory and supervisory body for banks operating in Kenya and is a supervisory body delegated by the Financial Reporting Centre to support the supervision of AML obligations of banks. All licensed banks in Kenya are registered Kenyan companies, no foreign banks conduct a banking business in Kenya through a branch. In case of difficulties or concerns with a Kenyan Bank, the Central Bank has the power to take management and control and most recently did so with a bank in 2015.

211. As reporting institutions, banks are required to keep records of all transactions for at least seven years from the date the relevant business or transaction was completed and make them available to competent

authorities on a timely basis (section 46(4) of the POCAMLA). Section 46(3) requires reporting institutions to establish and maintain records including the following information in respect of all transactions:

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

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

Beneficial ownership information on account holders

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

214. As explained under Element A.1 with regard to the availability of beneficial ownership information for companies under AML law, the POCAMLA establishes the Kenyan AML legal framework. Banks are required, under that framework, to ensure that beneficial ownership information on all of their customers is obtained and verified in accordance with the prescribed CDD measures. These requirements apply for all customers – Kenyan or foreign – legal persons and arrangements including partnerships, trusts and foundations.[22]

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

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

216. During the review period there were two possible issues identified with respect to CDD in the AML framework which may impact the availability of beneficial ownership in certain instances. The first was that it was not clear whether the concept of ultimate control described in the definition of beneficial owner is required to be interpreted as meaning any person who controls the company acting directly or indirectly, and acting individually or jointly. This issue was resolved through the replacement of the 2013 POCAML Regulations with the 2023 POCAML Regulations as discussed in paragraphs 96 to 99 in relation to element A.1. Representatives of the banking sector met at the onsite visit demonstrated a good understanding of requirements to identify beneficial owners, including beneficial owners having control by other means, and assured that this issue under the former Regulations did not manifest in practice, although the legal source for the meaning of "ultimately" owning or controlling a company was not identified.

217. The second issue, which applied in the review period and has not yet been resolved, is that while there is a requirement to carry out "ongoing" due diligence (see paragraph 101) there is no specified frequency for how often CDD should be updated on existing customers that would give this requirement practical effect, which could lead to situations where available beneficial ownership information may not be up to date. Representatives of the banking sector, including the Bankers Association of Kenya, met at the onsite visit stated that "ongoing" is understood to mean at least one, three or five years for high, medium and low risk customers respectively, and that this is comprehensively applied by banks in Kenya, although no source for this requirement or the banks' understanding of these timeframes was identified. Kenya should ensure that sufficient guidance is issued to explain the meaning of ongoing CDD, particularly in relation to the timing of updates. **Kenya is recommended to ensure that in all cases complete and up-to-date beneficial ownership information for all bank accounts is available in line with the standard**.

218. A new issue has arisen through the issuance the 2023 POCAML Regulations, in force from 6 October 2023. Scope for reporting institutions to conduct simplified due diligence was not previously provided, but the ability to do so was introduced in the 2023 POCAML Regulations. A reporting institution may apply simplified due diligence measures where lower risks have been identified and where the simplified measures are commensurate with the lower risk factors. This is subject to the further condition that such measures shall not be applied by a reporting institution whenever there is suspicion of money laundering, terrorism financing or proliferation financing, or specific higher risk scenarios apply. No further clarity or specification of simplified due diligence measures are provided in the regulations or in any guidance on these new measures. It is therefore possible that beneficial ownership information on account holder may not be fully obtained and

verified when customers are assessed as low risk. **Kenya is recommended to ensure that beneficial owners of all account holders are required to be identified**.

Oversight and enforcement

219. The Central Bank has a range of supervisory and enforcement powers under the Banking Act. It has issued Guidelines on AML which banks must comply with, and it may issue directions to specific banks. Failure to comply with the Guidelines or a direction is an offence punishable by a fine of up to KES 100 000 (EUR 630) for a body corporate and in the case of an officer of the institution, a fine of up to KES 50 000 (EUR 314) or imprisonment up to two years, or both. In addition, the Central Bank may provide information on the findings of its investigations to the Financial Reporting Centre and the Centre may impose sanctions under the POCAMLA. Failure to keep the records required by the POCAMLA is an offence. Upon conviction, a natural person is liable to imprisonment up to seven years or a fine up to KES 2 500 000 (EUR 15 700), or both. A body corporate is liable on conviction to a fine up to KES 10 000 000 (EUR 63 000) or the value of the property involved in the offence, whichever is higher.

220. While the CBK has a good understanding of beneficial ownership and carries out some inspections each year, the coverage across all banks was small, being only four in each of the years 2020 to 2022 and which was not dissimilar to previous years. The number of commercial banks operating in Kenya was 39 on 31 December 2022 (as well as 14 microfinance banks), so the annual coverage was around 10% or less. Although the Central Bank has not found substantial noncompliance that would cause significant concerns on the availability of banking information and beneficial ownership information from banks, the level of supervision does not provide sufficient assurance overall.[23] The Central Bank has since advised that in the calendar year 2023 it has conducted or will have conducted 11 onsite inspections of banks considered to be higher risk and these incorporate

23. A mutual evaluation review of the compliance of Kenya's financial sector with the AML/CFT standard was published in September 2022 and its review period covered most of the same review period of this report, except for the final six months. The report rated Kenya as Partially Compliant on Recommendations 10 (customer due diligence by financial institutions) and the level of effectiveness was rated "Low" and for Immediate Outcome 3 (supervision) and Immediate Outcome 4 (preventive measures). At the onsite visit for this report, meetings were held with the Central Bank, representatives of financial institutions and other AML-obliged persons. While the information gathered included statistics on supervisory activities and enforcement by the CBK and other supervisors for this peer review period that extended beyond that reviewed in the MER, there was no material change in the final six months.

AML inspections. While this falls outside the review period it does represent a significant acceleration in monitoring and supervision of AML obligations. **Kenya is recommended to strengthen its ongoing supervision of banks to ensure that banking information and accurate and up-to-date beneficial ownership information for all customers is maintained by all the banks in Kenya**.

Availability of banking information in EOIR practice

221. During the review period Kenya received 24 requests for banking information. Peers expressed satisfaction with the responses from Kenya and raised no concerns.

Part B: Access to information

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

B.1. Competent authority's ability to obtain and provide information

> Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information).

