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

Peer Review Report
Phase 2
Implementation of the Standard
in Practice
ARUBA



# Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Aruba 2015

PHASE 2: IMPLEMENTATION OF THE STANDARD IN PRACTICE

March 2015 (reflecting the legal and regulatory framework as at December 2014)



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### **About the Global Forum**

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

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

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

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

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

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

### **Executive Summary**

- This report summarises the legal and regulatory framework for transparency and exchange of information in Aruba as well as the practical implementation of the framework. The assessment of effectiveness in practice has been performed in relation to a three-year period (1 July 2010 to 30 June 2013). 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, and has experience in exchanging information for tax purposes, the report identifies a number of areas where Aruba could improve its legal infrastructure and the effectiveness of exchange of information in practice to more effectively implement the international standard. The report includes recommendations to address these shortcomings.
- 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. Aruba's economy is primarily dependent upon tourism. 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.

<sup>1</sup> 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.

- 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 authorities. This is complemented by obligations imposed through the licensing regime applicable to certain regulated financial activities in Aruba, including credit institutions and electronic money institutions, insurance companies, money transfer companies, and trust service providers. Finally, the anti-money laundering regulations which apply to all regulated financial businesses and relevant professionals (such as lawyers, notaries, accountants, and tax advisors), create a third layer of requirements to capture relevant information.
- 4. As of February 2012, it is no longer possible for Aruban companies to issue bearer shares. For bearer shares that were issued prior to 2012, the law requires holders of the shares to register them within a three-year period, i.e. by February 2015. If the shares remain unregistered, no rights can be exercised in connection with them but a concern remains that rights in shares may afterwards be revived. It has not been possible to assess the total number of bearer shares or companies issuing bearer shares in Aruba prior to 2012.
- 5. Changes to the Commercial Code in February 2012 ensure that all companies in Aruba are required to deposit a copy of their shareholder register with the Chamber of Commerce and Industry.
- 6. Furthermore, as of November 2014, limited partnerships are required to hold a register of their limited partners and foundations are required to hold a register of their beneficiaries resulting in the removal of Phase 1 recommendations and inclusion of a Phase 2 recommendation to monitor. However, there is no regular system of oversight to monitor compliance with the requirements on entities to keep and file ownership and identity information. Furthermore, there may be instances when AVVs and NVs do not have a representative in Aruba.
- 7. Aruba's accounting record-keeping requirements are generally satisfactory. Under Aruban tax law, companies, partnerships, foundations and trust service providers are required to keep accounting records and underlying documentation for at least ten years. Further, although entities submit accounting information to the tax authorities via their tax returns, overall the levels of compliance with tax filing obligations are not high and without a comprehensive system of monitoring in place, as such accounting records may not be available in all instances. In February 2012, new provisions entered into force requiring board members of AVVs and NVs to deposit the annual financial statements with the Chamber of Commerce and Industry.

However, there may be instances when AVVs and NVs do not have a representative in Aruba.

- Under the Aruban AML/CFT framework, service providers, such as credit institutions and electronic money institutions, insurance companies, money transfer companies, trust service providers 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 keep records in respect of all transactions for ten years from the date of the termination of the agreement under which service was provided.
- 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. Legal amendments in November 2014 clarified the involvement of the Minister of Justice, the scope of legal and professional privilege and abolished the notification requirement, the two month stand-by term and subsequent appeal rights thus resulting in the removal of Phase 1 recommendations and inclusion of a Phase 2 recommendation to monitor
- Aruba's network for the exchange of information has continued to develop rapidly since September 2009. Since the Aruba Phase 1 review in 2011, an additional 21 TIEAs have entered into force. There are currently a total of 23 TIEAs in force in Aruba and two TIEAs that are signed and awaiting entry into force. In addition, the *Protocol amending the Convention* on Mutual Administrative Assistance on Tax Matters (this convention, as amended, is referred to hereafter as the Multilateral Convention) has been extended to Aruba by the Kingdom of the Netherlands with entry into force on 1 September 2013.<sup>2</sup>
- 11 Whilst generally following the terms of the OECD Model TIEA, there are variations in three of Aruba's 25 EOI agreements and implementing domestic legislation which may prevent information being exchanged to the international standard in all instances. However, since the Multilateral Convention has been extended to Aruba as well as to the three treaty partners in question (Bermuda, British Virgin Islands and Cayman Islands), exchange

<sup>2.</sup> Aruba has been covered by the original Convention since 1997.

of information to the standard can take place with those jurisdictions under this convention.

- 12. During the period under review (1 July 2010 to 30 June 2013), Aruba received a total of 17 requests from four EOI partners. Aruba was able to provide a final response within 90 days in respect of 6% of cases and 88% within 180 days. About 94% of the requests were responded to within 1 year and 6% took over one year to respond to. Peers were satisfied with the quality of the responses from Aruba.
- During the period under review, delays were experienced in responding to incoming requests. These were caused by the lack of delegated authority, the two month stand-by period and a lack of clear internal procedures. In March 2014, Aruba delegated the Competent Authority to the Director of the Department of Taxes to reduce delays in responding to requests. However, this has not been sufficiently tested in practice. In addition, no status updates were sent by Aruba during the review period.
- 14. Aruba has been assigned a rating for each of the 10 essential elements as well as an overall rating. The ratings for the essential elements are based on the analysis in the text of the report, taking into account the Phase 1 determinations and any recommendations made in respect of Aruba's legal and regulatory framework and the effectiveness of its exchange of information in practice. On this basis, Aruba has been assigned the following ratings: Compliant for elements A.3, C.1, C.2, C.3 and C.4, Largely Compliant for elements A.2, B.1, B.2 and C.5; and Partially Compliant for element A.1. In view of the ratings for each of the essential elements taken in their entirety, the overall rating for Aruba is Largely Compliant.
- 15. A follow up report on the steps undertaken by Aruba to respond to the recommendations made in this report should be provided to the PRG within twelve months of the adoption of this report.

### Introduction

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

- The assessment of the legal and regulatory framework of Aruba and the practical implementation and effectiveness of this framework 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 conducted in two stages: the Phase 1 review assessed Aruba's legal and regulatory framework for exchange of information as at January 2011, while the Phase 2 review assessed the practical implementation of this framework during a three year period (1 July 2010) to 30 June 2013) as well as amendments made to this framework since the Phase 1 review up to 18 December 2014. The following analysis reflects the integrated Phase 1 and Phase 2 assessments. The assessment was based on the laws, regulations, and exchange of information mechanisms in force or effect as at December 2014, responses to the Phase 1 and Phase 2 questionnaires, information provided during the onsite visit, other materials supplied by Aruba, and information supplied by partner jurisdictions. During the onsite visit, which took place from 12-15 May 2014, the assessment team met with officials and representatives of relevant government agencies including the Ministry of Finance, the Department of Taxes, the Chamber of Commerce and Industry, the Central Bank of Aruba, the acting Attorney-General and the Department of Economic Affairs (see Annex 4).
- 17. 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 and the implementation and effectiveness of this 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 at the end of this report. In addition, to reflect the Phase 2 component, recommendations are made concerning Aruba's practical application of each of the essential elements and a rating of either: (i) Compliant, (ii) Largely Compliant, (iii) Partially Compliant, or (iv) Non-Compliant is assigned to each element. An overall rating is also assigned to reflect Aruba's overall level of compliance with the standards (see the Summary of Determinations and Factors Underlying Recommendations at the end of this report).

18. The Phase 1 and Phase 2 assessments were conducted by assessment teams comprising expert assessors and representatives of the Global Forum secretariat. The Phase 1 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 Phase 2 assessment team consisted of two assessors: Ms. Angelique Antat, Policy Analyst, Ministry of Finance, Trade and Investment, Seychelles and Mr. Neil Cossins, Director – Transparency Practice International, Australian Taxation Office; and one representative of the Global Forum Secretariat: Ms. Kathryn Dovey.

### Overview of Aruba

### Governance, economic context and legal system

- 19. Aruba is one of the four parts of the Kingdom of the Netherlands, the others being the Netherlands, Curação and Sint Maarten. In 1986, Aruba became a separate country within the Kingdom of the Netherlands, leaving the former Netherlands Antilles. The Netherlands Antilles was later dissolved on 10 October 2010, resulting in two new constituent countries (Curação and Sint Maarten), with the other islands (Bonaire, Saint Eustatius and Saba) joining the Netherlands as special municipalities. Aruba consists of a single island approximately 30 kilometres long and 10 kilometres wide and it has approximately 106 795 inhabitants. It lies in the southern part of the Caribbean Sea, approximately 30 kilometres off the coast of Venezuela.
- 20. Aruba has a market-based economy, which relies primarily on tourism. The contribution of international financial services to the GDP of Aruba is estimated to be less than one percent, and Aruba's domestic financial sector is relatively small. Aruba's most important trading partner is the United States of America. Based on information from the Central Bureau of Statistics, the contribution of international financial services to Aruba's GDP in 2013 was 423.7 million Aruban florins or approximately 239 million US

- dollars. The currency is the Aruban florin (AWG),<sup>3</sup> which has been pegged to the US dollar since 1986, at the exchange rate of USD 1.00 = AWG 1.79.
- 21. 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 at Kingdom level. For historical and practical reasons Aruba also co-operated with the former Netherlands Antilles on various issues (including justice and certain legislation) and the legal basis for this co-operation is set forth in the Cooperation Agreement for the Netherlands Antilles and Aruba.
- 22. The sovereign of the Netherlands is the head of State and the Governor is appointed by the sovereign 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 is 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 cabinet of ministers.
- 23. Aruba has a parliamentary system with a unicameral parliament called the Staten which consists of 21 members who are elected by popular vote 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 through State decrees and Ministerial regulations.
- 24. The judiciary is made up of independent judges who are appointed by the sovereign upon recommendation of the Joint Court of Aruba, Curaçao, Sint Maarten, and of Bonaire, Sint Eustatius and Saba (Joint Court). Cases are heard in first instance by the Court in First Instance and can be appealed to the Joint Court as court of second instance. Final 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). At the Supreme Court, only the application of the law by the previous instance is the subject of the judgment.
- 25. 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 organisation of government and its tasks and obligations, along with related subjects are regulated in the Constitution of Aruba.

<sup>3.</sup> On 18 June 2014, AWG 1 = EUR 0.41435 and EUR 1 = AWG 2.41340.

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

- 26. 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. As of March 2014, there were 13 271 NVs and 8 893 AVVs registered in Aruba.
- 27. In 2001, however, Aruba made a political commitment to cooperate with the OECD's initiative on transparency and effective EOI and, as part of the Kingdom of 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 abolition of the offshore regime; <sup>4</sup> (ii) the abolition of tax holidays for hotels and industries, phasing out 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 development, trading, holding, finance, insurance, leasing, licensing, music and film industry, aviation).
- 28. As of 1 January 2006 the Code of Commerce and applicable tax laws<sup>5</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. As of March 2014 there were 466 VBAs registered in Aruba.
- 29. 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 1 394 foundations incorporated, 115 of them being non-active. With the exception of the association with

<sup>4.</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.

<sup>5.</sup> State Ordinance on Profit Tax, State Ordinance on Income Tax and State Ordinance on Dividend Withholding Tax and Imputation Payment.

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.

- 30. 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. As of March 2014, there were 561 general partnerships (of which 115 were active), 65 limited partnerships (of which 17 were active) and 63 open partnerships (of which 24 were active).
- 31. Amendments to the Code of Commerce, which took effect as of 1 February 2012, ensure that it is no longer possible for Aruban companies to issue bearer shares. The trust service provider (TSP) supervisory law provides that if a TSP acts as a director or legal representative of a body with bearer shares, the TSP must either be the custodian of the bearer shares or have knowledge of the place where the shares are kept. With effect from January 2013, it is possible for a foreign branch of the TSP, foreign TSPs, banks and other financial institutions or civil law notaries or comparable professionals to act as custodians of the bearer shares.
- 32. For bearer shares that were issued prior to February 2012, the law requires holders of the shares to register them within a three-year period. However, the report identifies some remaining concerns with regards the identification of holders of bearer shares.

### General information on the taxation system

- 33. In matters of taxation, the responsible minister is the Minister in charge of Finance. Following a restructuring in December 2012, taxation matters are handled by either the Tax Department or the Department of Customs. Auditing and collection of taxes form an integral part of the Department of Taxes.
- 34. 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 a monthly basis or upon dividend distribution.
- 35. All individuals residing in Aruba are subject to income tax at progressive rates on their worldwide income (up to 58.95% and lowered to 25% for dividends, and to 15% for pension and lump sum redemption for the years 2012-14). 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 a 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). Companies resident in Aruba are also taxed on a worldwide basis.
- 36. 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>6</sup>, in which case they are subject to a profit tax rate of 2% on profit achieved with free zone activities), in accordance with the State Ordinance on Corporate Income Tax. In 2012 a special tax regime was introduced for companies which exploit an oil refinery and/or oil terminal subjecting them to a profit tax rate of 7% or 12%. Different special tax regimes may apply upon election and provided that certain conditions are met (see more details under section A.1), 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.<sup>7</sup>
- 6. 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. Financial services cannot be performed in the free zone. As of 2014, there were only 25 companies established in a free zone.
- 7. Namely, holding activities, financing of other companies (whether or not the financing is intercompany), investment activities (with the exception of investing

- 37. Since 2003, Aruba has imposed a dividend withholding tax on all dividend distributions by Aruba based companies. The tax rate<sup>8</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 on a qualified stock exchange; or
  - 0% if the participation exemption is applicable or if qualifying for the social tax regime applicable to companies exploiting an oil refinery and/or oil terminal.

### Overview of the financial sector and relevant professions

38. The Central Bank of Aruba (CBA) is the sole supervisory authority in Aruba with respect to the financial sector. The CBA's supervision seeks to safeguard the confidence in the financial system of Aruba by promoting the (financial) soundness and integrity of the supervised sectors and institutions. In this respect, the CBA, pursuant to the sectoral supervisory state ordinances, is responsible for the regulation and supervision of the credit system<sup>9</sup>, insurance sector<sup>10</sup>, company pension funds<sup>11</sup>, money transfer companies<sup>12</sup>, and trust service providers<sup>13</sup>. In addition, the CBA is entrusted with the execution of the AML/CFT State Ordinance and the Sanction State Ordinance 2006. Subsequently, the CBA also has AML/CFT oversight responsibility over all sectors subject to the AML/CFT State Ordinance and the Sanction

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>8.</sup> Subject to reduction under the Tax Arrangement of the Kingdom of the Netherlands (*Belastingregeling voor het Koninkrijk*) and double tax treaties.

<sup>9.</sup> State Ordinance on the Supervision of the Credit System (SOSCS) (AB 1998 no. 16).

<sup>10.</sup> State Ordinance on the Supervision of the Supervision of the Insurance Business (SOSIB) (AB 2000 no. 82) and the State Decree Supervision of Insurance Brokers (AB 2014 no. 6).

<sup>11.</sup> State Ordinance on Company Pension Funds (SOCPF) (AB 1998 no. GT 17).

<sup>12.</sup> State Ordinance on the Supervision of Money Transfer Companies (SOSMTC) (AB no. 2003 no. 60).

<sup>13.</sup> State Ordinance on the Supervision of Trust Service Providers (SOSTSP) (AB 2009 no. 13).

Decree Combat Terrorism and Financing Terrorism. Besides the financial institutions, the CBA supervises the Designated Non-Financial Businesses and Professions (DNFBPs), i.e. lawyers, civil notaries, tax advisors, accountants, jewellers, car dealers, real estate brokers, and casinos, for compliance with the AML/CFT laws and regulations.

- The financial sector consists of regulated financial businesses. defined as (i) credit institutions (such as banks) and electronic money institutions; (ii) insurance companies (life and non-life), (iii) money transfer companies, (iv) TSPs, and (v) company pension funds. According to the CBA, there are 24 licensed insurance companies (7 life insurance companies, 13 non-life (general) insurance companies and 4 captive insurance companies). 11 TSPs, three money transfer companies, 10 company pension funds and one general pension fund. There are 12 credit institutions registered in Aruba, namely, five 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. Foreign Direct Investment into Aruba amounted to AWG 6 616 000 000 (USD 3 696 089 385) in 2013. The total domestic assets held by commercial banks in Aruba totalled AWG 4 819 200 (USD 2 692 290) as at December 2013, while the total foreign assets totalled AWG 663 900 (USD 370 894).
- 40. The only relevant professions currently regulated under Aruban law are lawyers (75) including law offices, 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, nor part of a professional representative body. They are registered at the Register of the Chamber of Commerce and Industry. The Aruban anti-money laundering regulations apply to most relevant professionals, such as 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 and casinos. In addition, accountants performing financial audits at a supervised financial institution must be listed in the register of the Netherlands Institute of Chartered Accountants or listed elsewhere at a similar institute and must be subject to a similar regime of rules of conduct, professional code and discipline.

### Recent developments

41. In 2013, several sectoral ordinances entered into force for the purpose of strengthening and harmonising the state ordinances and also extending the scope of the State Ordinance on the Supervision of the Credit System (SOSCS) to electronic money institutions and the scope of the State Ordinance on the Supervision of Trust Service Providers (SOSTSP) to TSPs

that provide services to companies active on the Aruban market. The sectoral state ordinances apply to credit institutions and electronic money institutions, insurance businesses, money transfer companies and trust service providers.

- 42. In February 2014, Aruba was removed from the regular follow-up process of the Financial Action Task Force (FATF) as a result of these and other legislative changes to address deficiencies in their AML/CFT framework.
- 43. As of November 2014, Aruba has also amended provisions of the General Tax Ordinance (GTO) to do the following:
  - Abolish prior notification and appeal rights in connection with decisions of the Department of Taxes.
  - Clarify the role of the Minister of Justice in requests for information concerning criminal tax matters.
  - Create a requirement for Limited Partnerships to hold a register of their Limited Partners and similarly for Foundations to hold a register of their beneficiaries.
  - Clarify that professional privilege for notaries, lawyers, doctors, pharmacists and dignitaries of a ministry only applies when they are conducting their profession.
- 44. Ongoing legal projects in Aruba include the possibility for the Chamber of Commerce and Industry to apply for the liquidation of multiple entities that are no longer active including the liquidation of all AVVs that have been without legal representation for more than one year on the date of the law becoming effective. This is currently in the form of a draft proposal.

### **Compliance with the Standards**

### A. Availability of Information

### Overview

- 45 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 as well as the practical implementation of the framework. The assessment of effectiveness in practice has been performed in relation to a three-year period (1 July 2010) to 30 June 2013).
- 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 co-operative 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. Foundations must always be entered in the Foundations Register.

