GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

Peer Review Report Phase 2 Implementation of the Standard in Practice

BRAZIL

OECD

Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2013

PHASE 2:
IMPLEMENTATION OF THE STANDARD IN PRACTICE

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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.

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

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

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

Executive Summary

1. This report summarises the legal and regulatory framework for transparency and exchange of information in Brazil as well as the practical implementation of that framework. 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 (ToR), 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 Brazil has a developed legal and regulatory framework, the report identifies a number of areas where Brazil could improve its legal infrastructure to more effectively implement the international standard. The report includes recommendations to address these shortcomings.

2. The Federative Republic of Brazil (Brazil) is an emerging economy located in South America with more than 190 million inhabitants. Brazil is a member of the United Nations, Mercosur, the G20 and the Financial Action Task Force. Natural resources form an important part of its economy, which has been growing steadily in recent years. Brazil has a comprehensive income tax system for natural and legal persons and has been concluding double taxation conventions allowing for the international exchange of information since the late 1960s.

3. The legal and regulatory framework for the availability of information is in place in Brazil. Ownership and identity information is maintained by relevant entities and arrangements. In addition, much information is filled with governmental authorities, in particular the tax authorities and the Public Trade Registrar. Similarly, a good framework exists which requires full accounting records, including underlying documentation, to be kept for at least five years (which corresponds to the statute of limitations period). Full bank information, including all records pertaining to account holders as well as related financial and transaction information, is available in Brazil. In addition, the tax authorities also collect certain bank data every year, such as the identity of all bank account holders and the monthly global amounts in

deposit or saving accounts. In practice, ownership, accounting and banking information has been found to be available in all instances for exchange of information (EOI) purposes, though concerns have been expressed about the delay in providing it.

4. In respect of access to information, the Brazilian tax authorities are invested with broad powers to compel the provision of any information not already contained in their databases. These measures can be used for EOI purposes in the same way as for domestic purposes. Enforcement of these provisions is secured by the existence of significant penalties for non-compliance. Detailed bank information must be first sought from the taxpayer but there are no exceptions to this summons procedure in urgent cases or when the notification is likely to undermine the provision of the requested information. If this information is not provided by the taxpayer within a given timeframe, Brazilian tax authorities can request it directly from the banks. The Brazilian tax authorities have not experienced any difficulties in practice in accessing information required for EOI purposes.

5. Most of the 40 EOI agreements concluded by Brazil contain the necessary provisions to allow it to exchange in accordance with the international standard. However, 12 EOI agreements do not meet the standard either due to their restricted scope for information exchange for the purposes of the Convention or due to the absence of provisions which mirror Articles 26(4) and 26(5) of the OECD Model Tax Convention combined with restrictions in these treaty partners' domestic laws. Brazil is currently renegotiating these EOI agreements to bring them into line with the standard.

6. Brazil continues to expand its network of exchange of information instruments with six recently signed tax information exchange agreements and an additional seven new tax information exchange agreements under different stages of negotiation. In addition, Brazil signed the multilateral Convention on Mutual Administrative Assistance in Tax Matters at the signing ceremony held at the G20 Summit in Cannes, France in November 2011. It is noted, however, that the timeframe to bring the treaties signed into force can take, in some cases, several years. Brazil should ensure the ratification of its signed treaties expeditiously.

7. The unit in charge of exchanging information for tax purposes is located within the Federal Revenue of Brazil which sits within the Ministry of Finance. Whilst a certain amount of information is available from the taxpayer database at the Federal Revenue of Brazil's central office, in most cases the competent authority needs to rely on the local revenue units in order to gather the requested information. The lack of clear monitoring of internal timeframes and the insufficient level of resources as well as difficulties in obtaining information from local units in a timely manner have led to considerable delays in response times. However, this has improved significantly

in the past two years with a decrease in response times (from an average of 17 months to seven months) primarily due to the implementation of a new electronic system which effectively monitors the status and timelines of EOI requests. Further improvements are expected with the development of new IT tools, internal guidelines and restructuring of the EOI process. Local tax auditors in charge of gathering the information that is not already contained in the central tax database of Federal Revenue of Brazil are also increasingly aware of the importance of EOI, which should further improve the response times of Brazil.

8. Brazil receives more requests than it sends. As Brazil continues to enter into more EOI agreements and these come into force, the number of incoming requests is steadily increasing. For the three-year period under review (2009-11), Brazil received 89 requests from 18 treaty partners. Brazil was in a position to provide full responses within 90 days in 18 cases (20%), between 91 and 180 days in another 23 cases (26%), between 181 days and one year in an additional 20 cases (22%), and more than one year in a further 13 cases (15%). The remaining 15 cases (17%) are still outstanding. The feedback from Brazil's peers was generally positive. Some exchange partners commented on the delayed response times and the lack of consistency in providing updates. However, exchange partners also commented on the quality of Brazil's co-operation during the course of a request and the significant improvement on response times over the review period.

9. Brazil has been assigned a rating[1] 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 Brazil's legal and regulatory framework and the effectiveness of its exchange of information in practice. On this basis, Brazil has been assigned the following ratings: Compliant for elements A.1, A.2, A.3, B.1, C.2, C.3 and C.4, Largely Compliant for element C.1 and Partially Compliant for elements B.2 and C.5. In view of the ratings for each of the essential elements taken in their entirety, the overall rating for Brazil is Largely Compliant.

10. A follow up report on the steps undertaken by Brazil to answer the recommendations made in this report should be provided to the PRG within twelve months after the adoption of this report.

1. This report reflects the legal and regulatory framework as at the date indicated on page 1 of this publication. Any material changes to the circumstances affecting the ratings may be included in Annex 1 to this report.

Introduction

Information and methodology used for the peer review of Brazil

11. The assessment of the legal and regulatory framework of Brazil 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 has been conducted in two stages: Phase 1 assessed Brazil's legal and regulatory framework for the exchange of information as at January 2012, while Phase 2, performed in May 2013 in relation to a three year period (January 2009 through December 2011), looked at the practical implementation of that framework, as well as any amendments made to the legal and regulatory framework since the Phase 1 review.

12. The assessment was based on the laws, regulations, and exchange of information mechanisms in force or effect as at May 2013. It reflects Brazil's responses to the Phase 1 and Phase 2 questionnaires, supplementary questions and other materials supplied by Brazil, information supplied by exchange of information partners and explanations provided by Brazil during the on-site visit that took place from 1-4 October 2012 in Brasilia, Brazil. During the on-site visit, the assessment team met with officials and representatives of the Ministry of Finance, the Federal Revenue of Brazil (*Secretaria da Receita Federal do Brasil* – RFB), the Central Bank of Brazil (*Banco Central do Brasil* – BACEN), the Securities and Exchange Commission (*Comissão de Valores Mobiliários* – CVM), the Public Registrar (*Departamento Nacional de Registro do Comércio* – DNRC), delegates from the office of the Attorney-General and the Financial Intelligence Unit (*Conselho de Controle de Atividades Financeiras* – COAF). A list of all those interviewed during the onsite visit is attached to this report at Annex 4.

13. The Phase 1 assessment wasconducted by an assessment team which consisted of three assessors: Mrs. Agata Sardo, Tax Officer at the Assessment Directorate, International Division, Exchange of Information Office of the Revenue Agency Italy; Mr. Kamlesh Varshney, Director of the Department

of Revenue, Ministry of Finance, Government of India; and Mr. Rahul Navin, Director of the Foreign Tax and Tax Research Division, Ministry of Finance, Government of India; and one representative of the Global Forum Secretariat: Mrs. Renata Fontana. The assessment team examined the legal and regulatory framework for transparency and exchange of information and relevant exchange of information mechanisms in Brazil. The Phase 2 assessment was conducted by a team which consisted of five assessors: Mrs. Agata Sardo and Ms. Valeria Sperandeo, Tax Officers at the Assessment Directorate, International Division, Exchange of Information Office of the Revenue Agency Italy, Mr. Rahul Navin, Director of the Foreign Tax and Tax Research Division, Ministry of Finance, Government of India and two representatives of the Global Forum Secretariat: Mrs. Renata Fontana and Ms. Mary O'Leary.

14. The Terms of Reference break down the standards of transparency and exchange of information into 10 essential elements and 31 enumerated aspects under three broad categories: (A) availability of information; (B) access to information; and (C) exchanging information. This review assesses Brazil'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 regarding Brazil's legal and regulatory framework that either: *(i)* the element is in place, *(ii)* the element is in place but certain aspects of the legal implementation of the element need improvement, or *(iii)* the element is not in place. These determinations are accompanied by recommendations for improvement where relevant. In addition, to reflect the Phase 2 component, recommendations are made concerning Brazil'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 Brazil's overall level of compliance with the standards.

15. The ratings assigned in this report were adopted by the Global Forum in November 2013 as part of a comparative exercise designed to ensure the consistency of the results. An expert team of assessors was selected to propose ratings for a representative subset of 50 jurisdictions. Consequently, the assessment teams that carried out the Phase 1 and Phase 2 reviews were not involved in the assignment of ratings. These ratings have been compared with the ratings assigned to other jurisdictions for each of the essential elements to ensure a consistent and comprehensive approach. The assignment of ratings was also conducted at a different time from those reviews, and the circumstances may have changed in the meantime. Readers should consult Annex 1 for information on changes that have occurred.

Overview of Brazil

General information on the economy

16. The Federative Republic of Brazil (Brazil) is the largest country in South America, with over eight million square kilometers. The capital of Brazil is Brasilia. Except for Chile and Ecuador, Brazil shares boundaries with all the other South American countries: to the North with Surinam, Guyana, Venezuela and French Guiana (a French territory); to the Northwest with Colombia; to the West with Peru and Bolivia; to the Southwest with Paraguay and Argentina; and to the South with Uruguay. To the East the country faces the Atlantic Ocean.

17. With 190 million inhabitants, Brazil is divided into five regions: North, Northeast, Southwest, South and Central West, which are divided into 26 States and 5 565 Municipalities including the Federal District (Brasilia). Each State and Municipality has the autonomy to set normative regulations. The official language is Portuguese, spoken all over the country, and the currency is the Real (BRL).[2]

18. In 2012, the GDP of Brazil amounted to approximately BRL 4.40 trillion (around USD 2.16 trillion), a growth of 0.9%, taking the country to the rank of the seventh largest world economy. The services sector was responsible for 68.5% of that amount, followed by industry (26.3%) and agriculture (5.3%). Exports in 2012 amounted to approximately USD 243 billion and the imports to USD 223.2 billion, resulting in a USD 19.4 billion surplus of the trade balance.

19. The main countries from which Brazil imports goods are**:** China (15.3%), United States (14.5%), Argentina (7.5%) and Germany (6.4%), importing mainly oil, electronic circuits, transmitters/receivers, spare parts for vehicles, medicines, automobiles, fuel oils, power hard coal, natural gas and engines for aviation (data of 2011). The main countries to which Brazil exports are: China (17%), Unites States (11%), Argentina (7.4%) and the Netherlands (6.2%), exporting mainly iron ore, cast iron and steel, crude oil, soybeans and derivatives, automobiles, sugar cane, airplanes, beef, coffee and poultry (data of 2012).[3]

20. Among international organisations, Brazil is a member of the United Nations (UN), the World Trade Organization (WTO), the Organization of American States (OAS), the World Customs Organization (WCO), the

2. BRL 1 = USD 0.49 and USD 1 = BRL 2.03, as at 17 May 2013 (www.bcb.gov.br/?TXCAMBIO).
3. Brazilian Institute of Geography and Statistics (www.ibge.gov.br) and Ministry of Development, Industry and Foreign Trade (www.mdic.gov.br).

International Labour Organization (ILO), the Latin American Integration Association (ALADI) and the Common Southern Market (Mercosur). Brazil is also a member of the G20, the Financial Action Task Force (FATF/GAFI), the Financial Action Task Force of South America (GAFISUD) and the Egmont Group. Since September 2009, Brazil has been a member of the Global Forum, where it plays an active role as member of both the Steering Group and the Peer Review Group.

Governance and legal system

21. Brazil is a democratic republic and is currently governed by the 1988 Federal Constitution. The Federal Constitution is the primary source of law and it defines, among others, the principles, fundamental rights and guarantees, organisational structure, hierarchy of laws and separation of the government's autonomous powers into Legislative, Executive and Judiciary powers, exercised in the federal, state and municipal levels. As the national capital, Brasilia is the seat of all three branches of the Brazilian government. The Brazilian legal system is based on civil law.

22. At the federal level, Legislative power is exercised by the Brazilian Parliament (National Congress), formed by the House of Representatives (*Câmara dos Deputados*) and the Federal Senate (*Senado Federal*), which comprise, respectively, congressmen and senators elected by the people. The Brazilian lawmaking process is bicameral, as it involves the will of both the lower and the upper house of the National Congress, either together or separately. The hierarchy of the laws is, in decreasing order of rank: *(i)* constitutional amendments, *(ii)* complementary laws, *(iii)* international treaties and ordinary laws, *(iv)* delegated laws, *(v)* provisional measures, *(vi)* decrees, and *(vii)* resolutions.

23. A law of a higher rank will prevail over a law of a lower rank when they concern the same subject matter, but a law which is later in time will revoke an older law of equal hierarchy (Decree-law No. 4.657/42, establishing the Introductory Law to the Civil Code, article 2). In particular, international treaties and conventions on tax matters will always prevail over domestic tax law, provided that they do not violate the Federal Constitution or complementary laws (Law No. 5.172/66, which established the National Tax Code, article 98).

24. In the federal sphere, Executive power is exercised by the President of the Republic, who is popularly and directly elected in two rounds,[4] and occasionally replaced by the Vice-President. The President also relies on

4. If no candidate attains an absolute majority in the first voting, another election must be held within 20 days from the announcement of the results, between the

Ministers appointed by him. Public businesses are managed by the Executive power, either directly through the ministries and related agencies, or indirectly, by means of the indirect administration organisations, i.e. autarchies, public corporations and semi-public companies.

25. The Supreme Federal Court is the main organisation of the Judiciary power and its main function is to oversee the Federal Constitution, being the final court of appeal in constitutional matters. The Superior Court of Justice is the guardian of the uniform interpretation of the federal laws, being the final court of appeal in infra-constitutional matters. Other judicial organisations are the Federal Regional Courts, Labor Courts, Electoral Courts, Military Courts and the Local Courts for the States, the Federal District and the Territories.

Tax system

26. The Brazilian tax system is mainly outlined in the Federal Constitution, which sets out general principles, the limits of taxing powers and tax jurisdictions and the sharing of tax revenues. The Union, States, Federal District and Municipalities have administrative autonomy to impose taxes, subject to the limits of their taxing powers and tax jurisdictions. The Federal Constitution (articles 145 to 162) and the National Tax Code (Law No. 5.172/66) govern the Brazilian tax system, establishing five types of taxes: *(i)* taxes *stricto sensu* (on income, consumption, etc.), *(ii)* fees, *(iii)* improvement contributions, *(iv)* other contributions (social and other types) and *(v)* compulsory loans.

27. At the federal level, the Minister of Finance is the main administrative authority, who is responsible for the administration of all the federal taxes.[5] The Secretariat of the Federal Revenue of Brazil (*Secretaria da Receita Federal do Brasil* – RFB) is the agency of the Minister of Finance which is responsible for the administration of the federal taxes, as well as

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two candidates with the highest number of votes. The candidate with the majority of valid votes in the second voting will be considered elected.

5. The federal taxes are: *(i)* import tax over foreign goods (*Imposto sobre a Importação de produtos estrangeiros* – II); *(ii)* export tax over national or nationalised products (*Imposto sobre a Exportação para o exterior de produtos nacionais ou nacionalizados* – IE); *(iii)* rural territorial property tax (*Imposto sobre a Propriedade Territorial Rural* – ITR); *(iv)* industrialised products tax (*Imposto sobre Produtos Industrializados* – IPI); *(v)* income tax (*Imposto sobre a Renda e proventos de qualquer natureza* – IR); *(vi)* credit, exchange and insurance operations tax (*Imposto sobre Operações de Crédito, Câmbio, Seguro e Relativas a Títulos e Valores Mobiliários* – IOF). There are other taxes under the responsibility of the States, the Federal District and the Municipalities.

the customs control, including the efforts in counteracting money laundering. The collection of federal taxes amounted to BRL 1 029.3 billion in 2012 (roughly USD 507.2 billion), i.e. a 0.7% increase, after the 2012 inflation reduction.

28. There are two categories of income tax: *(i)* individual income tax (IRPF) and *(ii)* legal person income tax (IRPJ). The IRPF is applicable to individuals at progressive rates varying proportionally to taxable income, between 7.5% and 27.5%. The IRPJ is applicable to legal persons at a 15% flat rate and an additional 10% rate over the tax basis exceeding the amount of BRL 240 000 (approximately USD 118 000) per year or monthly fraction thereof, along with the Social Contribution on Net Profit (*Contribuiçao Social sobre Lucro Líquido* – CSLL) at a 9% rate (i.e. approximately 34%).

29. An individual who is physically present in Brazil is deemed to be a resident for tax purposes if he/she moves to Brazil under a permanent visa, or is hired by a Brazilian company, or remains in the country for more than 183 days during a 12 month-period from the original date of entry. A legal person is deemed to be resident in Brazil for tax purposes if it is incorporated under Brazilian law or if it opts for registering its corporate headquarters in Brazil (i.e. place of incorporation principle). Resident individuals or legal persons are liable to income tax on their worldwide income and capital gains, regardless of the source of the income. They must self-assess their own income tax liability under the rules applicable to resident taxpayers and are required to file an annual income tax return.

30. Brazilian law does not specifically provide for the concept of non-resident entities. In principle, all entities that do not fall within the concept of resident are characterised as non-residents. Brazil does not tax dividends nor does it apply a branch profit tax. Non-residents are not required to file an annual income tax return. However, non-residents who own properties (real estate, bank accounts, shares, vehicles, etc.) in Brazil must register as taxpayers with the Brazilian federal tax authorities. Likewise, foreign companies operating in Brazil through a branch, subsidiary or office or doing business in Brazil through a commissionaire or representative must be registered with the Brazilian public authorities. The branch, office or agent may be equated to a resident legal entity for tax purposes and taxed with respect to income attributable to the branch, office or agent (see further details in Section A below).

31. The Administrative Board of Tax Appeals (*Conselho Administrativo de Recursos Fiscais* – CARF) is also part of the Ministry of Finance structure. This administrative court judges *ex-officio* and voluntary appeals against first instance decisions, as well as special appeals, concerning the application of the legislation on the federal taxes administrated by the RFB. The decision of CARF is definitive at the administrative level, but this

administrative procedure does not impede the filing of a judicial proceeding on the same subject matter.

Overview of the financial sector and other regulated activities

32. The Brazilian financial sector is known as the National Financial System (*Sistema Financeiro Nacional* – SFN) and comprehends both public and private institutions, working all over the country and providing banking, insurance and investment services. In 2012, the SFN contributed to 5.9% the Gross Domestic Product (GDP).

33. The SFN comprises financial institutions, including bank and non-bank institutions, and auxiliary institutions. The SFN has a regulatory and operational structure, consisting of several supervisory bodies, as follows:

- National Monetary Council (*Conselho Monetário Nacional* – CMN);
- National Council on Private Insurance (*Conselho Nacional de Seguros Privados* – CNSP);
- National Regulatory Board for Complementary Pension Plans (*Conselho Nacional de Previdência Complementar* – CNPC);
- Central Bank of Brazil (*Banco Central do Brasil* – BACEN);
- Securities and Exchange Commission (*Comissão de Valores Mobiliários* – CVM);
- Superintendence of Private Insurance (*Superintendência de Seguros Privados* – SUSEP); and
- National Superintendence for Pension Funds (*Superintendência Nacional de Previdência Complementar* – Previc).

34. Financial institutions are broadly defined as private or public entities of which the main or secondary activity includes the collection, intermediation or investment of financial resources belonging to itself or to third parties, in national or foreign currency, and the custody of assets belonging to third parties. Banks are financial institutions which may receive deposits in cash and issue currency while non-bank financial institutions operate with non-monetary assets (shares, bank deposit certificates, bonds, etc.). These entities are supervised by the BACEN.

35. Other intermediate or auxiliary institutions are the stock exchanges or commodities and futures, brokers, distributor, leasing companies, exchange brokers, commodities and future brokers, self-employed investment agents and representatives of foreign financial institutions. These entities are generally supervised by the CVM. In addition, the Appeals Council for the

National Financial System – CRSFN is an appeal instance within the SFN, with powers to judge, in second and last administrative instance, *ex-officio* and voluntary appeals against administrative decisions of the BACEN and the CVM.

36. Between 2008 and 2013, the number of financial institutions, including bank and non-bank institutions, and auxiliary institutions within the SFN varied as follows:

Type of Institution	Number of Institutions				
	2008 (Dec)	2009 (Dec)	2010 (Dec)	2011 (Dec)	2013 (Mar)
Multiple Bank (BM)	140	139	137	139	137
Commercial Bank (BC)*	18	18	19	20	22
Savings (CE)	1	1	1	1	1
Development Bank (BD)	4	4	4	4	4
Investment Bank (BI)	17	16	15	14	13
Exchange Bank (Bco Camb)	-	-	2	2	2
Leasing Company (SAM)	36	33	32	31	30
CFI Company (SCFI)	55	59	61	59	58
Real Estate Credit** (SCI) and Savings and Loan (APE)	16	16	14	14	11
TVM Brokerage Company (SCTVM)	107	105	103	99	94
Exchange Broker (SCC)	45	45	44	47	61
TVM Distributer (SDTVM)	135	125	125	126	118
Funding Agency*** (Ag Fom)	12	14	15	16	16
Mortgage Company (CH)	6	6	7	8	8
Credit Cooperative (Coop)	1 453	1 405	1 370	1 312	1 242
Credit for Small Entrepreneurs**** (SCM)	47	45	45	42	40
Consortium (Cons)	317	308	300	284	210
TOTAL	2 409	2 339	2 294	2 218	2 067

* This includes the branches of foreign banks.

** This includes Real Estate Credit Sharing Companies (SCIR) that cannot collect public resources.

*** In Jan 1999, the first Funding Agency was set up, in accordance with Resolution 2.574/98.

**** In Oct 1999, the first SCM was set up, in accordance with Resolution 2.627/99.

Source: Unicad.

37. In addition to the BACEN, CVM and SUSEP which supervise the financial, securities market and insurance sectors, there are other ten supervisory bodies in charge of the supervision of other regulated activities, as follows:

- National Agency of Telecommunications (*Agência Nacional de Telecomunicações* – Anatel) responsible for the development of the telecommunication infrastructure, pursuant to Law No. 9.472/97;
- National Agency of Petrol (*Agência Nacional de Petróleo* – ANP) responsible for economic activities related to the petrol industry, natural gas and bio fuels, pursuant to Law No. 9.478/97;
- National Agency of Electric Energy (*Agência Nacional de Energia Elétrica* – Aneel) responsible for the production, transmission, distribution and sale of electric energy, pursuant to Law No. 9.427/96;
- National Agency of Supplementary Health (*Agência Nacional de Saúde Suplementar* – ANS) responsible for the economic operators and development of the health sector in Brazil, pursuant to Law No. 9.961/00;
- National Agency of Sanitary Vigilance (*Agência Nacional de Vigilância Sanitária* – Anvisa) responsible for the public health and control of harbours, airports and frontiers, pursuant to Law No. 9.782/99;
- National Agency of Water (*Agência Nacional de Águas* – ANA) responsible for implementing national policies in this sector pursuant to Law No. 9.984/00;
- National Agency of Cinema (*Agência Nacional do Cinema* – Ancine) responsible for the development of the cinema and video industry, pursuant to Provisional Measure No. 2.228-1/01;
- National Agency of Aquatic Transports (*Agência Nacional de Transportes Aquaviários* – Antaq) responsible for implementing national policies and supervising operators in this sector, pursuant to Law No. 10.233/01;
- National Agency of Ground Transports (*Agência Nacional dos Transportes Terrestres* – ANTT) responsible for the operation of railways and roads, pursuant to Law No. 10.233/01; and
- National Agency of Civil Aviation (*Agência Nacional de Aviação Civil* – Anac) responsible for the operation of airports and related infrastructure, pursuant to Law No. 11.182/05.

Anti Money Laundering Legislation

38. The anti-money laundering framework in Brazil is based on Law No. 9.613/98, which sets out the legal measures, such as the definition of money laundering crimes, preventive measures, the system for reporting suspicious activities and the procedures for international cooperation. This law is the result of several international initiatives, such as the Vienna Convention, the Palermo Convention, the UN Convention against the Financing of Terrorism, the UN Convention against Corruption, the FATF 40+9 recommendations, among others.

39. The Brazilian Financial Intelligence Unit (*Conselho de Controle de Atividades Financeiras* – COAF) is an autonomous government agency which is actively involved in international initiatives related to the prevention of money laundering and financing of terrorism. Brazil is a member of the FATF/GAFI, the GAFISUD and the Egmont Group. Brazil relies on authorities with expertise on the prevention of money laundering and financing of terrorism, including the federal police, the Attorney General's Office and special courts.

