# GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

# Peer Review Report Phase 1 Legal and Regulatory Framework

ARUBA



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

PHASE 1

April 2011 (reflecting the legal and regulatory framework as at January 2011)



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### **About the Global Forum**

The Global Forum on Transparency and Exchange of Information for Tax Purposes is the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by over 90 jurisdictions, which participate in the Global Forum on an equal footing.

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

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

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

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

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

### **Executive Summary**

- This report summarises the legal and regulatory framework for transparency and exchange of information in Aruba. The international standard which is set out in the Global Forum's Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information, is concerned with the availability of relevant information within a jurisdiction, the competent authority's ability to gain timely access to that information, and in turn, whether that information can be effectively exchanged with its exchange of information partners. While Aruba has a developed legal and regulatory framework, the report identifies a number of areas where Aruba could improve its legal infrastructure to more effectively implement the international standard. The report includes recommendations to address these shortcomings.
- 2. Aruba is an island located at the southern part of the Caribbean Sea. forming part of the Kingdom of the Netherlands, along with the Netherlands, Curação and Sint Maarten.<sup>1</sup> Aruba's economy is primarily dependent upon tourism and oil refining. There are only two offshore banks in Aruba and the contribution of international financial services to its GDP is marginal. In 2001. Aruba committed to co-operate with the OECD's initiative on transparency and effective EOI and to comply with the 1999 Report of the EU's Code of Conduct Group. As a result, Aruba promoted a comprehensive corporate and tax law reform to abolish the offshore tax regime and end tax holidays. In 2006, the Aruban exempt company legislation was revised to eliminate ring fencing.
- 3 In terms of assessing the framework to ensure the availability of relevant information, Aruba's legislation reflects a three-pronged approach. First, there are obligations imposed directly on companies, partnerships (or partners) and foundations to retain certain ownership, identity, accounting and banking information, and in some instances to provide that information to government

Following the dissolution of the Netherlands Antilles on 10 October 2010, two separate jurisdictions were formed (Curação and Sint Maarten) with the remaining three "BES islands" (Bonaire, Sint Eustatius and Saba) joining the Netherlands as special municipalities.

authorities. This is complemented by obligations imposed through the licensing regime applicable to certain regulated financial activities in Aruba, including credit institutions, insurance companies, money transfer companies, and trust company service providers. Finally, the anti-money laundering regulations which apply to most regulated financial businesses and relevant professionals (lawyers, notaries, accountants, and tax advisors), create a third layer of requirements to capture relevant information.

- 4. Limited liability companies and Aruba exempt companies may issue bearer shares, provided the full nominal value of issued shares has been paid up. Various regimes are currently in place that have the effect of immobilizing bearer shares or preventing their use, as well as providing for mechanisms to indentify owners of bearer shares. The new Aruba limited liability company which is not allowed to issue bearer shares and the recent introduction, in 2009, of supervision of Aruba exempt companies by trust company service providers represents progress. Amendments to the law are currently being prepared and expected to be in place in the first quarter of 2011 in order to provide for a total abolishment of the possibility to issue bearer shares.
- 5. Aruba's record-keeping requirements are generally satisfactory. Under Aruban tax law, companies, partnerships, foundations and trust company service providers are required to keep accounting records and underlying documentation for at least ten years. Under the Aruban AML/CFT framework, service providers, such as credit institutions, insurance companies and certain relevant professionals, are required to establish and verify the customer's identity and the person on whose behalf a customer is acting and are obliged to kept records in respect of all transactions for five years from the date of the termination of the agreement under which service was provided.
- 6. In respect of access to information, Aruba's competent authorities the Minister in charge of Finance and the Tax Inspector are vested with broad powers to gather relevant information for civil tax purposes, complemented by powers to search premises, seize information and compel oral testimony. On criminal tax matters, the Minister of Justice remains responsible for international legal assistance but he is required by law to involve the Minister of Finance. Enforcement of these provisions is secured by the existence of significant penalties for non-compliance. Secrecy provisions in Aruban law are overridden where information is required for EOI purposes, and there is no domestic tax interest requirement.
- 7. Aruba's network for the exchange of information has developed rapidly since September 2009, and 16 new EOI agreements have been signed in addition to the two existing ones. Out of these 16 TIEAs, four were signed less than one year ago and seven are pending ratification by the Netherlands after Aruba having taken all the necessary steps to ratify them. In addition to these 18 TIEAs, a further four EOI agreements have been concluded but

are still awaiting signature, and negotiations are underway with an additional seven jurisdictions. Once these EOI agreements are concluded and signed. Aruba's EOI network will cover a significant number of relevant partners.

- Whilst generally following the terms of the OECD Model TIEA, there are some variations in Aruba's EOI agreements and implementing domestic legislation which may prevent information being exchanged to the international standard in all instances. A practical assessment of whether these variations impose an impediment to the exchange of information will be made in the Phase 2 Peer Review of Aruba.
- Aruba's response to the recommendations in this report, as well as the application of the legal framework to the practices of its competent authority will be considered in detail in the Phase 2 Peer Review of Aruba which is scheduled for the first half of 2014

### Introduction

### Information and methodology used for the peer review of Aruba

- 10. The assessment of the legal and regulatory framework of Aruba was based on the international standards for transparency and exchange of information as described in the Global Forum's *Terms of Reference*, and was prepared using the Global Forum's *Methodology for Peer Reviews and Non-Member Reviews*. The assessment was based on the laws, regulations, and exchange of information mechanisms in force or effect as at January 2011, other materials supplied by Aruba, and information supplied by partner jurisdictions.
- 11. The Terms of Reference break down the standards of transparency and exchange of information into ten essential elements and 31 enumerated aspects under three broad categories: (A) availability of information; (B) access to information; and (C) exchanging information. This review assesses Aruba's legal and regulatory framework against these elements and each of the enumerated aspects. In respect of each essential element, a determination is made that either (i) the element is in place, (ii) the element is in place but certain aspects of the legal implementation of the element need improvement, or (iii) the element is not in place. These determinations are accompanied by recommendations on how certain aspects of the system could be strengthened. A summary of the findings against those elements is set out on pages 71-74 of this report.
- 12. The assessment was conducted by a team which consisted of two assessors: Mr. John Goldsworth, Chairman of the Seychelles International Business Authority and Mr. Neil Cossins, Manager of the Exchange of Information Unit, Australian Taxation Office; and one representative of the Global Forum Secretariat: Mrs. Renata Fontana. The assessment team examined the legal and regulatory framework for transparency and exchange of information and relevant exchange of information mechanisms in Aruba.

### Overview of Aruba

### Governance, economic context and legal system

- 13. Aruba is one of the four parts of the Kingdom of the Netherlands, the others being the Netherlands, Curaçao and Sint Maarten. The Netherlands Antilles (of which Aruba was part until 1986) was dissolved on 10 October 2010, resulting in two new constituent countries (Curaçao and Saint Maarten), with the other islands (Bonaire, Saint Eustatius and Saba) joining the Netherlands as special municipalities. Aruba consists of a single island with approximately 30 kilometres long and 10 kilometres wide and it has approximately 105 000 inhabitants. It lies in the southern part of the Caribbean Sea, approximately 30 kilometres off the coast of Venezuela.
- 14. Aruba has a market-based economy, which relies primarily on tourism, followed by oil refining. According to the CFATF report of Aruba of October 2009, the contribution of international financial services to the GDP is estimated to be less than one percent, and Aruba's financial sector is small (paragraph 37). Aruba's most important trading partner is the United States of America. Based on the Central Bureau of Statistics Aruba's report of August 2010, the contribution of the financial intermediation sector to Aruba's GDP in 2009 was 385,8 million Aruban florins or approximately 215 million US dollars. The currency is the Aruban florin (AWG),² which has been pegged to the US dollar since 1986, at the exchange rate of USD 1.00 = AWG 1.79.
- 15. The relation between Aruba and the other parts of the Kingdom of the Netherlands is governed by the Statute for the Kingdom of the Netherlands, based on which Aruba is self-governing to a large degree. Defence, foreign relations, nationality and extradition are handled by the Netherlands. For historical and practical reasons Aruba also cooperated with the former Netherlands Antilles on various issues (including justice and certain legislation) and the legal basis for this cooperation is set forth in the Cooperation Agreement for the Netherlands Antilles and Aruba.
- 16. The Queen of the Netherlands is the head of State and the Governor is appointed by the Queen for a term of six years to act as the sovereign's representative on the island. The government consists of the Governor and a cabinet of ministers and headed by a prime minister. The ministers are appointed and dismissed by the Governor but are solely accountable to the parliament (Staten) whose confidence they must have at all times. Actual executive power therefore lies with the ministers.
- 17. Aruba has a parliamentary system with an unicameral parliament called Staten which consists of 21 members who are elected by popular vote

<sup>2.</sup> On 26 November 2010, AWG 1 = EUR 0.4226 EUR and EUR 1 = AWG 2.3662.

for a four-year term of office after which they can be re-elected. The authority to legislate is in the mutual hands of the government and the Staten which results in State ordinances. The authority to further regulate a subject can be delegated to the Government and is exercised thought State decrees and Ministerial regulations.

- 18. The judiciary is made up of independent judges who are appointed by the Queen upon recommendation of the Common Court of Justice of the Netherlands Antilles and Aruba (Common Court). Cases are heard in first instance by the Court in First Instance and can be appealed to the Common Court as court of second instance. Further appeal is possible at the Supreme Court of the Netherlands, however only for civil and penal cases (and not for example for administrative or tax cases). In this last instance only the application of the law by the previous instance is the subject of the judgment.
- 19. The legal system of Aruba is based on the Dutch legal system with some modifications due to local and/or regional circumstances and the substantially smaller scale of Aruba compared to the Netherlands. The basic rights of citizens, the institution and separation of the judiciary, legislative and executive branches, the organization of government and its tasks and obligations, along with related subjects are regulated in the Constitution of Aruba.

# Overview of commercial laws and other relevant factors for exchange of information

- 20. There are several types of legal persons in Aruba, characterised by their nature, functions and legal status. Limited liability companies (NVs) have been used primarily as the corporate vehicle by local businesses, although a limited percentage were also used for offshore business. Aruba exempt companies (AVVs) may be used for financing, investment, trading or holding activities. The latter may be defined as managing foreign property or real estate or other assets outside Aruba. AVVs were originally not intended for Aruban residents or for participation in the economy of Aruba.
- 21. In 2001, however, Aruba made a political commitment to co-operate with the OECD's initiative on transparency and effective EOI and, as part of the Kingdom if the Netherlands, it agreed to abolish or amend the tax regimes identified as harmful in the 1999 Report of the EU's Code of Conduct Group. In 2003, Aruba promoted a comprehensive tax reform called the New Fiscal Framework, which consisted of: (i) the abolishment of the offshore regime;<sup>3</sup> (ii) the abolishment of tax holidays for hotels and industries, phasing out

<sup>3.</sup> Articles 8a, 8b, 14 and 14a of the Profit Tax Ordinance, which embedded the off-shore regime, were amended with effect as of 1 July 2003 and a transitional regime effectively ending on 1 July 2008.

after a period of 10 years for the date when the tax holidays were granted; and (iii) the introduction of dividend withholding tax and of an integrated tax system by way of an imputation payment, which is open to entities that are engaged in listed activities (*e.g.* hotel exploitation, trading, holding, finance, insurance, leasing, licensing, music and film industry, aviation).

- 22. As of 1 January 2006 the Code of Commerce and applicable tax laws<sup>4</sup> were amended to prevent ring fencing, meaning that the general tax exemption that previously applied to AVVs was abolished and that AVVs were now allowed to operate domestically in Aruba. AVVs are not, however, allowed to act as a credit institution. In January 2009, a new type of limited liability company the VBA was introduced which allows a lot of flexibility regarding its structure, but which has some improved transparency requirements, as compared to the other forms of companies.
- 23. Besides companies, different legal forms in which (non-profit) organisations can operate in Aruba are associations and foundations, which can also conduct business. There are currently 1 008 foundations incorporated, 65 of them being non-active. With the exception of the association with legal personality, all legal persons can only be established through a notarial deed which must contain the articles of incorporation. NVs, VBAs and AVVs must always be entered in the Trade Register (a public register kept by the Chamber of Commerce and Industry) while foundations and associations with legal personality must only be entered in the Trade Register if they are conducting a business.
- 24. There are four different types of partnerships under Aruban civil and commercial laws, all without legal personality: open partnerships, silent partnerships, general partnerships, and limited partnerships. Unlike legal persons, partnerships do not require establishment through a notarial deed. General and limited partnerships are always required to register with the Trade Register kept by the Chamber of Commerce and Industry. Open and silent partnerships are not required to be registered, but if the partners (other than professionals) carry on a business, they must be registered as individual businesspersons.
- 25. NVs and AVVs may issue bearer shares, provided the full nominal value of issued shares has been paid up. On the contrary, the management directors of a VBA are required to maintain at all times, at the company's office, an up to date shareholders register. Since 2008, the new trust company service provider (TCSP) supervisory law provides that if a TCSP acts as a director or legal representative of a body with bearer shares, the TCSP must

<sup>4.</sup> State Ordinance on Profit Tax, State Ordinance on Income Tax and State Ordinance on Dividend Withholding Tax and Imputation Payment.

either be the custodian of the bearer shares or have knowledge of the licensed financial institution where the shares are kept.

### General information on the taxation system

- 26. In matters of taxation, the responsible minister is the Minister in charge of Finance. All taxation matters are handled by the Tax Department, which consists of the Directorate of Taxes and Customs, the Inspectorate of Direct Taxes, and the Inspectorate of Customs and Excise. Auditing and collection of taxes form an integral part of the Inspectorate of Direct Taxes.
- 27. Aruba's tax system is based on two different systems regulated under the General Tax Ordinance, each with their own conditions for filing and payment of the taxes due, as follows:
  - assessment taxes, such as corporate and individual income taxes, where the taxpayer has to file an annual return based on which the tax authorities will issue an assessment; and
  - filed return taxes, such as wage tax, turnover tax (BBO), social security premiums and dividend withholding tax, where the taxpayer has to file a return and pay taxes on monthly basis or upon dividend distribution.
- 28. All individuals residing in Aruba are subject to income tax at progressive rates (up to 58.95% and lowered to 25% if some conditions are met) on their worldwide income. Non-residents are subject to the individual income tax for income derived from some specific sources, such as real estate situated in Aruba and employment performed in Aruba. Wage tax is an advance levy to the income tax, withheld by the employer in Aruba or foreign employer with a permanent establishment in Aruba. The Tax Department may however appoint a foreign employer as a withholding agent (even if there is no permanent establishment).
- 29. Corporate income tax is due if an enterprise is carried out through a resident entity (*i.e.* incorporated under Aruban law or effectively managed in Aruba) or a permanent establishment or representative of a foreign entity in Aruba. NVs, AVVs and VBAs are subject to profit taxation at the rate of 28% (except where established in a free zone<sup>5</sup>, in which case they are subject to a profit tax rate of 2% on profit achieved with free zone activities), in accord-

<sup>5.</sup> The free zone is a special designated area on Aruba for activities abroad (export), where a company can store, process, adapt, assemble, pack, display and spread out its goods, or it can render services from it. These services include amongst others maintaining or repairing goods in Aruba of non-residents or providing these services abroad, as well as advice and research on behalf of non-residents.

ance with the State Ordinance on Corporate Income Tax. Different special tax regimes may apply upon election and provided that certain conditions are met (see more details under section A.1. below), as follows:

- NVs, AVVs and VBAs can elect to be treated as fiscally transparent;
- NVs and VBAs can opt for the imputation payment regime; or
- AVVs and VBAs can choose to be exempt from profit taxation and dividend withholding tax if they perform certain qualified activities.
- 30. Since 2003, Aruba imposes a dividend withholding tax on all dividend distributions by Aruba based companies. The tax rate<sup>7</sup> is:
  - 10% of the dividend distribution, as a rule;
  - 5% of the dividend distribution if the shares of the distributing company or the receiving company are (for at least 50% of the shares and the voting rights) directly or indirectly listed at a qualified stock exchange; or
  - 0% if the participation exemption is applicable.