- 47. 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. A national ordinance which entered into force on 13 November 2014, amends article 48(7) of the General Tax Ordinance to require limited partnerships to hold a register containing the name and address of their limited partners. <sup>14</sup> Furthermore, foundations are required to keep a register containing the name and address of their beneficiaries as a result of this new provision. No disclosure to Aruban public authorities is required with regard to beneficial owners where a shareholder, member or partner is a legal entity.
- Domestic and foreign legal persons (as well as general and limited partnerships) engaged in Aruban business must obtain a declaration of no objection from the Aruban Financial Centre and a government permit to do business in Aruba. Upon application for a government 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 is not kept up to date in the event of changes. When engaged in regulated activities, an entity or person must have a licence from the CBA. Credit institutions and electronic money institutions are required to submit to the CBA annual updated information on the identity of qualified owners i.e. holding or exercising, directly or indirectly, more than 10% of the share capital or voting powers. A change of directors, members of supervisory board or qualified ownership of a credit institution, electronic money institution, money transfer company, TSP, insurance company or company pension fund requires prior written authorisation by the CBA. If a director of an NV, AVV or VBA is not a resident, he will need to obtain a director's permit (article 2. Establishment of Businesses Ordinance).
- 49. NVs and AVVs may no longer issue bearer shares as of February 2012 while VBAs have never been able to do so under Aruban law. For bearer shares that were issued prior to 2012, the law requires holders of the shares to register them within a three-year period, i.e. by February 2015. AVVs are always required to have a TSP 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 TSP, 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 hold at least 25% of the capital of a legal entity. Regarding entities with bearer shares, the

<sup>14.</sup> Article 48(7) of the General Tax Ordinance (AB 2004 no. 10) as amended by the National Ordinance of 13 November 2014 containing amendments to National Ordinance on income tax (AB 1991 no. GT 51), the National Ordinance on wage tax (AB 1991 no. GT 63) and the General Tax Ordinance (AB 2004 no. 10).

TSP 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 TSP as legal representative or a resident individual director.

- 50 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 all shareholders. 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 and with effect from February 2012, no Aruban companies are allowed to issue bearer shares. 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 shareholder register and have at least one Aruban resident individual as a managing director.
- With effect from February 2012, AVVs and NVs are required to 51. maintain an up to date shareholder register. Prior to this date, VBAs were already required to hold a shareholder register and NVs were required to keep a register of shareholders who had not paid up their shares in full. As of 2013, a copy of the register must be submitted to the Chamber of Commerce and Industry within eight months after the end of the fiscal year. This is a new filing obligation for all types of companies in Aruba. Prior to this, an obligation already existed for all companies (AVVs, NVs and VBAs) 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 and update this information within seven days following any changes.
- In addition, as of February 2013, AVVs and NVs are required to submit their annual financial statements to the Chamber of Commerce and Industry within eight days following approval (approval needs to take place within eight months of the end of the fiscal year). Prior to this date, only VBAs were required to submit their financial statements to the Chamber of Commerce
- 53. For entities carrying out regulated financial activities (i.e. credit institutions, electronic money institutions, money transfer companies, trust service providers, insurance companies and company pension funds), compliance in respect of their obligations to maintain ownership, accounting and banking information is monitored by the CBA. Monitoring is carried out via a combination of on-site examinations, as well as off-site monitoring activities, including surveys to assess compliance with the relevant provisions in the laws and regulations. Sanctions are set at an appropriate level to enforce

compliance with information keeping requirements. Sanctions such as fines are enforced in practice. Over the period 2010-13 a total of 40 onsite examinations were carried out by the CBA and nine formal enforcement measures were taken against non-complying institutions.

- 54. Entities that do not fall under the supervision of the CBA are monitored by the Chamber of Commerce and Industry. The Chamber is responsible for monitoring compliance with the requirement on Aruban companies to submit a copy of the shareholder register. Similarly, with the requirement on AVVs and NVs to submit a copy of the annual financial statements. This was already applicable to VBAs. Each obligation is accompanied by a monetary penalty for failure to submit. The obligations to maintain ownership, accounting and banking information are all accompanied by appropriate sanctions in Aruba. Nevertheless, there does not appear to be a regular system of oversight in place to monitor compliance with the requirements on companies, partnerships and foundations to keep and file ownership and identity information.
- 55. During the period under review (1 July 2010 to 30 June 2013), Aruba received a total of 17 requests from four EOI partners. Of the 17 requests received, 1 was responded to within 90 days, 14 within a period of between 91 and 180 days, 1 between 181 days and one year and 1 request took over a year to be responded to. Of the 17 requests, one request concerned company ownership and one request concerned accounting information in respect of a partnership. Two requests concerned banking information. All 17 requests concerned individuals and requested information related to residency status, marital status, confirming the name and address of the taxpayer(s), etc.

### 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

- 56. There are three types of companies in Aruba 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).

Ownership and identity information required to be provided to government authorities

### Commercial laws

- 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 2014, there were in Aruba 1 450 active AVVs (of a total of 8 893 registered), 7 033 active NVs (of a total of 13 271 registered), and 440 active VBAs (of a total of 466 registered). 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 for 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. 15
- 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>16</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).
- 59 Companies (other than public law bodies) engaged in Aruban business must either obtain a government permit to do business in Aruba

Article 37 and 38, Commercial Code, for NVs; article 155b and 155c, Commercial 15 Code, for AVVs and article 13, State Ordinance on the VBA, for VBAs.

<sup>16.</sup> www.arubafinancialcenter.aw.

- (article 1, Establishment of Businesses Ordinance and respective guidelines of the Department of Economic Affairs<sup>17</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 the Chamber of Commerce and Industry in case the shareholder is a legal entity (Guidelines for the Establishment of Companies issued by the Department of Economic Affairs).
- 60. As of February 2012, all capital companies in Aruba are required to deposit a copy of their updated shareholder register with the Chamber of Commerce and Industry within eight months after the end of the fiscal year. The boards of AVVs and NVs are required to maintain an up-to-date register for this purpose which contains the names of the shareholders, copies of the documents on the basis of which their identities were established, their address, details of the type(s) of share they own, details of their voting rights, the amount paid for the share and the date of acquisition (amended Articles 54 and 155(i) of the Commercial Code of Aruba (AB 1990 no. GT 50)). Failure to comply with this obligation to deposit a copy of the shareholder register is punishable with a fine of maximum AWG 5 000 (USD 2 793). As this is a recent provision, the effectiveness of this sanction could not be assessed and therefore Aruba is recommended to monitor the implementation of the new provision to ensure that updated ownership information is being maintained in respect of all entities.

### Commercial Law obligations in practice

61. During the period under review, the AFC provided a declaration of no objection to all companies that requested one, following the carrying out of their standard background checks, this amounted to a total of 1 540 declarations of no objection. The AFC is also mandated to provide permits to a specific category of companies namely (i) AVVs and VBAs carrying on qualified activities and opting to be treated as exempt companies, (ii) all companies opting to be treated as transparent companies provided 60% of the shares are owned by non-residents and the company does not participate in the Aruban economy and (iii) NVs and VBAs that opt for the imputation regime, provided 60% of the shares are owned by non-residents and the company does not participate in the Aruban economy. The AFC granted 19 permits during the period under review.

<sup>17.</sup> The Aruban Financial Center is an agency which has also been given the power to issue permits to a certain category of companies. Other companies fall under the remit of the Department of Economic Affairs.

- 62 All other government permits for companies were granted by the Department of Economic Affairs (DEA). During the period under review. the DEA granted 1 315 permits for companies. Whether applying for a declaration of no objection or a permit from either the AFC or the DEA, the information shared with the institution is provided upon application but not updated thereafter. The information provided is designed to attest to the standing of the applicant and includes a copy of the passport, certificate of good behaviour from the public prosecutions office, statement of registration by the population register, marriage certificate, etc.
- 63. Once a company has been created by means of a notarial deed and once the declaration of no objection and the business permit required for doing business in Aruba have been obtained, it is necessary to enter the company onto the Trade Register held by the Chamber of Commerce and Industry. The Chamber of Commerce and Industry is made up of a team of 19 full time employees including five who work at the registry department. When creating a company, individuals are invited to make an appointment with the Chamber. The Chamber's Trade Register is available to search online and is updated daily. In addition, all registered entities pay annual fees to the Chamber which become due on 1 April.
- 64. Companies are established in Aruba by notarial deed. The notary is required by law to register the VBA with the Chamber and the notary also often offers this service for the NV and the AVV as well. It is mandatory to register a company with the Chamber within seven days after incorporation. Together with the deed of incorporation and its articles of incorporation, it is also necessary to file the address and object of the company, managing and supervisory board and other legal representatives, if applicable. Upon registration it is also necessary to file details of the investment made.
- 65. In addition, the relevant registration form must be completed in accordance with the entity being created. The files are kept as paper copies. The representatives of the Chamber confirmed that the requirement for an entity to register once incorporated is complied with, particularly since it is required in order to be able to open a bank account in Aruba under the name of the entity. Similarly, they stated that the obligation to provide details of any updated information within seven days was also complied with in practice by companies that were considered "active" within the register. However, there is a lack of a regular system of oversight with regards the obligation on entities to make such updates. Amendments to the records held by the Chamber are made each weekday and there is no cost to companies wishing to make amendments. The Chamber provides access to the general public to their online registry. The basic information on the company is available online namely the trade name, statutory name, date of incorporation, the address,

authorised, issued and paid up capital, fiscal year, the information on the directors, supervisory board, authorised persons and corporate bodies.

- 66. Nevertheless, there does not appear to be a regular system of oversight in place at the Chamber of Commerce to monitor compliance with the requirements on companies to keep and file ownership and identity information. The Chamber does not cross-check the changes submitted, nor are any checks of registered entities in the form of desktop audits or onsite examinations conducted. Therefore, this may not ensure that updated ownership information is being kept and filed by all registered entities.
- 67. In addition, although VBAs are required to have either a resident director or a TSP as a legal representative in Aruba and AVVs are required to have a TSP as a legal representative, NVs do not have to comply with a similar requirement. If there were no resident individual in Aruba then enforcement of the requirement to hold and deposit the shareholder register would be difficult.
- 68. The Trade Register contains details of both "active" and "inactive" companies. The latter term is used to describe those companies that do not perform economic activities. The numbers of inactive companies amount to 7 443 AVVs (of a total of 8 893), 6 238 NVs (of a total of 13 271) and 66 VBAs (of a total of 466). It is unclear whether the companies identified as "inactive" in the Trade Register are still operating in practice. When determining whether a company is still active, the Chamber will look at such factors as the company having no registered director or legal representative, the company having an outstanding bill with the Chamber of three years or more, the company having its business permit cancelled and the company no longer being present at the address registered with the Chamber. From January 2012 to November 2014, there have been 101 establishments that were struck off the Trade Register by the Chamber following a request made by the entity or individual. Two were NVs, four were general partnerships and the remainder were all sole proprietorships.
- 69. The authorities confirmed that the Chamber of Commerce is considering ways to update the Trade Register so that it reflects more accurately the numbers of active entities. At present, in accordance with article 144a of the Commercial Code, the Chamber of Commerce has the possibility to liquidate individual entities but the process is lengthy and involves a court application. During the period under review, no entities were liquidated under this existing provision. A draft legal proposal has been put forward to allow the Chamber of Commerce to apply for the liquidation of multiple entities, this would simplify the current procedure.

### Regulated activities

- Legal entities (as well as partnerships) engaged in regulated financial activities (i.e. credit institutions and electronic money institutions, money transfer companies, trust service providers and company pension funds) are supervised 18 by and required to disclose to the CBA information on the identity of directors, members of the supervisory board and qualified owners. i.e. holding or exercising, directly or indirectly, more than 10% of the share capital or voting powers. 19 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 which is expected to be enacted in 2015. It is expected that the CBA will be appointed as supervisor. All four sectoral supervisory state ordinances were updated in 2013 in particular to harmonise and strengthen the fitness and properness criteria. Furthermore the concept of sound business operations was introduced, and the amounts of administrative fines were increased to AWG 1 000 000 (USD 558 659). The four sectoral supervisory state ordinances are applicable to credit institutions and electronic money institutions, the insurance business, money transfer companies and TSPs.
- A change of directors, members of supervisory board or qualified ownership of a credit institution, electronic money institution, money transfer company, TSP, insurance company or company pension fund requires prior written authorisation by the CBA (article 9, SOSCS, article 5(2), State Ordinance on the Supervision of Money Transfer Companies (SOSMTC),
- 18. The supervision of credit institutions (primarily banks) and electronic money institutions, insurance companies (life and non-life), money transfer companies, trust service providers and company pension funds has been regulated by various State ordinances and attributed to the CBA. As for credit institutions, electronic money institutions, trust service providers 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 subsequent supervision by the CBA. Credit institutions, electronic money institutions, trust service providers, 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, electronic money institutions, trust service providers, insurance companies and money transfer companies.
- 19. 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.

article 5 and 5(a), State Ordinance on the Supervision of Trust Service Providers (SOSTSP) articles 14(a) and 17, State Ordinance on the Supervision of Insurance Business (SOSIB) and article 4 of the State Ordinance on Company Pension Funds (SOCPF)). When submitting such a request, the regulated entity must provide the personal questionnaire together with all required accompanying documents. The CBA will then review the information and documents received for completeness and request any missing information from the regulated entity. If the request is complete a detailed assessment is conducted which includes reference checks, information from local authorities such as the Chamber of Commerce, the tax office, the public prosecutor's office, etc and from foreign regulatory authorities. During the period under review a total of 124 requests were received by the CBA regarding changes in directors, members of a supervisory board or qualified ownership.<sup>20</sup> Of the total requests received, 87 were approved, 13 have been conditionally approved and 18 are pending. One request was rejected and five were withdrawn. Furthermore, credit institutions and electronic money 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. 21

### Tax laws

- 72. Companies formed under Aruban law (NVs, AVVs<sup>22</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). The Director of Taxes is competent to establish the tax return's format (article 6(5), General Tax Ordinance).
- 73. 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>23</sup> Up until 2014,

<sup>20.</sup> Of these 51 came from insurance companies, 37 from credit institutions, 22 from pension company funds, nine from Trust Service Providers and five from Money Transfer Companies.

<sup>21.</sup> Articles 11 and 35a, SOSCS; article 23, SOSMTC; articles 8 and 16, SOSIB and article 26, SOCPF.

<sup>22.</sup> Under the General Tax Ordinance, AVVs are also required to file annual tax returns, to keep an administration and to provide information the Tax Inspector deems relevant for the levy of taxes.

<sup>23.</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

1 000 companies (i.e. 141 NVs, 847 AVVs and 12 VBAs) 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).

- Nevertheless, TCs are forbidden from issuing 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).
- An NV or VBA can opt to become an Imputation Payment Company 75. (IPC) provided it meets all conditions: <sup>24</sup> (i) performs only qualifying activities in Aruba; 25 (ii) has at least one Aruba resident individual as managing director; (iii) keeps a shareholder register; and (iv) has its financial statements prepared in accordance with internationally accepted principles and is

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>24</sup> Article 19, State Ordinance on Dividend Withholding Tax and Imputation Payment.

<sup>25.</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).

audited by a qualified (group of) independent certified public accountant.<sup>26</sup> 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.<sup>27</sup>

- 76. Therefore, if an NV or a VBA opts for the imputation tax regime, the company has to maintain an up to date shareholder 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). In March 2014, there were 19 companies (all NVs) which opted for the IPC status, i.e. mostly local hotels.
- 77. 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.

### Tax law obligations in practice

78. Up to December 2012, the Department of Taxes consisted of the Directorate of Taxes and Customs, the Inspectorate of Direct Taxes, and the Inspectorate of Customs and Excise. Following internal restructuring, the Department of Taxes has responsibility for direct taxes and the Department of Customs is a separate department. The Department of Taxes ensures compliance with the tax obligations set out above.

<sup>26.</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>27.</sup> Article 22(3), State Ordinance on Dividend Withholding Tax and Imputation Payment.

During the period under review, the tax filing compliance rates based on tax returns either filed or filed late by AVVs, NVs and VBAs on average over the three-year period were 81% in 2010, 79% in 2011 and 76% in 2012. The numbers are set out in the table below. The numbers below differ from the numbers of companies registered with the Chamber of Commerce because the tax department has a separate system for registering and if necessary for striking off companies from the tax register. When tax returns are not submitted, the tax department will make an estimated assessment. Penalties are imposed for late filing or non-payment of actual or estimated tax due. During the period 2010-13, administrative penalties for failure to file, late filing or incorrect filing of profit tax returns amounted to AWG 10 085 522 (USD 5 634 369).

2010			2011			2012			
		Filed	Filed		Filed	Filed		Filed	Filed
	Not filed	on time	late	Not filed	on time	late	Not filed	on time	late
AVVs, NVs, VBAs	1 479	4 102	2 024	1 664	4 185	2 084	2 013	5 010	1 520

- 80 The Tax Department maintains a tax database for all registered entities and individuals and stores all relevant information within this system including: name, address, date of birth, identification number, nationality, marital status, bank account details, etc. For companies, details of the directors and shareholders are stored along with the entity number and information about the company location. Each month the Tax Department receives a CD from the Chamber of Commerce which updates all details on their internal database
- In regards to the monitoring of compliance with the obligations under 81. the tax law, the Tax Department engages in both desktop monitoring and also onsite inspections in the form of regular audits. Firstly, all tax returns are examined upon submission and if suspicious activity is detected, the taxpaver can be invited to explain the details or a tax audit can be launched. During the period 2010-13, the tax administration carried out a total of 496 audits. During an audit, a copy of the shareholder register is always requested and examined

### Foreign companies

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 2014, 121 foreign companies were registered in Aruba. The Trade Registry Ordinance imposes different requirements in respect of the 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>28</sup>);
- pursuing the business of credit institutions or electronic money institutions via permanent establishments in Aruba and obtaining an authorisation 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).
- 83. Foreign companies carrying on a business in Aruba are required to register with the Trade Register in the same way as domestic companies. However the Chamber of Commerce did not engage in any monitoring of registered entities. Aruba is recommended to introduce a system of oversight to ensure compliance with the obligations for companies to keep and file ownership information in all instances.