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

224. The legal framework in respect of the access powers of the Competent Authority continues as before. There have been no administrative rulings or judicial decisions related to accessing information for exchange. No special procedures are required; the same powers and procedures are used as for accessing information for domestic purposes.

225. During the review period, Kenya received 124 requests for information (for ownership, accounting and banking, and other types of information) and Kenya has generally been able to use its access powers to obtain this information.

226. The conclusions are as follows:

Legal and Regulatory Framework: in place

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

Practical Implementation of the Standard: Compliant

No issues in the implementation of access powers have been identified that would affect EOIR in practice.

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

Accessing information generally

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

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

229. In practice, Kenya most commonly uses the access power under section 59 (Powers to compel production of records) of the TPA. Access powers may be used by the EOI unit or on its behalf by other areas of the KRA. The main source of information for legal and beneficial ownership is the BRS. The BRS could also be a source of information for financial

statements in the event that the KRA does not already have these records, but in practice during the review period the KRA did not make use of this as it used its own records or obtained them from the taxpayer. Banking information is sourced from the relevant bank. The Competent Authority accesses information from sources external to the KRA by issuing notices in writing under section 59 of the TPA to furnish or produce information to the KRA, generally within 14 days.

Accessing legal and beneficial ownership and accounting information

230. There are no legal restrictions on the KRA using its access powers to obtain legal and beneficial ownership information from the Registrar. While Regulation 13 of the Companies (General) Regulations provides certain restrictions on release of information held by the Registrar relating to beneficial ownership, it also specifically provides that such information is available to a competent authority upon written request. A competent authority is defined by the Regulations to include the KRA. There are designated officers in the KRA who have direct online access to beneficial ownership and accounting information filed with the Registrar, however none of the officers in the EOI unit have such access.

231. The KRA may also use the general powers described above to access the beneficial ownership information held by the company itself and service providers that are AML-obliged persons. Section 59(4) of the TPA provides that the power to compel production of records has effect despite any law relating to privilege or the public interest, confidentiality under the POCAMLA and any contractual duty of confidentiality. In practice Kenya received 5 requests for legal ownership information, 18 requests for beneficial ownership information and 45 requests for accounting information during the review period. There was no case where Kenya was unable to provide requested ownership or accounting information due to any inability to access available information.

Accessing banking information

232. The aforementioned powers of KRA in the TPA are also sufficient to effectively access banking information, as discussed in the 2016 Report (see paragraph 231). In practice Kenya received 24 requests for banking information during the review period and the Kenyan authorities advise that this is generally obtained within 14 days. There was no case where Kenya was unable to provide requested banking information due to any inadequacy in access powers, however five requests were not met due to a lack of further information on persons with common names in Kenya.

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

233. The concept of "domestic tax interest" describes a situation where a contracting party can only provide information to another contracting party if it has an interest in the requested information for its tax purposes. The standard requires a jurisdiction to be able to use its information gathering powers, notwithstanding that it may not need the information for its tax purposes.

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

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

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

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

237. Section 82 of the TPA allows imposing a penalty if a person who, without reasonable cause, fails to keep, retain, or maintain a document as required under a tax law without reasonable cause for a reporting period. The person is liable to a penalty equal to the higher of 10% of the amount of tax payable by the person under the tax law to which the document relates for the reporting period to which the failure relates; or KES 100 000 (EUR 630).

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

239. The TPA (Section 104) also provides that a person held to be committing an offence under the TPA is liable to a fine not exceeding KES 1 000 000 (EUR 6 300) or to imprisonment for a term not exceeding three years or to both.

240. During the review period, there were no cases where an information holder failed to co-operate with a request for information in relation to EOI requests. While Kenya has not provided statistics on the application of these sanctions by the KRA for noncompliance related to information gathering for domestic tax purposes, it confirms that firm action is taken on failures to co-operate including through the imposition of sanctions.

B.1.5. Secrecy provisions

Bank secrecy

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

242. Furthermore, the access powers in the TPA under section 59 (Powers to compel production of records) and section 60 (Powers of search and seizure) have effect despite any law relating to privilege or the public interest with respect to access to premises, or the production of any property or documents, including documents in electronic format; or any contractual duty of confidentiality. Therefore, banking secrecy is no impediment to access powers of the KRA as required under the standard.

243. No issues were raised by peers in connection with bank secrecy and neither the banking representatives met at the onsite visit nor the Kenyan authorities identified any issues in practice. Banks provided information in all cases requested.

Professional secrecy

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

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

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

247. In practice, it was not necessary for the Kenyan competent authority to rely on legal professionals or accountants as a source of information for EOI purposes during the review period, however access powers have been used with legal professionals for domestic purposes. Discussions with representatives of these professions during the onsite visit found no divergence in views between the KRA and those representatives on the application of legal privilege.

B.2. Notification requirements, rights, and safeguards

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

248. The 2016 Report found that there were no issues regarding prior notification requirements or appeal rights and the element was determined to be in place. This position continues to remain the same given no further changes to the legal framework since the 2016 Report. The implementation of that framework in practice also does not raise any issue and Kenya is rated Compliant with this element of the standard.

249. The conclusions are as follows:

Legal and Regulatory Framework: in place

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

Practical Implementation of the Standard: Compliant

The application of the rights and safeguards in Kenya is compatible with effective exchange of information

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

250. As described in the 2016 Report (see paragraphs 267-270), there are no legal requirements for prior or post notification of a taxpayer or for providing a reason for asking information to the third-party/information holder to respond to an EOI request, under the Kenyan legal framework. The request notices used by the Competent Authority to obtain information from any information holder are, in practice, in the same form as for requests made for domestic purposes including referencing the same TPA provision under which the request is made, commonly those described in paragraph 228. There is therefore nothing in a notice to indicate that information is requested for EOI purposes. In any case a third party recipient of such a notice is bound by the confidentiality requirements described for Element C.3 in paragraph 297. While this alone would be sufficient restriction on tipping off, it is noted that Kenya also has an anti-tipping off rule for AML purposes in the POCAMLA.[24]

24. The 2022 FATF mutual evaluation review of Kenya found that banks and large non-bank Financial Institutions demonstrated adequate measures to prevent tipping off. Smaller financial institutions portrayed some challenges and had a limited understanding of requirements. No tipping off violations were reported.