### Overview of the financial sector and relevant professions

- 31. The financial sector is supervised by two different entities: (i) the Central Bank of Aruba (CBA), which supervises financial businesses in terms of their regulatory obligations, and (ii) the Reporting Center for Unusual Transactions (FIU), which supervises, along with the CBA, financial and non-financial businesses, as well as relevant professionals, in terms of AML/CFT measures.
- 32. The financial sector consists of regulated financial businesses, defined as (i) credit institutions (banks); (ii) insurance companies (life and non-life),

Financial services cannot be performed in the free zone. As of 2010, there were only 19 companies established in a free zone.

<sup>6.</sup> Namely, holding activities, financing of other companies (whether or not the financing is intercompany), investment activities (with exception of investing in real estate), the licensing of intellectual and industrial property rights and similar rights according to the laws of Aruba or the laws of other countries (article 1, National Decree Indicating Aruba Exempt Company Activities). In the event the AVV or VBA starts performing non-qualifying activities (no matter how small), the exempt status for corporate income tax and dividend withholding tax will be lost.

<sup>7.</sup> Subject to reduction under the Tax Arrangement of the Kingdom of the Netherlands (*Belastingregeling voor het Koninkrijk*) and double tax treaties.

- (iii) money transfer companies, (iv) TCSP, and (v) pension funds companies. According to information available on the website<sup>8</sup> of the CBA, there are 24 licensed insurance companies, 15 TCSPs, six money transfer companies, 11 company pension funds, and 11 credit institutions registered in Aruba, namely four commercial banks, two offshore banks (solely engaged in banking activities with non-residents), one mortgage bank, two credit unions and two other financial institutions. Under Aruban law, all banks operating in or out of Aruba must be licensed.
- 33. The only relevant professions currently regulated under Aruban law are lawyers (102) and civil notaries (four). Other relevant professionals operating in Aruba, such as dealers in goods of high value, accountants and tax advisors, are not regulated under Aruban law, registered at the Register of the Chamber of Commerce, nor part of a professional representative body. The Aruban anti-money laundering regulations apply to most relevant professionals, namely lawyers, notaries, accountants, tax advisors and traders in real estate and other high value goods, such as ships, airplanes art, cars, jewelry and precious metals.

### Recent developments

- 34. Amendments to the law, like the Commercial Code of Aruba and the Trade Register Ordinance, are currently being prepared and are expected to be in place in the first quarter of 2011 in order to provide for:
  - a total abolishment of the possibility to issue bearer shares by NVs and AVVs;
  - a requirement for NVs and AVVs to keep a shareholders register;
  - a requirement for NVs and AVVs to file the annual accounts at the Chamber of Commerce and Industry; and
  - raising the penalties under article 20 of the Trade Register Ordinance.

 $<sup>8. \</sup>qquad www.cbaruba.org/cba/getPage.do?page=SUPERVISION\_LIST.$ 

### **Compliance with the Standards**

### A. Availability of Information

### Overview

- 35 Effective exchange of information (EOI) requires the availability of reliable information. In particular, it requires information on the identity of owners and other stakeholders as well as information on the transactions carried out by entities and other organisational structures. Such information may be kept for tax, regulatory, commercial or other reasons. If the information is not kept or it is not maintained for a reasonable period of time, a jurisdiction's competent authority may not be able to obtain and provide it when requested. This section of the report assesses the adequacy of Aruba's legal and regulatory framework on the availability of information.
- With the exception of the association with legal personality, all legal persons can only be established through a notarial deed which must contain the articles of incorporation. Domestic companies, general and limited partnerships and cooperative associations must always be entered in the Trade Register (a public register kept by the Chamber of Commerce and Industry). In addition, foreign companies, associations with legal personality and foundations are only required to be entered in the Trade Register if they are conducting a business. In addition, foundations must always be entered in the Foundations Register.
- 37. However, it appears that limited partnerships are not required to disclose or to maintain sufficient identity information concerning limited partners. Open partnerships and silent partnerships are not required to register at the Trade Register, but if the partners (other than professionals) carry on a

business, they must be registered as individual businesspersons. It is further noted that Aruban foundations are not required to register or keep updated identity information concerning their beneficiaries. No disclosure to Aruban public authorities is required with regard to beneficial owners where a shareholder, member or partner is a legal entity.

- 38. Domestic and foreign legal persons (as well as general and limited partnerships) engaged in Aruban business must obtain a government permit to do business in Aruba. When engaged in regulated activities, an entity or person must have a licence from the CBA. Upon application for this permit, the legal entity or partnership is required to identify the shareholders (individuals or legal entities) or partners (except the limited partners), as well as the directors. However, this information held by public authorities is not kept up to date in the event of changes. Credit institutions, however, are required to submit to the CBA annual updated information on the identity of qualified owners. If a director of a NV, AVV or VBA is not a resident, he will need to obtain a director's permit (article 2, Establishment of Businesses Ordinance).
- 39. NVs and AVVs may issue bearer shares while VBAs are not allowed to do so under Aruban law. AVVs are always required to have a TCSP established in Aruba and licensed by the CBA as a legal representative. The same only applies to VBAs that do not have, directly or indirectly, an individual residing in Aruba as director. A TCSP, whether acting as director or legal representative of an entity, must have at its disposal at all times information recorded in writing or otherwise on the identity, assets and background of qualified beneficial owners who holds at least 10% of the capital of a legal entity. Regarding entities with bearer shares, the TCSP must either be the custodian of the bearer shares or have knowledge of where the shares are kept. It is noted that NVs are not required to have a TCSP as legal representative or a resident individual director, nor are they required to maintain an updated shareholders register at the company's office after the capital is paid in full, unless they opt for certain special tax regimes (fiscal transparency and imputation payment regime).
- 40. For tax purposes, all taxpayers (*i.e.* resident and non-resident individuals, including partners of a partnership, legal persons (including AVVs) and foreign persons with certain Aruban sourced income) are required to file annual tax returns where domestic and foreign legal entities need to disclose their legal owners' identity information concerning shareholders that own at least 25% of their shares. Legal entities qualifying for special tax regimes (imputation or transparency) are not allowed to issue bearer shares and may be subject to additional transparency requirements. For example, companies opting for the transparent regime are obliged to disclose information on the identity and address of their shareholders, whereas NVs or VBAs opting for the imputation tax regime are required to maintain an up to date shareholders register and have at least one Aruban resident individual as a managing director.

### A.1. Ownership and identity information

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

### Companies (ToR A.1.1)

### Types of Companies

- There are several types of legal persons in Aruba, characterised by their nature, functions and legal status, which can be established under the commercial laws of Aruba, as follows:
  - limited liability companies (naamloze vennootschap, NVs) (articles 33-155, Commercial Code):
  - Aruba exempt companies (Aruba vrijgestelde vennootschap, AVVs) (articles 155a-155tt, Commercial Code):
  - Aruba limited liability companies (vennootschap met beperkte aansprakelijkheid, VBAs), introduced on 1 January 2009 (State Ordinance on the VBA):
  - foundations (stichting, see more details below) (State Ordinance on Foundations); and
  - associations with legal personality (vereniging, see more details below) (articles 1665-1684 Civil Code).

### *Information kept by public authorities*

### Commercial laws

42. Companies formed under Aruban law can only be established with a declaration of no objection of the government and through a notarial deed which must contain the articles of incorporation, and must immediately be entered in the Trade Register kept by the Chamber of Commerce and Industry (articles 1(1) and 2(1), Trade Registry Ordinance). As of 2010, there were registered in Aruba 1 718 AVVs, 6 152 NVs, and 39 VBAs. When incorporated, these entities are required to disclose information on the managing directors. supervisory board directors and legal owners (individuals and legal persons), within a week following the company's establishment (article 8(1)). In the event of changes, information required to be filed at the Trade Register must be updated within seven days after the fact has taken place (article 4(2)). Information on the shares of NVs and VBAs which the nominal capital is not paid in full must be updated every six months (article 8(6)). It is noted, however, that no disclosure is required with regard to beneficial owners or persons otherwise entitled to such shares. Various other disclosure requirements regarding their capital are applicable to those companies at their establishment, *e.g.* concerning information on the amount of civil capital, the number and amount of shares for which each of the founders of the company participates.<sup>9</sup>

- 43. In order to get incorporated NVs, AVVs and VBAs are also required to obtain a declaration of no objection from the Minister of Justice, which authority has been delegated to the Aruba Financial Center (AFC)<sup>10</sup> (article 38, Commercial Code, article 12, State Ordinance on the VBA and article 155d, Commercial Code). With regard to the AVVs and VBAs the persons who, at the incorporation of the company, are responsible for (co)determining the policy of the company, are also investigated and must be identified (*e.g.* by passport information).
- 44. Companies (other than public law bodies) engaged in Aruban business must either obtain a government permit to do business in Aruba (article 1, Establishment of Businesses Ordinance and respective guidelines of the Department of Economic Affairs<sup>11</sup>) or a licence from the CBA (see regulated activities below). Upon application for this permit, the company is required to submit a copy of its register of shareholders (see below) and to identify the shareholders and directors, enclosing an extract from Chamber of Commerce in case the shareholder is a legal entity (Guidelines for the Establishment of Companies issued by the Department of Economic Affairs).

### Regulated activities

45. Legal entities (as well as partnerships) engaged in regulated financial activities (*i.e.* credit institutions, money transfer companies and company pension funds) are supervised<sup>12</sup> by and required to disclose to the CBA

<sup>9.</sup> Article 37 and 38, Commercial Code, for NVs; article 155b and 155c, Commercial Code, for AVVs and article 13, State Ordinance on the VBA, for VBAs.

<sup>10.</sup> www.arubafinancialcenter.aw.

<sup>11.</sup> The High Commissioner of the Aruba Financial Center is an agency which has also been given the power to issue permits to a certain category of companies, apart from the Department of Economic Affairs.

<sup>12.</sup> The supervision of credit institutions (primarily banks and investment companies), insurance companies (life and non-life), money transfer companies, and company pension funds has been regulated by various State ordinances and attributed to the CBA. As for credit institutions and insurance companies, a licensing system is used with the CBA as the sole licensing and supervisory authority. Money transfer companies are subject to a registration system with

information on the identity of directors, members of supervisory board and qualified owners, i.e. holding or exercising, directly or indirectly, more than 5% of the share capital or voting powers. 13 Investment funds are not covered by the State Ordinance on the Supervision of the Credit System (SOSCS) but they will fall under the scope of the new Ordinance on the Supervision of Investment Business. It is expected that the CBA will be appointed as supervisor.

46 A change of directors, members of supervisory board or qualified ownership of a credit institution, money transfer company, TCSP or insurance company requires prior written authorization by the CBA (article 9. SOSCS, article 5(2), State Ordinance on the Supervision of Money Transfer Companies (SOSMTC), article 5, State Ordinance on the Supervision of Trust Service Providers (SOSTSP) and article 17, State Ordinance on the Supervision of Insurance Business (SOSIB)). Furthermore, credit institutions are required to submit to the CBA annual updated information on the identity of qualified owners (article 19, SOSCS). The CBA can revoke the licence or apply administrative sanctions in the event of non-compliance with the disclosure obligations mentioned above.<sup>14</sup>

### Tax laws

47. Companies formed under Aruban law (NVs, AVVs<sup>15</sup> or VBAs) will be subject to various disclosure requirements under Aruban tax law. On an annual basis, those companies are required to file a corporate income tax return where they have to disclose the identity of each shareholder (legal owner) that owns at least 25% of their shares. The Director of Taxes is competent to establish the tax return's format (article 6(5), General Tax Ordinance).

subsequent supervision by the CBA. Credit institutions, insurance companies and money transfer companies may only act as such after authorisation from the CBA via licensing or registration respectively. Company pension funds do not require prior authorisation of the CBA but are still subject to supervisory measures similar to those used for credit institutions, insurance companies and money transfer companies.

- 13. Article 5(1), SOSCS; article 4(1), SOSMTC; article 6(1), SOSIB; article 3 SOSTSP and article 4(2), State Ordinance on Company Pension Funds. For insurance companies, where the license applicant is a member of a group of companies, it must also submit information concerning the formal and factual control structure of the group.
- Articles 11 and 35a, SOSCS; article 23, SOSMTC; and articles 8 and 16, SOSIB. 14.
- Under the General Tax Ordinance, AVVs are also required to file annual tax 15 returns, to keep an administration and to provide information the Tax Inspector deems relevant for the levy of taxes.

- 48. An AVV (since January 2006), NV or VBA can opt to become a transparent company (TC) and thus be treated as a partnership for corporate, individual and dividend withholding income tax purposes. <sup>16</sup> Up until 2010, 930 companies (*i.e.* 130 NVs and 800 AVVs) have been registered as a TC in Aruba. The option for the transparent status must take place within one month after its incorporation. It is not possible for an existing AVV, NV or VBA to opt for the transparent status and the choice for the transparent regime is, in principle, permanent. TCs do not have to file a tax return, but if they carry out taxable activities in Aruba, their (domestic or foreign) shareholders have to file a tax return in their own name for the share of profits attributed to these activities. In case of non-compliance, the Tax Inspector can impose a fine of 5% of the amount of the assessment up to AWG 10 000 (USD 5 587) (article 54(1) of the General Tax Ordinance).
- 49. Nevertheless, TCs are forbidden to issue bearer shares and are obliged to disclose information on the identity and address of their shareholders (whether natural or legal persons, resident or domiciled in Aruba or elsewhere) when they enter the regime, and subsequently on an annual basis (articles 3b(3) and 49(4)(a), General Tax Ordinance and Ministerial Decree for enforcement of Article 3b(3) General Tax Ordinance). In case of non-compliance with the disclosure obligations listed above, a company will become taxable, but subject to an increased corporate income tax rate of 150% of the standard tax rate (article 15(5), Corporate Income Tax Ordinance).
- 50. A NV or VBA can opt to become an Imputation Payment Company (IPC) provided it meets all conditions:<sup>17</sup> (i) performs only qualifying activities in Aruba;<sup>18</sup> (ii) has at least one Aruba resident individual as managing director; (iii) keeps a shareholders register; and (iv) has its financial statements

<sup>16.</sup> This means that the shareholders or members of a TC will be subject to taxation on their *pro rata* participation in the profits of the TC and no dividend withholding tax will be levied due to the fiscal transparency. In case a TC has foreign shareholders, they will only be subject to corporate income tax on the share of profits allocated to a permanent establishment or representative in Aruba. If there is no taxable presence in Aruba, a TC will not be subject to taxes at all.

<sup>17.</sup> Article 19, State Ordinance on Dividend Withholding Tax and Imputation Payment.

<sup>18.</sup> The activities of the IPC are restricted to the following: (i) quality licensed hotels; (ii) shipping or aviation enterprises; (iii) developing, acquiring, holding, maintaining and licensing of intellectual and industrial ownership rights, similar rights and usage rights; (iv) insuring special entrepreneurial risks (captive insurance); (v) holding, if the entities in which the shares are held are subject to a tax rate of at least 14%; (vi) financing (not being a credit institution) of enterprises and entities; (vi) investments, provided no funds are put at the disposal of related entities or invested in real estate (article 1, State Decree Activities Imputation Payment Company).

prepared in accordance with internationally accepted principles and is audited by a qualified (group of) independent certified public accountant. 19 Besides the requirements the IPC must adhere to, the shareholders must: (i) have legal and beneficial ownership of the shares in the IPC for at least an uninterrupted period of 12 months; and (ii) file a request to the tax authorities to claim the imputation payment over a certain dividend distribution, accompanied by various documents, such as (final) corporate income tax assessment over that year, proof of payment of the amounts paid, and (preliminary) financial statements.20

- 51 Therefore, if a NV or a VBA opts for the imputation tax regime, the company has to maintain an up to date shareholders register and have at least one Aruban resident individual as a managing director (article 19(2)(b) and (c), State Ordinance on Dividend Withholding Tax and Imputation Payment). Furthermore, IPCs are not allowed to issue bearer shares (article 19(2)(c), State Ordinance on Dividend Withholding Tax and Imputation Payment). Since the imputation credit is directly payable to the shareholder, the identity and address of each shareholder residing in Aruba, or resident legal representative of non-resident shareholders, must be disclosed for qualifying for each imputation payment (article 22(3)(g), State Ordinance on Dividend Withholding Tax and Imputation Payment). Up to 2010, there were 28 companies which opted for the IPC status, *i.e.* mostly local hotels.
- In addition to the disclosure requirements described above, any legal entity that applies for a tax ruling will be required to disclose the identity and address of all shareholders, including direct shareholding and ultimate beneficial owners. This disclosure obligation is based on tax policy and administrative practices established by the Director of Taxes and the Tax Inspector.