40. Since 2001, Complementary Law No. 105/01 introduced new rules on bank secrecy and extended the access powers of the COAF. In addition, Law No. 10.701/03 provided the COAF with a broader authority to obtain information from third parties and created a national register of bank accounts.

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

41. The Brazilian legal framework contains principles and rules that provide for international cooperation and exchange of information with other countries (Federal Constitution, article 4, IX). As further detailed in section A below, the most relevant commercial laws in Brazil for exchange of information purposes are:

- Law No. 6.404/76, as amended: governs companies with the capital divided into shares;
- Law No. 10.406/02, establishing the new Civil Code: regulates companies in Book II (article 966 to 1.195); and
- Law No. 6.015/73: establishes procedures and rules concerning the registration of individuals, corporate bodies, documents and real estate.

42. In 2001, the National Tax Code was amended to make it clear that the RFB was able to exchange information with foreign authorities, as provided for in international treaties, agreements or pacts, in the

interests of tax collection and inspection (article 199, sole paragraph, added by Complementary Law No. 104/01). At the same time, Complementary Law No. 105/01 introduced new rules on bank secrecy, making it clear that the tax authorities have direct access to confidential data kept by financial institutions. Both Complementary Law No. 104/01 and Complementary Law No. 105/01 entered into force in 2001.

43. As a member of the Global Forum since 2009, Brazil is committed to implementing the international standard on transparency and exchange of information for tax purposes. Brazil is also a member of both the Steering Group and the Peer Review Group. Brazil has a significant treaty network, covering 60 jurisdictions, including 40 exchange of information agreements and the multilateral Convention on Mutual Administrative Assistance in Tax Matters signed at the signing ceremony held at the G20 Summit in Cannes, France in November 2011(though not yet in force). Treaty negotiations are in progress with seven other jurisdictions, six of them being Global Forum members (see further details in Section C below). A complete list of the agreements which have been concluded by Brazil is set out in Annex 2 to this report, including their dates of signature and entry into force.

Recent developments

44. In July 2012, the RFB introduced a new integrated system to accurately record the export and import of all services into and out of Brazil. This system, known as "*Siscoserv*", makes it mandatory for individuals and entities to provide information on all foreign transactions involving trade of services and other intangibles (Law No. 12.546/11, Decree No. 7.708/12 and Joint Ordinance No. 1.908/12). Under this process, any legal person or entity has to provide details of the party with whom they are transacting, the means by which the transaction took place (i.e. sale, lease or any conduct producing a flow in equity) and all rights created as a result. It is expected by RFB that this data will then be used in the course of international negotiations for services and also to assist the enforcement of taxes relating to foreign trade.

45. Law No. 12.683/12, introducing changes to the anti-money laundering regime, was approved by National Congress, on 9 July 2012, effectively broadening the scope of Law No. 9.613/98. This is part of a government run series of actions to combat corruption in Brazil. Previously, Law No. 9.613/98 did not criminalise the act of money laundering, unless the money or act was directly related to enumerated illegal activities. The new amendments broaden the scope of criminalizing transfers of funds where the nature or source has been concealed, and also increase the civil and criminal penalties for the offence. Most significantly for EOI purposes, the amendments broaden the scope of the anti-money laundering regime to cover designated non-financial businesses and professionals who are now subject to

information keeping and reporting obligations on the clients for whom they act.

46. With regard to exchange of information practices, Brazil has recently revisited its internal procedures in order to increase the efficiency in the processing of EOI requests. In the event that the competent authority does not have immediate access to the information requested from the taxpayer database, the request will be referred on to the tax investigation unit, which has direct access to a much greater amount of taxpayer data than the EOI Unit. Since the implementation of this new process in January 2013, all EOI requests received by Brazil have been responded to in much shorter time-frames. However, as this initiative has commenced outside of the review period and its effectiveness could not be assessed.

Compliance with the Standards

A. Availability of Information

Overview

47. 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 Brazil's legal and regulatory framework on the availability of information. It also assesses the implementation and effectiveness of this framework.

48. In respect of ownership and identity information, the comprehensive obligations consistently imposed on domestic and foreign companies, partnerships and foundations ensure that information is available either in the hands of public authorities (i.e. the Public Trade Registrar, the Civil Registry Office, the CVM, the BACEN, the RFB, etc.), the entity itself (articles of incorporation or shareholder register) or custodians (i.e. financial institutions and other entities supervised by the CVM). These obligations are complemented by the anti-money laundering legislation and rules concerning regulated activities.

49. Since 1990, the issuance of bearer shares and nominee ownership is now forbidden in Brazil. Trusts may not be established under Brazilian

law and the availability of information concerning foreign trusts with a link to Brazil is ensured by the combined application of general record-keeping requirements under tax law and the anti-money laundering legislation. Enforcement provisions are in place to ensure the availability of ownership and identity information. For the reasons above, element A.1 was found to be in place.

50. As far as accounting information is concerned, businesspersons (including commercial entities) must keep reliable accounting records and underlying documentation for at least 10 years under the Civil Code. Cooperatives and foundations are also required to follow the same general accounting requirements applicable to commercial entities under other commercial laws governing their incorporation and/or activities. Under tax law, all private legal entities (companies, partnerships, foundations) are required to keep reliable accounting records for at least five years. Certain companies and partnerships (depending on their size or activities) are systematically required to file a substantial amount of tax and accounting records in an electronic database kept by the RFB. Hence, element A.2 was found to be in place.

51. As to bank information, banks and other financial institutions have to comply with detailed know-your-customer obligations and must keep all records pertaining to account holders, as well as related financial and transaction information, for at least five years. Element A.3 was therefore found to be in place.

52. Compliance in respect of all entities' obligations to maintain ownership, accounting and banking information is strictly monitored by the Brazilian tax authorities and other public authorities such as the Public Trade Registrar and the respective regulatory bodies. Monitoring is carried out via a combination of routine inspections, desktop examinations and onsite inspections. Sanctions are set at the appropriate level to ensure compliance with information keeping requirements and sanctions such as fines are regularly enforced in practice. With regard to bearer shares still in circulation, a number of government initiatives are underway to convert the small percentage of residual bearer shares into nominative shares. Nevertheless, Brazil should continue to closely monitor residual bearer shares to ensure that identity information is available in practice. According to the feedback received from peers, no issues have arisen with respect to obtaining ownership and identity information during the review period, apart from delays.

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.

53. The relevant entities and arrangements of Brazil are companies (*ToR* A.1.1), partnerships (*ToR* A.1.3) and foundations (*ToR* A.1.5). Bearer shares have been abolished since 1990, although residual bearer shares still exist in very narrow circumstances (*ToR* A.1.2). Trusts cannot be created under Brazilian law and foreign trusts are not recognised (*ToR* A.1.4). This section also deals with enforcement provisions to ensure compliance with the laws on the ownership of relevant entities (*ToR* A.1.6).

54. Brazilian "companies" and "partnerships" are both considered legal persons and the distinction between them is based on the deciding factor in the creation of the entity: either the members' capital contribution in companies (*sociedades de capital*), or the personality of the members in partnerships, in which case the management falls to the members and equity in the entity cannot be passed freely to third parties (*sociedades de pessoas*).

Companies *(ToR A.1.1)*

Types of Companies

55. Under Brazilian law, companies (*sociedades de capital*) are formed under one of the following categories:

- *Sociedade Limitada* – LTDA (limited liability company): This commercial company has its capital divided into quotas and each quotaholder is liable only up to the value of his/her quota; however, the quotaholders are jointly liable for the entire social capital up to the full payment of the subscribed capital. A LTDA can be managed by one or more persons, who are either members or non-members, as appointed by the articles of incorporation or a separated act (Civil Code established by Law No. 10.406/02, as amended, articles 1.052 to 1.087). This is the most common type of company in Brazil, amounting to 7 054 698 entities (of which 3 955 673 were active) as at 31 March 2013.
- *Sociedade Anônima* – SA (joint stock company): This corporation, whether private or public, has its capital divided into shares and each shareholder is liable only up to the limit of the issuing price of his/her shares. Non-resident shareholders must have a representative in Brazil with the power to receive summons proposed against him (Law No. 6.404/76, articles 119). A SA is managed either by a board

of directors and administrative council, or exclusively by a board of directors (Civil Code, articles 1088 and 1089; Law No. 6.404/76). The directors and members of the fiscal council must be resident in Brazil (Law No. 6.404/76, articles 145, 146, 157, 158, 162 and 163). As of 31 March 2013, there were 280 481 SAs (of which 151 191 were active) in Brazil.

- *Sociedade em Comandita por Ações* – SCA (partnership limited by shares): This commercial partnership with the capital divided into shares is considered a company under Brazilian law. The same rules apply for SAs and SCAs, except that SCAs have general partners *(comanditados)* with unlimited liability who are responsible for the company's management, and limited partners *(comanditários)* with liability limited to the value of their shares (Civil Code, articles 1090 to 1092; Law No. 6404/76, articles 280 to 284). This form of company is rarely used and as of 31 March 2013, only 57 SCAs (of which 31 were active) were registered in Brazil.

Civil and Commercial Law

56. Book II of the Civil Code defines business activities as concerned with the production or circulation of goods or services (article 966). Conversely, intellectual, scientific, literary or artistic activities are regarded as non-business activities, except when conducted as a business (article 966, sole paragraph). The concept of businessperson or "entrepreneur" (*empresário*) is a key notion in Brazilian civil and commercial law. Businesspersons are defined as natural persons acting in a professional capacity and legal entities conducting business activities and they are bound by a number of obligations (Civil Code, articles 966 and 982). The Brazilian authorities have indicated that holding companies established in Brazil are treated as carrying on business activities and are, therefore, subject to these obligations.

57. Any businessperson carrying on a business activity in Brazil must be registered at the Public Trade Registrar (Civil Code, articles 967, 982 and 1.150). This registration is performed all over Brazil, in a systematic and uniform manner, by the National System for the Public Registration of Commercial Companies – SINREM. Registration takes place at the Public Trade Registrar in each State of the Federation, under the supervision of Trade Registration National Department – DNRC, which is linked to the Ministry of Development, Industry and Trade – MDIC (Law No. 8.934/94, articles 4 to 6).

58. Pursuant to article 46 of the Civil Code, the register must contain the following ownership information in respect of companies (and partnerships): *(i)* corporate name, purpose, headquarters, duration and social capital, if

applicable; *(ii)* name and particulars of the founders or incorporating members and directors; *(iii)* the manner in which the company is administered and represented, both in legal proceedings and otherwise; *(iv)* whether the articles of incorporation or by-laws may be amended with respect to its administration, and in which manner; and *(v)* whether the owners are subsidiary liable for the company's obligations. Any documents or changes to the articles of incorporation or by-laws must be filed within 30 days (Civil Code, articles 45, 998 and 1.151; Law No. 8.934/94, article 36).

59. The incorporation of a company entails some registration and publication requirements, and all the three types of companies (LTDAs, SAs and SCAs) must hold updated information identifying their owners. In order to acquire legal personality, a company must have its articles of incorporation or by-laws duly registered at the Public Trade Registrar before the beginning of its activities and, when required (see *Regulated Activities* and *Foreign Companies* below), it must also obtain an authorisation from the Executive power (Civil Code, articles 45 and 1.150; Law No. 8.934/94, article 32). Upon registration, the company receives a Company Register Identification Number – NIRE (Law No. 8.934/94, article 2, sole paragraph).

60. LTDAs are established by means of a private or public written agreement, setting out, among other things, the following ownership information: *(i)* name, nationality and resident or seat of administration of all the owners; *(ii)* their quota in the social capital and participation in the results; *(iii)* whether they are subsidiary liable for the company's obligations; and *(iv)* natural persons who are responsible for the administration of the company, as well as their powers and responsibilities (Civil Code, articles 997 and 1.054). Any changes to the articles of incorporation or by-laws (a private or public written agreement) concerning ownership information must be unanimously approved by the quotaholders and filed with the Public Trade Registrar (Civil Code, articles 45, 999 and 1.071).

61. SAs and SCAs may only issue nominative shares which are subject to registration and the share certificate must contain the identification of the shareholders (Law No. 6.404/76, articles 20 and 24, IX). Their ownership is attested by the shareholder register or by a statement provided by a custodian institution as fiduciary owner of the shares (Law No. 6.404/76, article 31). Transfers of shares must always be entered into the shareholder register, along with the date and signature of assignor and assignee, their legal representatives or brokers. Transfers by inheritance, gift, court order or other judicial means are subject to the presentation of appropriate documents, which will be kept by the company (Law No. 6.404/76, article 31). The shareholder register must be kept by the company and it must state the shareholders' names and number of shares, among other information (Law No. 6.404/76, article 100, I).

62. Nominative shares may also be kept in custody by financial institutions (commercial and investment banks), brokers and distributors, other equated entities and the stock exchange (collectively referred to as custodians), duly authorised and supervised by the Securities and Exchange Commission (CVM) (Law No. 6.404/76, article 34; Normative Instruction CVM No. 89/88, as amended by Normative Instructions CVM Nos. 212/94 and 261/97; Deliberation CVM No. 472/04). Custodians and intermediate financial institutions (sub-custodians) are required to keep proper documentation for the identification of the shareholders, including *(i)* for natural persons, the national identity number, taxpayer identity number and address; and *(ii)* for legal entities, copy of the articles of incorporation or by-laws and taxpayer identity number (Normative Instruction CVM No. 310/99). In addition, custodians and sub-custodians are subject to anti-money laundering rules (see *Anti-Money Laundering Laws* below).

Registration in practice

63. Registration obligations for companies (and partnerships) are presided over by the DNRC, which sets out guidelines for the registration process. An orientation manual exists for each type of entity, specifying the requirements that must be met in order for the registration to be effective. As a matter of practice, all documents and information filed at the offices of the Registrar are kept indefinitely, including records pertaining to liquidated companies.

64. There are ten state offices, 27 local trade offices and a further 600 municipal units where registration can take place. A project is currently underway by the DNRC that will allow for increased integration of the processes with the various offices of the trade registrars, mainly by facilitating the online registrations for all entities. This project, which enhances transparency and access to information on registered entities, has already been successfully implemented in several states and the process of harmonisation across all offices is due to be completed shortly.

65. Since 2009 the inspection program of the Registrar is carried out internally via desktop examinations only. Entities to be inspected are chosen based on a risk assessment, considering their characteristics such as business model, customer type and industry. In addition, those entities that have previously submitted incorrect or missing information are more likely to be examined the following year. No specific statistics were kept on the number of desk top examinations carried out during the period under review.

66. In the course of a desktop examination, a legal entity's compliance with registration obligations including with ownership information requirements will be verified. Depending on the outcome of the examination, the officials from the Registrar will compile a report and if breaches to

information keeping obligations have been found, a decision will be made as to the enforcement action to be taken. Over the review period, in cases where non-compliance was detected, the Registrar issued a recommendation and monitored these entities closely until the breach had been rectified. Therefore, it has not been necessary to issue any fines or penalties during the period under review (see also section *A.1.6 Enforcement provisions to ensure availability of information*).

67. In practice, when the competent authority receives an EOI request concerning ownership information about a company (or partnership), it will initially examine its own databases to see if the information can be provided. In cases where the requested information is held by another government entity, such as the Public Trade Registrar, a notice to produce the information is forwarded to the local office of the Public Trade Registrar where the company is registered.

68. During the three-year period under review (2009-11), the competent authority has not requested company information from the Public Trade Registrar, as the requested information was available either in the taxpayer database or obtained from other sources, such as directly from the taxpayer or from other third parties. However, during the review period, the Public Trade Registrar has provided ownership information with regards to partnerships to the competent authority. Further, should company ownership information be requested by the RFB in the future, the Registrar has confirmed that it would be readily provided on receipt of the notice to produce the information.

Regulated Activities

69. Companies performing regulated activities (including financial and similar institutions, insurance companies, brokers, etc.) are subject to an extra layer of requirements to capture ownership information (Civil Code, articles 1.123 to 1.133 and Law 4.595, article 10). Prior to the registration at the Public Trade Registrar, these entities must obtain a special authorisation from supervisory bodies, such as the Central Bank of Brazil (BACEN), the CVM and the Private Insurance Superintendence (SUSEP). In addition to these three supervisory bodies, there are ten other regulatory agents in charge of the supervision of regulated activities (see Introduction for further details).

70. Upon application for an authorisation, these companies must provide a copy of the articles of incorporation or by-laws containing ownership information, in addition to specific documents required under the laws governing each particular activity (Civil Code, article 1.128 and Law No. 4.595/64, article 10(11)). Generally, if a company was incorporated by means of public deed, it is sufficient to enclose a copy of the deed certificate to the authorisation request (Civil Code, article 1.128, sole paragraph). However, all financial

companies, even if incorporated by means of a public deed, will be subject to prior inspection by BACEN (Law No. 4.595/64, article 10(11)). Any changes to the articles of incorporation or by-laws, except for an increase in the social capital through the use of reserves or asset revaluation, must be analysed and approved by the supervisory body before its registration at the Public Trade Registrar to ensure the continuity of conditions existing at the time of the authorisation (Civil Code, article 1.133).

Regulated activities in practice

71. In practice, each of the supervisory bodies (BACEN, CVM and SUSEP) monitors companies performing regulated activities to ensure that they comply with their information keeping obligations. Monitoring is usually performed via desktop audits and a system of onsite inspections. In cases where a company is found to be in breach of these obligations, the regulator prefers to operate in a conciliatory manner and will initially evaluate the situation and ask for more information before making a final assessment. The regulator has confirmed that, in most cases, the matter can be rectified in this manner with the entity receiving certain recommendations or a warning and the regulator will closely monitor the entity until such time as the deficiency has been fully rectified. However, in more complex cases where the situation cannot be easily resolved, such as where the regulator suspects that the company is in serious breach of Law No. 9.613/98 dealing with money laundering or other norms and regulations, sanctions will be applied accordingly (for more details, see section A.1.6 *Enforcement provisions to ensure availability of information).*

72. The CVM acts as the regulator for the securities market. Its role includes ongoing surveillance of all regulated entities and this is undertaken via a comprehensive program of desktop audits and onsite inspections of entities. The CVM is also responsible for ensuring that licensed entities are complying with the obligations under the anti-money laundering regime and are actively reporting all transaction irregularities to COAF, the financial intelligence unit. The CVM reported that there is good compliance with these obligations by licensed entities and that, during the three-year review period, 3 915 suspicious transactions were reported to COAF by licensed entities in the securities market (for more information related to the penalties enforced in these cases, see below section A.1.6 *Enforcement provisions to ensure availability of information*).

73. BACEN conducts ongoing surveillance and monitoring of licensed financial institutions to ensure that they are complying with licensing regulations. As at May 2013, BACEN has 4 465 employees of whom 1 053 are employed in supervision and monitoring related roles of financial institutions authorised by the Central Bank. The ongoing monitoring and onsite

inspection program consists of both internal monitoring mechanisms and onsite inspections of licensed entities. Onsite inspections are chosen according to sample testing and a cross section of all types of licensed entities will be inspected. Over the three-year period, there were 488 anti-money laundering-related inspections performed by BACEN (i.e. 61 in 2009, 222 in 2010 and 205 in 2011) which have confirmed that compliance with information keeping requirements is high. In cases of non-compliance, BACEN usually attempts to reconcile such deficiencies in a conciliatory manner by giving the entity 30 days to remedy any deficiencies encountered. BACEN will closely monitor the entity until such time as the deficiency has been rectified and will request regular status updates as to the entity's progress in this regard. However, in the case of gross violations, fines and other penalties will be applied (see section A.1.6 *Enforcement in practice*).

Anti-Money Laundering Laws

74. Law No. 9.613/98 dealing with money laundering crimes adds yet another layer of requirements to maintain ownership information on the clients of companies (or partnerships) performing regulated activities (including financial and similar institutions, insurance companies, brokers, etc.), as well as natural or legal persons performing other designated activities (article 9).[6] Persons subject to Law No. 9.613/98 are required to identify their clients and keep updated records for a minimum period of five years from the termination of the account or transaction (articles 9 and 10). If the client is a legal entity, the identification must include the natural persons authorised to represent it, as well as its owners (article 10, first paragraph).

75. Company services providers are not regulated as a separate industry. Company formation and related services may be provided by lawyers, accountants, notaries or private company service providers.Law No. 12.683/12, as approved by the National Congress on 9 July 2012, broadens the scope of the anti-money laundering law to cover such designated non-financial businesses

6. This includes the following persons: "*(ix)* all Brazilian or foreign individuals or legal entities, which operate in Brazil in the capacity of agents, managers, representatives or proxies, commission agents, or represent in any other way the interests of foreign entities that engage in any of the activities referred to in this article; *(x)* individuals or legal entities that engage in activities pertaining to real estate, including the promotion, purchase and sale of properties; *(xi)* individuals or legal entities that engage in the commerce of jewellery, precious stones and metals, works of art, and antiques; and *(xii)* individuals or legal entities that trade or act as an intermediary in the trading of luxurious goods or those with high prices or that perform activities that involve great amounts in cash.".

and professionals. Pursuant to article 9 of Law No. 9.613/98, as amended, the obligations as set out under this statute are extended to:

> "XIII – commercial registries and the public notaries;
>
> XIV – natural or legal persons who provide, even occasionally, advisory, consulting, accounting, auditing, counselling or assistance services of any nature in operations of:
>
> a) purchase and sale of real estate, commercial or industrial businesses, or equity holdings of any nature;
>
> b) management of funds, securities or other assets;
>
> c) opening or management of bank, savings accounts, investments or securities accounts;
>
> d) setting up, exploring or management of companies of any nature, foundations, fiduciary funds or similar structures;
>
> e) a financial, business or real estate nature; and
>
> f) alienation or acquisition of rights over contracts related to professional sporting or artistic activities;
>
> (…)
>
> XVIII – the overseas facilities of the entities mentioned in this article through their main office in Brazil, relating to residents in the country."

76. This means that professionals such as lawyers, accountants, notaries or private company service providers are subject to information keeping obligations and reporting on clients for whom they act in a fiduciary capacity. As Law No. 12.683/12 has only been in effect since 10 July 2012, it is largely untested and it is recommended that Brazilian authorities closely monitor designated professionals' compliance with information keeping and reporting obligations in practice. These requirements are in addition to the civil, commercial and tax laws that require ownership information to be made available.

Anti-Money Laundering obligations in practice

77. COAF is responsible for supervising persons subject to the anti-money laundering obligations established by Law No. 9.613/98. COAF implemented two initiatives to monitor compliance with these obligations. First, it has streamlined its monitoring program so that it is based on a systematic management of risk. Secondly, due to the close working relationship between the RFB and COAF (the RFB is represented on the board of COAF), where a tax-related crime is identified by COAF in the course of its anti-money laundering

supervisory role, the information is shared with the RFB. Similarly, the RFB also shares information with COAF when a money-laundering crime is discovered by the RFB in the course of its monitoring activities.

78. Over the three-year review period, there were 108 cases where the RFB reported suspicious activities to COAF and in ten cases analysed by COAF, information was also disseminated to the RFB. This information is analysed by COAF and, when a person is found to have breached the applicable anti-money laundering obligations, COAF will open an administrative procedure for those entities under its supervision. Depending on the level of seriousness of the breach, COAF may issue a warning or enforce a penalty such as a fine. If a serious criminal activity is found to have been carried out, COAF then hands over the case to the law enforcement authorities, namely the Public Prosecutors and the Federal Police, who will then proceed to enforce criminal sanctions, as appropriate (see also section A.1.6 on *Enforcement provisions to ensure availability of information*).

Tax Law

79. The Brazilian tax authorities have a significant amount of ownership information at their disposal, which is kept up to date on a yearly basis. The Corporate Taxpayer Register – CNPJ consists of a comprehensive record of identity information concerning the owners (except for SAs and SCAs), directors and members of the administrative council of legal entities (including companies, partnerships and foundations) of relevance for the tax administration (Normative Instruction RFB No. 1.183/11).

80. Likewise, the Individual Taxpayer Register – CPF is a wide-ranging database that contains information on resident and non-resident taxpayers (Normative Instruction RFB No. 1.042/10). In particular, non-resident natural and legal persons who own certain assets in Brazil, such as real estate, vehicles, participation in a company or partnership, bank accounts or investments, are required to register at the CPF or CNPJ (Normative Instruction RFB No. 1.042/10, article 3, XII; Normative Instruction RFB No. 1.183/11, article 5, XV).

81. In addition, all private legal entities (companies, partnerships, foundations) holding an office in Brazil, including those equated to them, their branches, subsidiaries and representatives in Brazil of the legal entities holding their main office abroad, even if tax immune,[7] tax exempt or inactive,

7. A tax immunity is established by the Federal Constitution (article 150) and it can only be changed through the legislative process for constitutional amendment. On the other hand, a tax exemption is established through infra-constitutional law to benefit certain persons and situations, ceasing to apply once these persons or situations cease to exist.

are obliged to submit annual tax returns to the tax authorities, whatever their purposes and nationalities may be (Law No. 8.981/95, article 56; Income Tax Regulation – RIR/99, approved by Decree No. 3.000/99, article 808). These declarations contain identity information concerning the legal owners of such legal entities,[8] i.e. whether a natural or a legal person, full name, taxpayer identity number (CPF/CNPJ) and capital share.