Ownership and identity information required to be kept by companies and service providers

### Commercial laws

84. Amendments made to the Commercial Code in 2012 stipulate that AVVs and NVs are required to maintain a shareholder register and AVVs must keep a copy at the office of the company or its legal representative. As of 2013 all companies (AVVs, NVs and VBAs) must deposit a copy of the

<sup>28.</sup> The Aruban Financial Center is an agency which has also been given the power to issue permits to a certain category of companies. Other companies fall under the remit of the Department of Economic Affairs.

register with the Chamber of Commerce and Industry on an annual basis within eight months after the end of the fiscal year.<sup>29</sup> Prior to this date, VBAs were already required to hold a shareholder register and NVs were required to keep a register of shareholders who had not paid up their shares in full; this obligation was discontinued once the full nominal value of issued shares of an NV had been paid up. AVVs did not have a corresponding obligation to maintain a shareholder register.

- 85 Following the updates to the Commercial Code with effect from February 2012, NVs and AVVs are no longer able to issue bearer shares. It has been the case since their creation in 2009 that VBAs have been unable to issue bearer shares. Thus, the change in law means that no companies formed in Aruba can issue bearer shares with effect from February 2012 (see also section A.1.2 Bearer Shares).
- 86 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 shareholder register with the names and 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 the shareholder 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 shareholder 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).
- As outlined above, in practice there is no system of monitoring in place by the Chamber of Commerce to ensure that an updated shareholder register is being maintained. Further, the new legal obligations which require companies to deposit the shareholder register with the Chamber of Commerce are recent and therefore their effectiveness in practice could not be assessed.
- In addition, although VBAs are required to have either a resident director or a TSP as a legal representative in Aruba and AVVs are required to have a TSP as a legal representative, NVs do not have to comply with a similar requirement. If there were no resident director in Aruba then enforcement of the requirement to hold and deposit the shareholder register would be difficult.

<sup>29.</sup> Article 73(7) and article 155q(7) of the Commercial Code of Aruba (AB 1990 no. GT 50) as amended by the National Ordinance of 23 December 2011 containing amendments to the Commercial Code of Aruba the National Ordinance on the Limited Liability Company (AB 2008 no. 62), and the Trade Register Ordinance (AB 1991 no. GT 15) (interim increase of transparency and integrity of capital companies).

## Corporate service providers

- 89. AVVs must have a legal representative, which can only be a limited liability company incorporated and established in Aruba (article 155a(6), Commercial Code). Such legal representation is provided by a TSP, which must hold a licence and be supervised by the CBA under the SOSTSP. VBAs are also required to have a licensed TSP 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). NVs are not required to have a TSP as a legal representative or natural persons resident of Aruba acting directly or indirectly as managing directors.
- 90. A TSP, 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>30</sup> for whom the TSP 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)).
- 91. Furthermore, if a TSP acts as director or legal representative of a body of which the shares are bearer shares (issued pre-February 2012), and those shares are not kept within its custody, the TSP 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 between the custodian and the owner or owners of the shares, and the TSP must dispose of a copy of that agreement. This agreement must be concluded in writing between the custodian and the owner or owners of the shares and at any rate contain the stipulation that both the custodian and the TSP must be informed in writing of each sale of the shares, stating the name and address of the acquirer (article 9, SOSTSP). (See A.1.2)
- 92. The CBA is responsible for supervising compliance by the TSPs with the requirements of the SOSTSP, the AML/CFT State Ordinance and the

<sup>30.</sup> The term ultimate beneficial owner is defined as a natural person who holds at least 25% of the capital of a legal entity, body or capital administered by a TSP, or a beneficiary of 25% 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 TSP (article 1, State Ordinance for the Prevention and Combatting of Money Laundering and Terrorist Financing).

AML/CFT Handbook. There are 11 licensed TSPs in Aruba as at November 2014. During an onsite examination of a TSP, the CBA will select a number of TSP clients with bearer shares to determine whether the TSP complies with the requirements of article 9 of the SOSTSP. Should the TSP not comply, the CBA will instruct the TSP to obtain the required information within a given timeframe and inform the CBA accordingly. If it is not possible for the TSP to comply with the requirements of article 9, it will be instructed to terminate the relationship with the particular client. This process is monitored closely by the CBA. In addition, the CBA can choose to use formal enforcement measures in such circumstances. During the period under review, the CBA conducted ten on-site examinations at the licensed TSPs and found approximately 50 deficiencies. The deficiencies were mostly related to customer due diligence, embedding of the compliance functions, bearer shares, internal audit function and the TSPs policies, procedures and measures in the area of AML/CFT. One deficiency was related to accounting information. Most of the deficiencies found were of a less serious nature and therefore addressed in the on-site letter that is sent following the on-site examination. In nine cases the Central Bank also took informal measures such as holding a meeting with senior management also known as "normative" conversations. In three of these cases the Central Bank had serious concerns about the CDD and enchanced due diligence performed on clients of TSPs. The Central Bank took informal measures such as holding a meeting with the senior management of these TSPs and sending warning letters, as a result of which the TSPs terminated the relationship with the clients concerned. In one case, the Central Bank took a formal measure against a TSP, by giving the TSP a direction (also called an instruction) to take a certain action within a timeframe set by the Central Bank. No further measures were necessary since the TSP involved complied with the direction of the Central Bank. The Aruban authorities confirmed that as at June 2014, the licensed TSPs in Aruba serviced 757 client companies.

## Anti-money laundering laws

In addition to the specific supervisory State ordinances on regulated activities, a complete overhaul of the Aruban AML/CFT framework has been undertaken, including the introduction of a new State Ordinance for the Prevention and Combating of Money Laundering and Terrorist Financing (2011). This ordinance merges and updates two previous ordinances: the State Ordinance on Identification when Providing Service and the State Ordinance on the Reporting of Unusual Transactions. The new ordinance consolidated all AML/CFT supervisory functions under the CBA and expanded the scope of the CBA's supervision to include DNFBPs and financial institutions not previously included for AML/CFT oversight.

- 94. The new AML/CFT State ordinance covers financial and designated non-financial service providers, making it broader in scope than the former legislation. Financial services providers are defined as anyone who on a commercial basis conducts one or more the following activities:
  - 1. Accepting deposits and other repayable funds from the public;
  - 2. Granting loans
  - 3. Financial leasing, with the exception of consumer-related leasing;
  - 4. Transferring money or values;
  - 5. Issuing and managing means of payment other than money (credit cards, debit cards, checks, traveller's checks, bank and money orders and electronic money);
  - 6. Providing financial guarantees and commitments;
  - 7. Trading in money market instruments (foreign currency, payment instruments, shares, exchange, interest, and index instruments, transferable securities and commodities futures trading);
  - 8. Participating in the issue of securities and providing financial services related to this issue;
  - 9. Managing individual and collective investment portfolios;
  - 10. Receiving for safekeeping and managing cash or liquid securities on behalf of third parties;
  - 11. Otherwise investing, administering or managing funds or moneys on behalf of third parties;
  - 12. Underwriting, redeeming and paying a life insurance agreement and other investment-related insurance products;
  - 13. Exchanging money and foreign currency.
- 95. Designated non-financial service providers are defined to include lawyers, notaries, tax advisors, accountants, real estate agents, jewellers, car dealers, TSPs and casinos.
- 96. All service providers are required to determine whether the client is acting for himself or a third party and take reasonable measures to establish and verify the identity of the third party. Furthermore, the ordinance introduces specific requirements for service providers to carry out customer due diligence (articles 3-19). This includes the identification of the client and the verification of identity, the identity of the ultimate beneficiary, the establishment of the purpose and intended nature of the business relationship and transactions

throughout the relationship to ensure that they correspond with the knowledge the service provider has of the client and the ultimate beneficiary.

- The AML/CFT reporting system of Aruba is now based on the AML/ CFT State ordinance. Service providers (financial and non-financial) 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 25). To this end, institutions are implicitly required to monitor accounts and to have systems to detect these types of unusual transactions with suspicious patterns. In practice, the FIU holds all reports of unusual transactions for 12 years before deleting the information. If an unusual transaction is deemed suspicious then it will be shared with the relevant law enforcement agencies. The FIU shares information on approximately one case per month with the Financial Intelligence and Fraud Unit (FIOD) in practice. As of 2011 the FIU no longer has a supervisory role to play since the function has now been passed onto the CBA as regards DNFBPs.
- 98. With effect from 1 January 2011, the CBA split the Supervision Department into a Prudential Supervision Department (PSD) and an Integrity Supervision Department (ISD). The ISD is responsible for integrity-related matters including AML/CFT oversight while the PSD is responsible for ensuring financial safety and soundness of the financial sector. In practice, the ISD performs onsite examinations of the regulated entities on a regular basis along with ongoing off site monitoring. The PSD consists of 10 fulltime staff members and the ISD of eight full-time staff members. The CBA follows a risk-based approach and has a regular cycle of visits in place for the banking sector in particular. Over a four-year period from 2010 to 2013, the CBA has carried out a total of 40 onsite examinations in the area of AML/ CFT across the various sectors subject to AML/CFT oversight as set out in the table below.

Year	Credit institutions	Money transfer companies	Life insurance companies	TSP	DNFBP
2010	4	3	1	1	0
2011	3	1	1	5	0
2012	4	3	1	4	1
2013	2	0	0	2	4
Total	13	7	3	12	5

99 Staff of the CBA received training in 2012 with a focus on risk-based supervision, examination skills and effective reporting. Furthermore, the ISD dedicated significant resources to enhance its policies and procedures to ensure effective execution of the integrity and suitability tests. In addition, in

- 2012, the ISD focused on conducting AML/CFT supervision of the new target groups (NRFIs and DNFBPs). Several awareness-raising meetings were held with representatives from the relevant supervised sectors with a focus on registration and providing guidance and awareness-building.
- During the AML/CFT onsite examinations, the ISD reviews compliance with the AML/CFT State ordinance. The ISD also oversees compliance with the sectoral state ordinances. An on-site working program is prepared before the examination commences. During the on-site examinations, significant risk areas are assessed. The selection of the risk areas is based on the risk profile of an institution, past assessments, recent developments etc. The onsite examination is made up of five main parts: a review of policies, procedures, minutes and reports; an assessment of compliance with the CBA's regulatory prudential requirements; interviews with key staff; a file review and transaction testing. At the end of the on-site visit an exit meeting is held to provide an overview of the preliminary findings. In instances of noncompliance, the CBA has, depending on the violation, the following options amongst others: imposing a penalty charge order, imposing an administrative fine, giving a direction, publishing a direction, penalty charge order or administrative fine, silent receivership and revocation of the licence. It can also take informal measures such as warning letters or an "intrusive" conversation with the management/supervisory board.

#### Nominees

- 101. According to information provided by Aruba, neither the concept of nominee shareholding nor fiduciary owner is recognised 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.
- 102. Although the concept of nominee shareholding is not recognised in Aruba, the AML/CFT legislation establishes an obligation regarding the identification of clients by all service providers. In particular, service providers are required to determine whether the client is acting for himself or for the benefit of a third party and take reasonable measures in order to establish the identity of that third party and verify this identity (article 4 AML/CFT State Ordinance). Moreover, chapter 2 (articles 3-19) of the AML/CFT state ordinance sets out a comprehensive procedure for customer due diligence requirements applicable to financial and non-financial service providers. Article 11 requires service providers to perform enhanced customer due diligence in certain situations including with companies that have bearer shares or where the shares are kept by nominee shareholders.

- 103 While the Aruban tax laws are silent about the tax treatment of nominees, the Aruban 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).
- In practice, no requests regarding nominee shareholdings have been received by Aruba.

## Conclusion of company ownership information in practice

- During the period under review (1 July 2010 to 30 June 2013), Aruba received a total of 17 requests from four EOI partners. One of these requests concerned company ownership. The information required was available to the tax administration within their own files
- In practice there is no system of monitoring to ensure that the ownership information is being kept and filed at all times. Further, the new legal obligations which require AVVs and NVs to hold a shareholder register and all companies to deposit a copy of the register with the Chamber of Commerce are recent and therefore their effectiveness in practice could not be assessed
- In addition, although VBAs are required to have either a resident 107. director or a TSP as a legal representative in Aruba and AVVs are required to have a TSP as a legal representative. NVs do not have to comply with a similar requirement. If there were no resident individual in Aruba then enforcement of the requirement to hold and deposit the shareholder register would be difficult.
- Aruba is recommended to introduce a system of oversight to ensure compliance with the obligations for companies to keep and file ownership information in all instances.

# **Bearer shares** (ToR A.1.2)

109 With effect from February 2012, it is no longer possible for Aruban companies to issue bearer shares. This provision was introduced into articles 51 and 155i of the Commercial Code of Aruba, amended by the National Ordinance of 23 December 2011. Prior to this date, the possibility existed for AVVs and NVs to issue bearer shares but not VBAs. Furthermore, when a TSP acts as a director or legal representative of a body with bearer shares, the TSP must either be the custodian of the bearer shares or have knowledge of the place where the shares are kept in custody. In addition, the TSP must ensure there is a written custody agreement and it must have a copy on file, it must also be informed of the disposal of the shares, stating at least the name and address of the acquirer.

- 110. For bearer shares that were issued prior to February 2012, the law requires holders of the shares to register them within a three-year period by 1 February 2015. The CBA has sent out letters to the TSPs in Aruba requesting an update on the conversion of bearer shares of their client companies. If the shares remain unregistered, no rights can be exercised in connection with them. However, there is no additional penalty associated with failing to register the bearer shares. Furthermore, once the three-year transition period has passed, it is still possible for the holders to register the shares and revive the rights associated with them. Prior to this, the holder of the bearer shares may have transferred them and as such, accurate ownership information may not be available.
- 111. According to the Aruban authorities, various regimes had been put in place prior to February 2012 which had the effect of immobilising bearer shares or preventing their use. They also provided for mechanisms to identify owners of bearer shares. These regimes can be summarised as follows:
  - commercial laws: VBAs are not allowed to issue bearer shares (article 1, State Ordinance on the VBAs) and as of February 2012, AVVs and NVs are also unable to issue bearer shares;
  - *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 TSP acts as director or legal representative of a body with bearer shares (AVV), it must either keep them in 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 between the custodian and the owner or owners of the shares, and the TSP must dispose of a copy of that agreement (article 9, SOSTSP). Since January 2013, it is possible for a foreign branch of the TSP, foreign TSPs, banks and other financial institutions or civil law notaries or comparable professionals to act as custodians of the bearer shares. These entities or professionals must be subject to internationally accepted standards of AML/CFT and effectively supervised for compliance with these standards in the country of domicile. Prior to January 2013, the custodians could be either the TSP itself or a licensed financial institution.

- 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.
- In practice, representatives of the Department of Economic Affairs 112. confirmed that it is not possible for a company to obtain a business permit or directors license if the articles of association allow for the creation of bearer shares. The Department of Economic Affairs (DEA) noted that they have never seen a case of an Aruban company which has the possibility of issuing bearer shares applying for a permit since a rule was introduced in 1990 making such companies ineligible for permits.
- 113. It has not been possible to assess the total number of bearer shares or companies issuing bearer shares in Aruba prior to the change in the law in February 2012. Nevertheless, the Aruban authorities informed that the number is likely to be small, particularly due to the constraints that can arise when applying for a bank account or a business licence from the DEA, along with the various other regimes put in place which have the effect of immobilising the bearer shares, as set out above. Of the 11 licensed TSPs in Aruba. seven informed the CBA that they hold their clients' bearer shares in custody, one TSP indicated that the bearer shares of its clients are held by other custodians outside of Aruba (the TSP provided the CBA with the names of the institutions where the bearer shares are being held)and three TSPs indicated that none of their clients have bearer shares.
- For bearer shares issued prior to February 2012, a custodial arrangement is in place for AVVs whereby TSPs have custody of the bearer shares or are informed of the place where the shares were kept and record this. Furthermore, the TSP is required to guarantee that the shares are kept in

custody based on a written agreement between the custodian and owner or owners of the shares and that it has a copy of the agreement. In addition, the TSP is required to guarantee that the custodian and the TSP are immediately informed in writing of each alienation of the shares, stating at least the name and address of the acquirer.

- 115. As noted above, with effect from January 2013, it is possible for a foreign branch of the TSP, foreign TSPs, banks and other financial institutions or civil law notaries or comparable professionals to act as custodians of the bearer shares. Prior to January 2013, the custodians could be either the TSP itself or a financial institution licensed by the CBA. Should foreign custodians be used in practice, ownership information on the bearer shares held by the foreign custodian may not always be available in Aruba. However, since is it no longer possible in Aruba to issue bearer shares, there is a short period of time during which this may pose practical challenges.
- 116. As of March 2014 there are a total of 8 893 AVVs registered with the Trade Register (of which 1 450 are active). However, as of June 2014 there are 11 TSPs in Aruba servicing a total of 757 client companies. Given that AVVs are always required to have a TSP in Aruba licensed by the CBA, this would appear to point to a gap of at least 8 136 registered AVVs in Aruba without a legal representative and therefore potentially without a custodian mechanism to enable the identification of the owners of bearer shares. It is possible for a TSP to exit a client company by resigning as director, legal representative or local representative but the company itself will continue to exist. TSPs may exit a client company without any penalty and there is no requirement to inform the CBA of this.
- 117. As such, if an AVV did not have a TSP in Aruba then this entity would have had the possibility (prior to February 2012) to issue bearer shares without a custodian arrangement in place. Furthermore, a custodial arrangement did not exist for NVs that issued bearer shares. NVs are not required to keep identity information on the owners of bearer shares issued prior to 2012. In addition, the custodian requirement for AVVs may not be sufficient. The law abolishing the issuance of new bearer shares does not fully address these legacy issues.
- 118. During the period under review, Aruba did not receive any requests related to companies that had issued bearer shares.

## Partnerships (ToR A.1.3)

# Types of partnerships

- 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:
  - open partnerships (maatschap) the partners within this partnership, characterised as a contract without legal personality, practice a common profession and are personally liable for the obligations incurred by the firm (articles 1630-1664, book 7A, Civil Code);
  - general partnerships (vennootschap onder firma) the partners are jointly and severally liable for the debts resulting from the enterprise of the general partnership (articles 1630-1664, book 7A, Civil Code in conjunction with articles 11-31, Commercial Code); and
  - limited partnerships (vennootschap en commandite, LPs) the partners are separated into two groups: general (or managing) partners are jointly and severally liable for the debts of the LP, they manage the LP and represent the LP in dealings with third parties; the liability of the limited (or silent) partners is limited to the amount of capital they contribute to the LP, they are prohibited from directly managing the affairs of the LP (articles 1630-1664, book 7A, Civil Code in conjunction with articles 15-18 and 27, Commercial Code<sup>31</sup>).
- 120 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 March 2014, there were 561 general partnerships (of which 115 were active), 65 limited partnerships (of which 17 were active) and 63 open partnerships (of which 24 were active).

<sup>31.</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.