### Foreign companies

53 Foreign companies carrying on a business enterprise in Aruba, either directly or through a permanent establishment, are also required to register in the Trade Register and are subject to the same disclosure obligations as domestic companies, as well as the obligation to update information filed therein within seven days in the event of changes (article 9, Trade Registry Ordinance). As of 2010, 112 foreign companies were registered in Aruba. The Trade Registry Ordinance imposes different requirements in respect of the

<sup>19.</sup> A de mininus exception to the audit requirement exists when the purchase value of the assets is less than AWG 1 000 000 (USD 558 659) and the net turnover is less than AWG 2 000 000 (USD 1 117 318) (article 19(5), State Ordinance on Dividend Withholding Tax and Imputation Payment).

<sup>20.</sup> Article 22(3), State Ordinance on Dividend Withholding Tax and Imputation Payment.

registration of Aruban branches of businesses established abroad, requiring the disclosure of "anything stated or otherwise made public about the business for registration in a trade register under the legislation of that country" (article 11). Like domestic companies, foreign companies are subject to the same disclosure requirements mentioned above for the purposes of:

- engaging in Aruban business and obtaining a government permit to do business in Aruba (article 1, Establishment of Businesses Ordinance and respective guidelines of the Department of Economic Affairs<sup>21</sup>);
- pursuing the business of credit institutions via permanent establishments in Aruba and obtaining an authorization by the CBA (article 24, SOSCS); and
- complying with their tax obligations while liable for Aruban corporate income tax, by virtue of their effective management in Aruba (in which case, they are considered resident therein) or of maintaining a permanent establishment, a permanent representative or immovable property in Aruba (in which case, they may derive Aruban-sourced income).

Information kept by the companies, service providers and other persons

### Commercial laws

- 54. Under the Commercial Code, NVs and AVVs may issue bearer shares, provided the full nominal value of issued shares has been paid up. Until then, the management directors of a NV are required to keep a shareholders register containing the names of the shareholders (legal owner) who have not yet paid up their shares in full (article 54), but such an obligation is discontinued once the full nominal value of issued shares of a NV has been paid up. Directors that do not comply with their obligation regarding the shareholders register are punishable with imprisonment of up to three months or a fine not exceeding AWG 600 (USD 335) (article 455b, Criminal Code). It is noted, however, that NVs are not required to maintain a shareholder register or to keep information concerning the company's ownership and control available at their offices.
- 55. Unlike NVs and AVVs, VBAs are not allowed to issue bearer shares (article 1, State Ordinance on the VBAs). Under the State Ordinance on the VBAs, the management directors are required to maintain at all times, at the company's office, an up to date shareholders register with the names and

<sup>21.</sup> The High Commissioner of the Aruba Financial Center is an agency which has also been given the power to issue permits to a certain category of companies, apart from the Department of Economic Affairs.

addresses of all shareholders (legal owners) and of any parties with a right of usufruct and pledge on the shares (article 30(1), 30(2), and 30(3)). An exception is made for VBAs admitted to foreign stock exchanges, with regard to the part of shareholders register that must be kept abroad to comply with the foreign law and the stock exchange rules (article 30(6)). Non-compliance with this obligation regarding the shareholders register can result in the dissolution of the VBA (article 108) and punishment of the directors with imprisonment or a fine (article 455b, Criminal Code).

### Corporate service providers

- AVVs must have a legal representative, which can only be a limited 56 liability company incorporated and established in Aruba (article 155a(6), Commercial Code). Such legal representation is provided by a TCSP, which must hold a licence and be supervised by the CBA under the SOSTSP. VBAs are also required to have a licensed TCSP as legal representative in Aruba, unless the company has one or more natural persons resident of Aruba as managing director(s) or has a legal entity as managing director which, directly or indirectly, has one or more natural persons resident of Aruba as managing director(s). Non-compliance with these obligations regarding the legal representative can result in the dissolution of the AVV (article 155b(3), Commercial Code) or the VBA (article 108, State Ordinance on the VBAs).
- A TCSP, whether acting as director or legal representative of a company, must have at its disposal at all times information recorded in writing or on other data carriers on the identity, assets and background of the ultimate beneficial owners<sup>22</sup> for whom the TCSP performs its work. This includes at any rate knowledge of (i) the origin of the assets of the ultimate beneficial owner of the body used, and (ii) the purpose for which the group was formed (article 8(1), SOSTSP). This information must be stored for at least ten years (article 8(4)).
- 58. Furthermore, if a TCSP acts as director or legal representative of a body of which the shares are bearer shares, and those shares are not kept within its custody, the TCSP must always be informed of the place where these shares are kept and record this in writing. Shares may be placed in custody only under an agreement and with a financial institution under supervision of the CBA. This agreement must be concluded in writing between the custodian and the ultimate beneficial owner and at any rate contain the
- 22 The term ultimate beneficial owner is defined as a natural person who holds at least 10% of the capital of a legal entity, body or capital administered by a TCSP, or a beneficiary of 10% or more of the capital of a trust within the meaning of the Hague Convention on the Law Applicable to Trusts and their Recognition, which is administered by a TCSP (article 1, SOSTSP).

stipulation that both the custodian and the TCSP must be informed in writing of each sale of the shares, stating the name and address of the acquirer (article 9, SOSTSP).

59. It is noted that NVs are not required to have a TCSP as legal representatives or natural persons resident of Aruba which act directly or indirectly as managing directors, nor are they required to maintain an updated shareholders register at the company's office, unless they opt for certain special tax regimes or if they have shares that have not been paid in full. Out of the 6 512 NVs currently registered in Aruba, 6 134 are exclusively held by shareholders residing in Aruba and only 378 are held by foreign shareholders.

### Anti-money laundering laws

- 60. In addition to the specific supervisory State ordinances on regulated activities, the Aruban AML/CFT framework has been recently improved through the introduction, in 2009, of the State Ordinance on Identification when Providing Service. However, the scope of this State ordinance is limited to designated service providers when providing services listed therein (designated services). The designated service providers are credit institutions, life insurance companies, life insurance brokers, money transfer companies and certain relevant professionals (namely, certain dealers, lawyers, civil notaries, tax advisors, and accountants). Consequently, some financial activities are not subject to AML/CFT obligations, such as intermediaries operating on the stock exchange market of Aruba, which is neither regulated nor supervised, pension funds, TCSPs (but which are subject to a similar discipline, as mentioned above), general insurance companies, and general insurance brokers, amongst others. The designated services cover:
  - 1. taking into custody securities, banknotes, coins, currency notes, precious metals and other assets;
  - 2. opening an account;
  - 3. renting out a safety deposit box;
  - 4. executing a payment concerning the cashing of coupons or similar documents in respect of bonds or similar instruments;
  - 5. crediting or debiting, or having credited or debited, an account;
  - 6. issuing of loans and of letters of credit or guarantee;
  - 7. providing a service concerning a transaction or apparently interrelated transactions having an equivalent or combined equivalent equal to or exceeding an amount of AWG 20 000 (USD 11 173);
  - 8. conducting of securities transactions;

- conducting of transaction in which payments are effected in or outside Aruba; issuing or cashing of money order or similar intrinsic negotiable instruments; currency exchange activities for an amount exceeding AWG 20 000 (USD 11 173); and
- 10. giving advice or assistance for (i) the acquisition or sale of real estate. or of restricted or personal rights to real estate, (ii) the management of money, securities, coins, currency notes, precious metals, precious stones or other assets, (iii) the creation, operation or management of legal persons, partnerships, trusts or similar entities, (iv) the organization of contributions for the purpose of the creation of legal persons, partnerships, trusts or similar entities, or (v) the acquisition, sale or take-over of companies.
- 61. When providing the designated services covered by the State Ordinance on Identification when Providing Service, the designated service providers are prohibited from establishing a business relationship or conducting transactions with a customer before establishing and verifying the customer's identity and the person on whose behalf a customer is acting (articles 2, 4 and 8). They must keep this identification data recorded for five years from the date of the termination of the agreement under which service was provided (article 7).
- 62. If the customer is a natural person, this person's identity must be established by means of a valid identity document in Aruba or in the country of origin of the person in question. The identity of legal persons shall be established by means of a certified extract from the register of a Chamber of Commerce of the country in which the legal person is domiciled or a notarial deed drawn up by a competent authority of that country (article 3, State Ordinance on Identification when Providing Services).
- The reporting system of Aruba is mostly based on the State Ordinance on the Reporting of Unusual Transactions. Financial institutions, and since 2009 some designated non-financial businesses and relevant professionals, are required to report to the Reporting Center for Unusual Transactions (FIU) a number of unusual transactions taking into account various monetary thresholds or certain circumstances, defined by indicators issued by ministerial regulations (article 11). To this end, financial institutions are implicitly required to monitor accounts and to have systems to detect these types of unusual transactions with suspicious patterns.

### Nominees

According to information provided by Aruba, neither the concept of nominee shareholding nor fiduciary owner is recognized under Aruban law and to date the Aruban authorities have no experience with nominees. Under Aruban law, it is possible to pass on the economic benefits of share ownership, such as dividends, to a third party through the use of depositary receipts. Unlike a nominee, the holder of a depositary receipt cannot act on behalf of the legal owner and has no voting rights.

- 65. Although the concept of nominee shareholding is not recognized in Aruba, the AML/CFT legislation establishes an obligation regarding the identification of clients by designated service providers. In particular, designated service providers are required to ascertain whether a natural person who appears before him on behalf of a client is acting for himself or a third party (e.g. acting as a nominee) and to keep identity data for five years. In the latter case, the identity of the third party must be established (article 4, State Ordinance on Identification when Providing Service). Moreover, the Supervisory Directive on CDD for banks, adopted by the CBA (by virtue of articles 15(1), 20 and 35a, SOSCS), directs that Aruban banks should adopt additional CDD measures, such as conducting ongoing monitoring on the business relationships, identifying the ultimate beneficial owners, in particular with respect to companies that have nominee shareholders.
- 66. While the Aruban tax laws are silent about the tax treatment of nominees, an Aruban resident (e.g. acting as a nominee), the Aruba authorities advised that, under the general obligations arising from article 48 General Tax Ordinance and, in particular, the obligation for all taxpayers or third parties to provide to the Aruban tax authorities, upon request, any information enabling them to determine the amount of taxable income (articles 45(1), 45(3) and 49, General Tax Ordinance), whether this income is that of the person (e.g. acting as a nominee) or of the legal owner. The Aruban tax authorities have powers to request information from an Aruban resident (e.g. acting as a nominee), whether this relates to Aruban taxes or foreign taxes, to respond to an EOI request (as further described under Part B below).

### Bearer shares (ToR A.1.2)

- 67. As mentioned above, NVs and AVVs may issue bearer shares, provided the full nominal value of issued shares has been paid up. According to the Aruban authorities, various regimes are currently in place that have the effect of immobilizing bearer shares or preventing their use. They also provide for mechanisms to indentify owners of bearer shares. These regimes can be summarized as follows:
  - *commercial laws*: VBAs are not allowed to issue bearer shares (article 1, State Ordinance on the VBAs);
  - *permits and licences:* as a policy of the Department of Economic Affairs, no business permits or directors licences are granted to companies that issue bearer shares;

- service providers: if a TCSP acts as director or legal representative of a body with bearer shares (AVV), it must either keep them in the custody or be informed of the place where these shares are kept and record this in writing; shares may be placed in custody only under an agreement and with a financial institution under supervision of the CBA (article 9, SOSTSP);
- regulated activities: a company that is engaged in regulated financial activities (i.e. credit institutions, insurance companies (life and nonlife), money transfer companies, TCSP and company pension funds) is not allowed to issue bearer shares (article 5(1), SOSCS; article 4(1), SOSMTC; article 6(1), SOSIB; article 2(2) SOSTSP).
- AML/CFT legislation: companies with bearer shares cannot open a bank account or make use of any other services of a bank in Aruba without disclosing the identity of the beneficial owner(s) of the shares (see A.3. Banking Information below);
- tax laws: in order to benefit from the imputation regime, a company will have to disclose the identity of its Aruban resident shareholders or Aruban resident legal representative of non-resident shareholders to the tax authorities (articles 19 and 22, State Ordinance on Dividend Withholding Tax and Imputation Payment); to opt for fiscal transparency (check-the-box regime), a company will have to disclose the identity of its shareholders on an annual basis; companies incorporated as of 1 January 2006 that opt for this latter regime are not allowed to issue bearer shares at all (articles 3b(3) and 49, General Tax Ordinance and Ministerial Decree for Enforcement of Article 3b(3), General Tax Ordinance); for the reduction of withholding tax, either on a unilateral basis (from 10% to 5% for listed companies) or under the Tax Arrangement of the Kingdom of the Netherlands (Belastingregeling voor het Koninkrijk, BRK), the identity of shareholders will have to be disclosed.
- According to the new articles 51 and 155i of the Commercial Code of 68 Aruba, currently in the legislative process, the issuance of bearer shares by NVs and AVVs will be completely abolished in the first quarter of 2011.

### Partnerships (ToR A.1.3)

- 69 As opposed to legal persons, partnerships do not have legal personality and the partners (whether they are natural or legal persons) are therefore personally liable for the obligations incurred by the partnerships. The following types of partnerships exist in Aruba:
  - partnerships (maatschap) (articles 1630-1664, book 7A, Civil Code);

- general partnerships (*vennootschap onder firma*) (articles 1630-1664, book 7A, Civil Code in conjunction with articles 11-31, Commercial Code); and
- limited partnerships (*vennootschap en commandite*, LPs) (articles 1630-1664, book 7A, Civil Code in conjunction with articles 15-18 and 27, Commercial Code<sup>23</sup>).
- 70. A partnership can be silent or made known to the public. A silent partnership can be used for either exercising a business or a profession. This arrangement can be characterised as a contract, and like a contract, its existence is typically not disclosed to the public. It does not have any legal status and cannot hold real estate or own assets. As to a partnership made known to the public, a distinction is made between an open partnership, which exercises a profession, and a general partnership, which exercises a business. Like a general partnership, a limited partnership also operates a business under a name made known to the public. As of 2010, there were 117 general partnerships, 16 limited partnerships and 21 partnerships in Aruba.

### Information held by public authorities

- 71. All the partnerships listed above are regulated under the Civil Code, while general partnerships and LPs are also regulated by the Code of Commerce. Unlike legal persons, a notarial deed containing articles of incorporation is not required to set up a partnership. The main difference between open partnerships and general partnerships concerns the partners' liability. In the former, the members are equally and partially responsible for the debts of the partnership while in the latter each member is fully liable for the debts of the partnership. In limited partnerships, the general partners are fully liable for the debts of the partnership and the limited partners are only liable for debts incurred by the enterprise to the extent of their registered investment, which comes apparent according the disclosure requirements as included in the Trade Registry Ordinance (article 7).
- 72. General partnerships and LPs are always required to register with the Trade Register kept by the Chamber of Commerce and Industry (articles 1 and 2, Trade Registry Ordinance). Although no disclosure is required with regard to beneficial owners where the partner is a legal entity, disclosure is required with respect to identity information of the natural persons representing the legal entity, including the signature and initials of each representative.

<sup>23.</sup> If there is more than one managing partner, the laws governing the general partnership also apply to limited partnerships. The basic articles on partnership in the Civil Code also apply to the limited partnership insofar they are applicable to this specific kind of partnership.