82. Since 2011, legal persons that make a payment or credit income to a foreign beneficiary, whether or not subject to withholding income tax in Brazil, are systematically required to disclose ownership information concerning the foreign beneficiary to the RFB. They are required to file a Withholding Income Tax Declaration (DIRF) containing the fiscal identification number (NIF) supplied by the foreign tax authority that identifies the natural or legal person, as well as the complete address of the foreign beneficiary (Normative Instruction RFB No. 1.033/10, articles 1, second paragraph, and 20).

83. Finally, all private legal entities are obliged to safeguard documentation concerning ownership and accounting information on the assets and the activities of the entity, or which concern acts or operations that modify or may modify its patrimonial situation for at least five years from the date when taxes become due and payable (Decree-Law No. 486/69, article 4; National Tax Code, articles 173, 174, 195 and 197; Complementary Law No. 123/06, article 26, II; Normative Instruction RFB No. 983/09, article 27). Therefore, a combination of obligations established under Brazilian civil, commercial and tax laws is sufficient to ensure the availability of ownership information concerning companies.

Tax law obligations in practice

84. There are approximately 195 million individual taxpayers (of which approximately 164 million are active) registered with the Individual Taxpayer Register (CPF) and 15.6 million active legal entities registered with the Corporate Taxpayer Register (CNPJ). Each state has its own Taxpayer Register and, whilst the procedures for registration vary slightly from state to state, all entities will be subject to the same information keeping obligations for tax purposes. In practice, all annual tax returns are filed online and the RFB makes regular checks to see that individuals and legal entities are complying with their tax filing obligations. Over the three year review period, the average compliance rate for legal entities was 73%. Most of the non-compliant legal entities are small domestic enterprises (sole proprietors, companies or partnerships) which are unaware of their tax filing obligations.

8. SAs and SCAs must inform in File 60 – Partners or Shareholders' Identification (*Ficha 60 – Identificação de Sócios ou Titular*), up to the 999th biggest shareholder during the taxable period.

85. In the course of filing an annual tax return, all companies have to submit updated identity information concerning the owners and administrators on a yearly basis and, where an annual tax return is not filed, the entity will receive a reminder from the RFB. If the company does not comply with the reminder to file a tax return within 30 days, their status as an entity will be listed as suspended until such time as the updated information has been received. The suspension of a taxpayer number is a serious issue for companies as a valid taxpayer number is required for all business dealings in Brazil. As of 30 September 2012, there were 208 171 corporate taxpayers (including companies and partnerships) in the suspended category. The RFB regularly cross-checks ownership information as provided in the corporate tax return with ownership information submitted by the owners (shareholders or partners) in compliance with their own tax filing obligations. In the case that a discrepancy is found, the RFB will then seek to request full ownership information from the Public Registrar. In the case of a tax return being submitted with incomplete or incorrect ownership information, this would be addressed in the course of a tax audit procedure as carried out by the RFB.

86. Information which has either been provided by taxpayers at the time of registration or updated on an annual basis is accessible online via the taxpayer databases. This includes the address of the legal entity, ownership information (except for SAs and SCAs) and current taxpayer status, if the taxpayer number has been suspended or cancelled. In addition, the tax authorities in charge of the CNPJ and CPF have indicated that they also have a close working relationship with the Public Trade Register and often ask them for updated information concerning certain entities in order to update their records in the taxpayer databases.

87. The RFB has a comprehensive system of monitoring in place, including desktop audits, onsite inspections and interviewing of taxpayers. These investigations are all part of the enforcement program carried out by the RFB consisting of desktop audits, onsite visits, the enforcement of on the spot fines for non-compliance and in certain cases the summoning of taxpayers to the offices of the RFB to produce information. The RFB confirmed that the taxpayers investigated each year are chosen as a result of careful risk analysis where certain factors such as taxpayer profile, history, industry, compliance with information filing obligations, customer base and payment profile are closely considered and analysed.

88. During the three-year review period, approximate 1.5 million taxpayers (61 131 of them legal entities) were investigated by the RFB. In the case of the auditing of individuals, taxpayers are selected by special sophisticated software program that performs a risk analysis. Those selected will have their affairs investigated via a desktop audit. During the review period, the RFB carried out over 1.3 million of such audits. In the case of the auditing of legal

entities, they will either receive an onsite visit from officers from the RFB or be requested to attend a meeting at the offices of the RFB. During the review period, the RFB carried out approximately 43 000 onsite inspections of legal entities and approximately 14 360 legal entities were summoned to visit the offices of the RFB. Across its monitoring and enforcement program, the RFB raised approximately BRL 90 billion (roughly USD 44 billion) in 2009, and this figure rose to BRL 92 billion (roughly USD 45 billion) and to BRL 109 billion (roughly USD 54 billion) in 2011.

89. In order to simplify tax filing procedures, Law No. 11.598/07 introduced a new program, "The National Integration Project" (*Projeto de Integração Nacional* – PIN) whereby a company can bring all documents to one office only for both company registration and registration for tax purposes. The purpose of this program is to simplify, accelerate and integrate the companies registration process between states and the federal government. There are currently seven states where the information provided to the Public Trade Registrar at the time of registration, is also simultaneously submitted to the Corporate Taxpayer Register. This information includes ownership and identity information and the registered office of the legal entity. This has initially been implemented as a mandatory procedure at the federal government level and will eventually be rolled out to all state offices by the end of 2014.

Foreign Companies

90. According to the *Terms of Reference*, where a company or body corporate has a sufficient nexus to another jurisdiction (for example by reason of having its place of effective management or administration there), that other jurisdiction will also have the responsibility of ensuring that ownership information is available.

91. A legal person is deemed to be resident in Brazil for tax purposes if it is incorporated under Brazilian law. A company incorporated under the laws of a foreign jurisdiction (foreign company) is not regarded as resident for tax purposes in Brazil by virtue of having its place of effective management or management in Brazil. Nevertheless, foreign companies operating in Brazil through a branch, subsidiary or office or doing business in Brazil through a commissionaire or representative may be equated to a resident legal entity for tax purposes and taxed with respect to income attributable to the branch, office or agent (Law No. 3.470/58, article 76; Law No. 4.131/62, article 42; Law No. 6.264/75, article 1; RIR/99, article 147, II and III; Civil Code, article 1.126).

92. Brazil recognises the existence and legal personality of a foreign entity incorporated under a foreign law. However, in contrast to many other legal systems, if a foreign company wishes to operate or do business in

Brazil, it must first obtain an authorisation from the MDIC, protocolled by the DNRC. A foreign company authorised to operate in Brazil must have a permanent representative in Brazil and be registered at the Public Trade Registrar before the beginning of its activities (Civil Code, articles 1.136 and 1.138; Law No. 8.934/94, articles 4, X and 32, II, c). Any changes to its articles of incorporation must be filed at the Public Trade Registrar and depend on the Executive power's approval to produce effects in Brazil (Civil Code, article 1.139).

93. The application for this authorisation must contain, among other information, the following documents: *(i)* evidence that the company is regularly incorporated according to its law of origin; *(ii)* full content of its articles of incorporation or by-laws; *(iii)* list of members of all administration bodies, including name, nationality, occupation, address and the share amount of each one of them in the capital; *(iv)* proof of appointment of a permanent representative in Brazil; and *(v)* latest balance sheet (Civil Code, article 1.134; Normative Instruction DNRC No. 81/99). In addition, Normative Instruction No. 81/99, issued by the DNRC, requires that this application must also contain: *(i)* a complete copy of the articles of incorporation or by-laws; and *(ii)* a list of the partners or shareholders, with the names, professions, residential address and their participation in the capital of the company, except in instances where it is impossible to meet the requirement due to the laws of the country of origin (Normative Instruction No. 81/99, article 2, II, III).

94. A foreign company authorised to operate in Brazil is subject to the Brazilian laws and courts for the acts or operations performed in Brazil, including the registration at the CNPJ, the payment of taxes with respect to Brazilian sourced income and filing of annual tax returns (Civil Code, article 1.137; Law No. 8.981/95, article 56; RIR/99, article 808; Normative Instruction RFB No. 1.183/11). As mentioned above (see section on *Tax Law*), such declarations contain identity information concerning the legal owners of such legal entities, i.e. whether a natural or a legal person, full name, taxpayer identity number (CPF/CNPJ) and capital share. As of 30 September 2012, there were 180 foreign companies operating in Brazil.

95. In addition, Law No. 9.613/98 dealing with money laundering crimes states that Brazilian or foreign individuals or legal entities operating in Brazil as agents, directors, attorneys, commissionaire or that, by any other means, acting on behalf of a foreign entity" are obliged to identify their clients and keep updated records for a minimum period of five years from the termination of the account or transaction (articles 9 and 10). If the client is a legal entity, the identification must include the natural persons authorised to represent it, as well as its owners (article 10, first paragraph).

Foreign companies in practice

96. Once a foreign company receives authorisation to operate in Brazil, they have 30 days to register information with the Public Trade Registrar. Like domestic companies, foreign companies are required to provide identity and ownership information concerning their partners and managers upon registration with the Public Trade Registrar and the Corporate Taxpayer Register (CNPJ). In addition, foreign companies must also file annual tax returns containing updated identity and ownership information.

97. Brazilian authorities have confirmed that during the three-year period under review, there have been three requests concerning ownership and identity information of foreign entities operating in Brazil. In all these cases, this information has been made available to the requesting jurisdiction. In two cases, this information was retrieved directly from the entity whilst, in the other case, the requested information was retrieved directly from the CNPJ.

Nominees

98. The concept of nominee that exists in some jurisdictions, in particular in common law jurisdictions, does not exist in Brazilian law. Where a person purports to hold property for the benefit of a third person, that third person would have no rights under Brazilian law to claim the property. Consequently, shares issued by companies registered in Brazil are in principle held by their beneficial owner, whose identity is known to (or accessible by) the company and the Brazilian authorities.

99. In certain situations involving foreign exchange transactions, acting on behalf of a third party as a frontman or providing false identity information is considered as fraud, subject to imprisonment between one and six years (Law No. 7.492/86 dealing with white-collar crimes, articles 21 and 22). Likewise, managers or administrators of financial or similar institutions may be found to be co-authors for the crime of forgery if they facilitate the opening of an account or transfer of funds in the name of a frontman, a non-existing natural person or legal entity or a liquidated legal entity (Law No. 8.383/91, article 64). In order to avoid committing this crime, financial institutions may ask the RFB to confirm their clients' registration at the CFP or CNPJ.

100. In addition, as further explained in section B below, the RFB may open a special supervision procedure (*Regime Especial de Fiscalização* – REF) if there is evidence that a legal entity is formed by persons other than the real owners, i.e. shareholders, quotaholders or partners (Law No. 9.430/96, article 33, VII; Normative Instruction RFB No. 979/09).

Nominees in practice

101. Brazilian tax authorities have confirmed that to date they have not encountered incidences where a person has been purporting to hold property or shares for the benefit of a third person. In cases where the RFB has been asked by a foreign competent authority to confirm the identity of a client's registration at the CFP or CNPJ, they have not found an incidence of false identity information or of a nominee purporting to be acting for another person. Furthermore, as yet the RFB has not had to open an REF procedure to investigate the possibility that a legal entity may have been formed by other persons other than the real owners.

Conclusion

102. Overall, very comprehensive obligations established under Brazilian civil, commercial and tax laws ensure the availability of ownership information concerning companies, either in the hands of public authorities (i.e. the Public Trade Registrar, the CVM, the BACEN, the RFB, etc.), the company itself (shareholder register) or custodians (financial institutions and other entities supervised by the CVM). These obligations are complemented by the anti-money laundering legislation. Nominee ownership is forbidden in Brazil. Foreign companies authorised to operate in Brazil must disclose ownership information to public authorities (i.e. the Public Trade Registrar and the RFB). In addition, they are required to have a permanent representative in Brazil who must keep their ownership information for at least five years under the anti-money laundering legislation.

103. The Brazilian authorities have indicated that ongoing monitoring and inspection procedures ensure that ownership information obligations are complied with. First, the obligations pursuant to civil and commercial law are presided over by the Public Trade Registrar which has a regular system of desk top examinations in place. Secondly, regulated companies will also be subject in practice to ongoing monitoring and supervision by the relevant regulator (see also section A.1.6 *Enforcement provisions to ensure availability of information).*

104. Finally, the tax registration and filing obligations imposed on natural and legal persons are monitored in practice by the RFB who regularly ensures that all persons registered for tax purposes are complying with their information keeping obligations under the tax law. A system of ongoing surveillance and monitoring of individuals and legal entities is continuously undertaken by the RFB and, in cases where there has been a breach of the information filing obligations, the relevant taxpayer number will be either suspended or, in very serious cases, cancelled.

105. Over the review period, six EOI requests concerning company ownership information were received by the RFB. The Brazilian authorities have confirmed that in three cases this information was already in the hands of the RFB in their taxpayer database. In the other three cases, this information was retrieved directly from the taxpayer. This information was mostly provided within a period of between 180 days and just over one year. Feedback from peers indicates that no issues have arisen with obtaining information concerning the ownership and identity information of companies, apart from delays.

Bearer shares *(ToR A.1.2)*

106. Since 1990, the issuance of bearer shares has been expressly prohibited in Brazil by Law No. 8.021/90 (Civil Code, article 907). Bearer shares existing prior to Law No. 8.021/90 coming into force may not be used, cashed-in, negotiated or traded in the securities exchange, their voting rights may not be exercised, and dividends may not be received until the bearer has been fully identified and a full declaration concerning the source of the shares has been made to the RFB. There is no market for these bearer shares. Based on a survey carried on by the CVM on 650 companies, the Brazilian authorities have indicated that only a small number of bearer shares remain outstanding, which represents, on an average, less than 0.1% of the capital of such companies.

107. Since 2000, Brazil has tried to eliminate the residual bearer shares through Bill No. 2.550/00, but the deadline for bringing this bill into law expired in 2011, resulting in the bill being archived. According to the Brazilian authorities, the CVM, the Ministry of Finance and other bodies are currently considering drafting a new bill to address the residual bearer shares issue.

108. As of 30 September 2012, residual bearer shares were estimated to be worth approximately BRL 2 billion (approximately USD 980 million) and the Brazilian authorities have indicated that approximately 80% of these shares are attributable largely to three companies. The CVM has embarked on an educational awareness program whereby, through the distribution of published information leaflets, they alert people to the possibility that they may be the holders of bearer shares. In the event that people are found to have bearer shares, they are encouraged to come forward and identify themselves to the company where these shares will then be converted to nominative shares.

Conclusion

109. Since 1990, the issuance of bearer shares has been expressly prohibited in Brazil. Although residual bearer shares do exist, it appears that the risk posed by them is minimal since only a very limited number which were issued in very narrow circumstances exist, and no economic benefit may be obtained or voting rights exercised without the identification of their owners. In light of these considerations, the gap is not considered to be material.

110. In practice, the Brazilian authorities have confirmed that, to date, no information regarding companies that had previously issued bearer shares has been requested. Furthermore, the CVM is in the process of implementing an education program for potential holders of bearer shares in order to encourage them to come forward and convert these shares into nominal shares. Even though the availability of ownership information concerning holders of bearer shares has not given rise to any practical issues to date, Brazil should take the necessary measures to ensure that appropriate mechanisms are in place to identify the owners of residual bearer shares in all instances and should continue to closely monitor the situation with respect to residual bearer shares in practice.

Partnerships *(ToR A.1.3)*

Types of Partnerships

111. There are six types of partnerships (*sociedades de pessoas*) that can be set up in Brazil:

- *Sociedade em Comum* (unregistered company): This category includes partnerships that are in the process of being established (but have not yet been registered) or have been deemed to be partnerships by the court. All partners are jointly and severally responsible for the social liabilities (Civil Code, articles 986 to 990).
- *Sociedade em Conta de Participação* – SCP (unincorporated joint venture): Such partnership, even if registered, has no corporate status. A SCP is established solely to conduct a specific undertaking for a specific period of time. The active partner performs this activity in his/her individual name and under his/her own and exclusive responsibility, sharing the profits with the silent partners (Civil Code, articles 991 to 996). There were 17 SCPs registered in Brazil, as of 31 March 2013.
- *Sociedade Simples* (civil law partnership): This partnership is set up for carrying on non-business activities (i.e. intellectual, scientific, literary or artistic activities). The partnership agreement must outline

how the partners are responsible for capitalising the business and the extension of their liability in relation to third parties (Civil Code, articles 997 to 1.000). As of 30 September 2012, there were 545 233 civil law partnerships registered in Brazil.

- *Sociedade em Nome Coletivo* (general partnership): Only natural persons can take part in this partnership. All partners are jointly and severally liable for the social liabilities. It can only be administered by partners (Civil Code, articles 1039 to 1044). As of 31 March 2013, there were 14 344 general partnerships registered in Brazil.
- *Sociedade em Comandita Simples* (limited partnership): Such partnership has two types of partners, i.e. general partners (*comanditados*) who are natural persons responsible for the management, being jointly and severally liable for social liabilities, and limited partners (*comanditarios*) who are natural or legal persons liable only up to the extent of their participation in social capital (i.e. the value of their quotas). The partnership agreement must specify the nature of each partner (Civil Code, articles 1.045 to 1.051). There were 1 101 limited partnerships in Brazil, as of 31 March 2013.
- *Sociedade cooperativa* (co-operative partnership): Co-operatives are always regarded as civil partnerships and they are subject to the same rules, except for particular characteristics pertaining to co-operatives only (Civil Code, articles 982 and 1.096). This type of partnership may be constituted without any social capital and is aimed at conducting non-profitable activities. The partners may have limited or unlimited liability for the co-operative's debts and ownership cannot be transferred to third parties (including through inheritance). They must be administrated by a minimum number of partners (but there is no cap) and the quorum to allow decisions of the general assembly is based on the number of partners (rather than the value of each partner's ownership) following the principle "one man, one vote" (Civil Code, articles 1.093 to 1.096). As of 31 March 2013, there were 35 302 co-operatives registered in Brazil.

Civil and Commercial Law

112. Unregistered companies can be characterised as a contract, and like a contract, its existence is not necessarily disclosed to the public. These partnerships do not have any legal capacity and personality up to the moment they are registered at the Public Trade Registrar (Civil Code, article 986). Therefore, they cannot act as entities separated from their partners and cannot hold real estate or assets. They have no income, deductions or credits for tax purposes, do not carry on business and cannot be compared to a

limited partnership. Therefore, these arrangements fall outside of the scope of the *Terms of Reference*.

113. SCPs are also characterised as a contract and there is no legal requirement for their registration at the Public Trade Registrar (though legal registration requirements exist for tax purposes, as described under section *Tax Law* below). Even if registered, these partnerships do not have any legal capacity and personality. However, these entities are treated as separate legal entities for tax purposes and they may have income, deductions or credits (Decree-Laws Nos. 2.303/86, article 7, and 2.308/86, article 3; RIR/99, articles 148, 149, 257). Therefore, these arrangements are within the scope of the *Terms of Reference*.

114. Civil law partnerships must be registered with the Civil Registry Office for Legal Entities within 30 days from establishment (Civil Code, article 998; Law No. 6.015/73, articles 114, 120 and 121). Conversely, general partnerships and limited partnerships are typically commercial partnerships that are established for carrying on business activities and, like companies, they must be registered with the Public Trade Registrar (Civil Code, articles 967 and 982). Co-operatives are always regarded as civil partnerships, but must be registered at the Public Trade Registrar (Laws Nos. 5.674/71, article 18, and 8.934/94, article 32). In any event, all partnerships must disclose ownership and identity information concerning their partners and administrators, as part of the registration procedure.

115. Civil law partnerships, co-operatives, general partnerships and limited partnerships are established by means of a private or public written agreement, setting out, among other things, the following ownership information: *(i)* name, nationality and resident or seat of administration of all the owners (including limited partners); *(ii)* their quota in the social capital and participation in the results; *(iii)* whether they are subsidiary liable for the company's obligations; and *(iv)* natural persons who are responsible for the administration of the company, as well as their powers and responsibilities (Civil Code, articles 997, 1.041, 1.045 and 1.046). Any changes to partnership agreement concerning ownership information must be unanimously approved by the partners and filed with the Civil Registry Office or the Public Trade Registrar, as the case may be (Civil Code, article 999).

116. A partnership incorporated under the laws of a foreign jurisdiction (foreign partnership) which establishes a branch, subsidiary or office in Brazil will be subject to the same requirements concerning authorisation and registration that are applicable to foreign companies (see section on *Foreign Companies* above).

Tax Law

117. Like companies, all partnerships are required to register with the CNPJ and to submit updated identity information concerning the owners and administrators on a yearly basis (Normative Instruction RFB No. 1.183/11). Furthermore, these entities, even if tax immune, tax exempt or inactive, are obliged to submit annual tax returns to the RFB containing identity information concerning their legal owners, i.e. whether a natural or a legal person, full name, taxpayer identity number (CPF/CNPJ) and capital share (Law No. 8.981/95, article 56; RIR/99, article 808). Even though SCPs have no legal personality, they are equated to legal entities for tax purposes and they are subject to the same ownership and identity disclosure requirements (Decree-Law No. 2.303/86, article 7; Decree-Law No. 2.308/86, article 3; RIR/99, articles 148 and 149).

Availability of partnership information in practice

118. In practice, the obligations set out for partnerships under the Civil Code are presided over by the Public Trade Registrar. In order to ensure that partnerships are complying with these obligations, the Registrar has a comprehensive system of inspections carried via internal examinations in place during which it verifies, amongst other things, that partnerships are complying with their information obligations as set our under the civil and commercial code (see also section A.1.1 *Registration in practice for companies*).

119. Similarly with regards to the obligations under the tax law, in practice all partnerships are subject to the same ongoing monitoring process by the RFB as carried out for companies. All partnerships will have to submit updated identity information concerning the owners and administrators on a yearly basis and, where not received, the entity will receive a reminder from the RFB. If the partnership does not comply with the request within 30 days, their status as an entity will be listed as suspended until such time as the updated information has been received. As of 30 September 2012, there were 208 171 corporate taxpayers (including companies and partnerships) in the suspended category. As a valid taxpayer number is required for all business dealings in Brazil, its suspension is a very serious matter for the partnership and will greatly impact on their day-to-day operations (see also section A.1.6 *Enforcement provisions to ensure availability of information*).

Conclusion

120. Overall, very comprehensive obligations established under Brazilian civil, commercial and tax laws ensure the availability of ownership information concerning partnerships, either in the hands of public authorities (i.e. the

Public Trade Registrar, the Civil Registry Office, the RFB, etc.) or the partnership itself (partnership agreement). SCPs are not required to register with the Public Trade Registrar but they must disclose ownership information to the RFB when submitting their annual tax return.

121. Over the three-period under review, Brazil received 15 EOI requests for ownership information related to partnerships. In all cases, the requested information was available and was provided within one year. In five cases, the information was already in the hands of the RFB and in eight cases information was retrieved directly from the taxpayer. In the other two cases, this information was retrieved from the Public Registrar. The average time for providing this information was between 180 days and one year. Feedback from peers confirms that the ownership and identity information of partnerships was available in all cases and no concerns were expressed, apart from delays.

Trusts *(ToR A.1.4)*

122. The concept of "trust" does not exist under Brazilian law, and Brazil has not signed The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition. Under Brazilian law, there are no obstacles that prevent a Brazilian resident from acting as a trustee or administrator, or a foreign trust from investing or acquiring assets in Brazil. Therefore, foreign trusts may do business in Brazil directly or through a resident trustee or administrator.

123. The Brazilian authorities have indicated that the trustees of foreign trusts are very rarely residents in Brazil and foreign trusts are very rarely administered in Brazil. Several factors would explain this situation. In particular, the fact that Brazil does not recognise the concept of trusts creates a legal risk for the persons involved in a trust. The assets transferred to a trust may be deemed to be owned by the resident trustee, and therefore considered part of his/her assets, e.g. for income tax purposes, in case of death (for inheritance purposes) or concerning potential actions of creditors. Nevertheless, the fiduciary relationship between the trustee, settlor and beneficiaries may be relevant in specific situations, in which case the resident trustee will be subject to disclosure requirements, as further described below.

Exchange Control and Stock Market Regulations

124. Under Brazilian law, a foreign trust may directly invest or acquire assets in Brazil. In such a case, the foreign trust is deemed to be a foreign legal person. Pursuant to Law No. 4.131/62, direct investments in Brazilian companies or assets must be registered with the BACEN within 30 days from the date the funds are transferred to Brazil and the foreign investor's identity

must be disclosed as part of the registration process (Law No. 4.131/62, articles 3 and 5; Decree No. 55.762/65, articles 3 and 9). Non-compliance with this registration requirement, omission of information or inclusion of false information is punishable with a fine of BRL 250 000 (approximately USD 123 000) (Law No. 4.131/62, articles 6 and 58, as amended by Provisional Measure No. 2.224/01, article 4).