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

- 121. 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 to the disclosure requirements as included in the Trade Registry Ordinance (article 7).
- 122. 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. 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>32</sup>
- 123. Upon 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 identity 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.
- 124. 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 Joint Court of Aruba, Curaçao, Sint Maarten, and of Bonaire, Sint Eustatius and Saba

<sup>32.</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).

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 is limited to disciplinary measures to be imposed on a case-by case basis by the Joint Court of Aruba, Curação, Sint Maarten, and of Bonaire, Sint Eustatius and Saba.

- 125. 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).
- 126. In order to register a partnership with the Chamber of Commerce, applicants complete Form 2 from the Chamber of Commerce and submit this along with the required documents to the Chamber. The application requires copies of passports, proof of nationality, copy of the civil registry entry to demonstrate proof of residency (not less than 3 months old), details of marital status and the marital regime and the resident permit. In addition, details of the capital invested must be provided as part of the application.
- 127. During the period under review, no penalties were imposed by the Chamber of Commerce and Industry for any violation of the disclosure requirements by partnerships, similarly no penalties were imposed for failure to update the register of any changes. However, during the period under review, the Chamber of Commerce and Industry did not engage in a programme of active oversight of partnerships. Aruba is recommended to ensure that any partnerships comply with the updating requirements with the Chamber of Commerce and Industry and that any incidents of non-compliance are effectively sanctioned.

## Ownership information held by the partners and service providers

128. 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. As such, the possibility exists to create a partnership in Aruba but not have a natural person present in the jurisdiction thereafter. Under Aruban tax law, partnerships that have income, credits or deductions for Aruban tax purposes (including those partnerships that are carrying on business in Aruba) must 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 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).

- 129. However, this presents a challenge in terms of enforcing the requirements regarding ownership and identity information in as far as this relates to limited partnerships which do not otherwise have any connection to Aruba. Moreover, 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. A national ordinance which entered into force on 13 November 2014, amends article 48(7) of the General Tax Ordinance to require limited partnerships to hold a register containing the name and address of their limited partners. <sup>33</sup> As this is a recent provision, the enforcement of this provision in practice could not be assessed.
- 130. In practice, the numbers of partnerships being assessed for tax purposes is relatively low. In 2010 a total of 7 partnerships received a profit tax return for completion and 4 of them filed or filed late. In 2011, 14 partnerships received one and of this total 7 filed a tax return. In 2012, 8 received one and of this total, 2 filed a profit tax return.
- 131. Partnerships are generally considered transparent for tax purposes so the individual partners will file tax returns. Partnerships file wage tax returns and turnover tax returns each month.

## Trusts (ToR A.1.4)

132. It is not possible to form a trust under Aruban civil law and there is no domestic trust legislation. Aruba does not recognise 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. However, in order to carry on a business as a trustee a license is required from the CBA in accordance with article 2 of the SOSTSP, there must also be compliance with the AML/CFT laws and regulations and the Sanctions State Ordinance

<sup>33.</sup> Article 48(7) of the General Tax Ordinance (AB 2004 no. 10) as amended by the National Ordinance of 13 November 2014 containing amendments to National Ordinance on income tax (AB 1991 no. GT 51), the National Ordinance on wage tax (AB 1991 no. GT 63) and the General Tax Ordinance (AB 2004 no. 10).

#### Tax laws

- 133. The Aruban authorities may attribute, for tax purposes, the assets and income of a non-recognised foreign trust 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 unless the trustee declares the income of the trust separately. 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. The Aruban authorities confirmed that in practice a trustee residing in Aruba would be taxed in this way but that they have not seen such a situation occurring to date.
- 134. 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

- 135. In addition, the AML/CFT legislation establishes an obligation regarding the identification of clients by financial and designated non-financial service providers. Even though the concept of trust is not recognised in Aruba, the list of designated services under the State Ordinance for the Prevention and Combating of Money Laundering and Terrorist Financing (AB 2011 no. 28) includes the creation, operation or management of trusts or similar entities (see *ToR* A.1.1) In particular, 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 (Article 4 AML/CTF state ordinance) and to keep identity data for ten years (article 33 AML/CFT state ordinance). Furthermore the service provider is required to conduct customer due diligence requirements as set out in Chapter 2 of the ordinance (articles 3-19).
- 136. The AML/CFT State ordinance stipulates that the service provider shall take reasonable measures which in any case must lead to the service provider acquiring an understanding of the ownership and the actual control structure of the client. This provision applies equally to clients acting as trustee of a trust with the understanding that the reasonable measures shall lead

to the identity of the settlor and the ultimate beneficiary to the assets of the trust being established and verified. With regards foreign trusts, article 19(3) and (4) indicate that the identities of the trustee, or the person who otherwise exercises effective control, the settlor of the trust and the ultimate beneficiary shall be verified based on reliable and internationally accepted documents, data, or information, or on the basis of documents, data, or information that have been recognised by law in the state of origin of the client as a valid means of identification.

- 137. Furthermore, a TSP which acts as administrator of a foreign trust must have at its disposal at all times information recorded in writing or on another data carrier on the identity, assets and background of the beneficiaries of 25% or more of the capital of a trust for whom the TSP performs its work (article 1, AML/CFT State ordinance). This information must be stored for at least ten years (article 8(3) SOSTSP). Non-compliance herewith can lead to the application of administrative sanctions (a penalty charge order or an administrative fine not exceeding AWG 1 000 000 (USD 558 659) and/or the revocation of the license (articles 11 and 18(2)(b) SOSTSP).
- 138. In summary, if a service provider (financial or designated non-financial which includes TSPs) was to be used as an administrator of a 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 confirmed that they are not aware of any cases where foreign trusts have been established or administered by Aruban service providers.
- 139. In practice the Aruban authorities confirmed that they have not received any requests for information relating to trusts.

## Foundations (ToR A.1.5)

140. 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 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

- 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, the fact that the foundation is null and void cannot be held against third parties who were unaware of this (article 2).
- 142 All foundations must be registered in the special public register called the Foundations Register which is kept by the Chamber of Commerce and Industry, five people manage the Trade and Foundations Registers. 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 Foundations Register).
- 143. 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).
- 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).

- 146 As at 2014, there are three active foundations registered in the Trade Register (of a total of 31 registered) because they are carrying on a business. a further 1 276 active foundations are registered in the Foundations Register (of a total of 1 363 registered). In order to register a foundation with the Chamber, Form 6 of the Chamber must be completed and submitted along with copies of passports, driver's license, proof of nationality and copy of the civil registry entry to demonstrate proof of residency (not less than 3 months old).
- 147 The Aruban authorities confirmed that there are 129 foundations registered for profit tax out of a total of 510 registered for tax purposes. There are 11 foundations engaged in regulated activities (e.g. company pension funds). Pursuant to the State Ordinance on Company Pension funds, company 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. Furthermore, the authorities confirmed that approximately 20 foundations conducting a business are not yet registered with the Trade Register and therefore identity and ownership information may not be accessible in respect of these entities.
- During the period under review, no penalties were imposed by the 148 Chamber of Commerce and Industry for any violation of the disclosure requirements by such foundations, similarly no penalties were imposed for failure to update the register of any changes to the board members. However, during the period under review, the Chamber of Commerce and Industry did not engage in a programme of active oversight of foundations. Aruba is recommended to ensure that any foundations carrying on a business comply with the updating requirements with the Chamber of Commerce and Industry and that any incidents of non-compliance are effectively sanctioned. In addition, that any updates regarding foundations such as changes to the board members and articles of incorporation are made to the Foundations Register.

## 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. As such, the possibility exists to create a foundation in Aruba but not have a natural person present in the jurisdiction thereafter. In such circumstances, enforcement of requirements regarding ownership and identity information on foundations by the Chamber of Commerce would be difficult.

- For tax purposes, a foundation is a legal entity and is thus subject 150 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. This is problematic with regards to ownership and identity information concerning beneficiaries, which foundations are not required to file at the Foundations Register. However, a national ordinance which entered into force on 13 November 2014, amends article 48(7) of the General Tax Ordinance (GTO) to require foundations to hold a register containing the name and address of their beneficiaries.<sup>34</sup> As this is a recent provision, the enforcement of this provision in practice could not be assessed. Noncompliance with the obligation to hold a register of beneficiaries would result in a fine and or detention as set out in article 68 of the GTO
- There is no requirement that relevant information for the enforcement of tax laws is kept in Aruba. According to articles 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.
- 152 During the period under review, no requests for information were made concerning foundations.

<sup>34.</sup> Article 48(7) of the General Tax Ordinance (AB 2004 no. 10) as amended by the National Ordinance of 13 November 2014 containing amendments to National Ordinance on income tax (AB 1991 no. GT 51), the National Ordinance on wage tax (AB 1991 no. GT 63) and the General Tax Ordinance (AB 2004 no. 10).

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

153. 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

- 154. 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 5 000, 10 000 or 25 000 (USD 2 793, 5 587 or 13 966) depending on the gravity of the offense, as well as dismissal of the board members of a foundation (article 12, State Ordinance on Foundations).
- The representatives of the Chamber of Commerce and Industry 155 confirmed that the requirement for an entity to register once incorporated is complied with, particularly since it is required in order to be able to open a bank account in Aruba under the name of the entity. Similarly, they stated that the obligation to provide details of any updated information within seven days was also complied with in practice by companies that were considered "active" within the register. However, there is a lack of a regular system of oversight with regards the obligation on entities to make such updates. During the period under review, the Chamber of Commerce and Industry did not impose any penalties for any breach of requirements relating to registration or updates as set out in the commercial laws. However, given that there is a large number of companies deemed "inactive" in the trade register, coupled with the lack of a regular system of oversight and systematic striking off procedure by the Chamber of Commerce and Industry, this points to a potential lack of ownership information in respect of these entities. It is unclear whether the companies identified as "inactive" in the trade register are still operating in practice.

- 156 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 35) or a licence from the CBA (see Regulated activities below). Non-compliance with the disclosure obligations in connection with the Establishment of Businesses 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 withdrawal of the business license (articles 7 and 10).
- 157. Changes to the Commercial Code in February 2012 ensure that all companies in Aruba are required to deposit a copy of their updated shareholder register with the Chamber of Commerce and Industry within eight months after the end of the fiscal year. The changes stipulate that AVVs and NVs are required to maintain an up-to-date register for this purpose which contains the names of the shareholders, copies of the documents on the basis of which their identities were established, their address, details of the type(s) of share they own, details of their voting rights, the amount paid for the share and the date of acquisition (amended Articles 54 and 155(i) of the Commercial Code of Aruba (AB 1990 no. GT 50). Failure to comply with this obligation to deposit a copy of the shareholder register is punishable with a fine of maximum AWG 5 000 (USD 2 793). The first reports became due to the Chamber of Commerce in February 2013.
- 158. The imposition of penalties concerning the requirement to deposit the shareholder register with the Chamber will commence in the third quarter of 2015 following the initial grace period. Prior to this the Chamber will launch another campaign to inform companies of their obligation to comply with the obligation and to ensure that all stakeholders that will be involved in the penalties procedure have a good understanding of the requirements. As this is a recent provision, its enforcement could not be assessed and therefore Aruba is recommended to monitor the implementation of the new provision.
- VBAs have always been required to maintain a shareholder register while prior to February 2012 NVs were subject to the same obligations only with respect to shareholders whose capital was not fully paid up. Noncompliance with this obligation can result in punishment of the directors with imprisonment or a fine (article 455b, Criminal Code). AVVs did not previously have an obligation to keep a shareholder register prior to February 2012. During the period under review, no fines were imposed on VBAs for non-compliance with this requirement to maintain a shareholder register.

The Aruban Financial Center is an agency which has also been given the power 35. to issue permits to a certain category of companies. Other companies fall under the remit of the Department of Economic Affairs.

- 160. Whilst AVVs are always required to have a TSP established and licensed in Aruba as legal representative, VBAs are subject to the same obligation unless they have, directly 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). There were no incidents of dissolution of a VBA for failure to have a licensed TSP as legal representative during the period under review.
- 161. A TSP, 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 hold at least 25% of the capital of a legal entity or 25% of the beneficiaries of a trust for whom the TSP performs its work. Furthermore, if a TSP acts as director or legal representative of a body of which the shares are bearer shares, it must either keep the bearer shares within its custody or be informed of the place where these shares are kept and record this in writing. Non-compliance herewith can lead to the application of administrative sanctions (a penalty charge order or an administrative fine not exceeding AWG 1 000 000 (USD 558 659) and/or the revocation of the license (articles 11 and 18(2)(b) SOSTSP).
- 162. In practice, no instances of dissolution of AVVs for failure to appoint a TSP have occurred during the period under review. However, the Aruban authorities indicated that there may be a significant number of AVV structures without a current legal representative in the form of a TSP in Aruba. Similarly, when a TSP ceases to do business in Aruba and returns their license to the CBA, the AVVs which the TSP in question has as clients will become "floating AVVs" without a legal representative for a certain period of time. The CBA confirmed that they encourage the entities to select a new TSP as quickly as possible but there may be a period in between when they are without a legal representative.
- 163. There is an obligation upon all companies formed under Aruban law 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 and for changes to be updated within seven days after the fact has taken place. This, coupled with the more recent obligation to deposit the shareholder register within eight months of the end of the fiscal year ensures that information regarding the legal owners of companies will be made available to the Chamber of Commerce and Industry. However, in order for these obligations to be fully effective, they need to be accompanied by a systematic programme of oversight. No such system of oversight was in place during the period under review.

#### Tax laws

- 164 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 caused 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 of a partnership to hold a register of limited partners and failure of a foundation to hold a register of beneficiaries;
  - 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)).
- If proved that any of 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)).
- 166. In practice, Aruba's rate of compliance with the obligations to file a tax return was not high. When tax returns are not submitted, the tax department makes an estimated assessment which it shares with the entity, this has often resulted in the tax being paid at a later date. If the tax return

is not submitted, penalties will continue to accrue. The Aruban authorities confirmed that during the period under review criminal penalties of AWG 100 000 (USD 55 865) were imposed for failure to file a tax return and some cases are still pending trial. In addition, estimated amounts of tax were imposed of AWG 10 million (USD 5 586 592) in 2011, AWG 364 783 (USD 203 789) in 2012 and AWG 506 765 (USD 283 108) in 2013. During the period 2010-13, administrative penalties for failure to file, late filing or incorrect filing of profit tax returns amounted to AWG 10 085 522 (USD 5 634 369).

## Regulated activities

167. The CBA and their respective officials and employees have broad investigation and seizure powers relating to the supervision of service providers (TSP, credit institutions and electronic money institutions, insurance companies, company pension funds and money transfer companies), to the extent reasonably necessary for the fulfilment of their duties. They are authorised 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. The CBA can revoke the licence or apply administrative sanctions in the event of non-compliance with the disclosure obligations imposed for supervision of service providers.

The administrative sanctions for non-compliance by the regulated sector with the sectoral ordinances have been increased in the 2013 updates. With regard to credit institutions, electronic money institutions and insurance companies the administrative sanctions are a penalty charge order and/or an administrative fine not exceeding AWG 1 000 000 (USD 558 659) (article 35a. SOSCS) and criminal prosecution subject to imprisonment of up to six years. a fine not exceeding AWG 1 000 000 (USD 558 659) or both (article 53, SOSCS and articles 16 and 26, SOSIB). The administrative sanctions for non-compliance with regard to money transfer companies and trust service providers are a penalty charge order and/or an administrative fine not exceeding AWG 1 000 000 (USD 558 659) (article 23, SOSMTC and article 11, SOSTSP) and criminal prosecution subject to imprisonment of up to six years, a fine not exceeding AWG 1 000 000 (USD 558 659) or both (article 29, SOSMTC and article 31, SOSTSP). Furthermore, the CBA can revoke the licence of the TSP, credit institution, electronic money institution, money transfer company or insurance company which violates its disclosure obligations (article 18 SOSTSP, article 11 SOSCS, article 7, SOSMTC and article 8, SOSIB).

<sup>36.</sup> Article 28, State ordinance on supervision of the TSP; article 52 of the SOSCS; article 25 of the SOSIB, article 12 of the SOSMTC and article 20 of the SOCPF.

## Anti-money laundering laws

- The CBA and its respective officials and employees have supervi-169 sion powers in relation to the AML/CFT framework. Non-compliance with obligations under the AML/CFT regulations is punishable with a penalty charge and/or an administrative fee up to an amount of AWG 1 000 000 (USD 559 659) (article 37, AML/CFT State ordinance), and it can be considered a criminal offense punishable with a term of imprisonment not exceeding six years or a fine not exceeding AWG 1 000 000 (USD 558 659) (article 56, AML/CFT State Ordinance).
- Violations of the AML/CFT State ordinance constitute a criminal offence by virtue of Article 56, para 1. If the offence is committed intentionally, the penalty can be imprisonment or a fine not exceeding AWG 1 000 000 (USD 558 659) or both. If unintentional, the penalty will be either imprisonment for a maximum of one year or a maximum fine of AWG 500 000 (USD 279 330). During the period under review, the following enforcement measures for non-compliance with the AML/CFT State Ordinance were imposed by the CBA:

Institution	Number of entities as at 30 June 2013	Number of informal measures*	Number of formal measures**	Amount of administrative fines and penalty charge orders imposed and collected
Banks	6	3	2	200 000
Life insurers	7	2	2	400 000
Money transfer companies	3	7	4	65 000
Trust service providers	13	9	1	0
DNFBPs and non- regulated financial service providers	140	0	0	0
Total***	169	21	9	AWG 665,000 (USD 371 508)

<sup>\*</sup> These informal measures refer to meetings with the senior management of supervised institutions.

<sup>\*\*</sup> Of the nine formal measures imposed, three were administrative fines, two were directions (also called instructions) and four were penalty charge orders.

<sup>\*\*\*</sup> The enforcement measures taken were based on non-compliance with requirements in the area of customer due diligence (which includes holding ownership information about clients), transaction monitoring, and AML/CFT policies, procedures and measures.

171. The CBA has imposed penalties on entities in Aruba which related to non-compliance with AML/CFT requirements. During the period under review, nine formal measures were imposed and of these three were administrative fines, two were directions and four were penalty charge orders. An administrative fine is a requirement to pay a monetary fine whereas a penalty charge order is a direction requiring an entity to take an action, or refrain from acting in a certain way. If this is not complied with within a certain time period, a monetary fine will be imposed. Additional measures were also applied by the CBA such as "normative conversations" which are meetings with the senior management of the entity in question to point out the deficiencies and emphasise that further non-complaint behaviour will not be tolerated and that the institution must remediate the deficiencies within a certain timeframe given by the CBA. Furthermore, the CBA makes it clear that failure to remediate the deficiencies will lead to formal measures.