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

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

253. The Commission on Administrative Justice, more commonly known as Office of the Ombudsman, is a constitutional commission established under Article 59(4) of the Constitution, and the Commission on Administrative Justice Act, 2011. The mandate of the Office of the Ombudsman is two-fold: tackling maladministration in the public sector; and overseeing and enforcing implementation of the Access to Information Act, 2016.[25]

254. Kenyan authorities reported that there have been no appeals to the High Court or the Ombudsman in relation to EOI requests so far. Kenya advises that a court has the power to stay the processing of an EOI request, but it is of the view that the appellant would be required to satisfy the court that the KRA was exceeding the powers provided under tax law. Kenyan law does not require the KRA to notify the person who is the subject of the request nor disclose the purpose for which information is requested. Peer input from the current review did not indicate any cases where notification or rights and safeguards that apply to a person in Kenya affected exchange of information.

255. The rights and safeguards (e.g. notification, appeal rights) that apply to persons in Kenya are compatible with the requirement to ensure effective exchange of information.

25. Complaints to the Office of the Ombudsman can be made for free by visiting any of the Ombudsman offices in person; making a telephone call; sending a text message; writing a letter; writing an email; visiting a Huduma Centre outlet where officers from the Ombudsman are stationed, or filing an online complaint form found on the Ombudsman website.

Part C: Exchange of information

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

C.1. Exchange of information mechanisms

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

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

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

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

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

260. Kenya's EOI network now covers 150 jurisdictions, with 142 relationships based on instruments in force and 8 based on instruments signed but not yet in force.

261. In practice, the interpretation of the concept of foreseeable relevance in Kenya's exchange agreements is in line with the standard.

262. The conclusions are as follows:

Legal and Regulatory Framework: in place

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

Practical Implementation of the Standard: Compliant

No issues have been identified that would affect EOIR in practice.

Other forms of exchange of information

263. Kenya has procedures in place to both send and receive information as spontaneous exchange. During the review period, it received seven spontaneous exchanges from five jurisdictions, but did not identify any information for sharing spontaneously. Kenya has put in place a domestic legal framework to commence Automatic Exchange of Information on Financial Accounts from 2024.

C.1.1. Standard of foreseeable relevance

264. The 2016 Report concluded that the text of the DTC with Germany was restrictive and did not meet the standard and therefore should be amended. Kenya now has full exchange with Germany through the Multilateral Convention which is in force in respect to Kenya and Germany.

265. The new EOI arrangements that Kenya has signed since the 2016 Report[26] include the term "foreseeably relevant" in their EOI Article, with the exception of the renegotiated DTC with India signed in July 2016

26. Barbados, Botswana, China, India, Ireland, Italy (in renegotiation), Mauritius (renegotiated), Portugal and Singapore.

which retained the wording “necessary”. In contrast, the DTCs with Canada, Denmark, Italy, Norway, South Africa, Sweden, the United Kingdom and Zambia and the regional agreement under the EAC also have EOI Articles that provide for the exchange of information that is “necessary” for carrying out the provisions of the Convention or similar wording. Kenya’s authorities have reaffirmed that Kenya interprets these alternative formulations as equivalent to the term “foreseeably relevant”. As a result, these agreements also meet the standard of foreseeable relevance.

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

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

267. While no template is provided to a requesting jurisdiction to formulate a request, Kenya expects jurisdictions to provide sufficient information to demonstrate the foreseeable relevance of the request and seeks clarification where necessary. During the period under review, Kenya sought clarification on 7 of the 124 requests received. One was for the requesting jurisdiction to explain the need for the requested information (which was duly done and accepted by Kenya) and the other six were to seek unique identifiers to better trace the taxpayers concerned, such as a passport number of the person, or an account number for the account, or at least the name of the bank concerned. No requests during the review period were declined for a lack of foreseeable relevance (or for any other reason). The peer input received for the current review did not raise any concerns with Kenya’s interpretation or practices with foreseeable relevance of requests made by peers.

Group requests

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

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

269. The 2016 Report determined that 9 of Kenya's DTCs did not explicitly provide that the EOI provision was not restricted by Article 1 of the OECD Model Tax Convention.[27] The DTCs with these jurisdictions provide for the exchange of information as is necessary for carrying out the provisions of the domestic laws of the Contracting States, or similar language. To the extent that the domestic tax laws are applicable to non-residents as well as to residents, information under these agreements can be exchanged in respect of all persons and the agreements meet the standard. Moreover, 8 of the 9 jurisdictions are also signatories to the Multilateral Convention, which explicitly provides for EOI in respect of all persons.[28]

270. EOI agreements entered into since the 2016 Report allow for EOI with respect to all persons.[29]

271. Kenya indicates that it did not receive any request for information during the review period with respect to persons who were not residents either of Kenya or the requesting jurisdiction. No peers raised issues on this matter.

C.1.3. Obligation to exchange all types of information

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

273. The 2016 Report indicated that as some of Kenya's agreements were concluded before the update of the OECD Model Tax Convention in 2005, those agreements do not contain a provision corresponding to

27. Canada, Denmark, Germany, India, Italy, Norway, Sweden, the United Kingdom and Zambia.
28. The exception is Zambia.
29. Including the renegotiated DTC with India.

Article 26(5) which was introduced at that update.[30] Nevertheless, the 2016 Report noted that this absence did not automatically create restrictions on exchange of bank information. Kenya's domestic laws allow it to access and exchange bank information even in the absence of such provision in the DTCs as long as reciprocity is applied, i.e. depending on the domestic limitations (if any) in the laws of these treaty partners. Since then, the Multilateral Convention has entered into force in respect to Kenya and the absence of the updated EOI article in the respective DTCs will not impact the exchange of information with other signatories, in line with the standard.

274. One of Kenya's exchange partners with a pre-2005 DTC is not a signatory to the Multilateral Convention and also has not been assessed for compliance with the standard (Zambia). It remains unclear whether Zambia would have restrictions on the access of bank information in their domestic law. As Kenya reported that it was renegotiating its DTC with Zambia at the time of the 2016 Report, the Report included an in-text recommendation that Kenya should include a provision similar to Article 26(5) of the OECD Model Tax Convention. The DTC has not been renegotiated, however Kenya has attempted to initiate negotiations in 2022 and is awaiting a response.