125. Likewise, a foreign trust holding portfolio investments in Brazil must be registered at the CVM. Under Resolution CMN No. 2.689/00, the identity of the foreign investor, its Brazilian legal representative and its authorised custodian must be disclosed as part of the registration process. In addition, Normative Instruction CVM No. 301/99 imposes enhanced CDD requirements on financial intermediaries dealing with foreign investors, particularly when established through a foreign trust or a foreign company issuing bearer shares (article 6, first paragraph, I). Such controls include identification of the Brazilian legal representative/attorney, the trustee, and the beneficial owner.

126. While Normative Instruction CVM No. 301/99 does not specifically define beneficial owner, this concept (*efetivo beneficiário*) has been defined in double tax treaties concluded by Brazil and in Law No. 12.249/10 as "the individual or legal entity that is not incorporated with the sole or main purpose of tax saving, who derives income on his/its own behalf and not as an agent, fiduciary administrator or authorised representative acting on behalf of a third party" (article 26, first paragraph). According to the Brazilian authorities, this definition is generally applicable for domestic law purposes.

127. In practice, foreign investors investing directly in Brazil via the securities market will be subject to the supervision of the CVM. Although trusts are not recognised as legal arrangements in Brazil, since 2010, following a FATF/GAFI recommendation, an enhanced programme has been in place for monitoring and supervision of these arrangements. As part of this enhanced programme undertaken by the CVM, a specific module was added to ensure compliance with the requirement for investors to state where they are acting for a foreign trust (Normative Instruction CVM No. 301/99). In addition, since 2012, the CVM has adopted a risk based approach for the administration and monitoring of investment funds, and in particular, those where the investor may be acting for a foreign trust. These changes demonstrate that the CVM has recognised that, due to the increasing volume of foreign investments into Brazil, awareness of foreign trusts is necessary in order to ensure effective monitoring. Officials from the CVM have confirmed that since these changes were introduced in 2010, there has not been any case where an investor has reported that they were acting for a foreign trust. Where other assets, such as real estate and vehicles, are attributed to a foreign trust, it must be registered at the CNPJ (see section *Tax Law* below for further details).

Anti-Money Laundering Law

128. Pursuant to Law No. 9.613/98 dealing with money laundering crimes, "natural persons or legal entities, national or foreigner, operating in Brazil as agents, directors, attorneys, commissionaire or that, by any other means, acting on behalf of a foreign entity" are obliged to identify their clients and keep updated records for a minimum period of five years from the termination of the account or transaction (articles 9 and 10). If the client is a legal entity, the identification must include the natural persons authorised to represent it, as well as its owners (article 10, first paragraph).

129. The Brazilian authorities have indicated that the scope of these provisions is broad enough to capture fiduciaries (i.e. resident trustees and administrators) acting "by any other means" on behalf of foreign trusts. This interpretation appears to be confirmed by Normative Instruction CVM No. 301/99, which further regulates the registration requirements established by articles 9 and 10 of Law No. 9.613/98, explicitly referring to foreign trusts under article 6, first paragraph, I. As described above, this regulation imposes enhanced CDD requirements on financial intermediaries dealing with foreign trusts (article 6, first paragraph, I).

130. As outlined above (see section A.1.1 *Anti-money laundering laws*), Law No. 12.683/12, as approved by the National Congress on 9 July 2012, has broadened the scope of the anti-money laundering law to now cover designated non-financial businesses and professionals. This means that the obligations as set out under this statute have been extended to a number of professionals such as lawyers, accountants, notaries and private company service providers. These designated professionals will now be subject to information keeping obligations and reporting on clients for whom they act in a fiduciary capacity. However, as Law No. 12.683/12 has only been in effect since 10 July 2012, it is largely untested and it is recommended that Brazilian authorities closely monitor compliance by designated professionals, acting as trustees, with information keeping and reporting obligations.

131. All Brazilian natural persons and legal entities have an obligation to monitor situations where they are transacting with a non-resident person, such as where an investor is acting for a foreign trust. In all transactions involving foreign investors, the relevant financial institution will have to identify the risk level they represent within their portfolio and continue to monitor such transactions with foreign investors. In cases of high risk, the financial institution must also prepare and submit a suspicious transaction report to COAF detailing such transactions. Both COAF and the CVM have confirmed that financial institutions regularly file risk reports with COAF, including cases where an investor is acting for a foreign trust. These reports are then subject to follow-up investigative procedures.

Tax Law

132. The Brazilian tax law does not contain specific provisions on the taxation of the assets or income derived through foreign trusts with a link to Brazil. Nevertheless, ownership information must be kept if a trustee (professional or not) is resident in Brazil, the trust is administered in Brazil or certain assets are located in Brazil.

133. The tax authorities may attribute, for income tax purposes, the assets and income of a non-recognised foreign trust according to Brazil's own legal and tax system. As a result, a trustee resident in Brazil, who owns assets and earns income in his/her own name but on behalf of the foreign trust, would be taxed for all the assets and income as being his/her own. These assets and income are subject to tax as any other assets or income of the trustee, as well as any benefit distributed to beneficiaries, must be declared in their tax returns. Conversely, a resident administrator may avoid such a tax liability by providing evidence of the existence of such a fiduciary relationship (typically, the trust deed) and disclosing the identity of the settlor and beneficiaries to the RFB (RIR/99, articles 806 and 807).

134. If the Brazilian tax authorities consider an act performed by a resident trustee or administrator as a wilful misconduct, fraud, or simulation, the situation may be considered as crime against the tax order (Law No. 8.137/90, articles 1 and 2; Decree-Law No. 2.848/40 establishing the Penal Code, article 334). This could be the case where the foreign trust is used to hide the identity of the settlor or the beneficiaries. Therefore, a resident trustee or administrator is required to keep ownership information concerning a foreign trust.

135. All income derived from Brazilian sources by the foreign trust or payments made to foreign beneficiaries, except for dividends, are subject to withholding income tax (RIR/99, articles 682 and 684). Since 2011, legal persons (including a resident trustee or administrator) that make a payment or credit income to a foreign beneficiary, whether or not subject to withholding income tax in Brazil, are systematically required to disclose ownership information concerning the foreign beneficiary to the RFB. They are required to file a Withholding Income Tax Declaration (DIRF) containing the fiscal identification number (NIF) supplied by the foreign tax authority that identifies the natural or legal person, as well as the complete address of the foreign beneficiary (Normative Instruction RFB No. 1.033/10, articles 1, second paragraph, and 20).

136. In addition, trustees and administrators resident in Brazil (professional or not) are subject to general record-keeping requirements applicable to any person resident in Brazil, with respect to the assets held and income earned on behalf of the foreign trust (Civil Code, articles 1.184 and 1.186,

RIR/99, articles 210). This typically includes the trust deeds and therefore the names of the settlors and designated beneficiaries of the trust, and the nature of the assets in the trust that have generated the income.

137. Moreover, when certain assets attributed to the foreign trust are located in Brazil, such as real estate, vehicles, participation in a company or partnership, bank accounts or investments, the foreign trust must be registered at the CNPJ (Normative Instruction RFB No. 1.183/11, article 5, XV). When a foreign trust holds such assets in Brazil, its Brazilian legal representative will be personally responsible for complying with the general tax obligations resulting from the transactions performed on behalf of the foreign trust and for updating the information registered at the CNPJ (National Tax Code approved by Law No. 5.172/66, article 128; Law No. 8.981/95, article 79; RIR/99, article 780).

138. Finally, the tax administration can use all the powers at its disposal to seek and request any information not already in its possession, as further described in Section B below. Therefore, the RFB may ask the resident trustee, administrator or the beneficiaries for all information necessary to determine the amount of taxable income or assets (Law No. 2.354/54, article 7; Decree-Laws Nos. 5.844/43, article 123, and 1.718/79, article 2; National Tax Code, articles 195 and 197; RIR/99, articles 927 and 928).

139. Although common law trusts are not recognised in Brazil, Brazilian authorities recognise that in limited circumstances a foreign trust may invest in Brazil or a resident may act as trustee of a foreign trust. As trusts are not recognised, where a foreign trust directly holds investments or assets in Brazil, it must have a Brazilian legal representative. This person will be personally responsible for complying with the general tax obligations resulting from transactions performed on behalf of the foreign trust and for maintaining accounting records (including underlying documents) concerning the foreign trust's assets and activities for at least five years (National Tax Code, article 128; Law No. 8.981/95, article 79; RIR/99, articles 264, 527 and 780).

140. A search of the corporate taxpayer database for the word "trust" produced 5 870 results of entities with the word "trust" in their legal name representing 0.02% of the total number of corporate taxpayers. It is not known, however, if all of these results correspond to foreign trusts administered by a Brazilian resident trustee. The RFB confirmed that, in the course of their supervisory and monitoring role, they have not found any cases where resident, acting as trustee for a foreign trust or a non-resident trust investing in Brazil, has been in breach of his/her tax filing obligations. The Brazilian authorities have reported, and feedback from peers confirms, that to date there have been no information exchange requests related to ownership and identity information of a foreign trust.

Conclusion

141. Foreign trusts may invest in Brazil directly or have Brazilian trustees or administrators, but the latter situation rarely occurs according to the Brazilian tax authorities. Trustees or administrators resident in Brazil are not subject to specific obligations to keep identity information regarding settlors, trustees and beneficiaries of foreign trusts. Nevertheless, the conjunction of the exchange control and securities market regulations, the anti-money laundering obligations and the general tax obligations to maintain and submit information to the tax authorities, permit that information regarding the settlors, trustees and beneficiaries of trusts is available to the Brazilian authorities. The extension of customer due diligence obligations under the anti-money laundering regime to cover many designated professionals who may act as fiduciaries for foreign trusts should further ensure that ownership information for foreign trusts is available. It can, therefore, be concluded that Brazil has taken reasonable measures to ensure that ownership information is available to its competent authorities in respect of express foreign trusts administered in Brazil or in respect of which a trustee is resident in Brazil.

142. In practice, Brazil has not received any request for information concerning trusts in the last three years, which appears to indicate that the presence of foreign trusts in Brazil or their relevance for EOI purposes is not very significant. In case such a request should arise, the Brazilian authorities are confident that this information should be readily available either directly from their own taxpayer database, from other government authorities, such as the CVM or from service providers. Nevertheless, the Brazilian authorities should continue to closely monitor foreign trusts and Brazilian residents acting as trustees for a foreign trust to ensure that identity information is made available in all cases.

Foundations *(ToR A.1.5)*

143. Under Brazilian law, it is possible to establish two types of foundations: public and private. Public foundations must be established with public funds through a specific law (Federal Constitution, article 37, XIX; Decree-Law No. 200/67, article 5, IV). Private foundations may only be incorporated by a public deed or a will and only for religious, moral, cultural and assistance purposes (Civil Code, article 62). Hence, foundations (public and private) are non-profit legal entities established by natural or legal persons or State public sector entities, exclusively for listed public-interest purposes. Under Brazilian law, foundations may not be established for family purposes or for the benefit of an individual or a group of individuals. As of 30 September 2012, there were 12 036 foundations registered in Brazil.

144. Private foundations are strictly regulated by the Civil Code (articles 62 to 69) and the Civil Process Code established by Law No. 5.869/73 (articles 1.199 to 1.204). The articles of incorporation and any changes thereto must be submitted to the Public Attorney's Office for prior approval and must be then filed at the Civil Registry Office for Legal Entities before the beginning of its activities (Civil Code, article 45; Law No. 6.015/73, articles 114, 120 and 121; Civil Process Code, articles 1.200 and 1.203). The articles of incorporation must contain ownership and identity information concerning the founders and administrators, among other information, which must also be disclosed to the Civil Registry Office as part of the registration procedure (Civil Code, article 46, II; Law No. 6.015/73, article 120, VI).

145. In addition, private foundations are required to register with the CNPJ and to submit updated identity information concerning the founders and administrators on a yearly basis (Normative Instruction RFB No. 1.183/11). Even if tax immune, exempt or inactive, these entities are obliged to submit annual tax returns to the RFB (Law No. 8.981/95, article 56; RIR/99, approved by Decree No. 3.000/99, article 808).

Availability of foundation information in practice

146. In practice, the Civil Registry office monitors the registration of foundations and performs an annual program of inspections to ensure they comply with their information disclosure obligations. No issue regarding the disclosure of such information has been found in practice. The RFB also continuously monitors and surveys private foundations ensuring that in practice they provide updated ownership information. No specific statistics were kept on the number of inspections or onsite visits carried out during the period under review.

Conclusion

147. Overall, very comprehensive obligations established under Brazilian civil, commercial and tax laws ensure the availability of ownership information concerning foundations, either in the hands of public authorities (i.e. the Civil Registry Office, the Public Attorney's Office, the RFB, etc.) or the foundation itself (articles of incorporation).

148. As of March 2013, foundations represented a small percentage of total entities operating in Brazil (less than 1%). In practice, there were no EOI requests concerning public or private foundations over the three-year review period and no issues were encountered regarding the availability of information on foundations during the course of the review.

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

149. Jurisdictions 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.

Civil and Commercial Laws

150. All relevant legal entities (companies, partnerships and foundations) must be registered with the Public Trade Registrar or the Civil Registry Office before the beginning of their activities in order to acquire legal personality (Civil Code, articles 45 and 1.150). LTDAs are also required to notify the Public Trade Registrar of any changes to ownership information within 30 days (Civil Code, article 999). Legal representatives, owners (quotaholders, shareholders or partners) or administrators of such legal entities are liable for losses and damages for non-compliance with these registration requirements in the event of omission or delay (Civil Code, article 1.151, third paragraph). In addition, omission of information or inclusion of false information in the articles of incorporation or by-laws may be qualified as a crime of fraud or misrepresentation and punishable with imprisonment between one and five years and a fine (Penal Code, articles 49, 177 and 299).

151. Pursuant to article 100, I of Law No. 6.404/76, SAs and SCAs must keep an updated shareholder register stating the shareholders' names and number of shares, among other information. Administrators are liable for any loss caused when acting: *(i)* within the scope of their authority with fault or fraud; or *(ii)* contrary to the provisions of the law or of the by-laws (Law No. 6.404/76, article 158). Particularly with regard to SAs, custodians and intermediate financial institutions (sub-custodians) are required to keep proper documentation for the identification of the shareholders. Breach of this obligation is considered a severe offense and punished with suspension or cancellation of the authorisation to render custodian services granted by the CVM or a fine not exceeding the highest of BRL 500 000 (around USD 246 000), 50% per cent of the amount of the shares or three times the amount of the economic advantage gained or loss avoided due to this violation (Law No. 6.385/76, article 11).

152. The Registrar has reported that since 2009 their review of registered entities has been performed internally via desk top examinations only where they review registered entities that are selected based on risk assessment. In the case that issues related to information keeping obligations are encountered in the course of an examination, the usual procedure is to issue

a recommendation and monitor this entity closely until the breach has been rectified. As this is the usual procedure for rectifying non-compliance with information keeping requirements, it has not been necessary to issue any fines or penalties. However, the Registrar confirmed that should an entity be found to have seriously violated these obligations, they would have no issue in enforcing these fines.

153. Since 1990, the issuance of bearer shares has been forbidden in Brazil. Anyone issuing bearer shares may be punished with imprisonment from one to six months while the bearer may be punished with imprisonment from 15 days to three months and a fine (Penal Code, article 292). In addition, a person responsible for any payments to or redemption of shares of a non-identified beneficiary may be subject to a fine of the same amount of the transaction (Law No. 8.021/90, article 1). Officials from the CVM have confirmed that, since the issuance of bearer shares was prohibited in 1990, there has been no case of any entity issuing bearer shares.

Regulated Activities

154. Domestic or foreign financial institutions may not operate in Brazil without an authorisation by the BACEN. In case of violation of this obligation, the financial institutions, their directors, members of administrative, fiscal and similar councils, and managers may be punished with a number of penalties depending on the seriousness of the offense, ranging from warnings and fines (up to 200 times the highest minimum wage in Brazil) to suspension of their operations and functions, cancellation of their authorisation and imprisonment from one to two years (Law No. 4.595/64, article 44). Similar penalties are applicable to insurance companies operating with the authorisation of the SUSEP (Decree-Law No. 73/66, article 108).

155. As outlined above, the BACEN has a comprehensive system of onsite inspections of licensed entities in place. Where entities are found to be in breach of these obligations, the BACEN will initially try to resolve the issue in a conciliatory manner. However, for very serious breaches, a punitive administrative procedure will be initiated and depending on the outcome, a range of penalties may be enforced. In practice, this operates as a court-like procedure and is only opened in extreme cases due to the severity of the penalties imposed. Over the three-year review period, the BACEN opened five administrative procedures for breaches related to anti-money laundering. These resulted in BRL 3.6 million (USD 1.8 million) in fines being applied and two people being disqualified from director or management roles in Brazil for a period of three years.

156. The CVM acts as the regulator for the securities market. In cases where breaches of compliance obligations have been found, the CVM will

open an administrative procedure to investigate the incident and the enforce penalties, where appropriate. Over the three-year review period, 28 736 such procedures were opened, resulting in the application of 363 punitive measures. However, not all of these related to ownership keeping requirements.

Anti-Money Laundering Law

157. Non-compliance with anti-money laundering obligations set forth under Laws Nos. 9.613/98 and 12.683/12 may be punished with a number of penalties depending on the seriousness of the offense, ranging from warnings and fines (not exceeding 1% to 200% of the operation amount, 200% of the profit made or that presumably would have been made with the operation, or BRL 200 000 [approximately USD 98 000]) to suspension of the administrator's functions and cancellation of authorisation to operate (article 12).

158. In practice, COAF presides over the anti-money laundering obligations. Whilst the supervision of compliance with the obligations as set out under the anti-money laundering is primarily undertaken by the supervisory bodies for regulated entities, COAF is also responsible for indirect supervision of those natural persons and legal entities subject to the anti-money laundering regulations. A RFB representative is also a member of the board of COAF and both parties have a good working relationship to ensure that obligations regarding ownership and identity information are complied with. Whilst there is no mandatory obligation for the RFB to undertake such supervision with COAF, there have been incidences where both parties have worked together depending on the nature of the case. In any incidence of non-compliance with customer due diligence obligations, as set out under the anti-money laundering regulations, the initial step will be an extensive discussion with the obliged person in order to fully understand and assess the situation and perform a preliminary appraisal.

159. Should an entity be found to be in breach of the obligations, as set out under the anti-money laundering regime, a formal administrative proceeding before an administrative court will be initiated Depending on the outcome of these proceedings, the entity may then receive a warning, fine or ultimately the cancellation of their licence. COAF has confirmed that there were seven formal proceedings undertaken in 2009, 15 in 2010 and 30 in 2011. Out of the seven formal administrative proceedings initiated in 2009, six of these resulted in a fine and in one of these cases a fine and a warning were imposed. In 2010, out of the 15 formal proceedings initiated, six resulted in the imposition of a fine, seven were dismissed and two are still ongoing. In 2011, out of the ten formal proceedings initiated, six resulted in the imposition of penalties which were a mixture of fines and warnings whilst four cases are awaiting a decision. COAF has confirmed that all of these related to failure to comply with customer due diligence (CDD) obligations.

Tax Law

160. If a domestic or foreign legal entity fails to file any annual income tax return with the RFB within the deadline (including the DIRF), this delay will be subject to a fine ranging from 2% to 20% of the income tax due, calculated per month or fraction thereof, observed the minimum fine of BRL 500 (USD 246) applicable to most legal entities or BRL 200 (USD 99) applicable to legal entities benefiting from a special regime (Law No. 10.426/02, article 7, as amended; Complementary Law No. 123/06, article 38, third paragraph; Normative Instruction RFB No. 197/02, article 1; Normative Instruction RFB No. 983/09, articles 26 and 27). In addition, fines ranging from BRL 20 (USD 9) to BRL 100 (USD 49) apply for each group of ten fields containing inaccurate, incomplete or omitted information.

161. If domestic and foreign entities operate in Brazil without registration at the CNPJ, the RFB will summon their legal representatives, owners or managers to perform this registration within 10 days and the registration is made *ex officio* in case of non-compliance (Normative Instruction RFB No. 1.183/11, article 21). Furthermore, legal entities which are not registered at the CNPJ may not open bank accounts or own certain assets which transfers are subject to public registration. In addition, as further explained in section B below, the RFB may open a special supervision procedure (*Regime Especial de Fiscalização* – REF) if a taxpayer performs a transaction subject to taxation, without the due registration in the CNPJ or the CPF (Law No. 9.430/96, article 33, IV; Normative Instruction RFB No. 979/09).

162. The Brazilian authorities have confirmed that the RFB, in practice, undertakes regular checks to see that individuals and entities are complying with their tax filing obligations. Individuals registered with the Individual Taxpayer Register (CPF) and legal entities registered with the Corporate Taxpayer Register (CPNJ) are subject to strict identity controls and are required to file their annual tax returns online. As discussed above (see section A.1.1 *Tax Law obligations in practice*), in the case of failure to submit a tax return or to comply with tax filing obligations, a natural or legal person's taxpayer number can be suspended for a period of 30 days or longer and, in very serious cases, may even be cancelled.

163. As at March 2013, there were approximately 12% of registered individuals and less than 1% of registered legal entities whose taxpayer number had been suspended whilst further investigations were being conducted by the RFB. The RFB has indicated that, whilst some of these cases relate to breach of information keeping requirements and failure to lodge a tax return, many are related to investigations involving irregularities in the calculation of taxes payable, such as in the income amounts declared. The suspension of a taxpayer number is a serious issue for both individuals and business entities as a valid taxpayer number is required for all business dealings in Brazil.

164. In extreme circumstances, where there have been gross violations of tax filing obligations the partnership's taxpayer number may also be cancelled. Whilst all of those instances where taxpayer numbers have been suspended or cancelled do not relate directly to information keeping requirements, they demonstrate active enforcement of penalties in cases where taxpayers are not complying with their tax filing obligations. Furthermore, where a legal entity fails to comply with tax filing requirements within the prescribed time, this delay is subject to fines. In addition, fines are applied in cases of inaccurate, incomplete or omitted information. Furthermore, the RFB may also summon natural persons and legal entities, taxpayers or not, and other related parties, to provide any information and/or clarification required by the RFB in the exercise of its duties, within a stipulated period of time.

165. Over the review period, the RFB has also regularly enforced fines where they have found individuals and legal entities to not be in compliance with their tax filing obligations (see also subsection *Tax law obligations in practice* under section *Company ownership information).* In 2009, approximately BRL 87 million (roughly USD 43 million) was collected in fines from legal entities and approximately BRL 1.7 million (roughly USD 855 000) was collected from individuals. In 2010, approximately BRL 2 billion (roughly USD 1 billion) was collected in fines from legal entities and approximately BRL 977 000 (roughly USD 481 000) was collected from individuals. In 2011, approximately BRL 81 million (roughly USD 40 million) was collected in fines from legal entities and BRL 1.2 million (roughly USD 616 000) was collected from individuals.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

Phase 2 rating
Compliant.

A.2. Accounting records

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

166. A condition for exchange of information for tax purposes to be effective, is that reliable information, foreseeably relevant to the tax requirements of a requesting jurisdiction is available, or can be made available, in a timely manner. This requires clear rules regarding the maintenance of accounting

records. This section covers such obligations to maintain reliable accounting records which are found in the Civil Code and other commercial laws governing the various types of relevant entities covered by this report, as well as in the National Tax Code and other tax laws.

General requirements (ToR A.2.1), Underlying documentation (ToR A.2.2) and Document retention (ToR A.2.3)

Civil and Commercial Laws

167. Under the Civil Code, all businesspersons are subject to general and consistent record keeping obligations, apart from other commercial laws governing particular entities or activities (Civil Code, article 1.179).[9] As explained in Section A above, the term "businesspersons" covers all natural persons acting in a professional capacity (e.g. a professional trustee of a foreign trust) and all legal entities conducting business activities[10] (i.e. companies, general partnerships and limited partnerships). Cooperatives and foundations are also required to follow the general accounting requirements applicable to commercial entities, as well as other specific obligations set forth by Resolutions CFC Nos. 920/01 (item 10.8.1.3) and 837/99 (10.4.1.2).

168. Businesspersons are obliged to maintain accounting records, mail and other documents concerning their activities, which correctly explain their transactions (Civil Code, article 1.184), which enable their financial position to be determined with reasonable accuracy at any time and which allow financial statements to be prepared (Civil Code, article 1.186). These general record keeping obligations are equally applicable to foreign entities with a branch, subsidiary or office in Brazil (Civil Code, article 1.195). In principle, these accounting records are confidential, but an explicit exception is made

9. E.g. corporations which shares are publicly traded on the stock market must prepare their financial statements according to the international accounting standards and have them audited by independent auditors (Law No. 6.404/76, articles 176 and 177, as further regulated by the CVM).