#### Determination and factors underlying recommendations

Phase 1 determination				
The element is in place, but certain aspects of the legal implementation of the element need improvement.				
Factors underlying recommendations	Recommendations			
NVs are not required to keep identity information on the owners of bearer shares issued prior to 2012. Furthermore, the custodian requirement for AVVs may not be sufficient. The law abolishing the issuance of new bearer shares does not fully address these legacy issues.	Aruba should ensure that identity information on the owners of bearer shares in NVs and AVVs issued prior to 2012 is available.			

Phase 2 rating					
Partially compliant					
Factors underlying recommendations	Recommendations				
Aruba does not have a regular system of oversight to monitor compliance with the requirements on NVs, VBAs, partnerships and foundations to keep and file ownership and identity information. Furthermore, there may be instances when AVVs and NVs do not have a representative in Aruba. Amendments to the Commercial Code create an obligation on all companies to submit a copy of the shareholder register to the Chamber of Commerce and Industry on an annual basis. However these amendments are recent and have not yet been sufficiently tested in practice.	Aruba should ensure that compliance by all entities with ownership and identity information-keeping and filing requirements, including the effectiveness of the recent amendments to the Commercial Code, is appropriately monitored and enforced.				
Aruba amended the General Tax Ordinance requiring Limited Partnerships to maintain a register of their limited partners and Foundations to maintain a register of their beneficiaries. Since the amendments were only enacted in November 2014, they could not be tested in practice.	Aruba should monitor the practical implementation of these amendments to ensure their effectiveness in practice.				

# 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)

The management directors of an 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>37</sup> An expert (usually

<sup>37.</sup> Articles 73 and 155q, Commercial Code and article 36, State ordinance of the VBAs.

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>38</sup> In February 2012, new provisions entered into force requiring board members of AVVs and NVs to deposit (from 2013) the annual financial statements with the Chamber of Commerce and Industry within eight months following approval.<sup>39</sup> As these are recent provisions, the enforcement of these provisions could not be assessed and therefore Aruba is recommended to monitor the implementation of the new requirements. VBAs have always been required to file their annual accounts with the Chamber of Commerce 40

- 173 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 22 and 23 SOSCS, article 15, SOSMTC, and article 11 and 12, SOSIB). As an exception, TSPs must submit annual reports to the CBA but the auditing by an external auditor is not required (article 7, SOSTSP) as they are not allowed to have third party funds under their management.
- Individuals conducting any business or profession, individuals liable to withholding taxes and other bodies (companies, foundations, partnerships,

<sup>38.</sup> Articles 74 and 155r, Commercial Code and article 37, State ordinance of the VBAs

<sup>39.</sup> Article 73(7) and article 155q(7) of the Commercial Code of Aruba (AB 1990 no. GT 50) as amended by the National Ordinance of 23 December 2011 containing amendments to the Commercial Code of Aruba the National Ordinance on the Limited Liability Company (AB 2008 no. 62), and the Trade Register Ordinance (AB 1991 no. GT 15) (interim increase of transparency and integrity of capital companies).

Article 37(4). State ordinance of the VBAs. 40.

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 (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).

## Availability of accounting records in practice

All relevant entities in Aruba are required to keep accounting information for ten years. In February 2012, new provisions entered into force requiring board members of AVVs and NVs to deposit (from 2013) the annual financial statements with the Chamber of Commerce and Industry within eight days following approval (approval needs to take place within eight months of the end of the fiscal year). 41 It is possible, if there are exceptional

Article 73(7) and article 155q(7) of the Commercial Code of Aruba (AB 1990 41. no. GT 50) as amended by the National Ordinance of 23 December 2011 containing amendments to the Commercial Code of Aruba the National Ordinance on the Limited Liability Company (AB 2008 no. 62), and the Trade Register Ordinance (AB 1991 no. GT 15) (interim increase of transparency and integrity of capital companies).

circumstances, to extend the eight months by an additional six months maximum in a general shareholders' meeting. The annual financial statements are made up of a balance sheet, a profit and loss statement and accompanying notes. Once filed, the Chamber will provide the company with confirmation that the documents have been filed. TSPs hold accounting information on behalf of their client companies and will carry out the task of depositing the annual financial statements to the Chamber on behalf of their clients

- The first reports from AVVs and NVs became due to the Chamber of Commerce in February 2013. The Chamber has to date imposed a grace period during which they will not impose penalties for late submission of accounting information under the new provisions. The representatives of the Chamber noted that they reminded companies of this obligation twice in 2014 via educational seminars and circulars. The introduction of penalties concerning the requirement to deposit financial statements with the Chamber is due to be implemented in the third quarter of 2015. Prior to this, the Chamber will launch another campaign to inform companies of their obligation to comply with the obligation and to ensure that all stakeholders that will be involved in the penalties procedure have a good understanding of the requirements. As this is a recent provision, its implementation could not be fully assessed at the time of the review and therefore Aruba is recommended to monitor the implementation of the new provision.
- VBAs have always been required to file their annual accounts with the Chamber of Commerce. During the period under review, this obligation was being complied with by some VBAs. Once the provisions in respect of AVVs and NVs came into effect, additional efforts were made by the Chamber of Commerce to ensure compliance with the obligation on VBAs.
- The Aruban authorities confirmed that accounting information is 181. submitted with annual tax returns. The accounting information that is submitted with annual tax returns is the balance sheet and the profit and loss statement along with explanatory notes. All domestic and foreign companies registered with the tax department were sent a tax return. The numbers below differ from the numbers of companies registered with the Chamber of Commerce because the tax department has a separate system for registering and if necessary for striking off companies from the tax register. During the period under review, the tax filing compliance rates based on tax returns either filed or filed late by AVVs, NVs and VBAs on average over the threeyear period were 81% in 2010, 79% in 2011 and 76% in 2012.
- Furthermore, due to the large number of AVVs and NVs considered to be "inactive" by the Chamber of Commerce, the tax department sends tax returns out to a limited number of these entities. This is partly because it would be disproportionate in terms of costs to attempt to make estimated assessments on entities that are likely to be inactive and therefore unlikely

to respond. The rates of compliance with corporate tax returns (from those entities which receive forms) are not high. Non-compliance with filing requirements results in penalties being imposed. In 2014, a total of 3 289 estimated assessments have been made for profit tax with corresponding tax and penalties imposed. If the tax return is not submitted, penalties will continue to accrue. As such, due to the tax filing compliance rates which were not high, it will not be possible in all circumstances to rely on the provision of accounting information with tax returns.

		2010			2011			2012	
		Filed	Filed		Filed	Filed		Filed	Filed
	Not filed	on time	late	Not filed	on time	late	Not filed	on time	late
AVVs, NVs, VBAs	1 479	4 102	2 024	1 664	4 185	2 084	2 013	5 010	1 520

- In addition, although VBAs are required to have either a resident 183. director or a TSP as a legal representative in Aruba and AVVs are required to have a TSP as a legal representative, NVs do not have to comply with a similar requirement. If there were no representative in Aruba then enforcement of the requirement to deposit accounting information would be difficult.
- Furthermore, as noted in A.1.2, as of March 2014 there are a total of 184 8 893 AVVs registered with the Trade Register (of which 1 450 are active). However, as of June 2014 there are 11 TSPs in Aruba servicing a total of 757 client companies. Given that AVVs are always required to have a TSP in Aruba licensed by the CBA, this would appear to point to a gap of at least 8 136 registered AVVs in Aruba without a legal representative. As such, if an AVV did not have a TSP in Aruba then enforcement of the requirement to deposit accounting information would be difficult.
- 185. Regulated entities are also subject to obligations to maintain accounting records as set out in both the sectoral state ordinances as well as the AML/CFT state ordinance. For all regulated entities, the CBA is the body responsible for ensuring that licensed entities in Aruba maintain adequate accounting records. The CBA has carried out a number of off-site examinations and several onsite inspections during the period under review. The combination of requirements set out in the Civil Code. Commercial Code. the General Tax Ordinance and the regulatory ordinances require that reliable accounting records are held by all entities in Aruba for a period of ten years. Such accounting records correctly explain all transactions, enable the financial position of the entity or arrangement to be determined with reasonable accuracy at any time and allow financial statements to be prepared.

186. During the period under review, the Aruban authorities confirmed that they received one request for information relating to accounting information. In this instance, the accounting information was available in the files of the tax administration and the information was provided to the requesting party within 180 days.

## Underlying documentation (ToR A.2.2)

- 187. For tax purposes, individuals (including partners and trustees) conducting a business or profession, 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.
- 188. Tax obligations to keep accounting underlying documentation are supervised in the same way as general accounting obligations. During the period 2010-13, the tax department carried out a total of 496 audits. Tax audits carried out by the tax administration include checking whether accounting underlying documentation is kept. If underlying documentation is not properly kept, then penalties will be imposed. Accounting books and underlying documentation are required to be kept at the company, foundation or partnership in Aruba. The sanction for not keeping the records is reversal of the burden of proof in terms of the tax assessment, meaning that the entity would be required to demonstrate why the assessment by the tax department is not accurate. In addition, there are criminal penalties which may be imposed, such as a fine of AWG 25 000 (USD 13 966) and/or detention for a maximum of six months as set out in article 68 of the General Tax Ordinance.
- 189. Regulated entities are well monitored by the CBA. Penalties for non-compliance with obligations to keep underlying documentation range from monetary penalties to revocation of the license or cancellation of the registration. During the period under review, a direction was given by the CBA to a TSP for failure, amongst others, to hold underlying documentation related to accounting information.

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

190. 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.

- 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 TSP must be kept for a period of at least ten years (article 8(3), SOSTSP).
- 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.
- Under the Aruban AML/CFT framework, service providers, such as 193 credit institutions and electronic money institutions, insurance companies, trust service providers, money transfer 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 keep records in respect of all transactions for ten years from the date of the termination of the agreement under which service was provided.
- 194 As of February 2012, the requirement was added to the Commercial Code that companies are required to keep their annual financial statements and any records belonging to them at the office of the company for a period of ten years. This requirement was previously found in the General Tax Ordinance
- During the period under review, Aruba received one request for 195 accounting information which related to a partnership. Aruba was able to provide the information based on accounting information held within the files of the tax administration. None of the peers raised any concerns regarding the ability of Aruba to provide accounting information.

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

	Phase 1 determination
The element is in place.	

Phase 2 rating				
Largely compliant.				
Factors underlying recommendations	Recommendations			
While the combination of requirements set out in the Civil Code, Commercial Code, the General Tax Ordinance and the regulatory ordinances require that reliable accounting records are held by all entities, the only oversight is carried out by the tax administration which could be more rigorous in application. Furthermore, there may be instances when AVVs and NVs do not have a representative in Aruba which could pose a challenge to enforcement. However, NVs and AVVs are under a new legal obligation to file their financial statements with the Chamber of Commerce and Industry annually for financial years starting on or after February 2013 but these requirements remain untested in practice.	Aruba should ensure oversight of the obligation to hold accounting records in all cases and monitor the implementation and operation of the new obligation for NVs and AVVs to file financial statements with the Chamber of Commerce and Industry.			

# A.3. Banking information

Banking information should be available for all account-holders.

# Record-keeping requirements (ToR A.3.1)

196. Aruba's record-keeping requirements are generally satisfactory. Under the Aruban AML/CFT framework service providers are required to perform customer due diligence including the establishment and verification of 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>42</sup> This identification data must be recorded for ten 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

<sup>42.</sup> Chapter 2, AML/CFT State ordinance.

Chamber of Commerce and Industry or other competent authority (article 19, AML/CFT State ordinance). Anonymous accounts are strictly forbidden.

In accordance with Article 5 of the AML/CFT State ordinance, with regard to a client that is a legal entity, service providers are required to determine if the natural person purporting to act on behalf of this client is so authorised, establish the identity of that natural person and verify that identity before providing the service. Furthermore, the ordinance states that the service provider shall take reasonable measures which in any case must lead to the service provider acquiring an understanding of the ownership and the actual control structure of the client. This second provision applies equally to clients acting as trustee of a trust with the understanding that the reasonable measures shall lead to the identity of the settlor and the ultimate beneficiary to the assets of the trust being established and verified. With regards foreign trusts, article 19(3) and (4) indicate that the identities of the trustee, or the person who otherwise exercises effective control, the settlor of the trust and the ultimate beneficiary shall be verified based on reliable and internationally accepted documents, data, or information, or on the basis of documents, data, or information that have been recognised by law in the state of origin of the client as a valid means of identification. As a result of these requirements, 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 owners.

198 Under article 33 of the AML/CFT State ordinance, the service provider is obliged to keep the data and information required pursuant to the performance of customer due diligence in an accessible way for a period of ten years to include for natural persons:

- the surname, given names, date and place of birth, address, and domicile and/or place of business of the client and the ultimate beneficiary and of the person acting on behalf of this natural person, or a copy of the document containing a number identifying a person, and based on which identification took place;
- the nature, number, and date and place of issue of the document used to verify the identity;
- the nature and date of the transaction:
- the type and quantity of the currency involved in the transaction;
- the type and number of the account used during the transaction;
- all account files and business correspondence.

### Similarly, for legal persons:

- the legal form, name under the Articles of Incorporation, the trade name, address, and, if the legal person is listed with the Chamber of Commerce and Industry, the registration number of the Chamber of Commerce and Industry, and the manner in which the identity has been verified;
- of the persons acting on behalf of the legal person and of the ultimate beneficiary, the surname, given names, and date of birth;
- the nature and date of the transaction:
- the type and quantity of the currency involved in the transaction;
- the type and number of the account used during the transaction;
- all account files and business correspondence.
- 199. Under chapter three of the AML/CFT State Ordinance, financial institutions and designated non-financial service providers, 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 decree (article 25). 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.
- 200. 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 the 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.
- 201. 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.

#### Availability of banking information in practice

- All international banks and domestic banks operating in Aruba 202 are supervised by the Central Bank of Aruba. There are currently a total of 12 credit institutions licensed with the Central Bank operating in Aruba. Namely, five commercial banks, two offshore banks (solely engaged in banking activities with non-residents), one mortgage bank, two credit unions and two other financial institutions. In order to obtain a license from the Central Bank, the entity must meet the licensing requirements laid down in the state ordinance. The Central Bank will examine, amongst other items, whether the applicant bank or its parent company has a good track record, the reputation and financial strength of the bank's shareholders, the business plan, the systems, policies and measures in place to ensure compliance with AML/CFT obligations including the appointment of a money laundering compliance officer and a reporting officer. All client files and records should be available in Aruba or if this is not the case it should be made available within 24 hours.
- The CBA has a programme of on-site examinations and off-site monitoring of licensed banks operating within Aruba. During the period under review, on-site examinations were conducted at all banks (some more than once). During such examinations, the CBA will examine a sample of files held by the bank to ensure that the information is being held accordingly by the licensed institution. During the three year period under review, out of the total six banks in Aruba, two had formal measures imposed and three had informal measures imposed by the CBA following the on-site examinations. Informal measures include "normative" conversations with the senior management of the banks; formal measures taken were either an administrative fine or a penalty charge order. In respect of banks, the total amount of administrative fines and penalty charge orders over the three year period was AWG 200 000, USD 111 732.
- During the period under review, Aruba received two requests that related to banking information. In both instances all of the requested banking information was provided. However, in both cases the information was provided after a significant delay. In one case the delay surpassed one year because the bank in question (this being its first such request) wanted to confirm with their legal professionals in the country where the bank was headquartered whether they could legally share the information. Nevertheless, the information was available and provided. In the second request received by Aruba for banking information, the information was provided within one month by the bank but internal delays were occasioned due to a lack of delegated competent authority and a lack of clear internal processes. The issue of timeliness is dealt with in section C.5.

# Determination and factors underlying recommendations

	Determination
The element is in place.	

Phase 2 rating	
Compliant.	

#### B. Access to Information

#### Overview

- A variety of information may be needed in a tax enquiry and 205 jurisdictions 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, as well as the practical implementation of the 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 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.
- In November 2014, Aruba abolished the requirement on the Minister of Finance to notify the taxpayer of a decision to comply with a request for information and removed the requirement to wait for a period of two months before responding to the request.
- 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.

- 209. During the period under review (1 July 2010 to 30 June 2013), Aruba received a total of 17 requests from four EOI partners. Of the 17 requests received, 1 was responded to within 90 days, 14 within a period of between 91 and 180 days, 1 between 181 days and one year and 1 request took over a year to be responded to. Of the 17 requests, one request concerned company ownership and one request concerned accounting information in respect of a partnership. Two requests concerned banking information. All 17 requests concerned individuals and requested information related to residency status, marital status, confirming the name and address of the taxpayer(s), etc.
- 210. In practice, the Aruban tax department will utilise information held in the databases of the land and civil registries, to which it has access, along with information held in the database of the Chamber of Commerce and Industry which is made available in an internal version to the tax authorities. When the authorities require information in respect of a service provider or regulated entity, the Aruban authorities will serve a notice on the entity requesting the information required.

# 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)

- 211. Aruba's competent authority for exchange of information is the Minister of Finance and as of March 2014 this authority has been delegated to the Director of the Department of Taxes. Within the Department of Taxes, the Financial Intelligence and Fraud Unit (FIOD), made up of the Head of the FIOD and four members of staff, is responsible for responding to requests for information.
- 212. 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.
- 213. 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 (or the Director of Taxes under the delegated authority) 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), the Multilateral Convention, a double tax treaty (DTC) or a tax information exchange agreement (TIEA) (articles 38 and 40, General Tax Ordinance).

- 214. 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 pertain 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 authorisation of the Minister of Justice (article 39(2), General Tax Ordinance). In November 2014, Aruba amended article 39 of the General Tax Ordinance to allow for tacit approval from the Minster of Justice once a period of one month has passed from the date the consent was requested. This is designed to ensure that no delays would result from the need to request permission from the Minister of Justice to process a request for information related to criminal tax matters 43
- The Aruban authorities confirmed that they did not receive a request 215. involving criminal tax matters during the period under review.
- 216. The Head of the FIOD is both a tax officer and a criminal investigator. He has a strict procedure to follow should he receive a request relating to criminal tax matters. In essence, he is required to enter into contact with the public prosecutor in order to use his powers with regards a criminal tax matter. The formalities include a requirement for him to make a sworn statement to accompany the response which would clearly set out how the information was obtained. This is to ensure that the information provided could be used in court proceedings if so required by the requesting iurisdiction.
- 217 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 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

<sup>43.</sup> Article 39(3) of the General Tax Ordinance (AB 2004 no. 10) as amended by the National Ordinance of 13 November 2014 containing amendments to National Ordinance on income tax (AB 1991 no. GT 51), the National Ordinance on wage tax (AB 1991 no. GT 63) and the General Tax Ordinance (AB 2004 no. 10).