275. The DTC with Iran was not in force at the time of the 2016 Report, coming into force on 13 July 2017. It does not include language equivalent to Article 26(5) of the OECD Model Tax Convention. Iran is not a signatory to the Multilateral Convention and has not been assessed for compliance with the standard and so it is therefore unclear whether Iran would have restrictions on the access of bank information in their domestic law. Kenyan authorities have indicated that internal processes are underway to seek renegotiation of the DTC with Iran.

276. In view of the circumstances of the Iranian and Zambian agreements and the uncertainty over whether those jurisdictions would have any restrictions on accessing bank information under their respective laws, the previous recommendation in relation to renegotiating the Zambian agreement is has therefore been replaced with a recommendation that Kenya should ensure that these EOI relationships meet the standard (see Annex 1). No requests were received by Kenya from these jurisdictions during the review period.

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

30. Canada, Denmark, Germany, Norway, Sweden, the United Kingdom and Zambia. The DTC with Iran was concluded after 2005 and also does not contain a provision corresponding to Article 26(5) of the OECD Model Tax Convention.

C.1.4. Absence of domestic tax interest

278. The concept of "domestic tax interest" describes a situation where a contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes. An inability to provide information based on a domestic tax interest requirement is not consistent with the standard.

279. The 2016 Report concluded that the text of the DTCs with Sweden and the United Kingdom were restrictive in this respect and did not meet the standard. Kenya now has full exchange with Sweden and the United Kingdom through the Multilateral Convention, which is in force between Kenya and these jurisdictions.

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

281. In practice Kenya responded to six requests with an absence of domestic tax interest and no issues on this were raised by either Kenya or peers for the current review period.

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

282. Kenya's network of agreements provide for exchange in both civil and criminal matters, with no dual criminality restriction. In practice, none of the requests received in the review period related to criminal tax matters.

C.1.7. Provide information in specific form requested

283. Kenya's network of agreements have no restrictions that would prevent it from providing information in a specific form. In practice, no request was received during the review period that sought information in a specific form.

C.1. 8 and C.1.9. Signed agreements should be in force and be given effect through domestic law

284. The 2016 Report noted that Kenya had 9 DTCs signed but not in force. Four of those are still not in force (Italy, Kuwait, Mauritius and the Netherlands) although Kenya signed renegotiated agreements with Italy and Mauritius in March 2016 and April 2019 respectively. In addition, the EAC agreement is not yet in force although Kenya had completed all processes on its part to bring it into force.

285. Since the 2016 Report, Kenya has signed 6 new DTCs and another DTC that replaced an existing DTC with India. Only the Indian agreement has

been brought into force. Two DTCs that had been signed at the time of the 2016 Report were subsequently reopened for negotiation, one at the request of the other party and one as a consequence of a court ruling in Kenya.

286. Kenya signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters on 8 February 2016 and deposited its instruments of ratification of the Multilateral Convention on 22 July 2020. The Convention entered into force on 1 November 2020 in Kenya. The length of time from signing to ratification included part of the review period and may have limited EOI with some new partners covered by the Convention.

287. The 2016 Report contained a recommendation for Kenya to ensure that EOI arrangements signed with counterparts are ratified expeditiously. In March 2019 the Kenyan High Court made a ruling concerning procedures for ratification of a DTC. As a consequence, various DTCs signed but not yet ratified at that time were reopened for negotiation. The procedural issue identified in the Court decision has also affected some DTCs signed after that decision and has caused Kenya to reopen negotiations. The relevant DTCs were those with Barbados (signed 2019), Botswana (2019), China (2017), Ireland (2021), Portugal (2018) and Singapore (2018). Negotiations over these DTCs remain in progress, except for Singapore which has concluded and awaits signing. A protocol with Italy (signed 2016) is subject to renegotiation at Italy's request. The DTC with the Netherlands (2015) is under new negotiations. Mauritius (2019) has had some communication misunderstandings on ratification. All of these partners are covered by the Multilateral Convention. However, the timeliness of ratification procedures appears to be a continuing issue since the 2016 Report and it cannot be ruled out that delays may occur for future EOI arrangements not covered by the Multilateral Convention, so the recommendation is retained. Kenya should ensure the ratification of EOI arrangements signed with counterparts expeditiously (see Annex 1).

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

EOI mechanisms

Total EOI relationships, including bilateral and multilateral or regional mechanisms	150
In force	142
In line with the standard	140
Not in line with the standard	2[a]
Signed but not in force	8
In line with the standard	8[b]
Not in line with the standard	-
Total bilateral EOI relationships not supplemented with multilateral or regional mechanisms	**2**
In force	2
In line with the standard	-
Not in line with the standard	2[a]
Signed but not in force	-

Notes: a. Iran, Zambia.

b. The Multilateral Convention is not in force in Gabon, Honduras, Madagascar, Philippines, Togo and United States. The EAC regional treaty is not in force with Burundi and Tanzania.

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

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

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

290. Kenya signed the Multilateral Convention on 8 February 2016 and it entered into force on 1 November 2020. The number of exchange relationships has increased from 15 in force prior to the Multilateral Convention, to 142 in force at the cut-off date for this report.

291. No Global Forum members indicated, in the preparation of this report, that Kenya refused to negotiate or sign an EOI instrument with it. As the standard ultimately requires that jurisdictions establish an EOI relationship up to the standard with all partners who are interested in entering into such relationship, the in-box recommendations are removed. However, Kenya provided information on jurisdictions with whom it has commenced

negotiations but not yet concluded an agreement. Kenya should continue to conclude EOI agreements with any new relevant partner who would so require (see Annex 1).

292. The conclusion is as follows:

Legal and Regulatory Framework: in place

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

Practical Implementation of the Standard: Compliant

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

C.3. Confidentiality

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

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

294. Kenya also has policies and organisational procedures that ensure the compliance with confidentiality requirements in practice.

295. The conclusions are as follows:

Legal and Regulatory Framework: in place

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

Practical Implementation of the Standard: Compliant

No material deficiencies have been identified and the confidentiality of information exchange is effective.

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

296. All of Kenya's DTCs have confidentiality provisions to ensure that the information exchanged will only be disclosed as authorised by the DTCs.

While the wording varies, these provisions contain all of the required elements of Article 26(2) of the OECD Model Tax Convention and specifically spell out to whom the information exchanged can be disclosed and the purposes for which the information can be used.