In a silent partnership used for exercising a business, each individual business partner has to register (article 5 or 8, 8a and 8b Trade Registry ordinance). An open partnership (professionals) and a silent partnership used for exercising a profession are not required to register.<sup>24</sup>

- At the establishment, a general partnership is required to disclose to the Trade Register, in respect of each partner; name, domicile, place and date of birth, and nationality, substantiated with all relevant documents (article 6, Trade Registry Ordinance). LPs are required to provide information on the identify of general partners and to disclose only limited information concerning limited partners, *i.e.* number, nationalities, countries of residence. and invested amount (article 7, Trade Registry Ordinance). Any modification of the information submitted for registration must be reported to the Trade Register (article 13, Trade Registry Ordinance). By virtue of article 9 of the Trade Registry Ordinance, articles 6 and 7 also apply respectively to foreign general partnerships and foreign LPs.
- Partnerships are used, for example, by law and accounting firms. The only relevant professions currently regulated under Aruban law are lawyers (102) and the civil notaries (four). Lawyers are admitted to practice by the Common Court of the Netherlands Antilles and Aruba and are subject to disciplinary ruling on a case-by-case basis by the Council of Supervision, and in second instance by the Council of Appeal. A Bar Association (Orde van Advocaten) is present and active; however, this entity does not have regulatory powers, nor is membership mandatory for lawyers. Civil notaries are appointed by the Government, but do not have a self regulatory body which sets and enforces regulations on various subjects. Supervision limited to disciplinary measures to be imposed on a case-by case basis by the Common Court of the Netherlands Antilles and Aruba
- As far as taxation is concerned, partnerships are generally considered transparent, with the exception of the collection of payroll taxes and business turnover tax (sales tax). In case a partnership is considered transparent, the individual partners are required to file an annual tax return for their share of income as derived by the partnership. If considered non-transparent, a partnership is required to annually file tax returns (article 6, General Tax Ordinance).

### Information held by the partners and service providers

Under the Civil and Commercial Codes, there is no requirement for a partnership to have a legal representative in Aruba or to maintain an updated partners register. Under Aruban tax law, partnerships must keep records of

<sup>24.</sup> However, if a professional exercises a profession through an Aruban company, than the company must be registered (article 8, 8a and 8b, Trade Registry Ordinance).

all information that is relevant for the enforcement of tax laws, both to the partnership itself and to third parties, such as the partners (article 48(1)(c) and (2), General Tax Ordinance). Furthermore, qualifying partners who exercise control over the partnership, or who hold at least 50% of the share capital, are required to have all information that is relevant for the enforcement of tax legislation and may be compelled to provide it to the Tax Inspector upon request (article 45(4) in conjunction with article 2(b) and (i), General Tax Ordinance).

77. However, it is unclear whether this general obligation to keep relevant information for the enforcement of tax laws is sufficient to ensure that partnerships will keep updated ownership and identity information concerning their partners. In particular, where a partnership has only foreign partners and no activities in Aruba, it is very likely that no record keeping obligations will be applicable. This is problematic for LPs, which are not required to disclose ownership and identity information concerning their limited partners to the Trade Register (article 7, Trade Registry Ordinance).

### Trusts (ToR A.1.4)

78. It is not possible to form a trust under Aruban civil law and there is no domestic trust legislation. Aruba does not recognize foreign trusts and it has not ratified the Hague Convention on the Law Applicable to Trusts and their Recognition. Under Aruban law, there are no restrictions for a resident of Aruba to act as trustee, protector or administrator of a trust formed under foreign law.

### Tax laws

- 79. The Aruban authorities may attribute, for tax purposes, the assets and income of a non-recognized foreign trusts according to its own legal and tax system. As a result, a trustee residing in Aruba, who owns assets and/or earns income in his own name but on behalf of the trust, would be taxed for all the assets and/or income as being his own. Conversely, the Aruban authorities would not attribute the assets and/or earned income of the trust to a resident of Aruba who acts as an administrator of a foreign trust.
- 80. Nevertheless, under the General Tax Ordinance, an Aruban resident trustee or administrator of a foreign trust, whether a natural person conducting a business or profession or a legal entity, is required to keep records of any information that is relevant for the enforcement of tax laws, both in respect of the person and of third parties (article 48(1)(c) and 48(2)). This may include information about settlors, trustees and beneficiaries. Furthermore, the tax authorities have powers to request information from an Aruban resident trustee or administrator of a foreign trust, whether this relates to Aruban

taxes or foreign taxes, to respond to an EOI request under Articles 40 and 45(1), 49 of the General Tax Ordinance (see Part B below).

### Anti-money laundering laws

- In addition, the AML/CFT legislation establishes an obligation 81 regarding the identification of clients by designated service providers (financial institutions and relevant professionals, i.e. lawyers, civil law notaries, tax advisors or accountants). Even though the concept of trust is not recognized in Aruba, the list of designated services under the State Ordinance on Identification when Providing Service includes the creation, operation or management of trusts or similar entities (see ToR A.1.1) In particular. designated service providers are required to ascertain whether a natural person which appears before him on behalf of a client is acting for himself or a third party and to keep identity data for five years. In the latter case, the identity of the third party must be established (Article 4, State Ordinance on Identification when Providing Service).
- Although the State Ordinance on Identification when Providing Service does not specifically refer to settlors, trustees and beneficiaries, the definition of client is broad and encompasses natural or legal persons to or for the benefit of whom the service is provided. Moreover, the Supervisory Directive on CDD for banks, adopted by the CBA (by virtue of articles 15(1), 20 and 35a, SOSCS), directs that Aruban banks should adopt additional CDD measures, such as conducting ongoing monitoring on the business relationships, identifying foreign trusts' trustees, settlors/protectors and beneficiaries.
- 83 Furthermore, a TCSP which acts as administrator of a foreign trust must have at its disposal at all times information recorded in writing or another data carrier on the identity, assets and background of the beneficiaries of 10% or more of the capital of a trust for whom the TCSP performs its work (article 8, SOSTSP). This information must be stored for at least ten years (article 8(4)). Non-compliance herewith can lead to the application of administrative sanctions (a penalty charge order or an administrative fine not exceeding AWG 500 000 [USD 279 330]) and/or the revocation of the license (articles 11 and 18(2)(b)).
- In summary, if a designated service provider (financial institution or relevant professional) or a TCSP were to be used as administrators of foreign trust, information on the settlors and beneficiaries of a foreign trust would be available by virtue of the obligation regarding the identification of clients established under the AML/CFT legislation. In other cases, the General Tax Ordinance would impose on Aruban resident trustees or administrators of a foreign trust an obligation to keep all information that is relevant for the enforcement of tax laws, both in respect of the person and of third parties

information. The Aruban authorities informed that they are not aware of any cases where foreign trusts have been established or administered by Aruban service providers.

### Foundations (ToR A.1.5)

85. The different legal forms in which non-profit organisations can operate in Aruba are associations (articles 1665-1684 of the Civil Code), and foundations, which can also conduct business, as regulated under the State Ordinance on Foundations. Foundations are legal persons which have no members, shareholders or owners. Like associations, foundations aim to achieve idealistic, social, charitable or other non-profit goals through a working capital given to it for that purpose (article 1(3), State Ordinance on Foundations).

# Ownership and identity information required to be provided to government authorities

- 86. Like companies, foundations are created by one or more natural or legal persons through a notarial deed containing the articles of incorporation which should at least contain the name of the foundation (with the word *stichting* as part of that name), the aim of the foundation and the method and procedures for the appointment of the board members (article 3). The objective of a foundation cannot be to make payments to its founders or persons belonging to its organs, nor to others except if the payments to those others have an idealistic or social aim (article 1(3)). A foundation that is contrary to public order (*e.g.* aimed at disobedience to or violation of legal provisions) is prohibited and as such is null and void; however, this voidance cannot be held against third parties who were unaware of this (article 2).
- 87. All foundations must be registered in the special public register called the Foundations Register which is kept by the Chamber of Commerce and Industry. Registration must include the name(s) and address(es) of the founder(s) and board members of the foundation. Changes to the board members and articles of incorporation must also be entered in the Foundations Register (article 7). In addition, a true copy of the deed of incorporation, by laws and amendments thereto should be registered (article 6, State Decree of Foundation Register).
- 88. In case the foundation carries on a business, it will be subject to additional disclosure requirements under article 8(1) of the Trade Registry Ordinance concerning every board member and commissioner: names and domicile, place and date of birth, nationality substantiated with documents, signature and initials, date of commencement the employment, and if applicable the ability to represent the foundation (together with other persons). However, under the State Ordinance on Foundations or the Trade Register

Ordinance, there does not appear to be a requirement that identity information on the beneficiaries is filed on the Foundations Register.

- Non-compliance with the registration and disclosure obligations could result in the dismissal of a board member by the court of first instance, upon request of the Public Prosecution Service or any interested party (article 12). However, the State Ordinance on Foundations does not provide for the dissolution of the foundation in this case (articles 14 and 15).
- 90 Irrespective of carrying on a business, a foundation is a legal entity and is taxable, unless they purport to serve the public interest (article 1, State Ordinance on Corporate Income Tax). Therefore, foundations need to submit an annual corporate income tax return to the Tax Inspector (article 6, General Tax Ordinance). Moreover, foundations that are engaged in regulated activities (e.g. pension funds) are required to disclose information regarding the identity of founders, board members, and beneficiaries to the CBA and to the Ministry of Labour Affairs. Non-compliance with the disclosure obligations can be penalised with a fine not exceeding AWG 300 (USD 168) (article 27, State Ordinance on Company Pension Funds).

### Ownership and identity information required to be retained by the foundation, directors and founders

- Aruban foundations must be domiciled in Aruba (article 4). However, under the State Ordinance on Foundations. Aruban foundations are not required to retain information on the identity of the beneficiaries. It is also noted that Aruban foundations are not required to have one or more Aruban resident founders, directors or legal representatives.
- 92 For tax purpose, a foundation is a legal entity and is thus subject to the same disclosure obligations applicable to other persons under Aruban tax laws (article 48. General Tax Ordinance). Foundations are required to keep records, including information that is relevant for the enforcement of tax legislation concerning third parties, such as founder(s), beneficiaries and directors (articles 48 and 49, General Tax Ordinance). However, it is unclear whether this general obligation to keep relevant information for the enforcement of tax laws is sufficient to ensure that foundations will keep updated ownership and identity information concerning their founders, beneficiaries and board members. In particular, where a foundation has only foreign beneficiaries and no activities in Aruba, it is very likely that no record keeping obligations will be applicable. This is problematic with regards to ownership and identity information concerning beneficiaries, which foundations are not required to file at the Foundations Register.
- There is no requirement that relevant information for the enforcement of tax laws is kept in Aruba. According to article 45 and 46 of the General

Tax Ordinance, however, the tax authorities have the right to obtain all information and intelligence, including information kept abroad and from a third person who keeps the information.

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

94. Aruba should have in place effective enforcement provisions to ensure the availability of ownership and identity information, including sufficiently strong compulsory powers to access the information. This subsection of the report assesses whether the provisions requiring the availability of information with the public authorities or within the corporate entities reviewed in section A.1 are enforceable and failures are punishable. Questions linked to access are dealt with in Part B of this report.

#### Commercial laws

- 95. The Trade Register has power to request the production of and otherwise obtain such documents, accounts and information which are necessary for the purpose of exercising its functions. Upon establishment, domestic companies, general and limited partnerships must always be registered with the Trade Register. Foreign companies, Aruban foundations and associations with legal personality must be only entered herein if they are conducting a business. In a silent partnership used for exercising a business, each individual business partner has to register (articles 5 or 8, 8a and 8b Trade Registry ordinance). Non-compliance with the registration and disclosure requirements under the Trade Register Ordinance (article 20) is penalised with financial fines not exceeding AWG 500, 1 000 or 2 000 (USD 279, 559 or 1 117) depending on the gravity of the offense, as well as dismissal of the board members of a foundation (article 12, State Ordinance on Foundations) Future amendments to article 20 of the Trade Register Ordinance, currently under legislative process, will increase the maximum administrative penalties to AWG 5 000, 10 000 and 25 000 (USD 2 793, 5 587 or 13 966), respectively.
- 96. Domestic and foreign companies (other than public law bodies) engaged in Aruban business must either obtain a government permit to do business in Aruba (Article 1, Establishment of Businesses Ordinance and respective guidelines of the Department of Economic Affairs<sup>25</sup>) or a licence from the CBA (see Regulated activities below). Non-compliance with the disclosure obligations in connection with the Establishment of Businesses

<sup>25.</sup> The High Commissioner of the Aruba Financial Center is an agency which has also been given the power to issue permits to a certain category of companies, apart from the Department of Economic Affairs.

Ordinance is a criminal offense, punishable with a financial fine not exceeding AWG 2 000 (USD 1 117) or imprisonment for up to six months, in addition to the withdrawn of the business license (articles 7 and 10).

- 97 VBAs are always required to maintain a shareholders register while NVs are subject to the same obligations with respect to shareholders whose capital is not fully paid up. Non-compliance with this obligation can result in punishment of the directors with imprisonment or a fine (article 455b, Criminal Code). Future amendments to the Trade Register Ordinance, currently under legislative process, will also establish a fine not exceeding AWG 5 000 (USD 2 793) if a company fails to comply with its obligation to file annual accounts at the Trade Register or to maintain its shareholders register, when applicable (article 20, new paragraphs 4 and 5).
- Whilst AVVs are always required to have a TCSP established and licensed in Aruba as legal representative, VBAs are subject to the same obligation unless it has, direct or indirectly, one or more individuals residing in Aruba as directors. Non-compliance with this obligation can result in the dissolution of the company (article 155b(3), Commercial Code and article 108, State Ordinance on the VBAs).
- A TCSP, whether acting as director or legal representative of a company, must have at its disposal at all times information recorded in writing or on other data carriers on the identity, assets and background of the ultimate beneficial owners who holds at least 10% of the capital of a legal entity or 10% of the beneficiaries of a trust for whom the TCSP performs its work. Furthermore, if a TCSP acts as director or legal representative of a body of which the shares are bearer shares, it must either kept the bearer shares within its custody or be informed of the place where these shares are kept (with a financial institution under supervision of the CBA) and record this in writing. Noncompliance herewith can lead to the application of administrative sanctions (a penalty charge order or an administrative fine not exceeding AWG 500 000 [USD 279 330]) and/or the revocation of the license (articles 11 and 18(2)(b)).

#### Tax laws

- As far as taxation is concerned, article 68 of the General Tax Ordinance imposes a fine not exceeding AWG 25 000 (USD 13 966) (or the amount of the tax due and unpaid if higher) and/or detention for a maximum of six months, in case someone's action or omission cause the violation of an obligation under the General Tax Ordinance, as follows:
  - failure to file a tax return within the set period of time or filing it incorrectly or incompletely, except if the person files a correct and complete tax return before being challenged by the Tax Inspector (article 6);

- failure to provide information, data, or indications, or providing them incorrectly or incompletely, except if the person provides correct and complete information, data or indicators before being challenged by the Tax Inspector;
- failure to preserve data carriers or to allow the inspection of their contents, or making them available in a false, falsified or incomplete form;
- failure to keep administration and accounting records in accordance with the requirements laid down in a tax ordinance, or to lend cooperation to the Tax Inspector for the investigation of such records as provided under article 48(7);
- failure to provide the following annual lists, or providing them incompletely, to the Tax Inspector: (i) a list of third parties that were employed by or for this person during the past year, including managing directors, supervisory directors, and any persons other than commissionaires (article 49(2)), and (ii) a list of third parties that performed any work or provided any services to or for this person during the past year without being employed (article 49(3)).
- 101. If proved any the violations listed above was wilfully committed, the punishment may be increased to a fine of no more than AWG 100 000 (USD 55 866) (or twice the amount of the tax due and unpaid if higher) and/or imprisonment for no more than four years. Furthermore, if the requested information is not provided, the burden of proof may be reversed (article 18(7)).