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.

- 218. Article 49 of the General Tax Ordinance (read in conjunction with article 48), which applies by analogy to cross-border EOI requests (article 40), extends 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.
- 219. 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)).
- 220. 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)).
- 221. 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 co-operation 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)).
- 222. 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)).44
- 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".
- 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 Aruban authorities confirmed that in practice, in relation to requests for information this provision has not been an issue and does not narrow the scope of the information that can be sought and obtained by the tax administration.
- 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 the spot (article 46).

## Gathering information in practice

The Minister of Finance is the competent authority of Aruba and as of March 2014, this power has been delegated to the Director of the Department of Taxes. Within the Department of Taxes, the Financial Intelligence and Fraud Unit (FIOD), made up of the Head of the FIOD and four members of staff, is responsible for responding to requests for information.

<sup>44.</sup> 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.

- 227. The staff members working in the FIOD have full information gathering powers. Information can be accessed directly from taxpayers, from the databases of the tax administration or from third parties as required. As a matter of course, the FIOD will systematically check the databases of the civil registry and the land registry in Aruba to verify personal details such as the name, date of birth and address of a taxpayer. In addition, the tax department has access to the database managed by the Chamber of Commerce and Industry which holds ownership information on companies and foundations within Aruba. The tax department has also sought information for domestic purposes from the immigration department (DIMAS) to find details of whether an individual is resident in Aruba or not.
- When requested to provide banking information, the staff member of the FIOD will send a notice to the bank which only discloses the minimal information required to ensure confidentiality provisions are protected. Aruba confirmed that the letter will contain details of the international instrument under which exchange is possible along with the name of the requesting jurisdiction. The notice will request the information within a period of two weeks and the FIOD will follow up with a reminder once ten days have passed. Aruba has experienced delays in matters of exchange of information since on one occasion the bank wished to confirm with their legal professionals in the country where the bank was headquartered whether they could legally share the information. This resulted in delays in responding to the request for information and this request was responded to after more than one year. The staff members of the FIOD followed up several times during this period with the bank to encourage a response but compulsory powers were not used. Aruba is recommended to use the compulsory powers available to ensure that no delays occur in the provision of banking information. In addition, Aruba is encouraged to ensure that the banks are aware of their legal obligation to provide the information requested.
- 229. In the second request received by Aruba for banking information, the information was provided within one month by the bank but internal delays were occasioned due to a lack of delegated competent authority and a lack of clear internal processes. The Aruban authorities confirmed that for domestic purposes, they approach banks in Aruba approximately once a month and that the information requested is provided.
- 230. In other instances, the Aruban authorities have wide access powers which they use to request information directly from specific entities by serving a notice on the entity in question. They confirmed that these access powers work effectively in practice for domestic purposes. During the period under review, the Aruban authorities were only required to approach the banks as third party entities.

231 In one instance involving a request for information, the Aruban authorities went directly to the taxpayer to obtain the information requested and received a full response. This involved a case where it was in the taxpayer's interest to prove their residency status in Aruba.

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

232 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. No issues have arisen regarding a potential domestic tax interest in practice, nor was the issue raised in input from peers.

#### Compulsory powers (ToR B.1.4)

- Jurisdictions should have in place effective enforcement provisions to 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).
- 234 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.
- Non-compliance by a person under investigation or related third 235. 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 years 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). In practice, the Aruban authorities confirmed that no such penalties have been imposed upon a person under investigation or a third party for failure to provide information in either domestic or international investigations because

there was no non-compliance. All parties that were contacted by the tax administration complied with the request to provide information.

It is set out in article 45(5) of the general tax ordinance that if an Aruban domiciled entity has non-resident controlling or majority shareholders or has a non-resident controlling body, the Aruban domiciled entity can be compelled to provide information in the possession of the controlling non-resident shareholders or body. Article 68(4) sets out an exemption from punishment for failure to comply with the obligation laid down in Article 45(5) due to a legal or judicial prohibition imposed on the nonresident shareholders or body, or due to a refusal, not attributable to him, of the non-resident shareholders or body to provide the information requested. In essence, this is a power to compel information from a non-resident, and should the non-resident shareholders, or the non-resident controlling body refuse to provide the information sought for reasons such as when prevented by the laws or a court decision in their country of residence, the Aruban domiciled body would not be punished (article 68(4)). However, the information that is required to be available pursuant to the standard is required to be under the possession or control of persons in Aruba and the provisions of article 68(4) and 45(5) would not apply and do not displace the power of the Aruban authorities to obtain the information pursuant to 45(1). There is no exemption from punishment from article 45(1) and the above exemption applies only to article 45(5) when seeking information from non-resident controlling shareholders or a non-resident controlling body. In addition, the Aruban authorities confirmed that this provision is interpreted narrowly and that it has not had any impact in practice. While there has not been any impact in practice, Aruba is recommended to continue to monitor any application of this provision to ensure that this does not interfere with effective exchange of information.

# Secrecy provisions (ToR B.1.5)

# Corporate secrecy

237. 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). This obligation would not be a barrier to the tax administration obtaining ownership or accounting information from a VBA. During the period under review, no requests were received

by Aruba relating to VBAs, however the Aruban authorities confirmed this would not be applicable in the case of information required for exchange of information purposes.

#### Bank secrecy

- The State ordinances on the supervision of institutions performing regulated activities, i.e. credit institutions and electronic money institutions, insurance companies, TSPs, company pension funds 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. The secrecy provisions are included in the relevant ordinances (article 22 of the SOSTSP, article 23 of the SOSIB article 18 of the SOSMTC; article; article 28 of the SOCPF; article 49 of the AML/CFT State Ordinance and article 34 of the SOSCS), there is no accompanying penalty provided for in these ordinances.
- However, those secrecy provisions are meant for private matters and do not prevent access to banking information by public authorities. 45 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
- 240 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 matters regarding the sectoral state ordinances (articles 34 and 34a, SOSCS, articles 24 and 24a, SOSIB, article 23 SOSTSP and article 20. SOSMTC) and in AML/CFT matters (article 19 of the AML/ CFT State Ordinance. A new data protection ordinance came into effect in Aruba on 10 June 2011 and the Aruban authorities confirmed that the privacy protection does not affect EOI requests since they are based on international agreements which take precedence over domestic provisions.
- 45. As mentioned under section A.1 above, non-compliance with disclosure obligations under the AML/CFT regulations is punishable with a penalty charge and/ or an administrative fee up to an amount of AWG 1 000 000 (USD 558 659) article 37 AML/CFT state ordinance), and it can be considered a criminal offense punishable with a term of imprisonment not exceeding six years or a fine not exceeding AWG 1 000 000 (USD 558 659) if committed intentionally or with a term of imprisonment not exceeding one year or a fine not exceeding AWG 500 000 (USD 279 330) if committed unintentionally (article 56 AML/CFT State ordinance).

#### Professional secrecy

- 241. Article 51(3) of the General Tax Ordinance protects professional secrecy and includes information held by notaries, lawyers, doctors, pharmacists and dignitaries of a Ministry. However, in November 2014 this provision was amended to clarify that this exception only applies in so far as the individual is required to maintain confidentiality of the information. In particular, the information in respect of notaries and lawyers must be obtained for the purpose of seeking or providing legal advice, or produced for use in existing or potential judicial proceedings; the information in respect of doctors and pharmacists must be obtained by virtue of the treatment relationship between the patient and the doctor or pharmacist; and the information in respect of the holder of a Ministry must be obtained as part of the relationship of trust between a follower and a holder of a Ministry.<sup>46</sup>
- 242. In addition, lawyers, civil law notaries, tax advisers and accountants are not allowed to invoke a secrecy obligation or legal privilege on a statutory or any other basis the establishment in or from Aruba of a business relationship from the following activities performed in Aruba: (1) the purchase and sale of registered objects, as well as the rights to which these objects can be subjected; (2) the management of money, securities, or other asset components; (3) the management of bank, savings, or securities accounts; (4) the organisation of contributions for the creation, operation, or management of companies; and (5) the creation, operation, or management of legal persons or similar legal entities, and the purchase and sale of businesses.
- 243. Furthermore, the following situations are also covered: if it concerns a trust and company service provider, the performance in or from Aruba of the following activities: (1) to act as a founder or legal persons; (2) the provision of a domicile, business address or accommodation, postal or administrative address to a company, corporation, or partnership, or another legal person of arrangement; (3) to act or have someone else act as manager or representative of a trust; or (4) to act or have someone else act in the name of a shareholder; if it concerns a casino, the performance of cash transactions with a value of AWG 5 000. (USD 2 793) or more if it concerns a natural person, legal person or corporation trading in precious metals, precious stones, jewels, vehicles, vessels not being register objects, objects of art or antiquities on a professional or commercial capacity, the performance of cash transactions with a value of AWG 25 000 (USD 13 966) or more (Article 35 (7) AML/CFT State ordinance).

<sup>46.</sup> Article 51(3) of the General Tax Ordinance (AB 2004 no. 10) as amended by the National Ordinance of 13 November 2014 containing amendments to National Ordinance on income tax (AB 1991 no. GT 51), the National Ordinance on wage tax (AB 1991 no. GT 63) and the General Tax Ordinance, (AB 2004 no. 10).

244. The scope of legal and professional privilege has been clarified as a result of the recent amendments to the General Tax Ordinance. However, as this is a recent provision, the enforcement of this provision in practice could not be assessed. In practice, the Aruban authorities confirmed that legal and professional privilege would not limit their ability to effectively exchange information

#### Determination and factors underlying recommendations

# Phase 1 determination The element is in place.

Phase 2 rating			
Largely compliant			
Aruba received two requests for banking information during the review period. In one case Aruba experienced delays in accessing banking information and compulsory powers were not used. Banking information in this case was obtained by the tax administration after one year. However, in the other case the information was obtained from the bank within one month and the Aruban authorities have indicated that banking information is regularly and efficiently accessed for domestic tax purposes.	Aruba is recommended to use its compulsory powers in all EOI cases to ensure banking information for exchange of information purposes is obtained in a timely manner.		
Aruba has made amendments to the General Tax Ordinance in respect of the role of the Minister of Justice in criminal tax matters and to clarify the scope of legal and professional privilege. Since these amendments were only enacted in November 2014, they could not be tested in practice.	Aruba should monitor the practical implementation of these amendments to ensure their effectiveness in practice.		

#### 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)

- 245 Prior to amendments to article 39 of the General Tax Ordinance in November 2014, the Minister in charge of Finance was 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 recognised 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 previously set out under article 39(2) of the General Tax Ordinance permitted an exception to this notification rule if there were urgent reasons 47 to do so. This notification procedure could be postponed for four months (former article 39(4)). In this way, the notification rights were compatible with effective EOI. However, in November 2014, amendments to article 39 of the general tax ordinance abolished the requirement of the Minister of Finance to notify a taxpayer prior to complying with a request. 48
- 246. The Aruban authorities confirmed that prior to this amendment in practice, a standard letter was used to notify the taxpayer under investigation. This letter would state the name of the country requesting the information, the purpose of the information (i.e. for EOI) and the type of information being sought (i.e. banking or accounting information for instance). The Aruban authorities confirmed that they ensured that only minimal information regarding the request was provided for in this letter.
- 247. Prior to changes in the law in November 2014, article 39(3) stated that the Minister of Finance could not disclose the information before two months after sending the notification to the taxpayer. Two months appears to be excessive and may have interfered with Aruba's obligations under its EOI agreements to forward the information as promptly as possible to the

<sup>47.</sup> According to the Aruban authorities, urgent reasons amounted to a case of fraud or a suspicion that the person would abscond if informed, or where the tax department itself already started an investigation into the people interviewed.

<sup>48.</sup> Article 39 of the General Tax Ordinance (AB 2004 no. 10) as amended by the National Ordinance of 13 November 2014 containing amendments to National Ordinance on income tax (AB 1991 no. GT 51), the National Ordinance on wage tax (AB 1991 no. GT 63) and the General Tax Ordinance (AB 2004 no. 10).

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 previously this provision did not prevent Aruban authorities from complying with the 60-day acknowledgement of receipt notice or with the 90-day status update under the TIEAs, it could have unduly prevented or delayed effective EOI. Article 39(3) previously allowed for an exception if there were urgent reasons for the Minister of Finance to comply with the EOI request before the end of this two-month period. Under the amended article 39 the provision for prior notification has been removed along with the two month stand-by term.

- 248 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 requesting party provides the Minister with sufficient security to exchange the information
- In addition, a subjective test must be met before the Minister is 249 authorised to provide the information requested. The language was amended in November 2014 and states that the Minister must consider whether "such information may be of interest to the requesting state for the levying of the tax legislation in force in that country (i.e. the requesting country)" (article 39(1)).
- 250. The Aruban authorities confirmed that in practice the test is carried out at the outset and does not result in an additional delay to the process of exchanging information. If the request is considered valid by the competent authority, in terms of foreseeable relevance in accordance with the international standard, the presumption is that the information will be provided. The Aruban authorities confirmed that a request would be treated as valid and information exchanged, except in exceptional circumstances, for example if the information requested clearly bore no relation to tax matters. Furthermore, in practice this test is carried out by the Head of the FIOD when considering whether the request is valid and the Minister is not involved in the request again after this point. This is essentially the application of the test of foreseeable relevance by the Aruban authorities.
- 251. Amendments made in November 2014 to article 39 of the General Tax Ordinance abolished the appeal rights in respect of the decision by the Minister to proceed with a request for information. Article 39(5) of the General Tax Ordinance previously contained appeal rights in accordance with the National Ordinance on Administrative Justice. The person notified

could file an objection to the Minister of Finance, within six weeks from the date of the decision taken by the Minister. There was a special Commission which advises the Minister on the handling of the objection. If the Minister did not reply to the objection within 12 weeks, the person could 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 could then be appealed, within six weeks from the date of the decision, to the Joint Court of Aruba, Curaçao, Sint Maarten, and of Bonaire, Sint Eustatius and Saba. Nevertheless, an appeal filed to the Minister of Finance did not lead to the suspension of the provision of information. The appeal rights were therefore compatible with effective EOI.

- 252 The Aruban authorities confirmed that previously the two-month stand-by term existed to allow the taxpayer time to appeal the decision to comply with the request. As such, if an appeal was launched by the taxpayer during the two-month period, from that date the information could still be exchanged (without waiting for the two months to expire). In addition, an appeal filed to the Minister of Finance did not lead to the suspension of the provision of information. The appeal rights were therefore compatible with effective EOI. If the taxpayer in question was not resident in Aruba the Aruban authorities interpreted this to mean that the two-month stand-by term would not apply (the presumption being that appeal rights in in the country of residence would apply instead). During the period under review Aruba received 17 requests, of these 10 related to Aruban residents and therefore the two-month stand-by term was applied in those instances. However, peers did not indicate that the application of the stand-by term resulted in undue delays in providing the information. Amendments to the General Tax Ordinance which entered into force on 13 November 2014 abolish the notification requirement, the two month stand-by term and subsequent appeal rights.
- 253. 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)). The Aruban authorities confirmed that no such cases have arisen in practice.

#### Determination and factors underlying recommendations

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The element is in place.

#### Phase 2 rating Largely compliant. Aruba has made amendments to the Aruba should monitor the practical General Tax Ordinance to clarify the implementation of this amendment to language regarding the subjective ensure its effectiveness in practice. test of the Minister of Finance. Since the amendment was only enacted in November 2014, it could not be tested in practice.

# C. Exchanging Information

#### Overview

- 254 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), the Multilateral Convention, 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 255. network. Since the Phase 1 review, an additional 21 TIEAs have entered into force. There are currently a total of 23 TIEAs in force in Aruba and two TIEAs that are signed and awaiting entry into force. In addition, the *Protocol* amending the Convention on Mutual Administrative Assistance on Tax Matters was extended to Aruba by the Kingdom of the Netherlands with entry into force on 1 September 2013.49
- 256. 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. Although some provisions deviating from the OECD Model TIEA were included in three TIEAs, each of the three partner jurisdictions can now exchange with Aruba under the Multilateral Convention. 50
- The confidentiality of information exchanged with Aruba is protected by obligations imposed under the TIEAs, as well as in its domestic

<sup>49.</sup> Aruba has been covered by the original Convention since 1997.

The TIEAs in question are with Bermuda, the British Virgin Islands and the 50. Cayman Islands. The Multilateral Convention was extended to Aruba by the Kingdom of the Netherlands and by the United Kingdom to cover Bermuda, the British Virgin Islands and the Cayman Islands.

legislation (article 42, General Tax Ordinance), and is supported by sanctions for non-compliance. 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.

258. During the period under review (1 July 2010 to 30 June 2013), Aruba received a total of 17 requests from four EOI partners. Of the 17 requests received, one was responded to within 90 days, 14 within a period of between 91 and 180 days, one between 181 days and one year and one request took over a year to be responded to. Of the 17 requests, one request concerned company ownership and one request concerned accounting information in respect of a partnership. Two requests concerned banking information. All 17 requests concerned individuals and requested information related to residency status, marital status, confirming the name and address of the taxpayer(s), etc. Aruba was able to provide a final response within 90 days in respect of 6% of cases and 88% within 180 days. About 94% of the requests were responded to within one year and 6% took over one year to respond to. Peers were satisfied with the quality of the responses from Aruba.

#### C.1. Exchange of information mechanisms

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

- 259. 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.
- 260. 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 25 TIEAs with Antigua and Barbuda, Argentina, Australia, Bahamas, Belgium, Bermuda, British Virgin Islands, Canada, Cayman Islands, Denmark, Faroe Islands, Finland, France, Grenada, Greenland, Iceland, Mexico, Norway, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Spain, Sweden, the United Kingdom and the United States. To date, 23 TIEAs have entered into force, as detailed in Annex 2.
- 261. 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).

262 The Protocol amending the Convention on Mutual Administrative Assistance on Tax Matters was extended to Aruba by the Kingdom of the Netherlands with entry into force on 1 September 2013.<sup>51</sup> This brings the total number of jurisdictions with which Aruba is able to exchange information to 89

#### Foreseeably relevant standard (ToR C.1.1)

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 foreseeably 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."

The Commentary to Article 26(1) of the OECD Model Tax 264 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

<sup>51.</sup> Aruba has been covered by the original Convention since 1997.