10. The term "business activities" is defined as concerned with the production or circulation of goods or services (article 966, Book II of the Civil Code). This term is broadly interpreted by the Brazilian authorities to include holding companies established in Brazil. Conversely, intellectual, scientific, literary or artistic activities are regarded as non-business activities, except when conducted as a business (article 966, sole paragraph). Nevertheless, these entities are obliged to safeguard reliable accounting records for tax purposes and they may not opt for the simplified tax regime available for micro companies and small-sized companies (see *Tax Law* below).

for access by the tax authorities in the exercise of their duties (Civil Code, articles 1.190 and 1.193).

169. The entities and their accountants are jointly liable for losses and damages cause by non-compliance with these record keeping requirements (Civil Code, article 1.177 and 1.178). In addition, such accountants could have their professional licenses suspended from six month to one year, for two years or indefinitely, depending on the seriousness of this violation (Law No. 12.249/2001, article 27). Finally, including false accounting information in the records may be qualified as a crime of fraud, punishable with imprisonment between one and five years and a fine (Penal Code, articles 171, 298, 299 and 304).

170. As clarified by Resolution CFC 1330/2011 of the Federal Accounting Council, this requirement also covers underlying documents, including all documents, books, papers, records, invoices, contracts and others internal or external documents that support or form part of the accounting records (item 26). The accounting records and underlying documents must be kept insofar as legal actions that may be pertinent have not prescribed by the statute of limitations (Civil Code, articles 1.179 and 1.194). As a general rule, civil law actions are prescribed after 10 years unless a shorter timeframe is established by law (Civil Code, articles 205 and 206). Under the National Tax Code, the statute of limitations period is five years from the date in which taxes become due and payable (article 174).

Tax Law

171. Regardless of the applicable tax regime, all private legal entities (companies, partnerships, SCPs, foreign entities with a branch, subsidiary or office in Brazil and foundations) are obliged to safeguard documentation concerning ownership and accounting information on the assets and the activities of the entity, or which concern acts or operations that modify or may modify its patrimonial situation for at least five years from the date in which taxes become due and payable (Decree-Law No. 486/69, article 4; National Tax Code, articles 173, 174, 195 and 197; Complementary Law No. 123/06, articles 26 and 27; Law Nos. 8.218/91, article 14; 8.383/91, article 62 and 8.981/95, article 45; RIR/99, articles 253, 264 and 527; Normative Instruction RFB No. 983/09, article 27). Nevertheless, specific tax rules apply according to the type, sector and size of the entity.

172. Certain legal entities must be taxed under the actual profit regime including the ones: *(i)* obtaining a total revenue in the preceding calendar-year above BRL 48 million (roughly USD 23 million) or fraction thereof if incorporated less than 12 months ago; *(ii)* performing certain regulated activities, including financial and similar institutions, brokers, leasing

companies, credit cooperatives and private insurance companies; *(iii)* deriving capital profits, income or earnings from abroad; *(iv)* benefiting from tax incentives; and *(v)* rendering cumulative and continuous advisory services on credit management, selection of risks, administration of payable and receivable accounts and purchase of credit rights resulting from factoring (Law No. 9.718/98, article 14).

173. Legal entities taxed under the actual profit regime (i.e. net profit of the determination period adjusted by the additions, exclusions or compensations prescribed or authorised by the tax legislation) are required to keep: *(i)* accounting records in accordance with commercial and tax laws, that cover all its operations, the results from its activities within the national territory, as well as the profits, income and capital gains made abroad; *(ii)* a journal updated on a daily basis reflecting all the transactions as well as the acts that may modify patrimonial situation of the legal entity; and *(iii)* a ledger or forms used to summarise and totalise, by account or sub-account, the inputs made into the journal (RIR/99, articles 251, 258 and 264).

174. Legal entities opting for the assumed profit regime (i.e. a simplified system for determining the tax basis for calculating the income tax and social contribution based on the application of estimated profit margins defined according to the entity's activity to the gross revenues accrued in each quarter) must keep: *(i)* all mandatory record-keeping books as per the specific tax legislation, as well as any documents that served as a basis for the commercial and tax bookkeeping; *(ii)* a cash journal, in which all the financial statements, including banking statements, must be kept; and *(iii)* an inventory record book, which includes the existing stock records at the end of the calendar-year (RIR/99, article 527).

175. Finally, micro companies (annual revenue below BRL 360 000, roughly USD 177 000) and small-sized companies (annual revenue below BRL 3.6 million, roughly USD 1.7 million) electing the "Simples Nacional" may adopt a simplified regime the joint collection of federal taxes. Only entities directly held by individuals may adopt such regime. Certain entities are expressly forbidden to opt for it, such as: *(i)* entities performing intellectual, scientific, literary or artistic activities; *(ii)* SAs; *(iii)* foreign entities operating in Brazil; *(iv)* Brazilian entities with foreign partners or shareholders, among others (Complementary Law No. 123/06, article 17). Entities opting for this simplified tax regime must keep: *(i)* a cash journal, in which all the financial statements, including banking statements, must be kept; *(ii)* an inventory record book, which includes the existing stock records at the end of the calendar-year; and *(iii)* in good order all the documents and papers concerning transactions that are relevant for the tax assessment (Complementary Law No. 123/06, articles 26 and 27; RIR/99, article 190).

176. Where a foreign trust directly holds investments or assets in Brazil, it will be treated as a foreign legal person for Brazilian tax law purposes. As such, a foreign trust must have a Brazilian legal representative who will be personally responsible for complying with the general tax obligations resulting from the transactions performed on behalf of the foreign trust and for maintaining accounting records (including underlying documents) concerning the foreign trust's assets and activities for at least five years (National Tax Code, article 128; Law No. 8.981/95, article 79; RIR/99, articles 264, 527 and 780).

177. Conversely, a resident trustee holding a foreign trust's assets and income as being his/her own must declare them in his/her annual tax return and keep accounting records concerning such assets and income (including underlying documents) for at least five years from the date in which taxes become due and payable (National Tax Code, articles 173, 174, 195 and 197; RIR/99, articles 929 and 930).

178. In 2007, an Electronic Tax Bookkeeping System (EFD), known as tax SPED (Electronic Public Bookkeeping System), was introduced by Decree No. 6.022/07. The SPED is an electronic database accessible by the tax administration that comprises a substantial amount of commercial and tax accounting information and other information of interest for the tax departments of the States and the RFB, as well as records on tax assessments on transactions performed by the taxpayers. Increasingly, taxpayers are required to submit this electronic file to the tax authorities. Nevertheless, filing account information with the SPED does not exempt them from their general record keeping obligation (Decree No. 6.022/07, article 2, second paragraph).

179. The SPED is formed by three sub-projects:

- *SPED-Accounting*: since 2009, companies and partnership taxed under the actual profit regime are obliged to transmit on an annual basis digital files containing comprehensive accounting records on their activities and transactions.
- *SPED-Tax*: since 2009, all taxpayers subject to indirect taxes on the circulation of goods and services (ICMS) and/or on industrialised goods (IPI) must submit, in digital means and on a monthly basis, all relevant information concerning their activities and transactions which is necessary for the determination of these indirect taxes. Taxpayers must also submit details of social security payments and other fiscal payments they receive.
- *Electronic Invoice – NF-e*: is a document electronically issued and stored, aiming at documenting transactions performed by the ICMS taxpayers. ICMS Protocols Nos. 10/2007, 24/2008, 68/2008, 87/2008, 41/2009, 42/2009 and 43/2009 set an obligation for the use of the NF-e for certain economic sectors, such as cigarettes manufacturers,

distributors of liquid fuel, importers of vehicles and similar, manufacturers and importers of pieces/parts, manufacturers of cosmetics, cleaning products, paper, electronic components, dairy wholesalers and manufacturers, lubricant traders, wine and spirit manufacturers. Non-compliance is punished with fines reaching up to 50% of the amount of the transaction imposed on the issuer and/or recipient of the NF-e.

180. Taxpayers who fail to keep reliable accounting records that correctly explain their transactions may be punished with a fine of up to 150% of the taxes due in view of this inability to explain their transactions (Law No. 9.430/96, article 44, second paragraph). In addition, a taxpayer who fails to keep reliable accounting records for commercial and tax purposes may have its profits arbitrated by the RFB (RIR/99, articles 529 and 530). Tax exempt or immune persons who fail to comply with their record keeping obligations are punished with the suspension or termination of the special tax regime, have their profits arbitrated and are subject to the same penalties (Law No. 9.532/97, articles 12-15; National Tax Code, articles 9 and 14). In addition to penalties for the lack of record keeping, taxpayers that are required to submit this electronic file are subject to a fine of BRL 5 000 (approximately USD 2 500) if they fail to comply with this obligation.

Availability of accounting records in practice

181. The obligations to maintain reliable accounting records and underlying documentation pursuant to tax law are presided over by the RFB. All legal entities are subject to the same monitoring and inspection procedures by the RFB, with regards to their accounting record-keeping obligations under tax laws (see also section A.1.1 and the monitoring of *Tax law obligations in practice).* In addition, residents acting as trustees of foreign trusts and non-resident trust investing in Brazil may also be subject to RFB's monitoring and inspection procedures, with regards to their general tax obligations concerning accounting information. Nevertheless, in the course of its supervisory and monitoring role, RFB has not found any cases involving foreign trusts where tax filing obligations had been violated (see also section A.1.4 *Trusts* and subsection on *Tax laws).*

182. When legal entities submit their tax returns, they have the option of using different means by which to calculate the amount of tax payable, i.e. actual profit regime or assumed profit regime. Under both methods, taxpayers are obliged to maintain accounting records in order to substantiate the profit they have used as a basis. Another possibility is that the RFB calculates a form of "arbitrary profit" and then applies a tax rate 20% higher than the normal corporate tax rate. This is a pecuniary penalty, and is only applied in extreme cases where there has been a complete failure by the taxpayer to

comply with their tax filing obligations or to maintain any proper accounting books. In practice, the RFB will first try to ascertain the tax liability using all other tools available such as summoning third parties, re-making accounting books of the taxpayer, etc.).

183. In practice, 477 536 taxpayers (21 344 of them legal entities) were investigated by the RFB concerning their tax filing obligations in 2009, 523 825 (20 465 of them legal entities) were investigated in 2010, and 385 413 (19 322 of them legal entities) were investigated in 2011. These investigations covered both ownership and accounting information keeping obligations. The taxpayers investigated were chosen as a result of careful risk analysis where certain factors such as taxpayer profile, history, industry, compliance with information filing obligations, customer base and payment profile are assessed. The Brazilian authorities confirmed that just over a third of these inspections related specifically to further investigations of accounting information due to tax return discrepancies, during which compliance with accounting information keeping obligations was verified.

184. Out of the 1 424 937 investigations carried out over the review period, the RFB has stated that compliance with accounting records was generally found to be high. There were a small number of cases where breaches were identified and depending on the seriousness of the breach, a range of fines were applied. Where a new tax liability was payable due to recalculation based on accounting records, a fine of 50% of this amount was payable where the taxpayer did not respond to this notification within 30 days. If the taxpayer was found to have deliberately miscalculated the amount owed, a fine of 100% of the new tax liability was applied. In extreme cases where there was complete failure to maintain any sort of accounting records and it was therefore not possible to reasonably assess the tax liability of the entity, the RFB had to calculate the arbitrary profit and applied a tax rate 20% higher than the normal corporate tax rate. Over the review period, there were 17 cases where this latter measure had to be applied by the RFB with respect to legal entities.

185. The Electronic Tax Bookkeeping System (EFD), known as SPED imposes penalties on taxpayers if they fail to comply with the obligation to submit online electronic accounting data. In practice, SPED has been well received by both taxpayers and other government organisations. The project has been found to offer benefits such as savings in time, costs and the streamlining of administrative processes by permitting all accounting documents to be filed online. In 2010, there were 150 000 legal entities determined as coming within the SPED Accounting project due to being taxed on their actual profit. Out of these, 141 500 entities filed their accounting books under this system, demonstrating a 94% compliance rate with this electronic filing system. In 2011, 157 043 legal entities filed their accounting books

using SPED and, in 2012, this number rose to 162 058 legal entities. The RFB reported that the level of compliance with accounting record keeping obligations is particularly high among those legal entities which are determined as coming within the SPED accounting system. The same penalties as outlined above were applied in cases where taxpayers did not comply with their accounting filing obligations under the SPED.

186. The Brazilian authorities have confirmed that, during the three-year period under review, there were 72 requests for accounting information relating to Brazilian entities. The information requested included information on books of account, annual returns, statements of solvency, and financial statements. In all these cases, the information was made available to the requesting jurisdiction, usually within a period of between 180 days and one year after receipt of the request. In 38 cases, this information was retrieved directly from the subject of the request and in 31 cases this information was already in the hands of the RFB. In the other three cases, the information was obtained from the Registrar, from another government entity or from a third party, such as a related legal entity. Feedback from peers confirms that no issue has arisen with obtaining accounting information, apart from delays.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

Phase 2 rating
Compliant.

A.3. Banking information

Banking information should be available for all account-holders.

187. Access to banking information is of interest to the tax administration only if the bank has useful and reliable information about its customers' identity and the nature and amount of financial transactions. In Brazil, banks and other financial institutions are obliged to keep records of all financial transactions performed by natural persons and legal entities holding accounts and investments, as well as to provide this information to the tax authorities (National Tax Code, article 197; Complementary Law No. 105/01, articles 1 to 7).

Record-keeping requirements (ToR A.3.1)

188. Financial and similar institutions must conduct CDD procedures when opening deposit accounts or making any subsequent alterations to them (Resolution CMN No. 2.025/93, article 1 and Circular BACEN No. 3.461/09, article 2). They are also required to identify customers when carrying out occasional transactions (Circular BACEN No. 3.461/09, article 3) or when conducting wire transfers of a value equal to or exceeding BRL 1 000 (USD 492) (Circular BACEN No. 3.290/05, which revoked Circular BACEN No. 3.030/01). CDD information must be verified on the basis of reliable source documents, including the CFP and CNPJ registration numbers of natural and legal persons (Resolution CMN No. 2.025/93, article 3 and Circular BACEN No. 3.461/09, article 2). Financial and similar institutions are also required to identify the beneficial owner, defined as the natural person at the end of the ownership chain (Circular BACEN No. 3.461/09, article 2, second paragraph).

189. The amount of CDD information that must be collected varies, depending on the circumstances. For natural persons, this includes at least the full name, the parents' names, their nationality, date and place of birth CPF and identification document (type, number, date of issue and issuing entity), home and work address, monthly income and a signed statement outlining the purposes of the business relationship as well as the address (Circular BACEN No. 3.401/08). For legal persons, the information to be collected will include the name and CNPJ, the latest corporate charter, the address, the latest registered balance sheet, the bank(s) with which the customer's agents operate and keep bank accounts, and signature cards (Resolution CMN No. 2.025/93, article 1; Circular BACEN No. 3.461/09, articles 2 and 3). For customers that are investment funds, CDD information on the fund's respective denomination, and information identifying the directors and any other persons responsible for the funds' management must also be collected (Circular No. BACEN 3.461/09, article 2, fourth paragraph).

190. Financial and similar institutions are required to maintain CDD and transaction records for a period of five to 10 years from the termination of business relations with a permanent customer or the conclusion of a transaction, depending on the type of information concerned (Circular BACEN No. 3.461/09, article 11). Authorised foreign exchange agents are required to maintain documents relating to transactions on the foreign exchange market, by physical or electronic means, for the period of five years from date of the transaction (Circular BACEN No. 3.401/08).

191. Finally, financial and similar institutions are required to provide the RFB with certain bank information on an annual basis (DIMOF) concerning financial transactions in deposit or saving accounts made by their clients, when the total amount, in each semester, is superior to BRL 5 000

(approximately USD 2 500) for individuals or BRL 10 000 (around USD 4 900) for corporate bodies. Bank information contained in the DIMOF includes the clients' taxpayer identity numbers (i.e. CPF for individual and CNPJ for corporate bodies) and the monthly global amounts in deposit or saving accounts. The information that must be submitted also includes details of all banking transactions with any foreign entity outside of Brazil. The DIMOF must be submitted electronically, twice a year, through an application available on the website of the RFB. If the information submitted is inaccurate or incomplete, the financial institution will be subject to legal penalties. Further, the omission, unjustified delay or submission of false information in the DIMOF is considered a crime.

Availability of banking information in practice

192. The legal obligations in place to maintain banking information, both pursuant to the licensing requirements established under BACEN's regulations, as well as those obligations imposed by COAF under the anti-money laundering regulations, ensure that banking information is available. Furthermore, the details of banking transactions that must be submitted to the RFB, twice a year, further ensures that banking information is available in practice.

193. In practice, the BACEN undertakes ongoing surveillance and comprehensive monitoring of licensed financial institutions to ensure that they are complying with licensing regulations. The BACEN has a comprehensive supervision manual in place which assists in guiding and directing their supervisory role. The supervision manual clearly sets out the supervisory role in the detection of irregularities observed in the process of information rendering to the BACEN. This monitoring is performed via desktop audits and onsite inspections of entities (see also section A.1.1 *Regulated entities in practice*).

Sanctions for non-compliance

194. Non-compliance with anti-money laundering obligations set forth under Law No. 9.613/98 may be punished with a number of penalties depending on the seriousness of the offence, ranging from warnings and fines (not exceeding 200% of the operation amount, 200% of the profit made or that have been made with the operation or BRL 20 million, i.e. approximately USD 9.8 million) to suspension of the administrator's functions and cancellation of authorisation to operate (Law No. 9.613/98, article 12). Ultimately, a bank can lose its licence and its officers face disqualification from director or management roles within financial institutions for up to ten years (Law No. 9.613/98, article 12). In very serious cases, the BACEN is also vested

with the power to commence an administrative punitive process. These fines are fixed at an appropriate level to be dissuasive enough to promote effective compliance. During the three-year period evaluated (2009-11), five administrative proceedings were initiated. The procedures resulted in a total of BRL 3.5 million (roughly USD 1.7 million) being applied in fines and two people being disqualified from director or management roles in Brazil for a period of three years.

195. In addition, as banks are regulated entities, they will also be subject to similar sanctions as applied by the BACEN for non-compliance with their information keeping obligations. The infringement of any legal or regulatory norms applicable to financial entities may be punishable with penalties such as fines, suspension of their services, cancellation of operations and a special regime of supervision. In very serious cases the BACEN is also vested with the power to file an administrative punitive process for breach of regulatory obligations. In practice, the BACEN actively enforces record keeping obligations for banks and initiated five formal administrative proceedings during the period under review. Of these five, two were also related to non-compliance with information keeping obligations and resulted in the application of penalties of approximately BRL 443 000 (roughly USD 218 000).

Conclusion

196. Overall, the legal and regulatory framework in Brazil provides for the availability of banking information. In addition to anti-money laundering requirements, banking is a regulated industry, subject to ongoing surveillance and monitoring by the BACEN, to ensure compliance with licensing regulations and record keeping requirements. The BACEN has a large array of sanctions at its disposal, permitting it to appropriately tailor the fine to the level of breach. Ultimately, a bank can lose its licence and its officers face disqualification from director or management roles within financial institutions for up to ten years (Law No. 9.613/98, article 12). Therefore, sanctions appear to be fixed at an appropriate level to be dissuasive enough to deter non-compliance. Moreover, penalties are actively enforced in practice where entities are found to be in breach of their information keeping requirements.

197. Over the three-year period under review, Brazil received ten EOI requests concerning banking information, of which information was retrieved by the Brazilian authorities directly from the taxpayer database in four cases and directly from the taxpayer in the other six cases. The banking information requested included account statements, signatory authorisation, instructions given by account holder to the bank for the operation of the accounts, paying-in and disbursement slips, written remittance orders, detailed records of deposits and withdrawals, and wire transfers.

198. On receiving an EOI request relating to banking information, the RFB will first try to supply this information directly, since it has a substantial amount of banking information at its disposal via DIMOF. In cases where banking information is not available via DIMOF, this information is obtained directly from the taxpayer and, should this not be possible, the information is then accessed from the banking entity. As yet, the RFB has not had to exercise their access powers to obtain banking information from a bank for EOI purposes. Generally, bank information is made available within 180 days to one year. Feedback from peers has not indicated any issues with the availability of banking information, though concerns have been expressed about the delay in providing it.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

Phase 2 rating
Compliant.

B. Access to Information

Overview

199. A variety of information may be needed in a tax enquiry and 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 Brazil's legal and regulatory framework gives the authorities access powers that cover the right types of persons and information and whether rights and safeguards would be compatible with effective exchange of information (EOI). It also assesses the effectiveness of this framework in practice.

200. Brazil's competent authority is the Secretariat of the Federal Revenue of Brazil (*Secretaria da Receita Federal do Brasil* – RFB), which is subordinated to the Minister of Finance. The RFB has significant information resources at its disposal, including ownership, identity, bank and accounting information. In addition, the RFB has broad access powers to obtain information for international EOI purposes and measures to compel the production of such information.

201. These powers are consistent regardless from whom the information is sought (e.g. from a government authority, bank, company, trustee, or individual) and whether or not the information is required to be kept pursuant to a law. This information can be accessed by various means: in writing, visits to business premises, during tax examinations or by testimonies. There are no statutory, bank or professional secrecy provisions in place that restrict the tax authorities' access powers or prevent effective exchange of information. For the reasons above, element B.1 was found to be in place.

202. Application of rights and safeguards (e.g. notification and appeal rights) in Brazil do not restrict the scope of information that the RFB can obtain. However, the notification procedure does not allow for exceptions in

urgent cases or when the notification is likely to undermine the provision of the requested information. Therefore, element B.2 was found to be in place but needing improvement.

203. The Brazilian competent authority has broad powers to access accounting and banking information and data on the ownership of legal entities, readily available in their own databases and those of other governmental agencies. In addition, the RFB has a wide array of access powers at its disposal to access information from third parties for domestic purposes and, in practice, they make full use of their powers in order to access information in response to an EOI request. Where taxpayers have been summoned to provide banking information, in all cases they have been able to provide this information and no practical issue has been encountered with the prior summoning procedure. In the event of non-compliance with an EOI request, adequate enforcement measures are available to compel the disclosure of information, but in practice these have never had to be used for EOI purposes.

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).

204. Brazil's competent authority is the Secretariat of the Federal Revenue of Brazil (*Secretaria da Receita Federal do Brasil* – RFB), which is subordinated to the Minister of Finance. The RFB is also the organisation responsible for the administration of federal taxes, as well as customs control, including efforts in counteracting money laundering. The ability of RFB to obtain information for international exchange of information purposes is derived from its general access powers under the National Tax Code (in particular, articles 194, 195 and 199, sole paragraph), coupled with the authority provided by the relevant agreements containing EOI provisions (see Part C below).

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

205. The RFB has significant information resources at its disposal, including ownership and accounting information held by public authorities such as the Chambers of Commerce, updated information submitted by taxpayers on their annual tax returns, and information received through automatic reporting by third parties. In particular, some bank information is already in the hands of the RFB as a result of the automatic provision of data by banks and

financial institutions via the DIMOF, including the taxpayer identity numbers (i.e. CPF for individual and CNPJ for corporate bodies) and the monthly global amounts in deposit or saving accounts (see section on *Record-keeping requirements* above). As a result, some EOI requests may be responded to directly by RFB without the need to recourse to its access powers to obtain the requested information.

206. The RFB may issue normative instructions to clarify existing legislation and to standardise procedural issues under its competence. Normative Instruction RFB No. 1.183/11 sets out rules on the Corporate Taxpayer Register – CNPJ, which consists of a comprehensive record of identity information concerning the owners and directors of legal entities of relevance for the tax administration, which is updated on an annual basis.[11] Likewise, the Individual Taxpayer Register – CPF is a wide-ranging database that contains information on resident and non-resident taxpayers (Normative Instruction RFB No. 1.042/10). In particular, non-resident natural and legal persons who own certain assets in Brazil, such as real estate, vehicles, participation in a company or partnership, bank accounts or investments, are required to register at the CPF or CNPJ (Normative Instruction RFB No. 1.042/10, article 3, XII; Normative Instruction RFB No. 1.183/11, article 5, XV).

207. The RFB may also summon natural persons and legal entities, taxpayers or not, and other related parties, to show books and documents and to provide any information and/or clarification required by the RFB in the exercise of its duties, within a stipulated period of time (Law No. 2.354/54, article 7; Decree-Laws Nos. 5.844/43, article 123, and 1.718/79, article 2; and National Tax Code approved by Law No. 5.172/66, articles 195 and 197; RIR/99, articles 927 and 928). This includes ownership, identity, bank and accounting information, both for domestic purposes and in response to a request from another jurisdiction by means of an international treaty.

208. The same obligations are explicitly extended to "notaries and public registrars, securities exchange and broker enterprises, the National Institute of Industrial Property, Chambers of Commerce or divisions and surrogated authorities, assistance funds, trade union associations and organisations, insurance companies and other persons, entities or enterprises that can,

11. All legal entities holding an office in Brazil, including those equated to them, their branches, subsidiaries and representatives in Brazil of the legal entities holding their main office abroad, even if tax immune, exempt or inactive, are obliged to submit annual returns to the tax authorities, whatever their purposes and nationalities may be (Law No. 8.981/95, article 56; RIR/99, approved by Decree No. 3.000/99, article 808). Such declarations are submitted of an annual basis and contain the following identity information on the partners: whether it is a natural person or a legal entity, CPF/CNPJ, name/company name, capital share.

in any manner, clarify situations of interest to the tax administration" (Decree-Law No. 1.718/79, article 2; RIR/99, article 928, first paragraph). In particular, public notaries and accountants are subject to additional obligations to "facilitate the examination and verification (…) of deeds, records and books in the registries (…)" (Decree-Laws Nos. 5.844/43, article 128, and 1.718/79, article 2).