### Regulated activities

102. The CBA and their respective officials and employees have broad investigation and seizure powers relating to the supervision of service providers (TCSP, credit institutions, insurance companies and money transfer companies), to the extent reasonably necessary for the fulfilment of their duties. They are authorized to obtain all information, to request access to all business books, records and other information carriers and to make copies of them or take them along temporarily, as well as to enter all premises, except for homes without explicit permission from the occupant, accompanied by persons designated by them.<sup>26</sup> The CBA can revoke the licence or apply administrative sanctions in the event of non-compliance with the disclosure obligations imposed to supervision of service providers.

<sup>26.</sup> Article 28, State ordinance on supervision of TCSP; article 9, State Ordinance on Identification when Providing Services; article 23, State Ordinance on the Reporting of Unusual Transactions.

103 The sanctions for non-compliance with regard to credit institutions and insurance companies are a penalty charge order and/or an administrative fine not exceeding AWG 250 000 (USD 139 665) (article 35a, SOSCS) and criminal prosecution subject to imprisonment of up to four years, a fine not exceeding AWG 500 000 (USD 279 330) or both (article 53, SOSCS and articles 16 and 26, SOSIB). The sanctions for non-compliance with regard to money transfer companies are a penalty charge order and/or an administrative fine not exceeding AWG 250 000 (USD 139 665) (article 23, SOSMTC). The sanctions for non-compliance with regard to TCSPs are criminal prosecution subject to imprisonment of up to two years, a fine not exceeding AWG 250 000 (USD 139 665) or both (article 28, SOSTSP). Furthermore, the CBA can revoke the licence of the TCSP, credit institution, money transfer company or insurance company which violate its disclosure obligations (article 18 SOSTSP, article 11 SOSCS, article 7, SOSMTC and article 8, SOSIB).

### Anti-money laundering laws

- 104 The CBA and FIU and their respective officials and employees have supervision powers in relation to the AML/CFT framework. Noncompliance with obligations under the AML/CFT regulations is punishable with a penalty charge and/or an administrative fee up to an amount of AWG 250 000 (USD 139 665) (article 10, State Ordinance on Identification when Providing Services; article 24. State Ordinance on the Reporting of Unusual Transactions), and it can be considered a criminal offense punishable with a term of imprisonment not exceeding four years or a fine not exceeding AWG 500 000 (USD 279 330) (article 17, State Ordinance on Identification when Providing Services; article 31, State Ordinance on the Reporting of Unusual Transactions).
- Lawvers, civil law notaries, tax advisers and accountants are not 105. allowed to invoke a secrecy obligation or legal privilege on a statutory or any other basis with regard to the application of the CBA and FIU powers referred to above, in so far as it concerns the provision of a supervised service, which include giving advice or assistance for (i) the acquisition or sale of real estate, or of restricted or personal rights to real estate, (ii) the management of money, securities, coins, currency notes, precious metals, precious stones or other assets, (iii) the creation, operation or management of legal persons, partnerships, trusts or similar entities, (iv) the organization of contributions for the purpose of the creation of legal persons, partnerships, trusts or similar entities, or (v) the acquisition, sale or take-over of companies (articles 1(1), service, 110., 1(2) and 9(6), State Ordinance on Identification when Providing Services; articles 1(2) and 23(6), State Ordinance on the Reporting of Unusual Transactions).

106. The effectiveness of the enforcement provisions which are in place in Aruba will be considered as part of the Phase 2 Peer review.

#### Determination and factors underlying recommendations

Determination	
The element is in place, but certain aspects of the legal implementation of the element need improvement.	
Factors underlying recommendations	Recommendations
NVs are not always required to keep identity information concerning their shareholders, particularly when bearer shares are issued.	An obligation should be established for NVs to keep identity information concerning their shareholders in all cases, particularly when bearer shares are issued.
LPs are not required to keep a register of identity information concerning their limited partners.	An obligation should be established for LPs to keep identity information concerning their limited partners.
Foundations are not systematically required to keep a register of identity information concerning their beneficiaries.	An obligation should be established for foundations to keep identity information concerning their beneficiaries.

# A.2. Accounting records

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

# General requirements (ToR A.2.1)

107. The management directors of a NV, AVV or VBA are required to submit within eight months after closing of the company's fiscal year a balance sheet and a profit and loss statement accompanied by an explanation to the general shareholders meeting for approval.<sup>27</sup> An expert (usually an auditor) can or, in case the articles of incorporation so require, must be appointed by the general shareholders meeting to examine the books of the company and to report on the balance sheet and profit and loss statement as presented by the management.<sup>28</sup>

Articles 73 and 155q, Commercial Code and article 36, State ordinance of the VBAs

Articles 74 and 155r, Commercial Code and article 37, State ordinance of the VBAs.

- 108 Article 15a(1), book 3 of the Civil Code states that everybody that operates a business or independently exercises a profession shall keep such records of their financial condition and of anything related to their business or independent profession, in accordance with the requirements of such business or independent profession. The accounts, records and other information carriers must be kept in such a manner that at all times the rights and obligations of the aforementioned (legal) person can be known. It is required that the accounts give a true and fair view of the financial position of the persons who are subject to the accounting requirement. The Aruban authorities informed that, in practice, accounts are typically drawn up in accordance with Dutch or US GAAP and nowadays also the International Accounting Standards (IAS).
- Most entities engaged in regulated activities must have their annual accounts audited by an external auditor and must file their annual accounts with the CBA (article 23 SOSCS, article 15, SOSMTC, and article 11 and 12, SOSIB). As an exception, TCSPs must submit annual reports to the CBA but the auditing by an external auditor is not required (article 7, SOSTSP).
- 110. Individuals conducting any business or profession, individuals liable to withholding taxes and other bodies (companies, foundations, partnerships, etc.) must keep sound accounting records of their financial condition and anything related to their business (article 48, General Tax Ordinance). Such record keeping obligations are equally applicable to any persons, including trustees, who administer a foreign trust with respect to their business. They must also supply to the tax authorities each year a statement concerning third parties (not being employees) that rendered services to the company (article 49(3), General Tax Ordinance). A company opting to become a transparent company will remain a body within the meaning of article 48 of the General Tax Ordinance, and thus subject to the record keeping obligations under this provision, in spite of its transparent status for tax purposes.
- In addition, partnerships have the obligation to keep records of all information that is relevant for the enforcement of tax laws, both to the partnership itself and to third parties, such as the participating partners (article 49(4), General Tax Ordinance). Furthermore, the tax authorities may request qualifying partners to hand over all information that is relevant for the enforcement of tax legislation. Qualifying partners are partners that exercise control over the partnership, or hold at least 50% of the share capital (article 45(4), General Tax Ordinance).
- If a foundation is engaged in a business activity, it must keep accounts 112 (article 15a, book 3, Civil Code). Under the General Tax Ordinance, a foundation is always required to keep books and accounting records, regardless of whether or not it conducts a business. These books and accounting records must provide a proper insight in the assets and liabilities, rights and obligations of the foundation at all times (article 48, General Tax Ordinance). The Aruban

authorities informed that, in practice, this means that Dutch or US GAAP will be followed, and nowadays also the International Accounting Standards (IAS).

## Underlying documentation (ToR A.2.2)

113. For tax purposes, companies, foundations and partnerships are required to keep accounting records comprising all relevant circumstances in order to determine the financial position of the taxpayer at all times. Furthermore, these accounting records must be substantiated by all relevant documents such as contracts and detailed invoices (article 48(4) and (5), General Tax Ordinance). These accounting records constitute the basis for companies' and foundations' financial statements.

### Document retention (ToR A.2.3 and A.2.4)

- 114. The Trade Register keeps all registrations archived therein for an indefinite period of time. For the duration of the business license, all relevant information is kept by the Department of Economic Affairs.
- 115. The accounting information concerning natural and legal persons performing regulated activities is kept up to date by the CBA for as long as it deems necessary in order to fulfil its supervisory task. Information recorded by a TCSP must be kept for a period of at least ten years (article 8(4), SOSTSP).
- 116. Article 48(8) of the General Tax Ordinance requires any person liable to keep administration records (companies, foundations, partnership, etc.) to keep their records and the corresponding data for at least ten years.

#### **Determination and factors underlying recommendations**

	Determination
The element is in place.	

## A.3. Banking information

Banking information should be available for all account-holders.

# Record-keeping requirements (ToR A.3.1)

117. Aruba's record-keeping requirements are generally satisfactory. Under the Aruban AML/CFT framework applicable to credit institutions, life insurance, brokers, money transfer companies and certain relevant professionals, such service

providers are required to establish and verify the customer's identity and the person on whose behalf a customer is acting, before establishing a business relationship, conducting transactions above certain amounts, or performing any payment in or outside Aruba.<sup>29</sup> This identification data must be recorded for five years from the date of the termination of the agreement under which service was provided or after the execution of a payment. As indicated under section A.1.1 above, the identification of the customer, either natural or legal persons, shall be based on official identification documents, a deed of incorporation or extract from the Chamber of Commerce or other competent authority (article 3, State Ordinance on Identification when Providing Service). Anonymous accounts are thus forbidden.

- 118. For a customer that is a legal person, there is no requirement in the State Ordinance on identification when Providing Services or in its related regulations to identify natural persons who ultimately owns or controls the customer or to identify customers that are foreign trusts or other similar legal arrangements. Nevertheless, the Supervisory Directive on CDD for banks, adopted by the CBA (by virtue of articles 15(1), 20 and 35a, SOSCS), does recommend that these types of financial institutions adopt additional CDD measures, such as conducting ongoing monitoring on the business relationships, identifying ultimate beneficial owners, in particular with respect to companies that have nominee shareholders or shares in bearer form, as well as identifying foreign trusts' trustees, settlors/protectors and beneficiaries. As a result of this Supervisory directive, companies with bearer shares and foreign trusts cannot open a bank account or make use of any other services of a bank in Aruba without disclosing the identity of their shareholders.
- Under article 6 of the State Ordinance on Identification when Providing Service, the service providers are also obliged to record the following information in such a way that it is accessible:
  - name, address and place of residence, or registered office of the client, of the person on whose behalf a client is acting, and of the person in whose name the account or the deposit is registered, or of the person who will have access to the safety deposit box, or of the person in whose name a payment is made or a transaction is effected, as well as of their representatives;
  - nature, number, if possible, and date and place of issue of the document by means of which the identification was established;
  - nature of the service the relevant information related to the service. e.g. in the case of opening an account or a deposit, a clear description of the type of account or deposit, and the number given to the account or deposit; and
  - all transactions, as well as all correspondence related to transactions.

<sup>29.</sup> Articles 2, 4, 6-8, State Ordinance on Identification when Providing Service.

- 120. Under the State Ordinance on the Reporting of Unusual Transactions, financial institutions, and since 2009 some designated non-financial businesses and relevant professionals, are required to report to the FIU a number of unusual transactions taking into account various monetary thresholds or certain circumstances, defined by indicators issued by ministerial regulations (article 11). To this end, financial institutions are implicitly required to monitor accounts and to have systems to detect these types of unusual transactions with suspicious patterns.
- 121. On account of the enforcement of the EU Directive on the Taxation of Savings Income (2003/48/EC) in the form of interest payments, a bank or financial institution is required to provide to Minister of Finance, on an annual basis, the following information in relation to interest payments to EU resident individuals (articles 44b and 44c, General Tax Ordinance):
  - full name, date of birth, place of residence and, if known, the tax identification number of the beneficial owner:
  - full name and address of the institution making the payment;
  - account number of the beneficial owner (in case such information is not available; a clear description of the account/debt); and
  - complete annual data of interest payments associated with the concerning account/debt during the relevant tax year.
- 122. The Minister of Finance has to submit this information to the EU Member State where the beneficial owner of the interest payment resides to comply with its automatic EOI duties.

#### **Determination and factors underlying recommendations**

	Determination
The element is in place.	

### B. Access to Information

#### Overview

- A variety of information may be needed in a tax enquiry and jurisdic-123 tions should have the authority to obtain all such information. This includes information held by banks and other financial institutions as well as information concerning the ownership of companies or the identity of interest holders in other persons or entities, such as partnerships and trusts, as well as accounting information in respect of all such entities. This section of the report examines whether Aruba's legal and regulatory framework gives the authorities access powers that cover the right types of persons and information and whether rights and safeguards would be compatible with effective EOI.
- Aruba's Tax Inspector has powers to obtain relevant information on 124. ownership, identity, accounting records and financial data from any person within its jurisdiction who has relevant information in his possession, custody or under his control. The Tax Inspector has powers to search premises and seize information for the purpose of exercising the investigation powers invested in him. The Minister in charge of Finance is the competent authority to deal with EOI requests. On criminal tax matters, the Minister of Justice remains responsible for international legal assistance but he is required by law to involve the Minister of Finance. Non-compliance can be sanctioned with significant administrative and criminal penalties. However, Aruba should consider clarifying the procedural rules concerning EOI on civil and criminal tax matters to avoid any delay or restriction to the effective EOI under its international agreements.
- 125 If the Minister of Finance decides to comply with an EOI request, the person under investigation has to be notified by the Minister of Finance and an EOI request should only be answered after two months from this notification, but an exception for urgent reasons is permitted under the law, making the notification rights and the two-month stand by requirement compatible with effective EOI. Any secrecy obligations to which a person would otherwise be subject in respect of the information sought are overridden where provision of the information is in relation to an EOI request or AML/CFT matters.

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

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

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

- 126. Under Aruban law, the powers to access information do not vary depending on the type of information sought. That is, the powers can be consistently applied regardless of whether the information is ownership, identity, banking or accounting information. However, the access powers may not be sufficient to obtain all the information which may be sought under Aruba's EOI agreements, as outlined below.
- 127. The Aruban competent authorities have information gathering powers for civil tax matters purposes, as set out in articles 38 to 53 of the General Tax Ordinance. The Minister in charge of Finance may ask the Tax Inspector to make inquiries in order to obtain information from any person (natural or legal), in case an EOI request is made under the Tax Arrangement of the Kingdom of the Netherlands (*Belastingregeling voor het Koninkrijk*, BRK), a double tax treaty (DTC) or a tax information exchange agreement (TIEA) (articles 38 and 40, General Tax Ordinance).
- 128. On criminal tax matters, the Minister of Justice remains responsible for international legal assistance but he is required by law to involve the Minister of Finance, since the services rendered by the Inspectorate of Direct Taxes and the CBA pertains to the responsibility of the latter. If the request is addressed to the Police Department or the Minister of Justice, the information can only be exchanged after consultation with the Minister of Finance (article 560(2), Code of Criminal Procedures). If the EOI request is addressed to the Minister of Finance, the information can only be exchanged after the authorization of the Minister of Justice (article 39(6), General Tax Ordinance). It is unclear whether the involvement of the Minister of Justice can cause any delay or restriction to the response to an EOI request on criminal tax matters. The Aruban authorities informed that they have no experience with such requests. A practical assessment of the matter will take place in the Phase 2 Peer Review of Aruba.
- 129. Under article 45(1) of the General Tax Ordinance, which applies by analogy to cross-border EOI requests (article 40), the Tax Inspector may compel any person within Aruba's jurisdiction to provide to any data and information "that may be of importance for the taxes to be levied with regard to this

person" or data carriers or the contents thereof "that may be of importance for establishing the facts that may affect the taxes to be levied with regard to this person" (paragraphs a and b). The Aruban authorities informed that this provision, in conjunction with article 40, is interpreted as also covering taxes of the requesting jurisdiction in the context of an international EOI request.