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 provisions found in three of Aruba's TIEAs which may have the effect of departing from the standard. Two 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). However, the Multilateral Convention on Mutual Administrative Assistance was extended to Aruba by the Kingdom of the Netherlands and by the United Kingdom to cover Bermuda and the British Virgin Islands. Since the Multilateral Convention is in force in Aruba, Bermuda and the British Virgin Islands, exchange of information to the standard can take place under this convention.
- 266. 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]
- 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.
- 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. Furthermore, the Aruban authorities confirmed that they have received official correspondence from the Ministry of Finance in Bermuda, clarifying that the signature by a senior official of the requesting competent authority to the request satisfies the competent authority of Bermuda in respect of Article 5 of the TIEA. In addition, the correspondence from

the Ministry of Finance in Bermuda notes that the competent authority of Bermuda will provide information relating to a period of more than 6 years prior to the tax period under consideration when the information is still in the possession and/or control of someone under Bermudan jurisdiction. The authorities confirmed that this clarifies the effectiveness of the TIEA with Bermuda and that they will address a similar letter to the British Virgin Islands. Furthermore, the Multilateral Convention was extended to Aruba by the Kingdom of the Netherlands and to Bermuda by the United Kingdom. Since the Multilateral Convention is in force in both Aruba and Bermuda, exchange of information to the standard can take place under this convention.

- 269. 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.
- 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 the 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. No modification has been proposed to date regarding this provision although the Aruban authorities indicated that a letter is being prepared. The Multilateral Convention was extended to Aruba by the Kingdom of the Netherlands and by the United Kingdom to the Cayman Islands. Since the Multilateral Convention is in force in both Aruba and the Cayman Islands, exchange of information to the standard can take place under this convention. Nevertheless, Aruba is recommended to propose a modification of this provision in the TIEA with the Cayman Islands to bring it into conformity with the international standard, this is also recommended for the TIEAs with the British Virgin Islands and with Bermuda. In addition, no requests were received by Aruba from the Cayman Islands, the British Virgin Islands or Bermuda during the period under review.
- 271. 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 TIEAs, 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)*

- 272. For EOI to be effective it is necessary that a jurisdiction's obligations to provide information are 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.
- 273. Unlike the OECD Model Tax Convention, 52 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 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.
- 274. 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. There were no comments from peers regarding this point.

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

- 275. 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.
- 276. 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

<sup>52.</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.

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).

- 277. 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.
- 278. 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.
- 279. Aruba is able to exchange all types of information and no peers indicated any problems in accessing particular information.

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

- The concept of "domestic tax interest" describes a situation where a 280. 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.
- The BRK does not include the provision contained in paragraph 4 281. 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).

- 282. 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.
- 283. 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.
- 284. Aruba is able to answer all requests and does not require a domestic tax interest in the information being exchanged.

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

- 285. 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.
- 286. 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. Furthermore, no peer has reported any issue in this regard.

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

287. 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.

- 288 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 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).
- Aruba is able to exchange information relating to both civil and crim-290. inal tax matters. As set out in B.1 above, there is a different procedure for criminal tax matters. During the period under review, Aruba did not receive any requests relating to criminal tax 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.
- 292. The BRK (Article 38(2)(a) and (b)) and the Aruba-United States TIEA (Article 4(3)(k)) do not expressly address 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.
- 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).
- 294 Aruba is able to exchange information in the form requested. There were no comments made by peers in this regard.

#### In force (ToR C.1.8)

- 295. 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.
- 296. In addition to the BRK, there are 23 agreements currently in force in Aruba and two awaiting entry into force. In addition, the *Protocol amending the Convention on Mutual Assistance in Tax Matters* was extended to Aruba by the Kingdom of the Netherlands with entry into force on 1 September 2013 creating a total of 89 partner jurisdictions for exchange of information. <sup>53</sup> The status of these TIEAs, as well as the TIEAs which Aruba has concluded but which have not yet entered into force, is set out in Annex 2.
- 297. 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. 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. After approval and after legislation implementing the treaty is in place (if applicable), <sup>54</sup> the instrument of ratification will be deposited by the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
- 298. Within Parliament of the Kingdom of the Netherlands a fast track approval procedure is followed for TIEAs, this is known as the "silent procedure" and means that if within 30 days following submission, no request has been made by at least one fifth of the members of Parliament for the TIEA to be submitted to "explicit approval", then parliamentary approval is considered to have been given. (Explicit approval would mean that a Kingdom law needs to be drafted).
- 299. As such, the constitutional procedure for the entry into force of TIEAs in respect of Aruba is subject to a fast track process within the Parliament of the Kingdom of the Netherlands which is significantly less complicated than going through the explicit procedure. The Aruban authorities confirmed that the usual timeframe for completing the steps to ratify a TIEA is six months to one year. It was noted that there may be delays

<sup>53.</sup> Aruba has been covered by the original Convention since 1997.

<sup>54.</sup> In the case of the TIEAs, Aruba's legislation is in place, i.e. articles 38-44 of the General Tax Ordinance, in conjunction with articles 45-53 of the General Tax Ordinance.

once the draft TIEA and explanatory note have been sent to the Council of Ministers of the Kingdom. However, they also noted that there is a post within the Ministry of Foreign Affairs of the Kingdom of the Netherlands dedicated to treaty development focused specifically on Aruba, Curaçao, Sint Maarten and the BES states which has helped to improve timeliness with regards such treaties.

300. The constitutional procedure for the entry into force of DTAs is slightly different in that it is not subject to the fast track procedure outlined above and therefore can take significantly longer to reach entry into force. The reason for the difference is that TIEAs are standard treaties, in respect of which no discussion between Parliament and the government is expected, while there will generally be an exchange of views between Parliament and the government concerning DTAs.

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

- 301. 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.
- 302. Aruba has 23 TIEAs which have entered into force to date. Since the Aruba Phase 1 review in 2011, 21 TIEAs have entered into force. In addition, the *Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters* has been extended to Aruba by the Kingdom of the Netherlands with entry into force on 1 September 2013<sup>55</sup>.
- 303. This report has identified various limitations in Aruba's domestic law as discussed in Part A and B of the report. Aruba should address these issues in order to ensure that it can provide its partners with effective exchange of information.

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

	Phase 1 determination
The element is in place.	
	Phase 2 rating

Compliant.

<sup>55.</sup> Aruba has been covered by the original Convention since 1997.

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

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

- 304. 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.
- 305. As of December 2014, Aruba has signed 25 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 have pointed out that those jurisdictions are not relevant economic partners of Aruba, but they are relevant in a geographical sense. More recently, Aruba has signed TIEAs with Argentina, Belgium and Mexico.
- 306. 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. However, two jurisdictions stated that they requested a TIEA with Aruba but that they did not receive a response in spite of following up on the request. The Aruban authorities and the jurisdictions concerned have confirmed that negotiations are now underway. Aruba is recommended to respond favourably and in a timely manner to such requests.
- 307. The Aruban authorities indicated that TIEA and DTA negotiations are in progress with 14 jurisdictions, four of which were initiated directly by Aruba. The authorities also confirmed that they have never refused to enter into negotiations for TIEAs.

#### Determination and factors underlying recommendations

Phase 1 determination		
The element is in place.		
Factors underlying recommendations	Recommendations	
	Aruba should continue to develop its EOI network with all relevant partners.	

Phase 2 rating	
Compliant.	

#### C.3. Confidentiality

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

#### Information received: disclosure, use, and safeguards (ToR C.3.1) 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.
- 309. 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

#### Ensuring confidentiality in practice

- 310. The FIOD is located within the tax administration in Aruba whose offices are only accessible to staff members with authorised cards. All individuals entering the Tax Department are either required to have a swipe card for access or will be signed in at the main desk. As such, the number of individuals entering the building is kept to a minimum and all details are recorded. The doors to the tax administration remain locked at all times.
- 311. During the onsite visit, Aruba demonstrated that only limited personnel have access to the files relating to exchange of information and that these files are kept in a secure location at all times. Two individuals have physical access to a locked cupboard where the files relating to exchange of information are kept. This office is used by four individuals in total. When a request for information arrives, it is logged in an excel spreadsheet which is only accessible by members of the FIOD. This logging procedure was introduced by Aruba in 2013. Prior to 2013 the requests were registered in a word document by the Department of Fiscal Affairs of the Directorate of Taxes (as of January 2014, this Directorate and department no longer exists).
- 312. When a request for information is received by Aruba, all documents are date stamped and stamped with a confidentiality stamp. The large majority of documents are sent by the post and arrive directly to the mailroom of the tax administration before being passed to the Head of the Department of Taxes and then the Head of the FIOD. A limited number of individuals will have access to a request for information. Furthermore, all individuals working within the tax administration are subject to a general confidentiality obligation as set out in the General Tax Ordinance which applies to all employees of the tax administration, along with a general confidentiality requirement applicable to all employees of the government in Aruba. This confidentiality obligation is accompanied by a monetary penalty and possible imprisonment should there be unauthorised disclosure of confidential information. Individuals would also be at risk of losing their employment.
- 313. In its communication with third parties, Aruba does not share the original request from the foreign jurisdiction. Instead a standard letter is used which includes a brief description of the information required (i.e. banking or accounting information) and the reason why the information is being requested (i.e. for EOI purposes). The Aruban authorities confirmed that they ensure that only minimal information regarding the content of the request is provided for in this letter.
- 314. Similarly, when previously notifying a taxpayer that a request for information was being responded to, the Aruban authorities used a standard letter. This letter stated the name of the country requesting the information, the purpose of the information (i.e. for EOI purposes) and the type

of information being sent (i.e. banking or accounting information). The Aruban authorities confirmed that they ensured that only minimal information regarding the content of the request was provided for in this letter. In November 2014, amendments to article 39 of the general tax ordinance abolished the requirement of the Minister of Finance to notify a taxpayer prior to complying with a request.

- 315 When responding to a request, Aruba ensures the documentation is confidentiality stamped before it is sent to the mailroom and registered as logged out. Requests for information are in most instances responded to by registered mail.
- 316. No peers identified any issues with confidentiality in Aruba.

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

Phase 1 determin	ation
The element is in place.	

Phase 2 rating	
Compliant.	

#### 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)

- 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
- 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>56</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.

- 319. 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.
- 320. Article 51(3) of the General Tax Ordinance protects professional secrecy and includes information held by notaries, lawyers, doctors, pharmacists and dignitaries of a Ministry. However, in November 2014 this provision was amended to clarify that this exception only applies in so far as the individual is required to maintain confidentiality of the information. In particular, the information in respect of notaries and lawyers must be obtained for the purpose of seeking or providing legal advice, or produced for use in existing or potential judicial proceedings in respect of doctors and pharmacists must be obtained by virtue of the treatment relationship between the patient and the doctor or pharmacist; and in respect of the holder of a Ministry must be obtained as part of the relationship of trust between a follower and a holder of a Ministry.<sup>57</sup>
- 321. The scope of legal and professional privilege has been clarified as a result of the recent amendments to the General Tax Ordinance. However, as this is a recent provision, the enforcement of this provision in practice could not be assessed. In practice, the Aruban authorities confirmed that legal and professional privilege would not limit their ability to effectively exchange information and from the EOI partners that provided peer input, no issues were raised in this regard.

<sup>56.</sup> The TIEA concluded between Aruba and the Cayman Islands does not contain such a provision.

<sup>57.</sup> Article 51(3) of the General Tax Ordinance (AB 2004 no. 10) as amended by the National Ordinance of 13 November 2014 containing amendments to National Ordinance on income tax (AB 1991 no. GT 51), the National Ordinance on wage tax (AB 1991 no. GT 63) and the General Tax Ordinance, (AB 2004 no. 10).

#### Determination and factors underlying recommendations

	Phase 1 determination
The element is in place.	

Phase 2 rating	
Compliant.	

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

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

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

- 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 co-operation as cases in this area must be of sufficient importance to warrant making a request.
- 323. Each of the EOI agreements concluded by Aruba, except for the TIEAs signed with the Cayman Islands, the United States and the Bahamas, 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 TIEA with the Bahamas states that the requested Party shall use its best endeavours to forward the requested information to the applicant Party with the least possible delay.
- 324. During the period under review (1 July 2010 to 30 June 2013), Aruba received a total of 17 requests from four EOI partners. Of the 17 requests received, 1 was responded to within 90 days, 14 within a period of between 91 and 180 days, 1 between 181 days and one year and 1 request took over a vear to be responded to.
- In two of the 17 cases, part of the request was not responded to. In the first instance, this was because the company in question was not registered in Aruba. In the second instance, this was because the request related to taxpayers' files which were over 10 years' old, which is the maximum time

the Aruban tax administration will hold tax return documentation. In both instances, Aruba explained why the information was unavailable in Aruba and responded to the remainder of the request.

- 326 Of the 17 requests, one request concerned company ownership and one request concerned accounting information in respect of a partnership. Two requests concerned banking information. With regards the two requests relating to banking information, Aruba responded to one after 180 days and to the other after a year. The Aruban authorities explained that on one occasion the Aruban branch of the foreign bank contacted their headquarters to verify that they were able to share the information requested and this resulted in a significant delay. The staff members of the FIOD followed up several times during this period with the bank to encourage a response but compulsory powers were not used. Aruba is recommended to use the compulsory powers available to ensure that no delays occur in the provision of banking information (see B.1). In the second request received by Aruba for banking information, the information was provided within one month by the bank but internal delays were occasioned due to a lack of delegated competent authority and a lack of clear internal processes.
- 327. In the large majority of cases, the Aruban authorities were able to access the information from their own files within the tax department. The information provided in this way included ownership information and accounting information. The authorities also have direct access to two databases which act as important sources of information for personal records, address details and property ownership (the civil registry and the land registry).
- 328. Input received from peers was positive and they noted that Aruba did respond to requests for information, albeit following a period of delay and without the provision of status updates.
- 329. The Aruban authorities indicated that one of the main reasons for the delays in response time was the lack of delegated authority from the Minister of Finance to the Director of Taxes prior to March 2014. (See C.5.2) Delays were also experienced due to a lack of clear internal policies regarding the treatment of requests received which sometimes led to delays within internal departments. In addition, delays occurred as a result of the application of the two month stand-by period which has since been removed (see B.2).
- 330. Aruba was able to provide a final response within 90 days in respect of 6% of cases and 88% within 180 days. Approximately 94% of the requests were responded to within 1 year and 6% took over one year to respond to. Peers were satisfied with the quality of the responses from Aruba. Nevertheless, during the period under review, Aruba did not provide status updates to the requesting partners. Aruba is recommended to ensure that EOI processes include reminders for the provision of status updates in all cases.

	Jul-De	c 2010	20	)11	20	)12	Jan-Ju	n 2013	Total	Average
	Number	%	Num.	%	Num.	%	Num.	%	Num.	%
Total number of requests received*	2	100%	2	100%	13	100%	0	0%	17	100%
(a+b+c+d+e)	)									
Full response**: ≤90 days	1	50%	0	0%	0	0%	0	0%	1	6%
≤180 days (cumulative)	2	100%	0	0%	13	100%	0	0%	15	88%
≤1 year (cumulative) (a)	2	100%	1	50%	13	100%	0	0%	16	94%
1 year+ (b)	0	0%	1	50%	0	0%	0	0%	1	6%
Declined for valid reasons (c)	0	0%	0	0%	0	0%	0	0%	0	0%
Failure to obtain and provide information	0	0%	0	0%	0	0%	0	0%	0	0%
requested (d)	)									
Requests still pending at date of review (e)	0	0%	0	0%	0	0%	0	0%	0	0%

### Response times for requests received during 3 year review period

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

- The Minister of Finance is the Competent Authority in Aruba. Up to December 2012, the Department of Taxes consisted of the Directorate of Taxes and Customs, the Inspectorate of Direct Taxes, and the Inspectorate of Customs and Excise. Following internal restructuring, the Department of Taxes has responsibility for direct taxes and the Department of Customs is a separate department. The Finance Minister would send incoming requests to the Director of Taxes and Customs (up to December 2012) or the Director of the Department of Taxes (as of December 2012).
- As of 6 March 2014, the power of competent authority has been delegated to the Director of the Department of Taxes via an internal mandate order on international exchange of information. Prior to this date, all requests for information were sent for processing to the Minister of Finance directly as the competent authority. This resulted in delays in responding to requests given the various administrative steps that were required to be taken. Delays were also experienced due to a lack of clear internal policies regarding the treatment of requests received which sometimes led to delays within internal departments. In addition, delays occurred as a result of the application of the two month stand-by period. Delays were particularly evident in relation to the 90 day target.

<sup>\*</sup>Aruba counts each written request from an EOI partner as one EOI request even where more than one person is the subject of an inquiry and/or more than one piece of information is requested.

<sup>\*\*</sup>The time periods in this table are counted from the date of receipt of the request to the date on which the final and complete response was received.

- 333. The individuals responsible for EOI requests in Aruba are based in the FIOD. This is made up of the Head of the FIOD and four full time members of staff and this unit is responsible for responding to requests for information. Three members of the FIOD team have attended training on EOI. The staff members within the FIOD all have other responsibilities given that the number of requests for information received to date by Aruba is relatively low. However there is the possibility for the Head of the FIOD to increase the capacity of the team by adding an additional eight members of staff should requests for information increase.
- 334. When a request for information is received in Aruba, it is registered in the mailroom before being sent directly to the Director of the Department of Taxes who then sends it to the Head of the FIOD. When a request for information arrives at the FIOD, it is logged in an excel spreadsheet which is only accessible by members of the FIOD. This logging procedure was introduced by Aruba in 2013. Prior to 2013 the requests were registered in a word document by the Department of Fiscal Affairs of the Directorate of Taxes (as of January 2014, this Directorate and department no longer exists). From the point when the request is received by the Head of the FIOD, he will assess the validity of the request and proceed with the collection of information whether internal to the tax administration or from third parties. When checking the validity of a request, the Head of the FIOD will ensure that it is covered by the TIEA in question and that it has been sent by the competent authority in that jurisdiction.
- 335. The staff members working in the FIOD have full information gathering powers. Information can be accessed directly from taxpayers, from the databases of the tax administration or from third parties as required. As such, a minimum number of persons are involved in the task of gathering information for an EOI request which helps protect taxpayer confidentiality. As a matter of course, the FIOD will systematically check the databases of the civil registry and the land registry in Aruba to verify personal details such as the name, date of birth and address of a taxpayer. In addition, the tax department has access to the database managed by the Chamber of Commerce and Industry.
- 336. If information is required to be furnished by third parties outside the tax administration then a notice will be served on the relevant entity with a deadline of two weeks for provision of the information. This is carried out in writing by registered post. Such requests are then followed up by the staff members of the FIOD following a period of 10 days.
- 337. The staff members in the FIOD use calendar reminders to process requests for information in a timely manner. The delays that occurred during the period under review have been attributed in part to the lack of a mandate delegating authority from the Minister of Finance to the Director of

Taxes. With regards the two requests relating to banking information, Aruba responded to one after 180 days and to the other after a year. The Aruban authorities explained that on one occasion the Aruban branch of the foreign bank contacted their headquarters to verify that they were able to share the information requested and this resulted in a significant delay. The staff members of the FIOD followed up several times during this period with the bank to encourage a response but compulsory powers were not used. Aruba is recommended to use the compulsory powers available to ensure that no delays occur in the provision of banking information (see B.1). In the second request received by Aruba for banking information, the information was provided within one month by the bank but internal delays were occasioned due to a lack of delegated competent authority and a lack of clear internal processes. in addition the application by Aruba of the two month stand-by period (see B.2) resulted in some delays occurring.