209. In principle, there are no restrictions to the RFB's powers to directly interrogate persons or seize documents (Law No. 9.430/96, article 35; RIR/99, article 915). However, in the case of search and seizure of documents in private residences of individuals, the RFB needs to obtain a court order (Federal Constitution, article 5, XI).

Gathering information in practice

210. EOI activities are coordinated by the Coordination-General for International Relations of the RFB (*Coordenação-Geral de Relações Internacionais* – Corin) through the Division for International Tax Affairs (*Divisão de Assuntos Tributários Internacionais* – Datin). In practice, Corin empowers the General Coordinator for Tax and Customs Affairs to oversee the daily EOI activities. This is set out under a specific ordinance (Portaria Corin no.1, of 27 July 2012).

211. When an EOI request is received by Corin, the EOI Unit will first check if the information requested is available in the RFB's own individual and corporate taxpayer databases. Such information stored in the database records, includes contact details and address, tax returns, whether or not a natural or legal person is a resident of Brazil and in what local unit they are registered for tax purposes. If the information requested is of a basic nature (such as verification of name, address, and as to whether tax returns have been filed), the information is immediately accessible by the EOI Unit and in such cases can be furnished directly to the requesting jurisdiction.

212. In the vast majority of cases, however, the requested information is of a more complex nature and some analysis is required. In such cases the request must be forwarded to an auditor at the local unit (*delegacia*) of the RFB where the subject of the request is registered for tax purposes. Over the review period, Corin was able to access basic information directly from the taxpayer database in 12 cases. In all other 77 cases the request had to be forwarded to the local tax unit of the subject of the request.

213. In cases where the information is not available in the database of the RFB, the next step is to contact other governmental authorities, the taxpayer or third parties, in order to access the information. Where information required is held by another government agency, a formal notice for the production of the information (*oficio*) is issued by the competent authority and is

honoured by the relevant agencies via a formal response with any supporting documents. During the review period, information in response to an EOI request was obtained from another government agency in four cases. Whilst no timeframes were in place during the review period for the information to be provided interagency, Brazil has confirmed that this information was supplied expeditiously. Whilst to date, there has not been a need for formal inter-agency agreements regarding response to EOI requests, this may be implemented in the future in the interests of standardising inter-agency cooperation in the area of exchange of information. Pursuant to Normative Instructions RFB Nos. 19/98 and 20/98, inter-agency agreements of this nature must contain confidentiality clauses.

214. In cases where the requested information is held by the subject of the request or by a third party, the RFB issues a formal notice to produce the information (*oficio*). The RFB also has the power to summon natural persons and legal entities to provide any information within a shorter timeframe. In summary, the RFB have wide-ranging and a comprehensive set of powers at their disposal under which they may access information from taxpayers. In practice, the timeframes usually given in which to produce the information is usually 20 days for the taxpayer and third parties.

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

215. The concept of "domestic tax interest" describes a situation where a contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes. The powers described above apply for the express purpose of responding to requests for information from a foreign authority, without regard to whether the information is relevant for Brazil's domestic tax purposes (see below, Parecer PGFN/CAT No. 2.512/09, para. 69).

216. The Brazilian authorities make full use of their domestic information gathering powers in response to an EOI request whether they have an interest in the information for their own tax purposes or not.

Compulsory powers (ToR B.1.4)

217. There are several types of penalties applicable in case of non-compliance with the obligation to provide any information and/or clarification required by the RFB in the exercise of its duties, within a stipulated period of time, listed as follows.

- a fine ranging between BRL 534 and BRL 2 639 (USD 262 and USD 1 298) (Decree-Law No. 2.303/86, article 9; Laws Nos. 8.383/91, article 3, I, and No. 9.249/95, article 30; RIR/99, article 968);
- sealing of premises, warehouses and files when the circumstances or the quantity of documents do not allow for their identification or verification at the venue or moment they were found (Law No. 9.430/96, article 36, sole paragraph; RIR/99, article 916);
- making use of police force to enter dwellings or premises in the case of embarrassment or resistance to supervision (Law No. 2.354/54, article 7; National Tax Code, article 200; RIR/99, article 920); and
- criminal sanctions for the crimes of disobedience or disrespect, punishable with a fine and imprisonment, respectively between 15 days and six months or six months and two years (Law No. 2.354/54, article 7; RIR/99, article 919; Penal Code, articles 330 and 331).

218. In addition, the RFB may open a special supervision procedure (*Regime Especial de Fiscalização* – REF) in the following cases (Law No. 9.430/96, article 33; Normative Instruction RFB No. 979/09):

> "I – embarrassment of the supervision, caused by denial to show books and documents where the bookkeeping of the activities of the taxable person is registered without any justification, as well as for not providing information on assets, financial operation, business or activity, of its own or third parties, when summoned, and other cases that may authorise the request of force, under the terms of art. 200 of Law No. 5.172 of 25 October 1966;
>
> II – resistance to supervision, caused by denial to give access to the facilities, domicile or any other place where the activities of the taxable person are carried out, or where assets of his possession or ownership may be found.
>
> III – incidence of behaviour causing criminal representation, under the terms of the legislation that governs the crimes against the tax order;
>
> IV – performance of a transaction subject to taxation, without the due registration in the Corporate Taxpayer Register (CNPJ) or in the Individual Taxpayer Register (CPF);
>
> V – major breach of the tax legislation;
>
> VI – commercialisation of goods with evidence of smuggling or embezzlement;

> VII – evidence that a legal entity is constituted by people other than the true partners or shareholders, or the owner in the case of sole proprietorship."

219. The REF consists of applying certain restrictive measures, such as uninterrupted supervision in the premises of the taxpayer, reduction of the tax assessment periods and deadlines by half, systematic evidence of tax compliance, and special control of commercial and tax documents and financial transactions. Such measures may be applied separate or cumulatively, for as long as the tax obligations are not regularly fulfilled, without preventing the application of other penalties set forth in the tax legislation. The REF also results in a significant increase of the applicable fine on unpaid taxes from 75% to 150% (Law No. 9.430/96, article 44, second paragraph).

Use of compulsory powers in practice

220. The Brazilian competent authority stated that other government agencies, taxpayers or third parties have never refused to provide information in relation to an EOI request, and therefore no sanction has ever had to be applied to enforce these obligations. Similarly, the RFB has never had to use search and seizure for EOI purposes.

221. In practice, the RFB has increasingly made use of enforcement measures and sanctions for domestic purposes. For instance, in 2009, 281 fines were imposed for failure to comply with a request during an audit. Similarly, in 2010, 416 such fines were imposed and, in 2011, 356 fines were applied for failure to comply with a request during an audit (see also section A.1.6 *Enforcement provisions to ensure the availability of information*).

222. The opening of a special supervision procedure is another enforcement measure used in restricted cases for domestic tax purposes and is usually prompted by extreme changes in taxpayer behaviour. In 2009, the REF procedure was revaluated by the RFB and amended. In 2010 there were eight pilot cases opened and in 2011 another three special supervision procedure were opened. The RFB has confirmed that in most cases where an REF has been applied, taxpayers have subsequently complied with their tax filing obligations and any restrictive measures that were imposed are then lifted. Sealing of premises, making use of police force and applying criminal sanctions are used less frequently in domestic cases, as the array of information gathering powers at their disposal makes the use of such measures only necessary in exceptional cases.

Secrecy provisions *(ToR B.1.5)*

223. Jurisdictions should not decline on the basis of their secrecy provisions (e.g. bank secrecy, corporate secrecy, professional secrecy, etc.) to respond to a request for information made pursuant to an EOI mechanism.

Bank secrecy

224. The 1988 Federal Constitution does not expressly provide for bank confidentiality, but it protects the transmission of personal data as a fundamental right (article 5, XII). On the other hand, the Federal Constitution expressly provides the constitutional basis of the tax administration's access powers (article 145, first paragraph). Until 2001, bank confidentiality was protected under article 38 of Law No. 4.595/64. Nevertheless, bank confidentiality has never been absolute and exceptions were available for cases where disclosure was authorised by a court order (e.g. civil matters other than tax matters and criminal matters other than anti-money laundering or criminal tax matters).

225. Since 2001, the issue of the bank confidentiality has been dealt with by Complementary Law No. 105/01 which expressly revoked article 38 of Law No. 4.595/64 (article 13). However, the compatibility of Complementary Law No. 105/01 with the 1988 Federal Constitution has been under dispute for the last twelve years in two different sets of cases pending before the Brazilian courts. The first set concerns six lawsuits that seek a declaration of unconstitutionality of Complementary Law No. 105/01 with binding effects with respect to all Brazilian courts and all persons affected by this law.[12] Until the Supreme Federal Court renders its decision in one of these cases, Complementary Law No. 105/01 produces effect and entitles the RFB to have direct access to bank information, unless the taxpayer challenges the matter in court.

226. The second set concerns individual lawsuits which have no binding effects with respect to any Brazilian courts or any person who is not a party to these cases. The Brazilian courts have not yet taken a uniform approach in such individual lawsuits, but in at least one case the Supreme Federal Court rendered a decision in favour of the taxpayer, preventing the RFB from accessing this taxpayer's bank account details.[13] It is noted, however, that these cases concern access powers for domestic purposes and to date there has been no case involving bank information required under an EOI request.

12. ADIN Nos. 2.386, 2.389, 2.390, 2.397, 2.406 and 4.006. Should the Supreme Federal Court declare Complementary Law No. 105/01 as incompatible with the Federal Constitution, the RBF would still be able to have access to bank information when authorised by a court order in both civil and criminal tax matters.
13. RE 389808/PR. Currently there is only one other individual lawsuit pending before the Supreme Federal Court (RE 601314).

227. Complementary Law No. 105/01, as further regulated by Decree No. 3.724/01, made it clear that the RFB has direct access to the bank information, without requiring an authorisation by court order. Article 6 states that:

> "Article 6. The authorities and the tax agents of Federal, State, Municipal and Federal District administrations shall only examine documents, books and records of the financial institutions, including those relating to deposit accounts and financial investments, *when administrative proceedings or tax proceedings have been initiated* and said examination is *considered indispensable* by the competent administrative authority.
>
> Sole Paragraph. The results of the examination of the information and documents referred to in this article shall be kept confidential pursuant to current tax legislation." [*emphasis added*]

228. Even though bank information obtained by the RFB must be kept confidential, this information may be provided to foreign competent authorities under a valid EOI request, pursuant to article 199, sole paragraph of the National Tax Code. Article 6 imposes two conditions the RFB's direct access to bank information: *(i)* that administrative or tax proceedings have been initiated (this covers investigations in both civil and criminal tax cases), and *(ii)* that said examination is considered indispensable by the competent administrative authority.

229. The first condition was analysed by the Attorney General's Office, which is the legal adviser of the RFB, in the light of the international agreements signed by Brazil. The Attorney General issued a binding opinion[14] concluding that administrative or tax proceedings carried out in another jurisdiction are equivalent to ones carried out in Brazil, as follows:

> SENTENCE PGFN/CAT No. 2.512/09.
>
> "69. […] Brazil may exchange information with other States, even if there is no immediate interest from the applicant concerning tax collection and supervision. That is, we may state the legal frame in the interest of tax collection and supervision (sole paragraph of art. 199 of the CTN, in the text of Complementary Law n. 104 of 10 January 2001), it would be applied to all signatory jurisdictions of the pact, that is, Brazil would turn the interest of the applicant jurisdiction into its own.

14. Pursuant to Complementary Law No. 73/93, article 13 and 42. This opinion is binding on the RFB since it requested the Attorney General's advice on the matter.

> 70. In the end, under the terms of art. 6 of Complementary Law n. 105 of 2001, an international agreement, due to its nature and obligation, would justify a fiscal administrative procedure, with a consequent confidentiality breach. It is just that a supervision carried out in another jurisdiction would be equivalent to the supervision carried out in Brazil, with a deriving continuity need, by issuing a Tax Procedure Warrant, as provided in art. 2 of Decree No. 3.724 of 2001."

230. As to the second condition, the Brazilian tax authorities clarified that the term "indispensible" is used in opposition to "fishing expeditions", in order to prevent any request of information that is unlikely to be relevant to the tax affairs of a given taxpayer. Therefore, the Brazilian tax authorities maintain that the term "indispensible" is aligned with the concept of "necessary", "relevant" or "foreseeably relevant" information used in international agreements containing exchange of information mechanisms, concluded by Brazil.

231. Complementary Law No. 105/01 is regulated by Decree No. 3.724/01, as amended by Decree No. 6.104/07, which establishes cases where the examination is considered "indispensible", e.g. omission of income or gains arising from investments in fixed or variable income; investments or expenditures which exceed available income; remittance of amounts which are incompatible with the declared income; evidence that a person purports to hold property for the benefit of a third person (article 3). This also applies to detailed bank information (i.e. other than the monthly global amounts in deposit or saving accounts available to the RFB via the DIMOF), when the taxpayer refuses to provide the requested bank information or remains silent (Decree No. 3.724/01, article 3, X).

232. Before the beginning of the supervision procedure, the taxable person is summoned to provide the requested bank information within a given period (see section *Notification requirements, rights and safeguards* below). The supervision procedure is initiated by means of specific order, known as Tax Procedure Warrant (*Mandado de Procedimento Fiscal* – MPF), issued by the RFB (Decree No. 3.724/01, article 2). The request for bank information is then formalised by means of a document called Financial Operation Information Request (*Requisição de Movimentação Financeira* – RMF), which is addressed to the BACEN or to a financial or similar institution, as the case may be. Under such procedural rules, it is clear that access to detailed bank information must be properly substantiated, which represents an obstacle to "fishing expeditions".

233. In sum, since 2001 the RFB has had direct access to bank information, without regard to an authorisation by court order. The two conditions for this direct access are: *(i)* the existence of administrative or tax proceedings (this covers investigations in both civil and criminal tax cases), including the

supervision carried out abroad by a treaty partner jurisdiction, and *(ii)* the examination being considered necessary, relevant or foreseeably relevant by the competent administrative authority. Bank information obtained by the RFB must be kept confidential but it may nevertheless be provided to foreign competent authorities under a valid EOI request.

234. Until the Supreme Federal Court renders its decision in one of the six cases pending for the last twelve years and/or on case RE 601314, Complementary Law No. 105/01 produces effect and entitles the RFB to have direct access to bank information, unless the taxpayer challenges the matter in court. To date, these pending cases have not posed any impediment to effective EOI in practice. Access to banking information in practice

235. When the local tax unit (*delegacia*) receives an EOI request concerning banking information, the tax auditor in charge of this request will first have to ensure that the request for detailed bank information is properly substantiated by fulfilling the requirements under Complementary Law No. 105/01 regulated by Decree No. 3.724/01. These requirements are worded quite generally and, in practice, they operate to cover the vast majority of cases where banking information is sought. The requirements of Complementary Law No. 105/01 were able to be fulfilled in all cases concerning requests for banking information over the review period. The taxable person is then summoned to provide the requested bank information within a given period of usually 20 days (see section *Notification requirements, rights and safeguard*s below). During the review period, there have been six cases in which the RFB successfully fulfilled these requirements in order to request banking information from the taxpayer for EOI purposes.

236. In cases where the bank information cannot be obtained from the taxpayer or where the requesting jurisdiction does not wish that the taxpayer be alerted to the request, the tax auditor can proceed to access this information directly from the financial institution by opening a Tax Procedure Warrant. In 2011, 1 995 Financial Operation Information Requests (RMF) were sent to financial institutions in order to access detailed banking information for domestic tax auditing purposes. Out of these 1 995 cases, the Brazilian authorities have confirmed that there were six cases where delays or refusal to comply with the request was experienced and fines were applied. To date, it has not been necessary to issue an RMF for EOI purposes as requested information has always been available either from the tax administrations' databases or the taxpayer.

Conclusion

237. Access to detailed banking information requires a special procedure. During the period under review, the Brazilian authorities have confirmed that they were able, in all cases where bank information was requested, to access

it either directly from their own taxpayer database or from the subject of the request. Whilst, it has not been necessary in practice to issue an RMF to the financial institution the RFB has stated that it does not envisage any issues in practice with following either of these procedures for EOI purposes.

238. All treaty partners of Brazil that have requested banking information from Brazil in the three-year review period have confirmed that they have received the information (see Section A.3 *Banking information* above) The average length of time taken to answer a request for banking information was within 180 days to one year. These requests related both to the identification of the holders of bank accounts in Brazil, as well as to copies of individual bank statements and corporate banking transactions. Further no treaty partners reported that they have refrained from requesting banking information because they anticipated not being able to obtain it. Nevertheless, the practical impact of both the requirements for accessing banking information directly from a taxpayer or from a financial institution where foreseeably relevant banking information is required pursuant to an international agreement should be monitored by Brazil on an ongoing basis.

Professional secrecy and attorney-client privilege

239. Article 197 of the National Tax Code establishes an obligation for certain institutions or professionals to provide information requested by the tax authorities regarding third parties.

> "Article 197. Upon written notification, the following persons shall provide the administrative authority with all information at their disposal regarding assets, businesses or activities of third parties:
>
> I – public notaries, registrar and district servants;
>
> II – banks, banking houses, savings banks and other financial institutions;
>
> III – asset management companies;
>
> IV – brokers, auctioneers and official forwarding agents;
>
> V – estate administrators (executors);
>
> VI – assignees, agents and liquidators;
>
> VII – any other bodies or persons designated by law due to their position, function, ministry, activity or profession."

240. Nevertheless, in the sole paragraph, it also establishes an exception for professional secrecy with regard to "facts that the holder is legally obliged to keep confidential due to his or her position, function, ministry, activity or

profession." This exception only applies to persons who are subject to professional secrecy duties, such as attorneys, physicians and clerics, and only to the extent this information relates to their profession.[15] Therefore, it does not prevent the RFB from accessing information held by public notaries, registrars, financial institutions, or other persons mentioned above.

241. Specifically in relation to the client-attorney privilege, the Brazilian Attorneys' Statute protects "the inviolability of the office or working place, working documents and communications in writing, electronic format or by phone, only to the extent that the attorney acts in his or her capacity as an attorney" (Law No. 8.906/94, article 7, II, as amended by Law No. 11.767/08). However, the client-attorney privilege is not absolute and an exception is available where the attorney and/or the client are under a criminal investigation. In such cases, a search and seizure warrant must be obtained from a judge and this must be performed in the presence of a representative of the Brazilian Bar Association (Decree-Law No. 3.689/41 establishing the Criminal Procedure Code, articles 240 to 250; Law No. 8.906/94, article 7, sixth and seventh paragraphs, added by Law No. 11.767/08).

242. On its face, this provision appears to be broader than the standard as it goes beyond the protection of confidential communication. Instead, it also covers working documents and working premises where other records may be kept, which are situations expressly excluded from the scope of the client-attorney privilege.[16] Moreover, it is unclear whether the attorney-client privilege safeguard is limited to information obtained in the course of providing legal advice or legal representation. Brazil is therefore recommended to clarify the scope of this provision.

243. Nevertheless, the Brazilian authorities maintain that the attorney-client privilege does not relieve any person, including the taxpayer or third parties, from the obligation to disclose information to the RFB under articles 195 and 197 of the National Tax Code. As such, the attorney-client privilege should not impede the effective EOI because the avenue to obtain ownership, accounting and bank information directly from public registrars, the relevant entities or financial institutions remains available.

15. It is noted that these rights and safeguards are not extended to other legal representatives or accountants. In fact, an accountant may also be accused of participation in a tax crime, along with the taxpayer, and punished accordingly. See, for example, appeal in habeas corpus to the Superior Court of Justice No. 305 (STJ-RHC No. 305/SP), decided on 6 February 1990 and available at https://ww2.stj.jus.br/processo/ita/listarAcordaos?classe=&num_processo=&num_registro=198900108069&dt_publicacao=19/03/1990.

16. See paragraph 19.3 of the Commentary to Article 26 of the OECD Model Convention and paragraph 89 of the Commentary to Article 7(3) of the Model TIEA.

Operation of secrecy provisions and attorney-client privilege in practice

244. The Brazilian authorities have confirmed that, for domestic tax purposes, the professional secrecy exception in relation to lawyers is interpreted and applied in a restrictive manner which does not prevent tax authorities from accessing books of account, working papers and other documentation held by lawyers where they exercise their information gathering powers. In relation to domestic tax issues, the Brazilian authorities have confirmed that claims of attorney-client privilege rarely arise in practice and to date there have been no incidences where a claim of attorney-client privilege over information requested by the RFB has been successful.

245. The Office of the Attorney-General has indicated that attorney-client privilege has never been claimed over information sought pursuant to an EOI request nor over information sought for domestic purposes during the review period. Whilst in theory the attorney-client privilege could extend further than that as contemplated by the international standard, in practice this has not caused any difficulties with accessing information for EOI purposes. The Brazilian authorities have confirmed that it is not envisaged to shift or amend Brazil's legal framework to narrow the scope of this privilege.

246. Brazil's EOI partners indicate that professional secrecy has never caused any problem in practice in relation to EOI. There have been no cases in which an EOI request has been denied or in which, as a result of the information provided, an entity or individual has raised an objection founded on professional secrecy. Nevertheless, the impact of this on international exchange of information in practice should be monitored by Brazil on an ongoing basis.

Determination and factors underlying recommendations

Phase 1 Determination	
The element is in place.	
Factors underlying recommendations	**Recommendations**
There are some uncertainties as to whether the attorney-client privilege may unduly limit access to information acquired by attorneys.	Brazil should clarify the scope of the attorney-client privilege provision to ensure consistency with the standard.

Phase 2 rating
Compliant.

B.2. Notification requirements and rights and safeguards

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

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

247. Rights and safeguards should not unduly prevent or delay effective exchange of information. For instance, notification rules should permit exceptions from prior notification (e.g. in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the requesting jurisdiction).

248. Under Brazilian law, there is no obligation to notify the subject of a request for EOI nor is there a prior notification requirement as such. The RFB has significant information resources at its disposal, including direct access to comprehensive ownership and accounting held by the RFB itself or by other public authorities. Moreover, the RFB receives certain bank information provided by financial institutions on an annual basis (DIMOF) concerning financial transactions in deposit or saving accounts made by their clients, when the total amount, in each semester, is superior to BRL 5 000 (around USD 2 500) for individuals or BRL 10 000 (approximately USD 4 900) for corporate bodies. Bank information contained in the DIMOF includes the clients' taxpayer identity number (i.e. CPF for individual and CNPJ for corporate bodies) and the monthly global amounts in deposit or saving accounts.

249. As a general rule, when the requested information is not in the hands of the RFB, it may summon the taxpayer to provide it or directly request the holder of this information to provide it, without having to notify or obtain the consent of the person under investigation. By way of exception, the RFB always needs to first summon the taxpayer to provide bank information (Decree No. 3.724/01, article 4, paragraph 2). This will only happen with regard to more detailed bank information (e.g. bank statements showing each transaction) which is not already at its disposal via the DIMOF. Even though the taxpayer is not informed about the reason why this information is requested, the summoning procedure may have the effect of a prior notification (Decrees Nos. 70.235/72, article 7, and 7.574/11, article 33).

250. The notice of summons may be delivered to the taxpayer in person, by letter or by decree (Decrees Nos. 70.235/72, article 23; and 7.574/11, article 10). The taxpayer must respond to the summons within 5 to 20 days (Law No. 3.470/58, article 19, as amended by Provisional Measure No. 2.158-35/01, article 71). If the taxpayer refuses to provide the requested detailed bank information or remains silent, the RFB may initiate the supervision procedure

(MPF) and directly request the information from the bank, financial institution or equivalent entity, as described in the section concerning *Secrecy provisions* above (Decree No. 3.724/01, article 3, X).

251. Therefore, the prior summoning procedure only applies in limited circumstances, i.e. with respect to detailed bank information which is not already held by the RFB. The time for submission of bank information by the taxpayer or third parties is short (5 to 20 days) and in the absence of such submission the RFB may start a supervision procedure to obtain this information directly from the holder. However, there are no exceptions to this prior summoning procedure where, for example, the information request is of a very urgent nature or the notice is likely to undermine the chance of success of the investigation conducted by the requesting jurisdiction. It is recommended that Brazil introduce relevant exceptions to its summons procedure so that it is compatible with effective EOI.

252. It is noted that any information provided to the RFB is subject to tax confidentiality (Decree No. 3.724/01, article 7). Nevertheless, this provision does not prevent the RFB from exchanging information with foreign authorities, as provided for in international treaties (National Tax Code, article 199, sole paragraph, as added by Complementary Law No. 104/01).