- 130. Article 49 of the General Tax Ordinance (read in conjunction with article 48), which applies by analogy to cross-border EOI requests (article 40), extend the disclosure obligations under articles 45 to 47 to individuals and bodies (companies, partnerships and foundations) that are liable to keep accounting records, for the purposes of levying taxes from third parties and of levying taxes they are supposed to withhold. Therefore, companies and partnerships may be required to disclose information about their shareholders and partners, as well as financial institutions about their clients. This provision also applies to third parties with which a company has business relations, *e.g.* sale of goods.
- 131. Moreover, persons liable to keep accounting records are required to annually provide the Tax Inspector with (i) a list of third parties that were employed by or for this person during the past year, including managing directors, supervisory directors, and any persons other than commissionaires (article 49(2)), and (ii) a list of third parties that performed any work or provided any services to or for this person during the past year without being employed (article 49(3)).
- 132. Article 45(2) imposes disclosure obligations over fiscally transparent companies "with regard to taxes levied" on the persons entitled to part of its capital, covering both legal and beneficial owners. Within six months after the end of the fiscal year, transparent companies are required to provide the Tax Inspector with (i) a list of third parties that were shareholders of the transparent company during the past fiscal year, and (ii) an opening balance sheet and closing balance sheet as well as an income statement with regard to the past fiscal year (article 49(4)).
- 133. Furthermore, controlling or majority resident and non-resident shareholders, directly or indirectly holding at least half of the capital shares of a body, individually or by virtue of a mutual cooperation agreement, may be obliged to disclose information "that may be of importance for the taxes to be levied" on a body (*i.e.* a company, foundation or partnership) which is liable to taxes in Aruba (article 45(4)). If an Aruban domiciled body has controlling or majority shareholders resident or domiciled abroad, the body may be compelled to produce any data, information and data carriers in the possession of the controlling or majority shareholders (article 45(5)).
- 134. However, article 68(4) exempts from punishment anyone who fails to comply with the obligation under article 45(5) "due to a refusal, not attributable to him, of anybody not established within Aruba or anybody not living

within Aruba to provide the data or information requested or to make books, records, any other data carriers, or the contents thereof available for inspection." This exception to the application of the penalties under article 68 would make enforcing this requirement difficult.<sup>30</sup>

- 135. The access powers of the Tax Inspector also cover (i) third parties which hold in custody (*e.g.* a bookkeeper) data carriers belonging to the person under investigation (article 45(3)) and (ii) third parties whose affairs are regarded as "affairs of the person presumed to be liable to pay taxes" (*e.g.* the taxpayer's spouse and/or children) by virtue of any tax ordinance (article 45(7)).<sup>31</sup>
- 136. The Aruban law does not limit the type of information that may be requested, and therefore ownership, identity, accounting information and bank information can be accessed. However, the references to "taxes (to be) levied" in the above-mentioned provisions may not encompass all information within Article 1 of the OECD Model TIEA, that is information foreseeably relevant to the "assessment or collection" of tax, which shall include information foreseeably relevant to "the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters".
- 137. That is to say, if the reference to "taxes (to be) levied" is interpreted narrowly, the Tax Inspector may not be empowered to obtain all information on "the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters" which Aruba has agreed to exchange pursuant to its EOI agreements. The Aruban authorities indicated that such reference to "taxes (to be) levied" is interpreted broadly since international agreements are of a higher standard than the domestic laws. The practical impact of these restrictions on the effectiveness of access to information will be considered as part of the Phase 2 review of Aruba.
- 138. The Tax Inspector can require information to be provided orally, in writing or otherwise, within a set time period. The tax authorities can make copies, printouts and extracts of the data carries, as well as confiscate the data carriers when copies or printouts cannot be made on spot (article 46).
- 30. It is noted, however, that Aruba has the access powers needed to fulfil its obligations under all of its 18 tax information exchange agreements (TIEAs) signed to date, *i.e.* to provide information which is held by its authorities or in the possession or control of persons who are within its territorial jurisdiction.
- 31. In particular, under the Individual Income Tax Ordinance, income from one spouse is taxed as income of the other spouse, or children's income is treated as income of the parents. In this case, the spouse or child may be compelled by the Tax Inspected to provide information regarding their income to the extent this income is taxed in the hands of the other spouse or one of the parents under investigation.

### Use of information gathering measures absent domestic tax interest $(ToR^{\circ}B.1.3)$

139 The information gathering powers of the competent authority are not subject to Aruba requiring such information for its own tax purposes. As mentioned above, the Aruban authorities confirmed that article 45(1) of the General Tax Ordinance is interpreted in conjunction with article 40 to cover taxes of the requesting jurisdiction in the context of an international EOI request.

### Compulsory powers (ToR B.1.4)

- Jurisdictions should have in place effective enforcement provisions to 140. compel the production of information. The General Tax Ordinance provides for compulsory measures, to the extent so permitted under Aruban legislation and administrative practices (article 41(1)(c)). In addition to the powers to gather information described above, the Tax Inspector and experts are given the power to enter any premises and to inspect any information, book, record or other document (articles 46 and 47).
- On criminal tax matters, article 562 of the Code of Criminal Procedures puts a request for information by a foreign tax authority on par with a domestic preliminary criminal investigation. In a domestic criminal investigation, competent authorities have full powers to gather the information: the powers of the investigation judge to hear the suspect, witnesses, experts, to issue search warrants, to seize items of evidence, to tap telephone lines, etc.
- 142. Non-compliance by a person under investigation or related third party (e.g. a bank) to provide information is a criminal offence and can be punished with a fine amounting to AWG 25 000 (USD 13 966) (or AWG 100 000 [USD 55 866]) in case of willful action/omission), imprisonment for a maximum period of six months (or four year in case of willful action/omission), or both (article 68, General Tax Ordinance). Furthermore, the burden of proof may be reversed (article 18(7), General Tax Ordinance).

# Secrecy provisions (ToR B.1.5)

# Corporate secrecy

Under article 30(4) of the State Ordinance on the VBAs, the Trade Register and information contained therein may not be made available to third parties, unless this is done by or with the approval of the company. Furthermore, the legal representative of a VBA is obliged to observe secrecy in respect of all information entrusted to him or her by the company, its shareholders or managing directors or their representatives regarding the activities of the company and the persons involved in the company (article 20(6), State Ordinance on the VBAs).

### Bank secrecy

- The State ordinances on the supervision of institutions performing 144 regulated activities, i.e. credit institutions, insurance companies and money transfer companies, also contain secrecy provisions which prohibit any natural or legal persons performing any duty in connection with such State ordinances from using or divulging data or information furnished pursuant to the provisions of or under these State ordinances.<sup>32</sup> Violation of confidentiality can be punished with either a term of imprisonment (not exceeding four years if committed intentionally or one year otherwise), or a fine (not exceeding AWG 500 000 (USD 279 330) if committed intentionally or AWG 250 000 (USD 139 665) otherwise), or with both penalties (article 31, State Ordinance on the Reporting of Unusual Transactions).
- However, those secrecy provisions are meant for private matters and do not prevent access to banking information by public authorities.<sup>33</sup> They apply without prejudice to the obligation pursuant to the Criminal Procedure Code or the Civil Procedure Code to give a testimony as a witness or an expert in criminal or civil proceedings regarding data or information obtained during the performance of the duty pursuant to these State ordinances.
- Corporate and bank secrecy provisions are thus revoked if domestic or foreign public authorities request information in tax (article 51(1), General Tax Ordinance) or AML/CFT matters (article 34, SOSCS, article 24, SOSIB, and article 20, SOSMTC). The Aruban department of legislation is working on a general data protection ordinance but the privacy protection will not affect an EOI request.

## Professional secrecy

Article 51(2) of the General Tax Ordinance protects professional 147 secrecy, which includes not only information covered by the attorney-client privilege, but also accounting records held by clerics, notaries, physicians

<sup>32</sup> Article 35, SOSCS; article 23, SOSIB; article 18, SOSMTC; and article 20-21, State Ordinance on the Reporting of Unusual Transactions.

As mentioned under section A.1 above, non-compliance with disclosure obliga-33. tions under the AML/CFT regulations is punishable with a penalty charge and/ or an administrative fee up to an amount of AWG 250 000 (article 10, State Ordinance on Identification when Providing Financial Services; article24, State Ordinance on the Reporting of Unusual Transactions), and it can be considered a criminal offense punishable with a term of imprisonment not exceeding four years or a fine not exceeding AWG 500 000 (article 17, State Ordinance on Identification when Providing Financial Services; article 31, State Ordinance on the Reporting of Unusual Transactions).

and pharmacists. The scope of the professional secrecy safeguard in the case of notaries should apply only to the extent that they act in legal proceedings. in their capacity as attorneys or other legal representatives. Similarly, the professional secrecy in respect of clerics, physicians and pharmacists should be restricted to religious advice and medical records, to which those persons have access in the performance of their respective professional activities. Even though this provision is broader than the professional secrecy protected under the international standard. Aruba assured that it covers only information strictly connected with the professions listed therein. The practical impact of these restrictions on the effectiveness of access to information should be closely monitored on Phase 2 review of Aruba

#### **Determination and factors underlying recommendations**

Determination	
The element is in place, but certain aspects of the legal implementation of the element need improvement.	
Factors underlying recommendations	Recommendations
It is unclear whether the involvement of the Minister of Justice can cause any delay or restriction to the effective exchange of information on criminal tax matters.	Aruba should consider clarifying the procedural rules concerning exchange of information on criminal tax matters to avoid any delay or restriction to the effective exchange of information.
The scope of the professional secrecy safeguard, which includes not only information covered by the attorney-client privilege, but also accounting records held by clerics, notaries, physicians and pharmacists, appears to be broader than the international standard.	Aruba should make it clear that the scope of its professional secrecy rules in the case of notaries apply only to the extent that they act in their capacity as attorneys or other legal representatives, and in the case of clerics, physicians and pharmacists to the extent that they obtain information in the performance of their respective professional activities.

### B.2. Notification requirements and rights and safeguards

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

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

- 148. As a rule, the Minister in charge of Finance is required to notify the person under investigation in writing immediately after his decision to comply with the EOI request, providing a general description of the information to be provided and identifying the requesting authority. While the notification requirement is recognized as a legitimate right by the Commentary to Article 26(3) of the OECD Model Tax Convention, it should not prevent or unduly delay the effective EOI (section 14.1). The notification procedure under article 39(2) of the General Tax Ordinance permits an exception to this notification rule if there are urgent reasons<sup>34</sup> to do so. This notification procedure can be postponed for four months (article 39(4)). In this way, the notification rights appear to be compatible with effective EOI.
- 149. Pursuant to article 39(3), the Minister of Finance shall not disclose the information before two months after sending the notification to the tax-payer. Two months appears to be excessive and may interfere with Aruba's obligations under its EOI agreements to forward the information as promptly as possible to the competent authority of the requesting party (usually under Article 5(6) of the TIEAs). The Commentary to Article 5(6) of the OECD Model TIEA highlights that the requested party is encouraged to react as promptly as possible and, where appropriate and practical, even before the deadline (paragraph 75). Although this provision does not prevent Aruban authorities from complying with the 60-day acknowledge of receipt notice or with the 90-day status update under the TIEAs, it could unduly prevent or delay the effective EOI. Article 39(3) permits an exception if there are urgent reasons for the Minister of Finance to comply with the EOI request before the end of this two-month period.
- 150. Under article 42(2), the Minister of Finance can decline an EOI request if the domestic laws of the requesting jurisdiction do not impose secrecy obligations on the tax official of that State concerning any information received or discovered by them under an EOI request. The Aruban authorities clarified that the confidentiality clause under the TIEAs with the

<sup>34.</sup> According to the Aruban authorities, urgent reasons may be a case of fraud or a suspicion that the person will abscond if informed, or where the tax department itself already started an investigation into the people interviewed.

requesting party provides the Minister with sufficient security to exchange the information

- 151 In addition, a subjective final test must be met before the Minister is authorized to provide the information requested, which appears to go beyond the requirements set out in the international standard. That is, in addition to having established the requirements for a valid request, the Minister must verify if "such information may be of importance to such authority (i.e. the requesting party) for implementing the tax legislation in force in that country (i.e. the requesting country)" (article 39(1)). The practical impact of these restrictions on the effectiveness of access to information will be considered as part of the Phase 2 review of Aruba.
- Article 39(5) of the General Tax Ordinance contains appeal rights 152 in accordance with the National Ordinance on Administrative Justice. The person notified can file an objection to the Minister of Finance, within six weeks from the date of the decision taken by the Minister. There is a special Commission which advises the Minister on the handling of the objection. If the Minister does not reply to the objection within 12 weeks, the person may appeal to the Court of First Instance, within eight weeks from the date in which the response was due. A negative decision may be appealed within six weeks from the date of the decision. The Court of First Instance's decision can be appealed, within six weeks from the date of the decision, to the Court of appeal of the Netherlands Antilles and Aruba. Nevertheless, an appeal filed to the Minister of Finance does not lead to the suspension of the provision of information. The appeal rights are therefore compatible with effective EOL
- 153. Aruba is not required to exchange such information concerning trade, business, industrial, commercial or professional secrets, trade processes, or information disclosures which would be contrary to public policy, pursuant to provisions in each of its EOI agreements, as well as corresponding provisions in the General Tax Ordinance (article 41(1)(b) and 41(2)).

#### **Determination and factors underlying recommendations**

#### **Determination**

The element is in place, but certain aspects of the legal implementation of the element need improvement.

Factors underlying recommendations	Recommendations
The power of the Aruban tax authorities to provide information for exchange purposes is not unequivocally established and may be subject to interpretation issues (namely, minimum two-month stand-by term and subjective test before responding to an EOI request) that could prevent effective exchange of information.	Aruba should consider clarifying the General Tax Ordinance to remove any potential ambiguity as to whether tax authorities have the power to provide information in response to a request for information under an international agreement.

# C. Exchanging Information

#### Overview

- 154 Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanism for doing so. In Aruba, the legal authority to exchange information derives from bilateral TIEAs, a multilateral instrument concluded with the Netherlands and the Netherlands Antilles (now succeeded by Curacao and Sint Maarten) (BRK) as well as from domestic law to a lesser extent. This section of the report examines whether Aruba has an EOI network that would allow it to achieve effective EOI in practice.
- Since September 2009, Aruba has actively sought to extend its EOI network, and has signed a further 16 agreements in addition to its two preexisting TIEAs with the United States and Spain which were concluded in 2003 and 2008 respectively (Annex 2). Aruba had also concluded three further TIEAs which are awaiting signature, as well as the ongoing negotiation of another six TIEAs. Once these EOI agreements are concluded and signed, Aruba's EOI network will cover a significant number of relevant partners.
- Except for the TIEA concluded with the United States in 2003, all the other TIEAs which have been signed by Aruba generally follow the terms of the OECD Model TIEA. All the EOI agreements appear to meet the "foreseeably relevant" standard. However, as indicated below, in some instances provisions deviating from the OECD Model TIEA were included in the TIEAs which may result in restrictions to the effective EOI that are not in line with the international standard.
- The confidentiality of information exchanged with Aruba is protected 157 by obligations imposed under the TIEAs, as well as in its domestic legislation (article 42, General Tax Ordinance), and is supported by sanctions for noncompliance. The restrictions on the exchange of certain types of information is in accordance with the international standard, such as business or professional secrets, information subject to attorney-client privilege, or where the disclosure of the information requested would be contrary to public policy. These exceptions are reflected in Aruba's domestic law (articles 41 and 51, General Tax Ordinance) as well as in its EOI agreements.

### C.1. Exchange of information mechanisms

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

- 158. The BRK dates back to 1964. It is a multilateral agreement among the three former parts of the Kingdom the Netherlands, Aruba, and the Netherlands Antilles (now succeeded by Curaçao and Sint Maarten) for the avoidance of double taxation and the prevention of fiscal evasion. Under articles 37 and 38, it includes an EOI provision which generally follows the old wording of Article 26 of the OECD Model Tax Convention, *i.e.* before the inclusion of paragraphs 4 and 5 in the 2005 update.
- 159. In May 2001, Aruba made a political commitment to co-operate with the OECD's initiative on transparency and effective EOI. To date, Aruba has signed 18 TIEAs with Antigua and Barbuda, Australia, Bermuda, British Virgin Islands, Cayman Islands, Denmark, Faroes Islands, Finland, Greenland, Iceland, Norway, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Spain, Sweden, the United Kingdom and the United States. However, only two TIEAs with Spain and the United States have entered into force, as detailed in Annex 2.
- 160. In addition, since 2005, Aruba has agreed to implement measures equivalent to those contained in the EU Directive on the Taxation of Savings Income (2003/48/EC) via reciprocal bilateral agreements signed with each EU Member State. Those agreements provide for automatic EOI between Aruba and the competent authority of EU Member States on annual basis in respect of interest and similar payments made to beneficial owners (individuals) which are resident of such EU Member States (articles 44a, 44b and 44c, General Tax Ordinance).