297. Treaty obligations are complemented by Kenya's domestic legislation that contains relevant confidentiality provisions. Section 41 of the Income Tax Act gives effect to DTCs under that Act and provides primacy of the DTC over that Act and any other laws. Section 41A achieves the same for EOI agreements and section 6A of the TPA was added with effect from 1 July 2021 to provide the same for multilateral tax agreements. Section 6(1) of the TPA then requires authorised officers administering a tax law (including the Income Tax Act) to protect the confidentiality of documents or information obtained in the course of administering the tax law. Section 6(4) preserves this obligation after the employment or engagement ends. Section 6(3) extends this obligation to any other person who, under permitted circumstances, receives documents or information. A breach of section 6 is an offence and a person convicted is liable to a fine of up to KES 1 000 000 (EUR 6 300) or imprisonment up to 3 years or both.

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

299. The confidentiality provisions protecting tax information in Kenya's domestic laws are therefore adequate and are supported by sanctions in case of a breach.

300. Kenya's Constitution provides citizens with the right to access information, however the Constitution also provides for the limitation of such rights in accordance with law when reasonable and justifiable. The provisions of the TPA mentioned in paragraph 298 is such a law, and in particular section 6A(2) will constrain access to EOI information only to those permitted by the relevant agreement. Furthermore, this restriction of access is compatible with the Access To Information Act under which access is subject to specified limitations, including limitation for reasons of national security. That Act explicitly defines national security to include matters relevant to foreign relations, as well as information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime

and enforcement of any law. On this basis, the competent authority does not give access to the EOI files and in practice no requests were made during the review period, nor have they ever been made at any other time.

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

C.3.2. Confidentiality of other information

302. The confidentiality provisions in Kenya's EOI agreements and domestic laws do not draw a distinction between information received in response to requests and information forming part of the requests themselves. All other information, such as background documents, communications between the requesting and requested jurisdictions and within the tax authorities, are treated confidentially. EOI data is treated separately from the rest of the tax data and stored separately. Requests received from partners are not provided to other KRA staff or information holders when seeking requested information. Templates used by the EOI unit for the purposes of obtaining information from taxpayers, banks and other third parties are consistent with distilling from an exchange partner's request the minimum information necessary to action the request.

Confidentiality in practice

303. Kenya's internal policies and procedures set out the obligations upon staff to ensure confidentiality in handling EOI matters. During the hiring process, KRA conducts background checks from other enforcement agencies such as with the Directorate of Criminal Investigation where one is required to have a certificate of good conduct, an integrity report from Ethics and Anti-Corruption Commission, credit worthiness from the Credit Reference Bureau, Higher Education Loans Board, KRA Tax Compliance certificate, and in some cases confidential information from National Intelligence Service and other institutions. New employees sign an oath of secrecy and must adhere to a KRA Code of Conduct and Ethics, for which training is provided on induction and it includes confidentiality requirements.

Information security training is regularly provided to employees through online and face-to-face sessions. Contractors sign non-disclosure agreements as part of their contract. The KRA has access control policies and procedures defined and approved by management, that is based on ISO 27001:2013 requirements. Access controls across all IT systems and services are implemented to provide authorised, granular and appropriate user access and to ensure appropriate preservation of data confidentiality, integrity and availability in accordance with the KRA's Information Security Policy. Access is based on need-to-have and on least privilege principles. Entry to KRA premises is access controlled. Every person(s) is required to clear with security prior to being issued with access control card. Security checks are done for persons getting in and out of the premises. Registries and strong rooms where documents are kept are safeguarded with restricted access by authorised staff only. There are registers for tracking the chain of custody of documents. The KRA has disabled use of removable discs and drives while at work unless permission is exceptionally granted.

304. The EOI unit premises have additional physical access controls, including surveillance cameras and restricting access to EOI officers or, when necessary, other persons only when accompanied by EOI officers. The office is well equipped with lockable cabinets, a safe, shredders and password protected printers. The EOI unit maintains a clean desk policy, as does the KRA more generally. Officers are required to remove and lock away any documents from their desks when such documents are not in use. Documents received from exchange partners bear a treaty and confidentiality stamp following receipt. In the case of documents electronically received, these are printed, stamped with a treaty and confidential stamp, then scanned for sharing. A restricted email facility is used for both inward and outward communication with other jurisdictions, and communications are systematically encrypted.

305. The Competent Authority officials and other tax administration and government officials met during the onsite visit were well informed of their obligations regarding keeping information confidential. The KRA has an Enterprise Risk Management division, which manages the risk framework and risk treatments, including managing and monitoring cyber security.

306. In practice, all written or oral communication that the competent authority in Kenya receives from other competent authorities is treated as confidential. Kenya's peers have not raised any issues regarding confidentiality during the period of review. The KRA advised there have been no instances where information received by the competent authority has been improperly disclosed. Nevertheless, the EOI unit has documented procedures to escalate notification of any breach though KRA management and to any affected partner in a timely manner.

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

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

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

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

309. Communication between an attorney or other legal representative and a client is privileged under section 134 of the Evidence Act, but only to the extent that the attorney or other legal representative was acting in his or her capacity as an attorney or other legal representative (see also Element B.1.5). The POCAMLA was amended in January 2022, to include legal professionals as reporting institutions, although this was not in effect until 15 September 2023, see paragraph 164. In any case, this remains subject to section 18 of that Act which provides that nothing in the Act shall affect or be deemed to affect the relationship between an advocate and their client with regard to communication of privileged information between the advocate and the client. The scope of this privilege is subject to, and is narrowed by, the requirements of Kenya's EOI agreements which are incorporated into Kenyan law and given primacy over other laws including the Evidence Act through the provisions described in paragraph 297. As was described in the 2016 Report, the EOI agreements concluded by Kenya at that time met the standards for the protection and rights of taxpayers and third parties. This remains the case with EOI agreements concluded since then. This protection of the rights and safeguards of taxpayers and third parties is in accordance with the standard and does not inhibit access for EOI purposes.

310. The Kenyan authorities advised that there have been no practical difficulties experienced in responding to EOI requests due to the application of rights and safeguards in Kenya. Representatives of the legal and accounting profession met during the onsite visit raised no concerns in this area, and peers raised no concerns for the period under review (see paragraph 247).