253. A taxpayer who is summoned to provide bank information may make use of the appeal rights, which are fundamental rights protected by the 1988 Federal Constitution (article 5, LXIX). Under Law No. 12.016/09, the taxpayer may ask the court to issue a preliminary injunction to prevent the RFB from accessing the requested bank information. Once the RFB is notified about the court order, it must inform the Ministry of Finance and the Attorney General's Office within 48 hours (article 9) and provide the court with an explanation within 10 days (article 7, I). Once this deadline expires, the Attorney General has 10 days to issue an opinion and the court has 30 days to come to a decision (article 12).

254. The decision of the court, whether in favour or against the taxpayer, may be appealed to the court of second instance. The RFB or the Attorney General may ask the president of the appeal court to suspend the effects of the preliminary injunction in order to safeguard the public order and the taxpayer may appeal of this decision within five days (article 15). The RFB may appeal to a superior tribunal in case of a negative decision by the president of the appeal court or a favourable decision in the appeal filed by the taxpayer (article 15, paragraph 1). The superior tribunal must to come to a final decision within 5 days (article 20, paragraph 2).

255. These appeal rights equally apply to domestic as well as to international matters involving an EOI request, though to date this has rarely occurred. As the taxpayer is not informed of the existence of an international

EOI request, these appeals concern the question of whether the taxpayer or the third party was obliged to supply the RFB with the requested information under domestic rules. This, coupled with the clear time limits for all stages in the appeal process, ensures that the appeal rights of taxpayers are compatible with the effective EOI.

Prior notification procedure in practice

256. Brazilian authorities have reported that, if the EOI request relates to the identity of the bank account holders or monthly global transaction amounts, the request would be able to be immediately attended to, dispensing with the prior notification procedure (Complementary Law No. 105/01, article 5). When the RFB is able to answer the EOI request directly either with information already in its possession or in that of another government agency, it does not notify the taxpayer concerned. In cases where detailed banking information has to be accessed from the taxpayer or a financial institution, the RFB will have to notify the taxpayer and they will have to produce the information to the RFB within the timeframe established by RFB in the notification (usually within 20 days).

257. Whilst there are no legislative exceptions to the prior summoning procedure for accessing detailed bank account information, in practice, the tax auditor in charge of the case can apply directly for a court order enabling the local unit to dispense with the prior notification procedure. If this is granted, the auditor could then proceed directly to the bank for the requested information. When determining whether or not to dispense with a prior notification procedure, the judge will look to certain factors such as the urgency of the case, the profile of the taxpayer, the risk of the taxpayer concealing or destroying the information and other relevant factors particular to each case.

258. With regards to the alternative judicial procedure in order to access banking information, the RFB has confirmed that, in practice, this special procedure is usually invoked first by other government agencies, such as the Public Prosecutor, in the course of a criminal investigation. If information is subsequently handed over to the RFB to investigate an individual or legal entity for tax purposes, this alternative judicial procedure will already have been carried out and, therefore, the RFB will not have to undergo this procedure again in order to access bank information directly. While this alternative judicial procedure is usually invoked in criminal investigations, there is no restriction for its use in civil tax matters, although, in practice, this has only occurred in rare instances.

259. The Brazilian authorities and, in particular, the Attorney General's Office has confirmed that there have been cases where the judicial procedure to dispense with the prior notification procedure has been followed for

domestic tax purposes. When the court procedure to dispense with the prior notification has been utilised for domestic purposes, this has usually been granted within hours depending on urgency of case. However to date none of these cases have involved an EOI request for banking information. Officials from the Office of the Attorney General have confirmed that in the case of an EOI request, the particulars of the EOI request (such as the urgency and sensitivity of the case) would all be factors that the judge would take into careful consideration in deciding on the dispensing with the prior notification procedure. In addition, the Brazilian authorities have stated that cases seeking to dispense with the prior notification procedure are likely to be given priority in the Courts over other administrative or tax proceedings that are ongoing at the time.

260. The Brazilian competent authority has not experienced practical difficulties with the application of rights and safeguards, nor have its EOI partners reported any difficulties noted in Brazil. No legal challenges to the use of information gathering measures have occurred in relation to an EOI case. Nonetheless, the Brazilian authorities should continue to closely monitor that the prior notification procedure does not affect the provision of banking information for EOI purposes.

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**
There are no explicit exceptions to the prior summoning procedure for accessing detailed bank account information. To require in all cases that the taxpayer be first approached, and thus notified, may unduly prevent or delay the effective exchange of information in urgent cases.	It is recommended that certain exceptions from prior summoning procedure for accessing detailed bank information be permitted (e.g. in cases in which the information requested is of a very urgent nature or the notification is likely to undermine the chance of the success of the investigation conducted by the requesting jurisdiction).

Phase 2 rating
Partially Compliant.

C. Exchanging Information

Overview

261. Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanism for doing so. A jurisdiction's practical capacity to effectively exchange information relies both on having adequate mechanisms in place as well as an adequate institutional framework. This section of the report examines whether Brazil has a network of information exchange that would allow it to achieve effective exchange of information in practice.

262. Brazil has a significant treaty network including 40 EOI agreements (33 DTCs and seven TIEAs), of which 31 are in force (see Annex 2). Nine of the 29 DTCs in force[17] do not allow for exchange of information (EOI) to the standard, as they do not specifically allow for exchange of information for the enforcement of the domestic tax law of the requesting countries. Furthermore, the absence of provisions which mirror Articles 26(4) and 26(5) of the OECD Model Tax Convention creates an impediment to EOI with respect to three other DTCs,[18] due to restrictions in the domestic laws of these partner jurisdictions. Brazil has taken necessary steps start the renegotiation of these 12 DTCs in order to remediate such deficiencies. It is noted that the timeframe to bring the treaties signed into force can in some cases take several years. Brazil should ensure the ratification of its signed treaties expeditiously. For this reason, element C.1 was found to be in place but needing improvement.

263. Brazil's treaty network allows for EOI for tax purposes with all relevant partners. Brazil is currently negotiating or has initialled an additional seven TIEAs, six of them being with Global Forum members and is negotiating

17. Czech Republic, Hungary, Italy, Japan, Korea, Luxembourg, the Netherlands, the Philippines, and Slovak Republic.
18. The DTCs with Austria and Luxembourg, which are in force, and the DTC with Trinidad and Tobago, which is not yet in force.

or has initialled nine Protocols in order to bring existing DTCs in line with the standard. In addition, Brazil signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (Multilateral Convention) at the signing ceremony held at the G20 Summit in Cannes, France in November 2011. Comments were sought from Global Forum members in the course of the preparation of this report, and only one jurisdiction advised that Brazil had refused to negotiate a DTC. Brazil clarified that it proposed instead to negotiated a TIEA, as there is no significant economic relationship or risk of double taxation with this particular jurisdiction. Element C.2 was therefore found to be in place.

264. All EOI articles in Brazil's DTCs and TIEAs contain confidentiality provisions which meet the international standard and its domestic legislation also contains relevant confidentiality provisions and enforcement measures. While each of the articles might vary slightly in wording, these provisions generally contain all of the essential aspects of Article 26(2) of the OECD Model Tax Convention. Where domestic law provisions on general confidentiality rules are less restrictive than those provided under the EOI agreements concluded by Brazil, the latter prevails ensuring that the standard is met. Consequently, element C.3 was found to be in place.

265. Brazil's DTCs and TIEAs protect rights and safeguards in accordance with the standard, by ensuring that the parties are not obliged to provide information that would disclose any trade, business, industrial, commercial or professional secret or information the disclosure of which would be contrary to public policy. Most of these rights and safeguards are explicitly provided under domestic law. Hence, element C.4 was found to be in place.

266. There appear to be no legal restrictions on the ability of Brazil's competent authority to respond to requests within 90 days of receipt by providing the information requested or by providing an update on the status of the request. However, in practice response times were generally greater than 90 days and in many cases took more than one year and status updates were not routinely provided.

267. The unit in charge of exchanging information for tax purposes (EOI Unit), the Coordination-General for International Relations of the RFB (*Coordenação-Geral de Relações Internacionais* – Corin), is located within the Federal Revenue of Brazil (RFB) which sits within the Ministry of Finance. In the case that the information requested is directly accessible from the taxpayer database, this information is accessed immediately by the EOI Unit and forwarded to the requesting jurisdiction. However, in most cases, the information requested is of a more complex nature and the request has to be forwarded to the local unit of the RFB where the subject of the request is registered. The lack of clear monitoring of internal timeframes and the insufficient level of resources within the EOI Unit, as well as difficulties in

obtaining information from local units in a timely manner, have led to considerable delays in response times.

268. Brazil globally receives more requests than it sends. Over the three-year review period, Brazil received 89 requests from 18 EOI partners and sent seven requests concerning four jurisdictions. Brazilian authorities have seen an increase in incoming requests and expect this trend to continue in view of the increasing volume of foreign investments into Brazil and the enhancement of bilateral and multilateral EOI relationships in practice. Feedback from peers has indicated, and the Brazilian authorities have confirmed, that mainly due to the efficient streamlining of the EOI process as well as the rolling out of a new online monitoring system for EOI requests, response times had decreased significantly during the three-year period under review (2009-11). Despite the delays in response times, feedback from peers indicate that the responses provided by Brazil are comprehensive and of good quality.

C.1. Exchange of information mechanisms

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

269. Under articles 49, 59 and 84 of the Federal Constitution of Brazil, DTCs and TIEAs are given the force of law once they are duly signed and ratified. The competent authority to request and provide information under Brazil's EOI agreements and domestic laws is the Secretariat of the Federal Revenue of Brazil, a government agency which operates under the Ministry of Finance.

270. According to the hierarchy of legal norms, international agreements are at the same level as ordinary laws, but they take precedence over domestic tax legislation, including ordinary tax laws enacted later in time (National Tax Code, article 98). Nevertheless, international treaties should be compatible with the Federal Constitution, which reserved certain tax matters to Complementary Law, including the allocation of taxing rights among the Union, States, Federal District and Municipalities, the regulation of constitutional limitation to taxing powers and the general tax legislation dealing with the establishment of taxes, tax bases, tax assessments, tax credits and time limitations (article 146).

271. In addition to its 40 EOI agreements, Brazil signed the Multilateral Convention in November 2011, although this Convention is not yet in force in Brazil. The updated Multilateral Convention, which incorporates internationally agreed standards for exchange of information in tax matters, is the most comprehensive multilateral instrument available for tax co-operation. When two or more arrangements for the exchange of information for tax purposes exist between Brazil and a treaty partner, the parties may choose the most

appropriate agreement under which to exchange the information. Details of all of Brazil's EOI agreements are set out in Annex 2 to this report, including their dates of signature and entry into force.

272. Brazil's EOI network has increased rapidly over the past few years, in particular as a result of the signature of the Multilateral Convention at the end of 2011. Due to increased investment into Brazil in recent years, many jurisdictions have approached Brazil to negotiate an EOI agreement. Where strong economic relations exist with other jurisdictions, Brazil's preference is to negotiate a DTC due to the advantages these provide for bilateral commercial flows. However, Brazil is also open to concluding TIEAs, signing its most recent TIEAs with Guernsey in February 2013 and the Cayman Islands in March 2013.

273. Whilst to date it has not been the practice of the competent authority to negotiate competent authority agreements, there is currently a competent authority agreement in place with Portugal, Brazil's second largest EOI partner and similar agreements are being contemplated for the future. The agreement between the competent authorities of Brazil and Portugal establishes timeliness for EOI upon request and regulates other forms of international tax cooperation between the treaty partners, including spontaneous and automatic EOI, simultaneous tax examinations and tax examinations abroad.

Other forms of exchange

274. Whilst this report is focused on the terms of its EOI agreements and practices concerning the exchange of information on request, it is noted that the DTCs signed by Brazil are not restricted to this form of information exchange and the Brazil-Portugal DTC, as well as the Multilateral Convention, explicitly provide for spontaneous and automatic exchange of information. To date, Brazil has only exchanged information on request but Brazilian authorities have confirmed that they are in a position to provide information on a spontaneous and automatic basis also.

Foreseeably relevant standard *(ToR C.1.1)*

275. The international standard for exchange of information envisages information exchange upon request 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:[19]

19. Article 26(1) of the Model Tax Convention contains a similar provision.

> 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.

276. The latest DTC signed by Brazil (with Turkey) in 2010 is the only DTC that uses the words "foreseeably relevant". Brazil's DTCs generally provide for the exchange of information that is "necessary" for carrying out the provisions of the Convention or of the domestic tax laws of the Contracting States. The commentary to Article 26(1) of the OECD Model Tax Convention refers to the standard of "foreseeable relevance" and states that the Contracting States may agree to an alternative formulation of this standard that is consistent with the scope of the Article, for instance by replacing "foreseeably relevant" with "necessary" or "relevant". The Brazilian authorities confirmed that the terms "necessary" and "relevant" under these EOI agreements are interpreted in accordance with Commentary to Article 26(1) of the OECD Model Tax Convention.

277. However, DTCs with nine jurisdictions[20] limit EOI to the purposes of carrying out the provisions of the Convention. These DTCs fail to meet the standard as they do not specifically allow for EOI for the enforcement of the domestic tax law of the requesting jurisdiction. This includes DTCs with major economies and important trade partners, such as Italy, Japan and the Netherlands. On 19 July 2011, Brazil sent to the embassy of each of these jurisdictions a proposal of renegotiation of the EOI article in these DTCs, to bring them into line with the standard. Renegotiation of these DTCs is ongoing and the Brazilian authorities have reported that they should be concluded by mid 2014.

278. The Brazil-United States TIEA refers to information that is "relevant" for EOI purposes, which allows for the same scope of EOI as does the term "foreseeably relevant". The most recent TIEAs signed by Brazil with Bermuda, the Cayman Islands, Guernsey, Jersey, the United Kingdom and Uruguay (none as yet in force) refer to the foreseeable relevance of a request. Another seven TIEAs are under negotiation, six of these with Global Forum members. The Brazilian authorities have advised that these TIEAs meet the "foreseeably relevant" standard and will be signed as soon as possible.

20. Czech Republic, Hungary, Italy, Japan, Korea, Luxembourg, the Netherlands, the Philippines, and Slovak Republic.

279. The Brazilian authorities have also stated that no EOI request has ever been declined for reasons of foreseeable relevance and this is consistent with the feedback received from peers.

In respect of all persons (ToR C.1.2)

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

281. 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. Twelve of Brazil's 33 DTCs contain this sentence, allowing for EOI in respect of all persons.[21] However, Article 26(1) of the DTCs with an additional 12 jurisdictions[22] apply to "carrying out the provisions of the Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention". As a result of this language, these DTCs would not be limited to residents because all taxpayers, resident or not, are liable to the domestic taxes listed in Article 2.

282. Similarly, the TIEAs concluded by Brazil with Bermuda, the Cayman Islands, Guernsey, Jersey the United Kingdom and Uruguay (none as yet in force) and with the United States (in force) are not restricted to certain persons such as those considered resident in or nationals of either contracting party, nor do they preclude the application of EOI provisions in respect to certain types of entities. Therefore, EOI in respect of all persons is possible under the terms of these 28 EOI agreements.

283. Although Brazil's EOI agreements vary in respect of explicitly stating that the agreement is "in respect of all persons", both discussions with Brazilian authorities and feedback from exchange partners indicate that in practice no difficulties have arisen with any of its exchange of information partners regarding an exchange request relating to residents of either of the contracting states or residents of third party jurisdictions.

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21. Chile, China, Finland, Israel, Mexico, Peru, Portugal, Russia, South Africa, Venezuela, Turkey and Trinidad and Tobago.
22. Argentina, Austria, Belgium, Canada, Denmark, Ecuador, France, India, Luxembourg, Spain, Sweden and Ukraine.

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

284. Jurisdictions cannot engage in effective exchange of information if they cannot exchange information held by financial institutions, nominees or persons acting in an agency or a fiduciary capacity. Both the OECD Model Tax Convention and the OECD Model TIEA, which are 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.

285. Article 26(5) of the OECD Model Tax Convention states that a contracting state may not decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person. Except for the DTCs with Chile, Peru, Turkey and Venezuela (not yet in force) [23] and the TIEAs with Bermuda, the Cayman Islands, Guernsey, Jersey, the United Kingdom and Uruguay (none yet in force), and the United States (in force), none of Brazil's other 29 DTCs contain such a provision.

286. However, the absence of this paragraph does not automatically create restrictions on exchange of bank information. The commentary to Article 26(5) indicates that while 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). Brazil has access to bank information for tax purposes under its domestic law (see section B), and is able to exchange this type of information when requested, on a reciprocal basis, i.e. where there are no domestic impediments to exchange of bank information in the case of the requesting party. In 2009, Brazil withdrew its previous observation to Article 26(5) of the OECD Model Tax Convention. Nevertheless, the

23. Under these DTCs, EOI is conditional to the constitutional and legal limitations and on the basis of a reciprocal treatment. In December 2009, Chile enacted Law 20.406, which establishes a procedure that allows the Tax Authority to access all bank information, including information subject to bank confidentiality and secrecy for EOI purposes in all tax matters. It is unclear whether Peru or Venezuela has constitutional and legal limitations concerning bank information, as these jurisdictions are not covered by the Tax Co-operation 2010: Towards a Level Playing Field – Assessment by the Global Forum on Transparency and Exchange of Information for Tax Purposes (http://oecd.org/document/12/0,3746,en_21571361_43854757_46098764_1_1_1_1,00.html).

Brazilian authorities confirmed that Brazil had always been able to exchange bank information even before withdrawing its observation, including under EOI agreements signed before 2009.

287. Among Brazil's DTCs partners, Austria and Luxembourg are currently unable to access bank information for exchange purposes absent an explicit provision in the DTC. The embassies of each of these jurisdictions were contacted on 19 July 2011 and again in August 2012 for the renegotiation of the EOI article in these DTCs. Similarly, the authorities of Trinidad and Tobago can only access bank information when there is an ongoing tax assessment and an objection to the assessment by the taxpayer. The embassy of Trinidad and Tobago was contacted for the first time in this respect in August 2012. Therefore, Brazil's DTCs with these three jurisdictions are not considered to meet the standard. It is unclear whether Ecuador has restrictions to the access of bank information in their domestic law, so it is not feasible to assess at this time whether this DTC conforms to the standard.

288. The TIEAs concluded by Brazil with Bermuda, the Cayman Islands, Jersey, Guernsey the United Kingdom, the United States and Uruguay 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.

289. Brazil made contact with Austria, Luxembourg, Trinidad and Tobago in August 2012 in order to renegotiate these DTCs to ensure that all types of information can be exchanged in practice. These negotiations are ongoing and Brazil hopes to have them concluded shortly. Otherwise as all of the EOI agreements Brazil has in place contain either an explicit provision similar to Article 5(5) of the OECD Model TIEA and Article 26(5) of the OECD Model Tax Convention, or implicitly allow for the exchange of financial information there has been no issue in practice with exchanging information held by financial institutions. At least two peers reported requesting banking information from Brazil, which was provided without any issues arising.

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

290. The concept of "domestic tax interest" describes a situation where a contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes. A refusal to provide information based on a domestic tax interest requirement is not consistent with the international standard. EOI partners must be able to use their information gathering measures even though invoked solely to obtain and provide information to the requesting jurisdiction.

291. The DTCs with Peru and Turkey are the only ones which include the provision contained in paragraph 4 to Article 26 of the OECD Model Tax Convention, which states that the requested party "shall use its information gathering measures to obtain the requested information, even though that [it] may not need such information for its own tax purposes". However, the absence of a similar provision in a DTC 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).

292. Brazil's domestic powers to access relevant information are not constrained by a requirement that the information must be required for a domestic tax purpose (Parecer PGFN/CAT No. 2.512/09, para. 69). However, the Trinidad and Tobago's authorities can only obtain information from taxpayers under examination or being assessed.[24] This requirement is tantamount to a domestic tax interest, which is an obstacle to the effective EOI and the DTC with Trinidad and Tobago, which is not yet in force, does not meet the standard.

293. The TIEAs with Bermuda, the Cayman Islands, Guernsey, Jersey, the United Kingdom, the United States and Uruguay explicitly permit the information to be exchanged, notwithstanding that it may not be required for a domestic tax purpose.

294. In practice, Brazilian authorities have indicated and feedback from peers confirms that in all cases Brazil has provided information to its contracting party regardless of whether or not it has an interest in the requested information for its own tax purposes.

Absence of dual criminality principles (ToR C.1.5)

295. 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, exchange of information should not be constrained by the application of the dual criminality principle.

296. None of the EOI agreements concluded by Brazil apply the dual criminality principle to restrict exchange of information No request has been turned down on this basis during the period under review.

24. See Peer Review Report – Phase 1: Legal and Regulatory Framework – Trinidad and Tobago, 2011; published on the Global Forum website (www.oecd.org/tax/transparency).

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

297. 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").

298. All of the EOI agreements concluded by Brazil provide for the exchange of information in both civil and criminal tax matters in all cases. Most of Brazil's DTCs contain 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. In addition, the DTCs with India, Portugal and Ukraine specifically mention that the information exchange will occur including for the prevention of fraud and/or evasion in relation to taxes (criminal matters).

299. All seven of Brazil's TIEAs with Bermuda, the Cayman Islands, Guernsey, Jersey the United Kingdom, the United States and Uruguay provide for the exchange of information for the "administration or enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this agreement". Furthermore all TIEAs specifically mention the provision of information that may be relevant to criminal tax matters.

300. During the three-year review period, Brazil provided information requested to EOI partners equally for both criminal and civil tax matters. Further, the process of exchanging information related to criminal matters is the same as that for civil matters.

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

301. 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.

302. The DTC with Venezuela expressly allows for information to be provided in the specific form requested, to the extent allowable under the

requested jurisdiction's domestic laws (Article 26(3)). In addition, there are no restrictions in Brazil's other EOI agreements or laws that would prevent it from providing information in a specific form, so long as this is consistent with its own administrative practices.

303. Brazil's competent authority can provide information in the specific form requested to the extent permitted under Brazilian law and administrative practice. In relation to the three-year period under review, Brazil was requested to provide requests in a specific form on a few occasions where documents had to be certified by a public notary.

In force *(ToR C.1.8)*

304. 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.

305. Brazil has a significant treaty network including 33 DTCs and seven TIEAs, as well as being a signatory to the Multilateral Convention. The DTCs with Russia (2004), Trinidad and Tobago (2008) and Venezuela (2005) and the TIEAs with Bermuda (2012), the Cayman Islands (2013), Guernsey (2013), Jersey (2013), the United Kingdom (2012), and Uruguay (2012), and the Multilateral Convention (2011) are not yet in force in Brazil.

306. When looking to the Brazilian treaty network, it can be seen that the time gap between the signature of an EOI arrangement and its entry into force can be quite long. The Brazilian authorities have indicated that the signature and ratification process, as set forth in the Federal Constitution, usually takes more than two years. This situation is due to several factors, as follows:

- the process concerning signature, referendum and ratification is complex, since it involves the Ministry of Finance, the Ministry of External Relations, the Cabinet of the President and the National Congress; and
- international treaties which lead to revenue losses must be adopted in plenary by the National Congress, which means both the House of Representatives (*Câmara dos Deputados*) and the Federal Senate (*Senado Federal*).

307. The President of the Republic is the competent authority to sign international treaties, *ad referendum* of the National Congress (Federal Constitution, article 84, item VIII). The ratification process of treaties that result in charges to or commitments by the National Treasury is initiated when the text is sent by the President of the Republic to the National Congress, where the treaty will

be discussed and then voted (Federal Constitution, article 49, item I). In order to be approved, the treaty should follow the legal procedures in both legislative bodies. First, it goes through the House of Representatives and then through the Federal Senate. If approved, the National Congress enacts its formal decision through a Legislative Decree, which is then published in the Official Gazette (Federal Constitution, article 59, item VI). The final step is the effective ratification by the President of the Republic and the enactment of a Presidential Decree.

308. The DTCs with Venezuela (2005) and Trinidad and Tobago (2008) have been approved by the National Congress and the instruments of ratification have been exchanged. The next and final step is the enactment of a Presidential Decree in each case. The DTC with Russia (2004) is under examination by the National Congress. The TIEAs with Bermuda (2012), the Cayman Islands (2013), Guernsey (2013), Jersey (2013), the United Kingdom (2012) and Uruguay (2012) are to be sent to the National Congress shortly. The Multilateral Convention (2011) is currently in the President's office pending appraisal by the subcommittees of both houses of parliament and will then be voted on through plenary meeting. Brazil is recommended to bring these EOI agreements into force expeditiously.

Signature and ratification in practice

309. The responsibility for negotiating EOI agreements lies with the Coordinator General of International Relations (*Coordenação-Geral de Relações Internacionais*) as situated within the RFB of the Ministry of Finance. Once an EOI agreement has been negotiated it is forwarded to PGFN (*Procurador),* the in-house counsel of Ministry of Finance, through the Executive Secretary of the Ministry of Finance where an in-house attorney will issue a legal opinion on the content of the EOI agreement. Once the EOI agreement has been agreed upon within the Ministry of Finance, it is then sent to the Ministry of International Affairs along with a covering letter and the legal opinion of the in-house attorney from the Ministry of Finance. The legal department of the Ministry of International Affairs then reviews the EOI agreement, carefully considering all the Constitutional and other legal aspects and issues its opinion. Once consensus has been reached, the EOI agreement proceeds to the international acts unit of the Ministry of External Relations and all final procedures are carried out for the EOI agreement to be signed.