In 2014, the Aruban authorities have put in place an EOI manual which sets out the various steps to be taken to process requests for information in a timely manner, including the sending out of receipt confirmation and status updates where necessary. Aruba is recommended to monitor the use of these procedures in practice and develop them further where necessary to ensure effective exchange of information in practice.

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

339 Exchange of information assistance should not be subject to unreasonable, disproportionate, or unduly restrictive conditions. As noted in Part B of this Report, prior to changes in the law in November 2014, there was 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 (former article 39(3), General Tax Ordinance). This requirement has since been removed. 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**

#### Phase 1 determination

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

Phase :	Phase 2 rating				
Largely compliant.					
Factors underlying recommendations	Recommendations				
During the period under review, delays were experienced in responding to incoming requests. These were caused by the lack of delegated authority, the two month stand-by period and a lack of clear internal procedures. In March 2014, Aruba delegated the Competent Authority to the Director of the Department of Taxes to reduce delays. However, this has not been sufficiently tested in practice.	Aruba should monitor the use of the internal procedures in practice and develop them further to ensure it can respond to EOI requests in a timely manner in all cases.				
During the period under review Aruba did not send status updates to requesting jurisdictions.	Aruba should systematically provide an update or status report to its EOI partners in situations when the competent authority is unable to provide a substantive response within 90 days.				

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

C	Overall Rating
Largely Compliant	

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensurand arrangements is avail	formation for all relevant entities s (ToR A.1)	
Phase 1 determination: The element is in place, but certain aspects of the legal implementation of the element need improvement.	NVs are not required to keep identity information on the owners of bearer shares issued prior to 2012. Furthermore, the custodian arrangement for AVVs may not be sufficient. The law abolishing the issuance of new bearer shares does not fully address these legacy issues.	Aruba should ensure that identity information on the owners of bearer shares in NVs and AVVs issued prior to 2012 is available.

	Factors underlying				
Determination	recommendations	Recommendations			
Phase 2 rating: Partially compliant.	Aruba does not have a regular system of oversight to monitor compliance with the requirements on NVs, VBAs, partnerships and foundations to keep and file ownership and identity information. Furthermore, there may be instances when AVVs and NVs do not have a legal representative in Aruba. Amendments to the Commercial Code create an obligation on all companies to submit a copy of the shareholder register to the Chamber of Commerce and Industry on an annual basis. However these amendments are recent and have not yet been sufficiently tested in practice.	Aruba should ensure that compliance by all entities with ownership and identity information-keeping and filing requirements, including the effectiveness of the recent amendments to the Commercial Code, is appropriately monitored and enforced.			
	Aruba amended the General Tax Ordinance requiring Limited Partnerships to maintain a register of their limited partners and Foundations to maintain a register of their beneficiaries. Since the amendments were only enacted in November 2014, they could not be tested in practice.	Aruba should monitor the practical implementation of these amendments to ensure their effectiveness in practice.			
Jurisdictions should ensu and arrangements (ToR A	ensure that reliable accounting records are kept for all relevant entities				
Phase 1 determination: The element is in place.					

Determination	Factors underlying recommendations	Recommendations			
Phase 2 rating: Largely Compliant	While the combination of requirements set out in the Civil Code, Commercial Code, the General Tax Ordinance and the regulatory ordinances require that reliable accounting records are held by all entities, the only oversight is carried out by the tax administration which could be more rigorous in application. Furthermore, there may be instances when AVVs and NVs do not have a representative in Aruba which could pose a challenge to enforcement. However, NVs and AVVs are under a new legal obligation to file their financial statements with the Chamber of Commerce and Industry annually for financial years starting on or after February 2013 but these requirements remain untested in practice.	Aruba should ensure oversight of the obligation to hold accounting records in all cases and monitor the implementation and operation of the new obligation for NVs and AVVs to file financial statements with the Chamber of Commerce and Industry.			
	ld be available for all account-hole	ders (ToR A.3)			
Phase 1 determination: The element is in place.					
Phase 2 rating: Compliant					
subject of a request unde their territorial jurisdiction	should have the power to obtain and provide information that is the der an exchange of information arrangement from any person within ion who is in possession or control of such information (irrespective on such person to maintain the secrecy of the information) (ToR B.1)				
Phase 1 determination: The element is in place.					

	Factors underlying	
Determination	recommendations	Recommendations
Phase 2 rating: Largely Compliant	Aruba received two requests for banking information during the review period. In one case Aruba experienced delays in accessing banking information and compulsory powers were not used. Banking information in this case was obtained by the tax administration after one year. However, in the other case the information was obtained from the bank within one month and the Aruban authorities have indicated that banking information is regularly and efficiently accessed for domestic tax purposes.	Aruba is recommended to use its compulsory powers in all EOI cases to ensure banking information for exchange of information purposes is obtained in a timely manner.
	Aruba has made amendments to the General Tax Ordinance in respect of the role of the Minister of Justice in criminal tax matters and to clarify the scope of legal and professional privilege. Since the amendments were only enacted in November 2014, they could not be tested in practice.	Aruba should monitor the practical implementation of these amendments to ensure their effectiveness in practice.
	ds (e.g. notification, appeal right db compatible with effective ex	
Phase 1 determination: The element is in place.		
Phase 2 rating: Largely compliant.	Aruba has made amendments to the General Tax Ordinance to clarify the language regarding the subjective test of the Minister of Finance. Since the amendment was only enacted in November 2014, it could not be tested in practice.	Aruba should monitor the practical implementation of this amendment to ensure its effectiveness in practice.

	Factors underlying			
Determination	recommendations	Recommendations		
Exchange of information (ToR C.1)	mechanisms should allow for ef	fective exchange of information		
Phase 1 determination: The element is in place.				
Phase 2 rating: Compliant				
The jurisdictions' network partners (ToR C.2)	of information exchange mecha	anisms should cover all relevant		
Phase 1 determination: The element is in place.		Aruba should continue to develop its EOI network with all relevant partners.		
Phase 2 rating: Compliant				
	isms for exchange of information sity of information received <i>(ToR C</i>			
Phase 1 determination: The element is in place				
Phase 2 rating: Compliant				
The exchange of information taxpayers and third partie	ation mechanisms should respects (ToR C.4)	ct the rights and safeguards of		
Phase 1 determination: The element is in place				
Phase 2 rating: Compliant				
The jurisdiction should provide information under its network of agreements in a timely manner ( <i>ToR C.5</i> )				
This element involves issues of practice that are assessed in the Phase 2 review. Accordingly no Phase 1 determination has been made.				

Determination	Factors underlying recommendations	Recommendations
Phase 2 rating: Largely compliant	During the period under review, delays were experienced in responding to incoming requests. These were caused by the lack of delegated authority, the two month stand-by period and a lack of clear internal procedures. In March 2014, Aruba delegated the Competent Authority to the Director of the Department of Taxes to reduce delays in responding to requests. However, this has not been sufficiently tested in practice.	Aruba should monitor the use of the internal procedures in practice and develop them further to ensure it can respond to EOI requests in a timely manner in all cases.
	During the period under review Aruba did not send status updates to requesting jurisdictions.	Aruba should systematically provide an update or status report to its EOI partners in situations when the competent authority is unable to provide a substantive response within 90 days.

## Annex 1: Jurisdiction's response to the review report<sup>58</sup>

Aruba in the first place wishes to express its gratitude for the work done by the assessment team in evaluating Aruba for the Phase 2 of the Peer Review process. Aruba is very pleased with the professional and pleasant cooperation with the assessment team and with the outcome of the review with an overall rating of Largely Compliant.

Secondly Aruba is aware that there are a few items which still need to be addressed. Aruba wishes to emphasize its commitment to take the necessary steps to address these items and herewith implement the recommendations given in this report.

Finally Aruba reiterates its continued commitment to the Global Forum and its international standards on transparency and exchange of information.

<sup>58.</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

#### Multilateral and bilateral instruments

In the case of Aruba, the relevant multilateral instruments with respect to EOI are as follows:

- 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>59</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.
- 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).

<sup>59.</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.

• The Kingdom of the Netherlands extended to Aruba the application of the original multilateral *Convention on Mutual Administrative Assistance in Tax Matters* with entry into force on 1 February 1997, and of the Protocol amending it, with entry into force on 1 September 2013. The status of the Convention (as amended) as at December 2014 is set out in the table below. <sup>60</sup> When two or more arrangements for the exchange of information for tax purposes exist between Aruba and a partner jurisdiction, the parties may choose the most appropriate agreement under which to exchange the information.

The table below also contains the bilateral EOI agreements of relevance for Aruba as of December 2014

		Type of EoI		Date entered
	Jurisdiction	arrangement	Date signed <sup>a</sup>	into force
1	Albania	Multilateral Convention	signed	01/12/2013
2	Andorra	Multilateral Convention	signed	Not in force
3	Anguilla <sup>b</sup>	Multilateral Convention	extended	01/03/2014
4	Antigua and Barbuda	TIEA	30/08/2010	01/12/2013
5	Argentina	Multilateral Convention	signed	01/09/2013
5	Argentina	TIEA	30/09/2013	31/05/2014
6	Australia	TIEA	16/12/2009	17/08/2011
0	Australia	Multilateral Convention	signed	01/09/2013
7	Austria	Multilateral Convention	signed	01/12/2014
8	Azerbaijan	Multilateral Convention	signed	Not in force
9	Bahamas	TIEA	01/08/2011 08/08/2011	01/10/2012
10	Polaium	TIEA	24/04/2014	Not in force
10	Belgium	Multilateral Convention	signed	Not in force
11	Belize	Multilateral Convention	signed	01/09/2013
12	Bermuda <sup>b</sup>	TIEA	20/10/2009	01/12/2011
12	bermuda	Multilateral Convention	extended	01/03/2014
13	Brazil	Multilateral Convention	signed	Not in force
14	Pritich Virgin Islands	TIEA	11/09/2009	01/07/2013
14	British Virgin Islands <sup>b</sup>	Multilateral Convention	extended	01/03/2014
15	Cameroon	Multilateral Convention	signed	Not in force

<sup>60.</sup> The updated table is available at <a href="https://www.oecd.org/document/14/0,3746">www.oecd.org/document/14/0,3746</a> en\_2649\_33767\_2489998\_1\_1\_1\_1\_1,00.html.

	Jurisdiction	Type of Eol arrangement	Date signed <sup>a</sup>	Date entered into force
10	Canada	TIEA	20/10/2011	01/06/2012
16	Canada	Multilateral Convention	signed	01/03/2014
47	Courses Islandah	TIEA	20/04/2010	01/12/2011
17	Cayman Islands <sup>b</sup>	Multilateral Convention	extended	01/01/2014
18	Chile	Multilateral Convention	signed	Not in force
19	China (People's Republic of)	Multilateral Convention	signed	Not in force
20	Colombia	Multilateral Convention	signed	01/07/2014
21	Costa Rica	Multilateral Convention	signed	01/09/2013
22	Croatia	Multilateral Convention	signed	01/06/2014
23	Curaçao	Multilateral Agreement (BRK)	28/10/1964	01/01/1965
24	Cyprus <sup>c</sup>	Multilateral Convention	signed	Not in force
25	Czech Republic	Multilateral Convention	signed	01/02/2014
26	Denmank	TIEA	10/09/2009	01/06/2011
20	Denmark	Multilateral Convention	signed	01/09/2013
27	Estonia	Multilateral Convention	signed	01/11/2014
28	Faroe Islands <sup>d</sup>	TIEA	10/09/2009	01/10/2011
20	raide islands	Multilateral Convention	extended	01/09/2013
29	Finland	TIEA	10/09/2009	01/06/2011
29	rilland	Multilateral Convention	signed	01/09/2013
30	France	TIEA	14/11/2011	01/04/2013
30	France	Multilateral Convention	signed	01/09/2013
31	Gabon	Multilateral Convention	signed	Not in force
32	Georgia	Multilateral Convention	signed	01/09/2013
33	Germany	Multilateral Convention	signed	Not in force
34	Ghana	Multilateral Convention	signed	01/09/2013
35	Gibraltar <sup>b</sup>	Multilateral Convention	extended	01/03/2014
36	Greece	Multilateral Convention	signed	01/09/2013
37	Greenland <sup>d</sup>	TIEA	10/09/2009	01/05/2012
37	Oreginario	Multilateral Convention	extended	01/09/2013
38	Grenada	TIEA	21/06/2012	Not in force
39	Guatemala	Multilateral Convention	signed	Not in force
40	Guernsey <sup>b</sup>	Multilateral Convention	extended	01/08/2014
41	Hungary	Multilateral Convention	signed	Not in force

	Jurisdiction	Type of Eol arrangement	Date signed <sup>a</sup>	Date entered into force
40	la alam d	TIEA	10/09/2009	01/01/2012
42	Iceland	Multilateral Convention	signed	01/09/2013
43	India	Multilateral Convention	signed	01/09/2013
44	Indonesia <sup>e</sup>	Multilateral Convention	signed	Not in force
45	Ireland	Multilateral Convention	signed	01/09/2013
46	Isle of Man <sup>b</sup>	Multilateral Convention	extended	01/03/2014
47	Italy	Multilateral Convention	signed	01/09/2013
48	Japan	Multilateral Convention	signed	01/10/2013
49	Jersey <sup>b</sup>	Multilateral Convention	extended	01/06/2014
50	Kazakhstan	Multilateral Convention	signed	Not in force
51	Korea	Multilateral Convention	signed	01/09/2013
52	Latvia	Multilateral Convention	signed	01/11/2014
53	Liechtenstein	Multilateral Convention	signed	Not in force
54	Lithuania	Multilateral Convention	signed	01/06/2014
55	Luxembourg	Multilateral Convention	signed	01/11/2014
56	Malta	Multilateral Convention	signed	01/09/2013
57	Maying	Multilateral Convention	signed	01/09/2013
57	Mexico	TIEA	18/07/2013	01/09/2014
58	Moldova	Multilateral Convention	signed	01/09/2013
59	Monaco	Multilateral Convention	signed	Not in force
60	Montserrat <sup>b</sup>	Multilateral Convention	extended	01/10/2013
61	Morocco	Multilateral Convention	signed	Not in force
62	Netherlands	Multilateral Agreement (BRK)	28/10/1964	01/01/1965
63	New Zealand	Multilateral Convention	signed	01/03/2014
64	Nigeria	Multilateral Convention	signed	Not in force
0.5	Nemues	TIEA	10/09/2009	01/08/2011
65	Norway	Multilateral Convention	signed	01/09/2013
66	Philippines	Multilateral Convention	signed	Not in force
67	Poland	Multilateral Convention	signed	01/09/2013
68	Portugal	Multilateral Convention	signed	Not in force
69	Romania	Multilateral Convention	signed	01/11/2014
70	Russia	Multilateral Convention	signed	Not in force
71	Saint Kitts and Nevis	TIEA	11/09/2009	19/10/2011
72	Saint Lucia	TIEA	10/05/2010	01/01/2012

		Type of Eol		Date entered
	Jurisdiction	arrangement	Date signed <sup>a</sup>	into force
73	Saint Vincent and the Grenadines	TIEA	01/09/2009	20/10/2011
74	San Marino	Multilateral Convention	signed	Not in force
75	Saudi Arabia	Multilateral Convention	signed	Not in force
76	Singapore	Multilateral Convention	signed	Not in force
77	Sint Maarten	Multilateral Agreement (BRK)	28/10/1964	01/01/1965
78	Slovak Republic	Multilateral Convention	signed	01/03/2014
79	Slovenia	Multilateral Convention	signed	01/09/2013
80	South Africa	Multilateral Convention	signed	01/03/2014
81	Spain	TIEA	24/11/2008	27/01/2010
		Multilateral Convention	signed	01/09/2013
82	Sweden	TIEA	10/09/2009	02/06/2011
		Multilateral Convention	signed	01/09/2013
83	Switzerland	Multilateral Convention	signed	Not in force
84	Tunisia	Multilateral Convention	signed	01/02/2014
85	Turkey	Multilateral Convention	signed	Not in force
86	Turks and Caicos Islands <sup>b</sup>	Multilateral Convention	extended	01/12/2013
87	Ukraine	Multilateral Convention	signed	01/09/2013
88	United Kingdom	TIEA	05/11/2010	01/01/2012
		Multilateral Convention	signed	01/09/2013
89	United States	TIEA	21/11/2003	13/09/2004
		Multilateral Convention	signed	Not in force

- a. This column reports, in respect of the Multilateral Convention, information regarding the partner jurisdiction.
- b. Extension by the United Kingdom.
- c. Footnote by Turkey: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of United Nations, Turkey shall preserve its position concerning the "Cyprus issue".

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

- d. Extension by the Kingdom of Denmark.
- e. Indonesia has ratified the Multilateral Convention, it will enter into force in Indonesia on 1 May 2015.

# 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 for the Prevention and Combating of Money Laundering and Terrorist Financing

### 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

National Ordinance of 13 November 2014 containing amendments to National Ordinance on income tax (AB 1991 no. GT 51), the National Ordinance on wage tax (AB 1991 no. GT 63) and the General Tax Ordinance (AB 2004 no. 10).

National Ordinance of 23 December 2011 containing amendments to the Commercial Code of Aruba, the National Ordinance on the Limited Liability Company (AB 2008 no. 62), and the Trade Register Ordinance (AB 1991 no. GT 15) (interim increase of transparency and integrity of capital companies).

# Annex 4: List of representatives interviewed during on-site visit

- 1. Minister of Finance
- 2. Representatives of the Ministry of Foreign Affairs
- 3. Representatives of the Department of Taxes
- 4. Representatives of the Chamber of Commerce and Industry
- 5. Representatives of the Aruba Financial Centre
- 6. Representatives of the Department of Economic Affairs
- 7. Representatives of the Central Bank of Aruba
- 8. Representatives of the Reporting Centre for Unusual Transactions
- 9. Representatives of the Attorney General's Office

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

## PEER REVIEWS, PHASE 2: ARUBA

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

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

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

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