311. The conclusions are as follows:

Legal and Regulatory Framework: in place

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

Practical Implementation of the Standard: Compliant

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

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

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

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

313. Since 2016, Kenya has consolidated its framework and practices for handling EOI requests. Volumes of requests have significantly increased both inward and outward, and Kenya now has a well-functioning team of EOI officials with experience, training and documented procedures. Feedback from peers is positive in terms of quality of responses and communications with Kenya. Some further improvement is possible in relation to enforcing information gathering powers in cases where information holders are not co-operative, and making use of alternative sources of information when delays are encountered.

314. The conclusions are as follows:

Legal and Regulatory Framework

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

Practical Implementation of the Standard: Largely Compliant

Deficiencies identified/Underlying factor	Recommendations
A number of requests, including some still pending, have taken substantially longer than a year to process. Some were due to unresponsive taxpayers subject to an initial information request where there were delays before Kenya sought information from alternative sources.	Kenya is recommended to continue to improve the timeliness of responses, including using all available access powers and sources of information where one source may not be responsive.

C.5.1. Timeliness of responses to requests for information

315. From 1 July 2019 to 30 June 2022, Kenya received 124 requests for information. The information sought in these requests related to (i) ownership information (23 cases), (ii) accounting information (45 cases), (iii) banking information (24 cases) and other type of information (32 cases). The information requested is further broken down to (i) companies (106 cases) and (ii) individuals (18 cases). The majority of the requests were received from India and the United Kingdom.

316. The following table relates to the requests received during the period under review and gives an overview of response times of Kenya in providing a final response to these requests, together with a summary of other relevant factors impacting the effectiveness of Kenya's practice during the period reviewed.

Statistics on response time and other relevant factors

		1 July 2019 to 30 June 2020		1 July 2020 to 30 June 2021		1 July 2021 to 30 June 2022		Total	
		Num.	%	Num.	%	Num.	%	Num.	%
Total number of requests received	[A+B+C+D+E]	48	100	44	100	32	100	124	100
Full response: ≤ 90 days		48	100	13	30	6	19	67	54
≤ 180 days (cumulative)		48	100	14	32	16	50	78	63
≤ 1 year (cumulative)	[A]	48	100	22	50	16	50	86	69
> 1 year	[B]	0	0	19	43	11	34	30	24
Declined for valid reasons		0	0	0	0	0	0	0	0
Requests withdrawn by requesting jurisdiction	[C]	0	0	0	0	5	16	5	4
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	3	7	0	0	3	2
Outstanding cases after 90 days		0		31		26		57	-
Of these, status update provided within 90 days		0		31	100	25	96	56	98

Notes: Kenya counts each taxpayer for whom information has been requested as a separate request, i.e. if a partner jurisdiction is requesting information about four persons in one request, Kenya counts that as four requests. Furthermore, Kenya counts each type of information requested as a separate request, i.e. if a partner jurisdiction requests both accounting information and banking information of a person, Kenya counts this as two requests. If Kenya received a further request for information that relates to a previous request, with the original request still active, Kenya counts it as a new request.

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.

317. During the review period, Kenya responded to 54% of requests within 90 days and 63% within 180 days. Response timeframes were particularly short in the review period prior to the Covid-19 pandemic, but were subsequently affected by this event, particularly in the year ending 30 June 2021. During the pandemic the EOI staff worked from home, with initial return to the office only being on rotation. Difficulties were experienced in processing some requests when the information holders had closed their premises or were otherwise in restricted circumstances. Ministry of Health restrictions on movements and some staff circumstances also contributed to the difficulties. However, the pandemic has driven some changes such as automation of EOI processes, which will ensure mitigation of difficulties in the event of such challenges in the future.

318. A request from one partner, counted as a single request by that partner but counted as 8 by Kenya due to the multiple taxpayers and information types requested, had partial responses provided with some components delayed due to unresponsive taxpayers subject to the information request. After some delays, Kenya sought and obtained information from alternative sources. Kenya has recognised that improved timeliness is possible through the selection of different information sources and potentially using more than one source. **Kenya is recommended to continue to improve the timeliness of responses, including using alternative sources of information where one source may not be responsive**.

319. No requests were declined by Kenya during the review period. Five requests were withdrawn by the requesting jurisdictions following requests for clarification by Kenya. Kenya's competent authority explained that these related to requests for banking information where the names of the individuals are common names in Kenya and there was no other identity information provided that was capable of identifying the persons with sufficient accuracy.

Status updates and communication with partners

320. Kenya provided status updates for requests that could not be answered within 90 days in almost all cases, with one instance only slightly falling outside that timeframe.

321. One other request from a peer that was sent by post was not received by the Kenyan competent authority, however when this was identified by the peer and resent by email, it was ultimately resolved to the satisfaction of the peer. Kenya's practices with status updates were confirmed by peers.

322. Peers were generally satisfied with the responses to requests made to Kenya. One peer noted that an initial response to a request was not in line with the standard as it provided legal ownership information instead of the

requested beneficial ownership information. However, according to Kenya this was an administrative oversight when compiling the information and it was promptly corrected upon feedback from the peer.

C.5.2. Organisational processes and resources

Organisation and resourcing of the competent authority

323. The Cabinet Secretary, National Treasury and Planning is the competent authority for Kenya. The Cabinet Secretary has delegated this authority to the Commissioner General of the KRA. The details of the delegated competent authorities are published on the secure site of the Global Forum and direct communication is done to treaty partners who are not Global Forum members. The details are also listed on the KRA website.[31]

324. Kenya's EOI unit sits within the Large Taxpayers Office in the Domestic Taxes Department of the KRA. It comprises eight staff involved in the processing of EOI requests including the manager, with an assistant manager and six staff specifically tasked to EOIR. The EOI office is well equipped and staff have received training on a range of topics relevant to their work. There is a core of staff within the unit who have been in place for some time and are well experienced in EOI.

Incoming requests

325. A tracking system has been implemented to log requests and record the validation and work carried out on the requests. An EOI Procedure Manual is in place to guide the procedures for handling requests, including target timeframes for staff to complete each step. The EOI Procedure Manual also includes procedures for responding to group requests, although none have been received in the reviewed period. A dedicated email facility has been created, to which only competent authority staff have access. It is monitored daily within the EOIR unit and regular progress reports are provided to the executive of the KRA.