# Foreseeably relevant standard (ToR C.1.1)

161. The international standard for EOI envisages information exchange to the widest possible extent. Nevertheless it does not allow "fishing expeditions", *i.e.* speculative requests for information that have no apparent nexus to an open inquiry or investigation. The balance between these two competing considerations is captured in the standard of "foreseeable relevance" which is included in Article 1 of the OECD Model TIEA, set out below:

"The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is fore-seeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment

and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information."

- 162 The Commentary to Article 26(1) of the OECD Model Tax Convention refers to the standard of "foreseeable relevance" and states that the Contracting States may agree to an alternative formulation of this standard that is consistent with the scope of the Article, for instance by replacing "foreseeably relevant" with "necessary" or "relevant". Article 37 of the BRK provides for EOI that is "necessary" for carrying out that law and the tax laws of each of the three countries concerning taxes covered by that law, insofar as the taxation thereunder is not contrary to that law. The Aruban authorities confirmed that the term "necessary" under the BRK is interpreted in accordance with Commentary to Article 26(1) of the OECD Model Tax Convention. Therefore, the BRK meets the "foreseeably relevant" standard.
- There are a number of provisions found in Aruba's TIEAs which may 163. have the effect of departing from the standard. Some TIEAs concluded by Aruba create a requirement for establishing a valid request which is in addition to those set out in Article 5(5) of the OECD Model TIEA, i.e. the requesting party must specify: "(...) the reasons for believing that the information requested is foreseeably relevant to the administration or enforcement of the domestic laws of the Requesting party" (Article 5(6)(d), Aruba-British Virgin Island TIEA) or "(...) why it is relevant to the determination of the tax liability of a taxpayer under the laws of the applicant party" (Article 5(7)(g), Aruba-Bermuda TIEA).
- Article 5(6) of the Aruba-Bermuda TIEA also creates another additional condition for the establishment of a valid request under Article 5, requesting that the applicant party confirms the relevance of the requested information, as follows:

"Where the applicant Party requests information in accordance with this Agreement, a senior official of the competent authority of the applicant Party shall certify that the request is relevant to, and necessary for, the determination of the tax liability of the taxpayer under the laws of the applicant Party." [emphasis added]

165. It is also noted that in Aruba's TIEAs with Bermuda (Article 5(5) (ii)) and British Virgin Islands (Article 5(5)(b)), a requested party is under no obligation to provide information which relates to a period more than six years prior to the tax period under consideration.

- 166. Nevertheless, those variations to Article 5(5) of the OECD Model TIEA appear to be in line with the purpose of the requirements in this provision, which is to demonstrate the foreseeable relevance of the information sought.
- 167. Item I of the Protocol to the Aruba-Cayman Islands TIEA states that the term "pursued all means available in its own territory" under Article 5(5) (g) of this TIEA is understood as including an obligation for the requesting party to use "exchange of information mechanisms it has in force with any third country in which the information is located". That is, under this interpretation of Article 5(5)(g), a requesting party (either Aruba or Cayman Islands) cannot make an EOI request until it has sought the information from its other relevant EOI partners.
- 168. This interpretation of Article 5(5)(g) may impose disproportionate difficulties on the requesting party to make use of EOI mechanisms to obtain information outside its own territory. It is inconsistent with Commentary to Article 5(5) of the OECD Model TIEA (paragraph 73) and narrower than the international standard. Aruba is therefore encouraged to propose a modification to item I of the Protocol to the Aruba-Cayman Islands to bring it into conformity with the international standard. The interpretation and application of other TIEAs concluded by Aruba containing similar provisions will be monitored in Phase 2 of the review process.
- 169. In all other regards, Aruba's TIEAs meet the "foreseeably relevant" standard as described in the Commentary to Article 5(5) of the OECD Model TIEA. In most of Aruba's TIEA, this is provided for under Article 5 while the Aruba-United States uses a different text under Article 4, which also meets the international standard

# In respect of all persons (ToR C.1.2)

- 170. For EOI to be effective it is necessary that a jurisdiction's obligations to provide information is not restricted by the residence or nationality of the person to whom the information relates or by the residence or nationality of the person in possession or control of the information requested. For this reason the international standard for EOI envisages that EOI mechanisms will provide for exchange of information in respect of all persons.
- 171. Unlike the OECD Model Tax Convention,<sup>35</sup> the BRK does not contain a provision which explicitly indicates that the EOI mechanisms under Articles 37 and 38 are not restricted by the personal scope of application of

<sup>35.</sup> Article 26(1) of the OECD Model Tax Convention indicates that "[t]he exchange of information is not restricted by Article 1", which defines the personal scope of application of the Convention and indicates that it applies to persons who are residents of one or both of the Contracting States.

the BRK, i.e. to persons who are residents of countries of the Kingdom of the Netherlands. However, Article 37(1) applies to information "necessary for carrying out this Law or the laws of each of the countries [of the Kingdom] concerning taxes covered by this Law, insofar as the taxation thereunder is not contrary to this Law". As a result of this language, the BRK would not be limited to residents because all taxpayers, resident or not, are liable to the domestic taxes listed in Article 3. Exchange of information in respect of all persons is thus possible under the terms of the BRK.

All the TIEAs signed by Aruba contain a provision concerning jurisdictional scope which is equivalent to Article 2 of the OECD Model TIEA and which conforms to the international standard

# Obligation to exchange all types of information (ToR C.1.3)

- Jurisdictions cannot engage in effective EOI if they cannot exchange information held by financial institutions, nominees or persons acting in an agency or a fiduciary capacity. Both the OECD Model Convention and the OECD Model TIEA, which are primary authoritative sources of the standards, stipulate that bank secrecy cannot form the basis for declining a request to provide information and that a request for information cannot be declined solely because the information is held by nominees or persons acting in an agency or fiduciary capacity or because the information relates to an ownership interest.
- 174 The BRK does not include the provision contained in paragraph 5 to Article 26 of the OECD Model Tax Convention, which states that a contracting State may not decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person. However, the absence of this paragraph does not automatically create restrictions on exchange of bank information. The Commentary on Article 26(5) indicates that whilst paragraph 5, added to the Model Tax Convention in 2005, represents a change in the structure of the Article it should not be interpreted as suggesting that the previous version of the Article did not authorise the exchange of such information (see item 19.10 of the Commentary to Article 26(5) of the OECD Model Tax Convention).
- Aruba has access to bank information for tax purposes in its domestic law (see Part B above), and is able to exchange this type of information when requested, under the BRK (article 38, General Tax Ordinance). If the other parties in the BRK are similarly able to do so under their domestic laws, the EOI agreement concluded with such jurisdictions will not require the inclusion of Article 26(5) of the OECD Model Tax Convention to be considered as meeting the standard.

176 All the TIEAs concluded by Aruba (usually under Article 5(4) and in the Aruba-United States TIEA under Article 4(4)(f)) explicitly forbid the requested jurisdiction to decline to supply the information requested solely because it 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.

### Absence of domestic tax interest (ToR C.1.4)

- The concept of "domestic tax interest" describes a situation where a 177 contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes. A refusal to provide information based on a domestic tax interest requirement is not consistent with the international standard. EOI partners must be able to use their information gathering measures even though invoked solely to obtain and provide information to the requesting jurisdiction.
- 178. The BRK does not include the provision contained in paragraph 4 to Article 26 of the OECD Model Tax Convention, which states that the requested party "shall use its information gathering measures to obtain the requested information, even though that [it] may not need such information for its own tax purposes". However, the absence of a similar provision in other treaties does not, in principle, create restrictions on EOI provided there is no domestic tax interest impediment to exchange information in the case of either contracting party (see item 19.6 of the Commentary to Article 26(4) of the OECD Model Tax Convention).
- Aruba has no domestic tax interest restrictions on its powers to access information (see Part B above), being able to exchange information under the BRK (article 38, General Tax Ordinance), including in cases where the information is not publicly available or already in the possession of the governmental authorities. If the other parties in the BRK are similarly able to do so under their domestic laws, the EOI agreement concluded with such jurisdictions will not require the inclusion of Article 26(4) of the OECD Model Tax Convention to be considered as meeting the standard.
- 180 All of the TIEAs concluded by Aruba (usually under Article 5(2)) explicitly permit the information to be exchanged, notwithstanding the fact that Aruba may not need such information for a domestic tax purpose. Similarly, Aruba's domestic powers to access relevant information are not constrained by a requirement that the information is sought for a domestic tax purpose.

### Absence of dual criminality principles (ToR C.1.5)

- The principle of dual criminality provides that assistance can only be provided if the conduct being investigated (and giving rise to the information request) would constitute a crime under the laws of the requested country if it had occurred in the requested country. In order to be effective, EOI should not be constrained by the application of the dual criminality principle.
- None of the TIEAs concluded by Aruba applies the dual criminality principle to restrict exchange of information. These TIEAs contain explicitly language under Article 5(1), except for the Aruba-United States TIEA.

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

- 183 Information exchange may be requested both for tax administration purposes and for tax prosecution purposes. The international standard is not limited to information exchange in criminal tax matters but extends to information requested for tax administration purposes (also referred to as "civil tax matters"). All of the EOI agreements signed by Aruba may be used to obtain information to deal with both civil and criminal tax matters
- The BRK contains a similar wording to the one used in Article 26(1) of the OECD Model Tax Convention, which refers to information foreseeably relevant "for carrying out the provisions of this Convention or to the administration and enforcement of the domestic [tax] laws", without excluding either civil nor criminal matters.
- All the TIEAs signed by Aruba (usually under Article 1(1)) mention that 185 the information exchange will occur for the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims (i.e. civil matters), or the investigation and prosecution of tax matters (i.e. criminal matters).

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

In some cases, a Contracting State may need to receive information in a particular form to satisfy its evidentiary or other legal requirements. Such forms may include depositions of witnesses and authenticated copies of original records. Contracting States should endeavour as far as possible to accommodate such requests. The requested State may decline to provide the information in the specific form requested if, for instance, the requested form is not known or permitted under its law or administrative practice. A refusal to provide the information in the form requested does not affect the obligation to provide the information.

- 187. The BRK (Article 38(2)(a) and (b)) and the Aruba-United States TIEA (Article 4(3)(k)) do not expressly addresses this question but they do not contain any restrictions either, which would prevent Aruba from providing information in a specific form, so long as this is consistent with its own administrative practices.
- 188. All of the other EOI agreements concluded by Aruba allow for information to be provided in the specific form requested, notably witness depositions and authenticated copies, to the extent allowable under the requested jurisdiction's domestic laws (usually under Article 5(3)). Domestic law accommodates this requirement by requiring information to be produced orally or in writing, in the form and within the period determined by the Tax Inspector (article 46, General Tax Ordinance).

# In force (ToR C.1.8)

- 189. Exchange of information cannot take place unless a jurisdiction has EOI arrangements in force. Where EOI arrangements have been signed, the international standard requires that jurisdictions must take all steps necessary to bring them into force expeditiously.
- 190. In addition to the BRK, the only EOI agreements currently in force are the TIEAs with the United States (since 2004) and Spain (since 2010). The status of these TIEAs, as well as the TIEAs which Aruba has concluded but not yet signed, is set out in Annex 2. It is therefore crucial for Aruba to find ways of speeding up the entry into force of newly signed EOI agreements, so that it will have an EOI network which complies with the international standard as soon as possible.

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

- 191. For information exchange to be effective, the parties to an EOI arrangement need to enact any legislation necessary to comply with the terms of the arrangement. In the Kingdom of the Netherlands, each of the four countries has authority to decide individually if an international treaty is to be extended to that country.
- 192. After a positive decision of the Aruban Government and the Council of Ministers of the Kingdom, the treaty in question is submitted to the Council of State of the Kingdom for advice. The treaty with the advice of the Council of State of the Kingdom together with the pertaining report of the Council of Ministers of the Kingdom is submitted for approval to the Parliament of the Netherlands and the Parliament of Aruba. 36 After approval

<sup>36.</sup> The Aruban authorities have indicated that the Parliament of Aruba does not need to give its approval explicitly since approval is considered to be given after 30 days.

and after legislation implementing the treaty is in place (if applicable),<sup>37</sup> the instrument of ratification will be deposited by the Ministry of Foreign Affairs of the Kingdom of the Netherlands. This complex legislative procedure involving two sovereign States within the Kingdom of the Netherlands may cause some delay to the ratification process.

Aruba has only ratified two TIEAs to date, Spain and the United States, which are in force. The other 16 TIEAs signed between September 2009 and November 2010 are still pending ratification. Out of these 16 TIEAs, four were signed less than one year ago. The Aruban authorities have indicated that they have taken all the necessary steps to ratify seven of their TIEAs (with the Nordic countries) and that they have no control over this last part of the ratification process with regards to these seven TIEAs. The remaining five TIEAs are in various earlier stages of the ratification procedure described above which depends on the combined efforts of Aruba and the Netherlands.

#### **Determination and factors underlying recommendations**

Determination	
The element is in place, but certain aspects of the legal implementation of the element need improvement.	
Factors underlying recommendations	Recommendations
The interpretation given by Item I of the Protocol to the Aruba-Cayman Islands TIEA to the term "pursued all means available in its own territory" under Article 5(5)(g) imposes disproportionate difficulties on the requesting party.	Aruba is encouraged to propose a modification of this provision to bring it into conformity with the international standard.
Although 18 EOI agreements have been concluded by Aruba, to date only two have been ratified and entered into force. Out of the other 16 EOI agreements, 4 were signed less than one year ago and 7 are currently pending with Parliament in the Netherlands.	Aruba should ensure that its EOI agreements are ratified and brought into force as quickly as possible.

The Parliament of Aruba has the possibility to ask for an examination of the treaty, which would halt the approval procedure in the Parliament of the Netherlands.

In the case of the TIEAs, Aruba's legislation is in place, i.e. articles 38-44 of the 37. General Tax Ordinance, in conjunction with articles 45-53 of the General Tax Ordinance.

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

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

- 194. Ultimately, the international standard requires that jurisdictions exchange information with all relevant partners, meaning those partners who are interested in entering into an information exchange arrangement. Agreements cannot be concluded only with counterparties without economic significance. If it appears that a jurisdiction is refusing to enter into agreements or negotiations with partners, in particular ones that have a reasonable expectation of requiring information from that jurisdiction in order to properly administer and enforce its tax laws it may indicate a lack of commitment to implement the standards.
- 195. As of 5 November 2010, Aruba has signed 18 TIEAs and the BRK, which contains an EOI provision. Aruba's first TIEA was signed in 2003 (in force since 2004) with its most important trading partner, *i.e.* the United States. Other relevant partners of Aruba are the jurisdictions which form part of the Kingdom of the Netherlands and Spain. It is also noted that Aruba has concluded TIEAs with a number of smaller jurisdictions, such as Antigua and Barbuda, Bermuda, British Virgin Islands, Cayman Islands, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines. The Aruban authorities informed that those jurisdictions are not relevant economic partners of Aruba, but they are relevant in a geographical sense.
- 196. The policy of Aruba with respect to expanding its EOI network has been to focus on jurisdictions that are OECD and EU members, as well as those jurisdictions with which it has a significant economic relationship. Aruba has signed EOI agreements with ten OECD members (including the Netherlands) and negotiations are undergoing with an additional seven OECD members.
- 197. Comments were sought from the jurisdictions participating in the Global Forum in the course of the preparation of this report, and no jurisdiction advised the assessment team that Aruba had refused to negotiate or conclude a TIEA with it.

#### **Determination and factors underlying recommendations**

#### Determination

The element is in place, but certain aspects of the legal implementation of the element need improvement.

Factors underlying recommendations	Recommendations
Although 18 EOI agreements have been concluded by Aruba, to date only two have been ratified and entered into force. Aruba is actively negotiating new EOI agreements with relevant partners.	Aruba should continue to develop its EOI network with all relevant partners.