326. The EOI unit manager conducts a preliminary examination of the request by verifying that an EOI agreement exists with the requesting jurisdiction, the request deals with periods and taxes which are covered by the relevant agreement, the requesting person is on the Global Forum Competent Authority database, the information provided is sufficient and the request is clear and specific, all reasonable means were used by the requesting jurisdiction to obtain the information, and the information is

31. https://www.kra.go.ke/about-kra-footer/exchange-of-information; visit on 30 October 2023.

"necessary" or "foreseeably relevant" to an ongoing tax examination case. If the request is unclear or incomplete, the EOI unit will write (usually via email) to the requesting jurisdiction to provide clarity or more information. In any case, the procedures require that receipt of the request is acknowledged and the target timeframe for acknowledgement is within seven days, which Kenya advises is met in 95% of cases.

327. Standard operating procedures also require a status update to be provided by email before the expiry of 90 days if a full response cannot be provided, with such updates continuing until a final reply is provided. A status update may be incorporated in an partial response to a request advising of the status for the remaining information requested.

328. Responses to peers are subject to quality assurance procedures within the EOI unit before sending by the Competent Authority. All documents are stamped with a treaty and confidential stamp.

Outgoing requests

329. The 2016 Terms of Reference includes an additional requirement to ensure the quality of requests made by assessed jurisdictions. During the period 1 July 2019 to 30 June 2022, Kenya made 363 outbound EOI requests, with annual volumes increasing through each year of the review period. Outbound requests are co-ordinated through the EOI unit, with documented procedures included in the EOI Procedure Manual. The manual includes a template which must be used by other areas of the KRA when submitting requests to the EOI unit.

330. Outgoing requests are sent by auditors in operational departments of the KRA to the EOI unit, where they are logged and checked for relevance and completeness. If the request is invalid or the information provided is insufficient to ascertain foreseeable relevance, the EOI manager will ask the auditor to provide more details to allow the request to be processed, failing which the case will be closed. Requests assessed as valid are assigned to EOI case officers for drafting of a request to exchange partner(s), for signing by the competent authority and despatch to the relevant jurisdiction(s). Case officers monitor progress to completion, including any follow up. Documents received bear a treaty and confidentiality stamp to reinforce auditor awareness of their obligations with the information.

331. Peers have been generally satisfied with the quality of requests sent by Kenya. In some cases, clarifications were requested by the peers (around 5% of the total outgoing requests), which were almost always provided without significant delay by Kenya. Three peers mentioned seeking additional information for foreseeable relevance of in total 11 requests made by Kenya and were satisfied with the clarifications.

332. In summary, Kenya has addressed the organisational issues identified in the 2016 Report and now has a well-functioning team of EOI officials with experience, training and documented procedures. It has responded well to a large increase in requests since the Multilateral Convention came into force with respect to Kenya. Timeliness is generally good, however it recognises that further improvements on information sources can be made. Kenya almost always provides status updates when required, and no issues have been identified with outgoing requests.

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

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

Annex 1. List of in-text recommendations

The Global Forum may identify issues that have not had and are unlikely in the current circumstances to have more than a negligible impact on EOIR in practice. Nevertheless, the circumstances may change and the relevance of the issue may increase. In these cases, a recommendation may be made; however, it should not be placed in the same box as more substantive recommendations. Rather, these recommendations can be stated in the text of the report. A list of such recommendations is reproduced below for convenience.

- **Element A.1**: Kenya should ensure that beneficial owners of companies are required to be identified in cases where simplified CDD is applicable (para. 103).
- **Element C.1.3**: Kenya should include a provision similar to Article 26(5) of the OECD Model Tax Convention through renegotiation of the DTCs with Zambia and Iran (para. 276).
- **Element C.1.8**: Kenya should ensure the ratification of EOI arrangements signed with counterparts expeditiously (para. 287).
- **Element C.2**: Kenya should continue to conclude EOI agreements with any new relevant partner who would so require (para. 291).

Annex 2. List of Kenya's EOI mechanisms

Bilateral international agreements for the exchange of information

	EOI partner	Type of agreement	Signature	Entry into force
1	Barbados	DTC	11 December 2019	Not in force
2	Botswana	DTC	23 July 2019	Not in force
3	Canada	DTC	27 April 1983	8 January 1987
4	China (People's Republic of)	DTC	21 September 2017	Not in force
5	Denmark	DTC	13 December 1972	24 March 1987
6	France	DTC	4 December 2007	1 November 2010
7	Germany	DTC	17 May 1977	17 July 1980
8	India	DTC	11 July 2016	30 August 2017
9	Iran	DTC	29 May 2012	13 July 2017
10	Ireland	DTC	23 July 2021	Not in force
11	Italy	DTC	3 March 2016	Not in force
12	Korea	DTC	8 July 2014	3 April 2017
13	Kuwait	DTC	12 November 2013	Not in force
14	Mauritius	DTC	10 April 2019	Not in force
		Protocol	16 October 2019	Not in force
15	Netherlands	DTC	22 July 2015	Not in force
16	Norway	DTC	13 December 1972	10 September 1973
17	Portugal	DTC	10 June 2018	Not in force
18	Qatar	DTC	23 April 2014	25 June 2015
19	Seychelles	DTC	17 March 2014	1 April 2015
20	Singapore	DTC	12 June 2018	Not in force
21	South Africa	DTC	26 November 2010	19 June 2015
22	Sweden	DTC	28 June 1973	28 December 1973
23	United Arab Emirates	DTC	21 November 2011	22 February 2017

	EOI partner	Type of agreement	Signature	Entry into force
24	United Kingdom	DTC	31 July 1973	30 September 1977
25	Zambia	DTC	27 August 1968	Date of entry into force unknown (Eff: 1 April 1964)

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

The Convention on Mutual Administrative Assistance in Tax Matters was developed jointly by the OECD and the Council of Europe in 1988 and amended in 2010 (the Multilateral Convention).[32] The Multilateral Convention is the most comprehensive multilateral instrument available for all forms of tax co-operation to tackle tax evasion and avoidance, a top priority for all jurisdictions.

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

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

The Multilateral Convention is in force in respect of the following jurisdictions: Albania, Andorra, Anguilla (extension by the United Kingdom), Antigua and Barbuda, Argentina, Armenia, Aruba (extension by the Netherlands), Australia, Austria, Azerbaijan, Bahamas, Bahrain, Barbados, Belgium, Belize, Benin, Bermuda (extension by the United Kingdom), Bosnia and Herzegovina, Botswana, Brazil, British Virgin Islands (extension by the United Kingdom), Brunei Darussalam, Bulgaria, Burkina Faso, Cabo Verde, Cameroon, Canada, Cayman Islands (extension by the United Kingdom), Chile, China (People's Republic of), Colombia, Cook Islands, Costa Rica, Croatia, Curaçao (extension by the Netherlands), Cyprus,[33] Czech Republic, Denmark, Dominica,

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

33. Note by Türkiye: 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

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

In addition, the Multilateral Convention was signed by the following jurisdictions, where it is not yet in force: Gabon, Honduras, Madagascar, Philippines, Togo and United States (the original 1988 Convention is in force since 1 April 1995, the amending Protocol was signed on 27 April 2010).[34]

East African Community Income Tax Treaty

Kenya is a signatory to the EAC regional Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income signed on 30 November 2010 (not yet in force), which provides for the necessary legal basis to enhance co-operation and EOI among

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Greek Cypriot people on the Island. Türkiye recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Türkiye shall preserve its position concerning the "Cyprus issue".

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

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

the five revenue authorities of Kenya, Uganda, Burundi, Rwanda, Tanzania, under Article 27. Furthermore, a "Memorandum of Understanding on the Exchange of Information on Tax Expertise and Other Related Matters" (MoU) was signed on 10 November 2010 by the five revenue authorities, which provides for detailed rules and procedures for EOI on tax matters, in line with the 2002 OECD Model TIEA.

Annex 3. Methodology for the review

The reviews are based on the 2016 Terms of Reference and are conducted in accordance with the 2016 Methodology for peer reviews and non-member reviews, as amended in December 2020 and November 2021, and the Schedule of Reviews.

The evaluation is based on information available to the assessment team including the exchange of information arrangements signed, laws and regulations in force or effective on 22 December 2023, Kenya's EOIR practice in respect of EOI requests made and received during the three year period from 1 July 2019 to 30 June 2022, Kenya's responses to the EOIR questionnaire, inputs from partner jurisdictions as well as information provided by Kenya's authorities during the on-site visit that took place from 20 February 2023 in Nairobi.

List of laws, regulations and other materials received

Access to Information Act

Banking Law

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

Capital Market Licensing Regulations

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

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

Constitution

Co-operative Societies Act

Evidence Act

Fair Administrative Action Act

Income Tax Act

Insolvency Act

Kenya Revenue Authority Act

Kenya Revenue Authority Code of Conduct and Ethics

Limitation of Actions Act

Limited Liability Partnership Act (LLPA)

Partnerships Act

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

EOI Procedure Manual

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

Tax Procedures Act

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

Co-operative Societies Act

Access to Information Act

Limitation of Actions Act

Kenya Revenue Authority Act

Evidence Act

Authorities interviewed during on-site visit

Representatives from:

Bankers Association and banks

Business Registration Service

Capital Markets Authority

Central Bank

Financial Reporting Centre

Institute of Public Accountants of Kenya

Kenya Revenue Authority

Law Society of Kenya

Ministry of Finance

National Treasury

Current and previous reviews

Kenya underwent a combined review (Phase 1 and Phase 2) of its legal and regulatory framework and the implementation of the framework in practice in 2016. The 2016 Review was conducted according to the terms of reference approved by the Global Forum in February 2010 and the Methodology used in the first round of reviews.

Due to the COVID-19 pandemic, the onsite visit that was scheduled to take place in March 2021 could not take place. Consequently, Kenya's Round 2 EOIR peer review was phased, starting with a desk-based Phase 1 on the compliance of the legal and regulatory framework that culminated in November 2021 with the adoption of the report assessing the legal and regulatory framework of Kenya against the 2016 Terms of Reference (Phase 1 report). The onsite visit to Kenya has since taken place in February 2023 and the present review complements the first report with an assessment of the practical implementation of the standard, including in respect of exchange of information requests received and sent during the review period from 1 July 2019 to 30 June 2022, as well as any changes made to the legal framework since the Phase 1 review. Information on each of Kenya's reviews is listed in the table below.

Summary of reviews

Review	Assessment team	Period under review	Legal Framework as of	Date of adoption by Global Forum
Round 1 Phase 1	David Smith, United Kingdom; Antonio Nikolakopoulos, San Marino; and Mary O'Leary from the Global Forum Secretariat	Not applicable	27 August 2013	November 2013
Round 1 Phase 2		1 July 2011 to 30 June 2014	18 December 2015	March 2016
Round 2 Phase 1	Jolanda Roelofs (Netherlands); Mukhta Toofanee (Mauritius); Ricky Herbert (Global Forum Secretariat)	Not applicable	31 August 2021	November 2021
Round 2 Phase 2		1 July 2019 to 30 June 2022	22 December 2023	27 March 2024

Annex 4. Kenya's response to the review report[35]

Kenya would like to express its appreciation to the Global Forum Secretariat, the Peer Review Group and the Assessment Team for their dedication and commitment during the Round 2 Peer Review of Kenya.

Kenya's appreciation and gratitude also goes to the Kenya Peer Review Committee members consisting of the National Treasury, the Business Registration Service, the Central Bank, the Financial Reporting Centre, the Attorney General's Office, Ministry of Lands, Law Society of Kenya, Institute of Certified Public Accountants of Kenya, the Capital Markets Authority, the Kenya Bankers Association and various departments of the Kenya Revenue Authority.

The ratings and the recommendations put forward in the Peer Review Report give a fair assessment of the legal and administrative framework in Kenya. Some of the recommendations are already being addressed and we look forward to full implementation of the standard in the coming days.

Kenya has been an active participant in the implementation of effective exchange of information with its global partners and remains steadfast in its commitment to continue this collaboration in furtherance of tax transparency worldwide.

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

GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

Peer Review Report on the Exchange of Information on Request KENYA 2024 (Second Round, Combined Review)

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

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

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

This peer review report analyses the practical implementation of the standard of transparency and exchange of information on request in Kenya, as part of the second round of reviews conducted by the Global Forum on Transparency and Exchange of Information for Tax Purposes since 2016.

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