### C.3. Confidentiality

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

### Information received: disclosure, use, and safeguards (ToR C.3.1) and All other information exchanged (ToR C.3.2)

Governments would not engage in information exchange without the assurance that the information provided would only be used for the purposes permitted under the exchange mechanism and that its confidentiality would be preserved. Information exchange instruments must therefore contain confidentiality provisions that spell out specifically to whom the information can be disclosed and the purposes for which the information can be used. In addition to the protections afforded by the confidentiality provisions of information exchange instruments, jurisdictions with tax systems generally impose strict confidentiality requirements on information collected for tax purposes. Confidentiality rules should apply to all types of information exchanged, including information provided in a request, information transmitted in response to a request and any background documents to such requests.

The TIEAs concluded by Aruba generally meet the standard for confidentiality including the limitations on disclosure of information received and use of the information exchanged, which are reflected in Article 8 of the OECD Model TIEA. In most of Aruba's TIEAs, this is provided for under Article 8 or 9, while the TIEA between Aruba and the United States includes a similar provision under Article 4(7) and the BRK under Article 38(1). These confidentiality obligations are also reflected in Aruba's domestic law under article 33 of the General Tax Ordinance.

#### **Determination and factors underlying recommendations**

Determination	
The element is in place.	_

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

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

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

- 200. The international standard allows requested parties not to supply information in response to a request in certain identified situations where an issue of trade, business or other secret may arise. Among other reasons, an information request can be declined where the requested information would disclose confidential communications protected by the attorney-client privilege. Attorney-client privilege is a feature of the legal systems of many countries.
- 201. However, communications between a client and an attorney or other admitted legal representative are, generally, only privileged to the extent that, the attorney or other legal representative acts in his or her capacity as an attorney or other legal representative. Where attorney-client privilege is more broadly defined it does not provide valid grounds on which to decline a request for EOI. To the extent, therefore, that an attorney acts as a nominee shareholder, a trustee, a settlor, a company director or under a power of attorney to represent a company in its business affairs, EOI resulting from and relating to any such activity cannot be declined because of the attorney-client privilege rule. The vast majority of the TIEAs concluded by Aruba<sup>38</sup> contain an attorney-client privilege provision which is substantially identical to Article 7(3) of the OECD Model TIEA and compatible with the standard.
- 202. The limits on information which must be exchanged under Aruba's TIEAs mirror those provided for in the OECD Model TIEA and Article 26 of the OECD Model Tax Convention. That is, information that is subject to legal privilege; which would disclose any trade, business, industrial, commercial or professional secret or trade process; or would be contrary to public policy, is not required to be exchanged. While most of Aruba's TIEAs contain such exception under Article 7 or 8, the same requirements are included under Article 4(4)(c)/(d) of the Aruba-United States TIEA and under Article 38(2)of the BRK. As noted under Part B (under *ToR* B.1.5), these exceptions are also incorporated into Aruba's domestic law by virtue of articles 41(1)(b), 41(2)and 51(2) of the General Tax Ordinance.
- 203. Article 51(2) of the General Tax Ordinance protects professional secrecy, which includes not only information covered by the attorney-client privilege, but also accounting records held by clerics, notaries, physicians and

<sup>38.</sup> The TIEA concluded between Aruba and the Cayman Islands does not contain such a provision.

pharmacists. Even though the scope of the professional secrecy safeguards appears to be broader than the international standard. Aruba assured that the professional secrecy covers only information strictly connected with the professions listed therein. Furthermore, the Aruban authorities have indicated that any secrecy obligations to which a person would otherwise be subject in respect of the information sought are overridden where provision of the information is in relation to an EOI request or AML/CFT matters. The practical impact of these restrictions on the effectiveness of access to information should be closely monitored on Phase 2 review of Aruba.

### **Determination and factors underlying recommendations**

	Determination
The element is in place.	

## C.5. Timeliness of responses to requests for information

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

### Responses within 90 days (ToR C.5.1)

- 204 In order for EOI to be effective it needs to be provided in a timeframe which allows tax authorities to apply the information to the relevant cases. If a response is provided but only after a significant lapse of time the information may no longer be of use to the requesting authorities. This is particularly important in the context of international cooperation as cases in this area must be of sufficient importance to warrant making a request.
- 205. Each of the EOI agreements concluded by Aruba, except for the TIEAs signed with the Cayman Islands and the United States, include an obligation to either respond to the request, or provide a status update within 90 days of receipt of the request. The TIEA with the Cayman Islands provides that the requested Party shall forward the requested information as promptly as possible to the requesting party. The TIEA with the United States does not contain a provision concerning the time within which a status update or response to an EOI request is to be provided. The extent to which the timeliness of responses is affected by the absence of a specified timeframe in these two TIEAs will be considered as part of the Phase 2 review of Aruba.

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

206. A review of Aruba's organisational process and resources will be conducted in the context of its Phase 2 review.

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

207. Exchange of information assistance should not be subject to unreasonable, disproportionate, or unduly restrictive conditions. As noted in Part B of this Report, there is a requirement that the Minister of Finance hold the information for a minimum of two months after sending the notification to the taxpayer, before passing it to the requesting EOI partner (article 39(3), General Tax Ordinance). As identified, this may have the effect of preventing Aruba from providing the information requested within 90 days. Other than those matters identified earlier, there are no further conditions which may restrict the provision of exchange of information assistance.

#### **Determination and factors underlying recommendations**

#### **Determination**

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

# **Summary of Determinations and Factors Underlying Recommendations**

Determination	Factors underlying recommendations	Recommendations		
Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities (ToR A.1)				
The element is in place, but certain aspects of the legal implementation of the element need improvement.	NVs are not always required to keep identity information concerning their shareholders, particularly when bearer shares are issued.	An obligation should be established for NVs to keep identity information concerning their shareholders in all cases, particularly when bearer shares are issued.		
	LPs are not required to keep a register of identity information concerning their limited partners.	An obligation should be established for LPs to keep identity information concerning their limited partners.		
	Foundations are not systematically required to keep a register of identity information concerning their beneficiaries.	An obligation should be established for foundations to keep identity information concerning their beneficiaries.		
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements ( <i>ToR A.2</i> )				
The element is in place.				
Banking information should be available for all account-holders (ToR A.3)				
The element is in place.				

Determination	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) ( <i>Tor B.1</i> )					
The element is in place, but certain aspects of the legal implementation of the element need improvement.	It is unclear whether the involvement of the Minister of Justice can cause any delay or restriction to the effective exchange of information on criminal tax matters.	Aruba should consider clarifying the procedural rules concerning exchange of information on criminal tax matters to avoid any delay or restriction to the effective exchange of information.			
	The scope of the professional secrecy safeguard, which includes not only information covered by the attorney-client privilege, but also accounting records held by clerics, notaries, physicians and pharmacists, appears to be broader than the international standard.	Aruba should make it clear that the scope of its professional secrecy rules in the case of notaries apply only to the extent that they act in their capacity as attorneys or other legal representatives, and in the case of clerics, physicians and pharmacists to the extent that they obtain information in the performance of their respective professional activities.			
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 ( <i>ToR B.2</i> )					
The element is in place, but certain aspects of the legal implementation of the element need improvement.	The power of the Aruban tax authorities to provide information for exchange purposes is not unequivocally established and may be subject to interpretation issues (namely, minimum two-month stand-by term and subjective test before responding to an EOI request) that could prevent effective exchange of information.	Aruba should consider clarifying the General Tax Ordinance to remove any potential ambiguity as to whether tax authorities have the power to provide information in response to a request for information under an international agreement.			

Determination	Factors underlying recommendations	Recommendations			
Exchange of information mechanisms should allow for effective exchange of information (ToR C.1)					
The element is in place, but certain aspects of the legal implementation of the element need improvement.	The interpretation given by Item I of the Protocol to the Aruba-Cayman Islands TIEA to the term "pursued all means available in its own territory" under Article 5(5)(g) imposes disproportionate difficulties on the requesting party.	Aruba is encouraged to propose a modification of this provision to bring it into conformity with the international standard.			
	Although 18 EOI agreements have been concluded by Aruba, to date only two have been ratified and entered into force. Out of the other 16 EOI agreements, 4 were signed less than one year ago and 7 are currently pending with Parliament in the Netherlands.	Aruba should ensure that its EOI agreements are ratified and brought into force as quickly as possible.			
The jurisdictions' network partners ( <i>ToR C.2</i> )	of information exchange mecha	anisms should cover all relevant			
The element is in place, but certain aspects of the legal implementation of the element need improvement.	Although 18 EOI agreements have been concluded by Aruba, to date only two have been ratified and entered into force. Aruba is actively negotiating new EOI agreements with relevant partners.	Aruba should continue to develop its EOI network with all relevant partners.			
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received ( <i>ToR C.3</i> )					
The element is in place.					
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties (ToR C.4)					
The element is in place.					

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

#### Annex 1: Jurisdiction's Response to the Review Report\*

In the first place Aruba wishes to express its gratitude for the work done by the assessment team in evaluating Aruba for the Phase I of the Peer Review process. We are very pleased with the professional and pleasant cooperation with the assessment team and with the outcome of the review.

We are aware that there are a few items outstanding, which still need to be addressed. One of the recommendations pertains to the abolishment of bearer shares. We wish to indicate that Aruba has already taken the necessary steps in drafting the legislation to achieve this and is now awaiting the formal approval of the proposed legislative changes by parliament, which is expected to take place before summer of 2011.

Aruba is constantly increasing its number of TIEA's and is in fact negotiating more TIEA's and will be more than happy to conclude TIEA's with other jurisdictions who are interested.

Aruba has been member of the Convention on Mutual Administrative Assistance in Tax Matters since February 1, 1997. Aruba, however, had made the reservation that the treaty only applied to countries with which a bilateral tax treaty exists with an information exchange provision. Because Aruba fully endorses the OECD international standard for information exchange, Aruba now wishes to withdraw its reservation. In the context of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters, signed on May 27th 2010 for the Kingdom of The Netherlands, Aruba is awaiting approval from parliament to withdraw the aforementioned reservation.

Currently Aruba is working on legislation implementing the 3rd EU AML directive that needs to be in effect on short notice due to FATF commitments.

<sup>\*</sup> This Annex presents the Jurisdiction's response to the review report and shall not be deemed to represent the Global Forum's views.

## **Annex 2: List of All Exchange-of-Information Mechanisms** in Force

#### Multilateral agreements

Aruba is a party to the:

- Tax Arrangement of the Kingdom of the Netherlands (*Belasting-regeling voor het Koninkrijk*, BRK) of 28 October 1964 (in force as of 1 January 1965), which is a multilateral agreement concluded among the three former parts of the Kingdom the Netherlands, Aruba, and the Netherlands Antilles<sup>39</sup> (now succeeded by Curaçao and Sint Maarten) for the avoidance of double taxation and the prevention of fiscal evasion. Under articles 37 and 38, it includes an EOI provision which generally follows the old wording of Article 26 of the OECD Model Tax Convention, *i.e.* before the inclusion of paragraphs 4 and 5 in the 2005 update.
- Council of Europe and OECD Convention on Mutual Administrative Assistance in Tax Matters, which is currently in force with respect to 14 jurisdictions: Azerbaijan, Belgium, Denmark, Finland, France, Iceland, Italy, the Kingdom of the Netherlands, Norway, Poland, Sweden, the Ukraine, the United Kingdom and the United States.<sup>40</sup>

<sup>39.</sup> Following the dissolution of the Netherlands Antilles on 10 October 2010, two separate jurisdictions were formed (Curacao and St. Maarten) with the remaining three islands (Bonaire, St. Eustatius and Saba) joining the Netherlands as special municipalities. TIEAs concluded with the Kingdom of the Netherlands, on behalf of the Netherlands Antilles, will continue to apply to Curaçao, St. Maarten and the Caribbean part of the Netherlands (Bonaire, St. Eustatius and Saba) and will be administered by Curaçao and St. Maarten for their respective territories and by the Netherlands for Bonaire, St. Eustatius and Saba.

<sup>40.</sup> Canada, Germany and Spain have signed the Convention and are awaiting ratification.

• EU Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments. This Directive aims at ensuring: (i) that savings income in the form of interest payments in favour of individuals or residual entities being resident of an EU Member State are effectively taxed in accordance with the fiscal laws of their state of residence; and (ii) that information is exchanged with respect to such payments. Since 2005, Aruba has agreed to implement measures equivalent to these contained in this Directive via reciprocal bilateral agreements signed with each EU Member State (articles 44a, 44b and 44c, General Tax Ordinance).

#### **Bilateral agreements**

EOI agreements signed by Aruba as of 5 November 2010, in chronological order:

	Jurisdiction	Type of Eol Arrangement	Date Signed	Date Entered Into Force
1	United States	TIEA	21/11/2003	13/09/2004
2	Spain	TIEA	24/11/2008	27/01/2010
3	Bermuda	TIEA	1/09/2009	
4	Denmark	TIEA	10/09/2009	
5	Faroes	TIEA	10/09/2009	
6	Finland	TIEA	10/09/2009	
7	Greenland	TIEA	10/09/2009	
8	Iceland	TIEA	10/09/2009	
9	Norway	TIEA	10/09/2009	
10	Sweden	TIEA	10/09/2009	
11	British Virgin Islands	TIEA	11/09/2009	
12	Saint Kitts and Nevis	TIEA	11/09/2009	
13	Saint Vincent and the Grenadines	TIEA	20/10/2009	
14	Australia	TIEA	16/12/2009	
15	Cayman Islands	TIEA	20/04/2010	
16	Saint Lucia	TIEA	10/05/2010	
17	Antigua and Barbuda	TIEA	30/08/2010	
18	United Kingdom	TIEA	05/11/2010	

## Annex 3: List of All Laws, Regulations and Other Material Received

#### Civil and commercial laws:

Civil Code of Aruba, articles 1665-1684

Commercial Code of Aruba, articles 1-76 and 155a-155tt

Trade Register Ordinance

State Decree Activities Aruba Exempt Company

State Ordinance on the Private Liability Company (VBA)

State Ordinance on Foundations

State Ordinance on the Establishment of Businesses

Guidelines for the Establishment of Companies

#### Regulated activities and AML/CFT laws:

State Ordinance on the Supervision of Trust Service Providers (SOSTSP)

State Ordinance on the Supervision of the Credit System (SOSCS)

State Ordinance on the Supervision of Money Transfer Companies (SOSMTC)

State Ordinance on the Supervision of Insurance Business (SOSIB)

State Ordinance on Identification when Providing Services

Ministerial decree on Identification of Legal Persons

State Ordinance on the Reporting of Unusual Transactions

#### Tax laws:

General Tax Ordinance, articles 3b, 38-53 and 68

Decree for enforcement of Article 3B (3) General Tax Ordinance

State Ordinance on Dividend Withholding Tax and Imputation Payments, articles 1-19, 22

State Decree for Enforcement of Article 19(2) State Ordinance on Dividend Withholding Tax and Imputation Payments

State Decree Activities Imputation Payment Company

## Annex 4: Overview of Laws and Other Relevant Factors for Exchange of Information

#### Primary legislation

Civil Code of Aruba

Commercial Code of Aruba

Trade Register Ordinance

State Decree Activities Aruba Exempt Company

State Ordinance on the Private Liability Company (VBA)

State Ordinance on Foundations

State Ordinance on the Establishment of Businesses

State Ordinance on the Supervision of Trust Service Providers (SOSTSP)

State Ordinance on the Supervision of the Credit System (SOSCS)

State Ordinance on the Supervision of Money Transfer Companies (SOSMTC)

State Ordinance on the Supervision of Insurance Business (SOSIB)

State Ordinance on Identification when Providing Services

State Ordinance on the Reporting of Unusual Transactions

General Tax Ordinance

State Ordinance on Dividend Withholding Tax and Imputation Payments

#### Primary government authorities

Minister in charge of Finances

Minister in charge of Justice

Director of Taxes

Central Bank of Aruba (CBA)

Reporting Center for Unusual Transactions (FIU)

High Commissioner Aruba Financial Center

### ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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### Global Forum on Transparency and Exchange of Information for Tax Purposes

#### PEER REVIEWS, PHASE 1: ARUBA

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

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

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

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

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

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