310. Feedback from peers indicates that in practice there have been delays in signing EOI agreements with Brazil once negotiations have been concluded. Brazil recognises the delays and has stated that it intends to sign the other agreements shortly.

311. Feedback from peers also indicates that there have been delays experienced with the ratification of concluded agreements by Brazil. As mentioned above, Article 49, item 1 of the Federal Constitution states that international agreements which lead to revenue losses must be adopted in plenary by both the House of Representatives (*Câmara dos Deputados*) and the Federal Senate (*Senado Federal*). By their nature, TIEAs are only concerned with exchange of information for tax purposes and do not result in a potential loss of revenue. Law 4.131/62 suggests that agreements such as TIEAs could be concluded via a simplified procedure as follows:

> "Article 16. The Government is authorised to conclude agreements on administrative cooperation with foreign countries in order to exchange information of tax or foreign exchange interest such as remittances of profits and royalty payment for technical assistance and similar payments, the value of imported goods, rents cinematographic films, machines etc., as well as any other elements forming the basis of the levying of taxes."

312. Due to the systemic delays in bringing international agreements into force, Brazil is encouraged to look into means to simplify their signature and ratification processes in order to address concerns raised by its peers and as experienced in practice.

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

313. For information exchange to be effective the parties to an exchange of information arrangement need to enact any legislation necessary to comply with the terms of the arrangement.

314. According to the hierarchy of legal norms, international agreements are at the same level as ordinary laws, but they take precedence over domestic tax legislation (National Tax Code, article 98), provided that the conditions established in such international treaties do not violate the Federal Constitution or deal with tax matters reserved to Complementary Laws. Once the National Congress has approved the treaty, through a ratification process described above, the treaty partner will be informed of the completion of the Brazilian procedures in accordance with the entry into force of the treaty. Usually, such notice is given through diplomatic channels.

315. Once a treaty has been ratified, Brazil gives effect to it by using its domestic legislation and, in particular, as regards EOI, its domestic information gathering powers as described in Part B above. The sole paragraph to article 199 of the National Tax Code allows the Federal Treasury to exchange information with the foreign authorities, as provided for in international treaties, agreements or pacts, in the interests of tax collection and inspection.

316. Once an EOI agreement has been signed, which is usually done through the Ministry of External Relations or the RFB, the EOI agreement then has to be adopted in plenary by the National Congress, where it will go through the subcommittees of both the House of Representatives and the Senate. No changes can be made to the text at this stage. Once the order is approved by the National Congress, and upon publication in the Official Gazette, a notification is sent to the partner and the EOI agreement will then come into force pursuant to its terms.

317. Significant delays occur and once an agreement is signed the process generally takes from six months to three years and longer in exceptional cases. It is recommended that Brazil look at ways by which to expedite this process to ensure that their agreements are given effect through domestic law in shorter timeframes. Other than the serious problem of delays, no other issue has arisen with regards to giving international agreements effect through domestic law.

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**
Of the 40 EOI agreements signed by Brazil, 28 provide for exchange of information to the standard. Of these 28 EOI agreements, 19 are in force. Brazil has taken necessary steps to renegotiate the 12 EOI agreements which do not meet the standard.	Brazil should ensure that all its agreements provide for exchange of information to the standard.
Of the 40 EOI agreements signed by Brazil, 31 are in force. The ratification of EOI arrangements is delayed on some occasions and can take several years.	Brazil should ensure the ratification of all EOI arrangements signed with counterparts expeditiously.

Phase 2 rating
Largely Compliant.

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

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

318. 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.

319. On 3 November 2011, Brazil signed the Multilateral Convention, originally developed by the OECD and the Council of Europe but, since June 2011, also open to all countries, covering 43 jurisdictions that signed the Protocol to the Multilateral Convention.[25] As a result, Brazil's information exchange agreements cover 60 jurisdictions including most of its major trading partners, 55 Global Forum members, including 15 G20 economies and 32 OECD member jurisdictions. To date, Brazil has signed seven TIEAs and further TIEA negotiations have been concluded or are still undergoing with an additional seven jurisdictions, six of them being Global Forum members.

320. Brazil continues to expand its EOI network, and has concluded negotiations with the Republic of Georgia. Brazil is also currently negotiating protocols to its agreements with three other jurisdictions in order to bring them in line with the standard. Brazil's DTC with Germany expired on 31 December 2005. As Germany is one of Brazil's largest trading partners it is important that an agreement is in place to facilitate effective exchange of information between these two jurisdictions. As both Brazil and Germany are signatories to the Multilateral Convention, exchange of information will be enabled once the Multilateral Convention is in force in both countries. In summary, Brazils' network of information exchange agreements covers all relevant partners.

321. Comments were sought from the jurisdictions participating in the Global Forum in the course of the preparation of Phase 1 report, and only one jurisdiction advised that Brazil had refused to negotiate a DTC with it. In response to this call, Brazil sent an official letter to the competent authority in this jurisdiction on 17 November 2011 proposing the negotiation of a TIEA and received a positive answer on 24 November 2011. Brazil clarified that

25. The updated list of signatories and parties to the Multilateral Convention is available at www.oecd.org/dataoecd/8/62/48308691.pdf.

it prefers the conclusion of a TIEA where there are no significant economic relationships or where there is no risk of double taxation.

Determination and factors underlying recommendations

Phase 1 Determination	
The element is in place.	
Factors underlying recommendations	**Recommendations**
	Brazil 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)

322. 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.

323. The EOI agreements concluded by Brazil meet the standards for confidentiality including the limitation on disclosure of information received and use of the information exchanged, which are provided in Article 26(2) of the OECD Model Tax Convention and Article 8 of the OECD Model TIEA. These confidentiality obligations are also reflected in domestic law provisions and respective enforcement measures.

Exchange of information agreements

324. All of Brazil's DTCs have confidentiality provisions, most of them based on the 1963 OECD Draft Convention or the 1977 OECD Model Convention, to ensure that the information exchanged will be disclosed only to persons authorised by the DTCs. While each of the EOI provisions might vary slightly in wording, these provisions generally contain all of the essential aspects of Article 26(2) of the OECD Model Tax Convention and specifically spell out to whom the information exchanged can be disclosed and the purposes for which the information can be used.

325. All the DTCs concluded by Brazil implicitly or explicitly allow the information exchanged to be disclosed to courts or to person or authorities concerned with the enforcement of or prosecution with respect to the taxes covered by such DTCs. Only five DTCs[26] and all of the seven TIEAs[27] as signed by Brazil specifically provide that the information exchanged can be disclosed in public court proceedings or in judicial decisions. In principle, the absence of this language would not necessarily lead to information being inadmissible in court, since this exception to confidentiality is expressly provided under domestic law (see below).

Domestic law

326. Under articles 198 and 199 of the National Tax Code, tax information obtained by the Brazilian tax authorities concerning "the economic or financial situation of a taxpayer or third party and the nature and state of their business or activities" is treated as confidential and it may not be disclosed by the civil servants. The civil servants who violate this confidentiality duty may be punished with administrative and criminal sanctions, i.e. dismissal, a fine and/or imprisonment between six months and six years (Law No. 8.112/90, article 132, IX; Decree-Law No. 2.848/40 establishing the Penal Code, article 325).

327. Section 1 establishes two exceptions to the rule contained in Article 198, allowing for the disclosure of tax information when requested *(i)* by a judicial authority, in the interest of justice; or *(ii)* by an administrative authority, in the interest of the Public Administration, upon proof of regularly instituted administrative proceedings regarding administrative infringements committed by a taxpayer. The purpose of these exceptions is to assure that the confidentiality of tax information will not be an obstacle for the proper administration of justice by the Brazilian courts or to administrative proceedings

26. China, Finland, India, Peru and Russia.
27. Bermuda, Cayman Islands, Guernsey, Jersey, the United Kingdom, the United States and Uruguay.

connected to the investigation of administrative infringements committed by a taxpayer.

328. Section 3 establishes three other exceptions to the general confidentiality rule contained in Article 198 of the National Tax Code. These exceptions do not allow the disclosure of tax information, but only the fact that a taxpayer (in Brazil): *(i)* is subject to a criminal prosecution for a criminal tax offence; [28] or *(ii)* owes taxes to the Treasury, without mentioning how much or other details; or *(iii)* has a tax debt payable in instalments or suspended during a certain period of time (moratorium), without disclosing other details than name of the taxpayer, tax period and amount. Therefore, these exceptions do not allow publicizing any details (i.e. facts, data, documents, etc.) concerning the transactions that originated a tax claim, which remain subject to the general confidentiality rules. Such publicity aims at protecting the *bona fide* taxpayer who may enter into a business with another taxpayer to whom those exceptions apply.

329. Article 198 of the National Tax Code is a very broad provision which is not specifically aimed at dealing with the confidentiality of information exchanged under a DTC or TIEA. Instead, it establishes general confidentiality rules applicable to any information obtained by the Brazilian tax authorities concerning domestic affairs (e.g. processing tax returns, conducting administrative investigations, etc.). However, a DTC or a TIEA may establish confidentiality provisions which are more restrictive than those set forth under the Brazilian tax law.

330. In case of potential conflict, article 98 of the National Tax Code, as interpreted by the Supreme Federal Court,[29] sets forth a principle whereby international treaties (e.g. a DTC or a TIEA) override domestic tax legislation, including ordinary laws enacted later in time. Therefore, if a DTC or a TIEA establishes confidentiality requirements which are stricter than those set forth under the National Tax Code or other tax legislation, this DTC or TIEA will take precedence over domestic tax law.

331. Article 199 of the National Tax Code provides for mutual assistance for inspecting the respective taxes and exchange of information among the Treasury Departments of the Federation, States, Federal District and

28. That is, when the tax administration issues a document to the Public Prosecutor Office enabling the Public Prosecutors to file a criminal lawsuit against the taxpayer, stating that the taxpayer has committed a tax crime, along with proper evidence, after exhausting all administrative procedures without the collection of taxes.

29. The latest and most comprehensive decision of the Supreme Federal Court on the matter is RE 229.096-RS of 16 August 2007. It confirms earlier decisions of the Supreme Federal Court, i.e. RE 84.759-SP of 24 August 1976, RE 86.035-PN of 19 November 1976 and RE 114.063-SP of 16 April 1991.

Municipalities, in the manner set forth by law or by agreements. The sole paragraph to article 199 allows the Federal Treasury to exchange information with the foreign authorities, as provided for in international treaties, agreements or pacts, in the interests of tax collection and inspection.

332. In sum, the general domestic rules on confidentiality read in conjunction with the confidentiality provisions contained in Brazil's EOI agreements would lead to the conclusion that information exchanged with foreign authorities may only be disclosed to persons or authorities, including courts and administrative bodies, concerned with the assessment, collection, prosecution or enforcement of the tax law in question or in criminal proceedings related to such taxes.

Ensuring confidentiality in practice

Human resources

333. Prior to any formal appointment with the RFB, all candidates are required to undergo comprehensive background and security checks to ensure that they will not pose any risk to security. Once appointed, all employees are subject to confidentiality obligations as set out in the terms of their employment. All confidentiality obligations, processes and procedures are clearly outlined and explained during the induction training that all employees must undertake at the commencement of their employment with the RFB. Internal training is also systematically provided to remind and update employees on their confidentiality obligations and procedures. A culture of disclosing wrongdoing is fostered and employees are also encouraged to report any actual or suspected breaches of confidentiality.

334. As outlined above, domestic legislation in Brazil provides for confidentiality obligations and strict sanctions in the case of breach. All persons who are concerned with tax matters in Brazil are required under the National Tax Code to maintain all information relating to the financial or tax affairs of taxpayers as strictly confidential and breaches of this obligation are subject to sanctions ranging from fines to imprisonment for a term of six years. The obligation to maintain tax secrecy continues after the end of the employment relationship with the RFB and former employees who breach confidentiality shall also be subject to strict sanctions.

Facilities

335. Physical security for the confidentiality of all information/documents and computer equipment belonging to the EOI Unit is also strictly maintained. The EOI Unit is located within the RFB building, and the public are not authorised to enter the RFB building except for limited areas, accompanied at all times by RFB officials. All visitors must register at the front desk

security where they obtain a visitor pass valid for one day only. The RFB building has 24 hour security guards on duty.

Storage and processing of incoming requests

336. All EOI requests are made or received through the competent authority, being the Coordination-General for International Relations of the RFB (*Coordenação-Geral de Relações Internacionais* – Corin) by means of the Division for International Tax Affairs (*Divisão de Assuntos Tributários Internacionais* – Datin). In practice, EOI requests are received via courier, registered or regular mail where they are immediately forwarded to Corin. A hard file is opened for each request and kept in a secure cabinet within the Corin offices which is locked with a key at all times. It is the policy of Corin that only two members of staff have access to this cabinet being the person responsible for EOI and the head of the Datin.

337. On receipt of an EOI request, all details of the request are entered into an electronic system called SIFE which is only accessible by those in the EOI Unit. The existence of the request is also entered into "Comprot" which is an internal document management system of the Ministry of Finance. No details of the request are entered into this system. Secure firewalled servers are in place and only authorised persons (i.e. officials within the EOI Unit in Corin) have access to the information concerning all EOI requests. Whilst the auditor processing the EOI request at the local unit level will have access to SIFE, they will only have access to the details of the particular case on which they are working. The database which contains the information concerning EOI requests is referred to as a "hot database", and for security purposes it is not externally accessible, acting as a further preventive measure in ensuring the electronic confidentiality of information.

338. Each employee has a unique user ID and password and cannot access their PC without the use of a token that must be used at all times in order to access their PCs. These measures ensure that access to highly confidential information such as EOI requests is limited. The RFB also has many internal measures in place to ensure that confidentiality practices are being respected by all employees concerned with the EOI process.

339. In the course of accessing the requested information, all internal email exchanges within the RFB are sent via secure encrypted email. Whenever a document is to be sent to another person, division or unit within the organisation, a receipt must be signed by its addressee/receiver, confirming the document is under his custody. Documents are kept in restricted access locations.

Gathering and sending information to a foreign tax authority

340. Every entity and individual in Brazil belongs to a particular local tax unit (*delegacia*) which is then responsible for the supplying of information pertaining to that individual or entity when they are the subject of an EOI request. Once the EOI request is received at the office of the competent authority, it is first verified to see if the request can be answered from the basic taxpayer information immediately available to the EOI Unit. In cases where this information can substantiate the request, this is then forwarded to the requesting jurisdiction. However, in most cases, the request will be of a more complex nature and will necessitate further analysis by an auditor at the local unit where the subject of the request is registered. It is then verified as to which local unit oversees the handling of tax matters for the subject of the request. Once verified, the request is forwarded to an auditor in that local unit who will be responsible for obtaining the requested information.

341. When the requested information can be accessed directly from the taxpayer database, the information is compiled into a letter. This letter along with any supporting documentation is inserted into a sealed envelope which is placed into another envelope and sent back to the requesting jurisdiction. A copy of all information and a receipt of information sent is maintained on the hard file pertaining to the EOI request.

342. In the case that requested information must be retrieved from the taxpayer or a third party, this is done via a notice to produce the information. The information included in the notice is limited to the name or identity (i.e. such as bank account number) of the taxpayer, the information requested, the legal basis under the domestic law for the information to be produced, the consequence for non-compliance and the timeline within which this has to be produced. This notice will be sent by the auditor overseeing the EOI request and explicitly specifies that details of the request and information must be kept confidential at all times by the holder of the information. The information is usually provided via registered mail to the local unit handling the request who will draft a report detailing the required information. This report and any supporting documentation are placed in a sealed envelope which is placed in another envelope and sent back to the EOI Unit in Brasília via internal mail. A copy of all information sent is retained by the auditor at the local tax unit.

343. In addition to the general articles on confidentiality under the National Tax Code, there also is an internal regulation issued by the RFB (Portaria SRF N. 580 of 12 June 2001) that sets forth procedures to guarantee the confidentiality of exchanged information subject to tax secrecy. The procedure requires that such information shall be transmitted as follows:

> I. at the top right of every page of the mail conveying the information from the local unit, as well as on the documents

attached, the expression "information protected by tax secrecy" is printed or stamped;

II. The information is enclosed in two sealed envelopes:

The outer envelope shall contain only the name or position of the addressee and his address, with no mention to the level of secrecy or of its content.

a. The inner envelope shall inform the name or position of the addressee, his address, the requesting document number, the number of the mail conveying the information, and the expression "information protected by tax secrecy";

III. The inner envelope will be sealed and such shipment of this envelope shall be accompanied by a receipt;

IV. The receipt for the control of the custodian of the information shall:

a. include statements about the sender, the recipient, the document number or requisition request and the formal correspondence number relating to this information;

b. be filed once proof of delivery of the inner envelope information has been received.

344. On providing the information to the treaty partner, materials are always sent via registered mail, whereby a mail tracking function is in place. A copy of any documents requested is kept at the local unit office, whilst a copy of the request, the local unit report and the cover letter is maintained for reference purposes at the offices of the competent authority. As yet Brazil does not respond electronically to EOI requests but Brazil is currently consulting with its IT department on possible means of achieving this. Feedback from peers indicates that there have been no issues with confidentiality as it relates to exchange of information requests to date.

345. The Brazilian authorities have confirmed that, there have been no cases in which information received by the competent authority from an EOI partner has been made public or disclosed to a third party other than in accordance with the terms under which it was provided and the international standard.

Determination and factors underlying recommendations

Phase 1 Determination
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)

346. 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 listed 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 jurisdictions. 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.

347. Where attorney-client privilege is more broadly defined it does not provide valid grounds on which to decline a request for exchange of information. 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, exchange of information resulting from and relating to any such activity cannot be declined because of the attorney-client privilege rule.

348. The EOI agreements concluded by Brazil meet the standards for protection of rights and safeguards of taxpayers and third parties, which are provided in Article 26(3) of the OECD Model Tax Convention and Article 7 of the OECD Model TIEA. These rights and safeguards are also reflected in domestic law provisions.

Exchange of information agreements

349. The limits with which information can be exchanged, as provided for in Article 26(3) of the OECD Model Tax Convention and Article 7 of the OECD Model TIEA, are included in each of the DTCs and TIEAs concluded by Brazil. That is, information which is subject to legal privilege; which would disclose any trade, business, industrial, commercial or professional secret or trade process; or which would be contrary to public policy, is not required to be exchanged.

350. In general, Brazil's DTCs do not contain a specific reference to trade or business[30] secrets in the provision which mirrors Article 26(3)(c) of the OECD Model Tax Convention. Instead, these provisions refer more generally to commercial secrets, which could encompass trade and business secrets. As such the grounds for declining to provide information in response to a request appear to be slightly narrower than those contemplated in the OECD Model Tax Convention.

351. Brazil has confirmed that commercial secrets are interpreted in exactly the same way as trade and business secrets and there is no difference between the two in practice despite two slightly different terms being used. Furthermore, Brazil has confirmed that no entity has refused to provide information pursuant to an EOI request on the grounds of commercial, trade or business secrecy.

Domestic law

352. As described in section B.1.5 above, the scope of the professional secrecy protected under Article 197 of the National Tax Code and the client-attorney privilege provided by article 7 of Law No. 8.906/94 appear to be broader than the standard. Nevertheless, this should not impede the effective EOI because the avenue to obtain such information directly from the relevant entities, as well as an exception to the attorney-client privilege, remain available.

353. There are no explicit provisions under domestic legislation concerning commercial and industrial secrets. Finally, the Brazilian Tax Administration may decline an EOI request if the disclosure of such information would be contrary to national sovereignty, public order and the principle of morality (Decree-Law No. 4.657/42, establishing the Introductory Law to the Civil Code, article 17).

Attorney-client privilege in practice

354. The scope of attorney-client privilege as codified under Brazilian law is not clear and could potentially go beyond the standard by extending to working documents and working premises where records may be kept and to information obtained other than in the course of providing legal advice or legal representation (see also section B.1.4 *Professional secrecy and attorney-client privilege*). The Brazilian authorities have confirmed that attorney-client privilege has never been claimed over information pursuant to an EOI request. Even in relation to domestic tax issues, Brazilian authorities indicated that claims of attorney-client privilege rarely arise in practice and claims of privilege did not arise in any case over the review period.

30. The only exceptions are the DTC with Turkey which explicitly covers trade and business secrets and the DTCs with Israel, Mexico, the Netherlands, Peru, Russia (not in force) and Ukraine, which explicitly cover business secrets.

355. Furthermore, the attorney-client privilege is not absolute and an exception is available where the attorney and/or the client are under a criminal investigation. Under the national Tax Code sanctions can also be applied in cases where it is determined that there has been abuse of attorney-client privilege.

356. In conclusion, no issues in relation to the rights and safeguards of taxpayers and third parties have been encountered in practice, nor have they been raised by any of Brazil's exchange of information partners.

Determination and factors underlying recommendations

Phase 1 Determination	
The element is in place.	
Factors underlying recommendations	**Recommendations**
There are some uncertainties as to whether the attorney-client privilege may unduly limit access to information acquired by attorneys.	Brazil should clarify the scope of the attorney-client privilege provision to ensure consistency with the standard.

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)

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

358. In the three-year period under review, Brazil has received 89 requests for information[31] from 18 different jurisdictions. The number of requests has more than doubled over the past three years. Argentina is Brazil's main

31. A request is regarded as a single request irrespective of the number of entities involved for which information is requested.

exchange of information partner, responsible for 27 of peer input requests over the three-year review period.

359. Of the 89 requests received during the period under review, Brazil has been able to respond fully to 83% (74) of these with 17% (15) of the EOI requests from that period still outstanding as of the time of the onsite visit which took place in October 2012. In 20% of cases, full information was provided within 90 days, in 26% of the cases between 91 and 180 days, in 22% of the cases between 181 days and one year and with 15% of cases it took more than one year. The remaining 17% of the cases are still outstanding. The table below shows the response times for incoming requests received by Brazil in the period 2009-11.

Response times for requests received during 3 year review period

	2009		2010		2011		Total	Average
	nr.	%	nr.	%	nr.	%	nr.	%
Total number of requests received* (a+b+c+d+e)	19	100%	33	100%	37	100%	89	100%
Full response**: ≤ 90 days	4	21%	4	12%	10	27%	18	20%
≤ 180 days (cumulative)	5	26%	11	33%	25	68%	41	46%
≤ 1 year (cumulative) (a)	9	47%	20	61%	32	86%	61	68%
1 year+ (b)	8	42%	3	9%	2	5%	13	15%
Declined for valid reasons (c)	0	0%	0	0%	0	0%	0	0%
Failure to obtain and provide information requested (d)	0	0%	0	0%	0	0%	0	0%
Requests still pending at end of the review period (e)	2	11%	10	30%	3	8%	15	17%

* Brazil 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.

** 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.

360. In most cases where requests had not been fulfilled within 90 days, the Brazilian authorities have stated that this was as a result of the lack of internal processes in monitoring the gathering of the information and in turn in responding to an EOI request. Response times over the three-year period have reduced dramatically (from an average of 17 months to seven months). This is primarily due to the implementation of a new electronic system "SEPRO" which effectively monitors the status and timelines of EOI requests. It is expected that response times and the EOI process will improve further in the coming months as a result of this system being further rolled out across all local units in Brazil.

Despite the delays in response times, feedback from peers indicate that the responses provided by Brazil are comprehensive and of good quality.

361. During the period under review, it has been standard practice in Brazil to send an acknowledgment of receipt to the requesting jurisdiction (see also C.5.2 below). However, in cases where Brazil was unable to provide the requested information within 90 days, a status updated has not been consistently provided. The official within the EOI Unit responsible for EOI communicates with the local units as to the status of an EOI request. However, communication is not regular, there are no set deadlines for sending the requested information back to the EOI Unit and there is presently no system of monitoring of response times and approaching deadlines.

362. In the vast majority of cases a final response, an update or an interim response is provided within one year to eighteen months. In most cases, a status update was not provided to the requesting jurisdiction. It is, therefore, recommended that Brazil ensures that response times are significantly reduced and status updates are provided to treaty partners by *(i)* putting in place reasonable deadlines by which information or updates must be provided by information holders; and *(ii)* implementing effective measures to monitor and communicate the status of requests to EOI partners and approaching deadlines to officials responsible for collecting information to respond to a request.

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

Organisational process

363. In April 2008, the RFB issued the "Manual on Exchange of Information" which establishes the limits, procedures, forms and other technical information to be observed by the officials concerned with the current EOI organisational process (Portaria Conjunta Asain/Coana/Codac/Cofis/Copei No. 001/08). The guidelines to be followed to obtain and provide information pursuant to an EOI are largely based on the 2006 OECD "Manual on the Implementation of Exchange of Information for Tax Purposes" and, in particular, on the modules concerning general and legal aspects of exchange of information and EOI on request. This manual sets the general framework for the EOI process and the procedures to be followed.

364. Once a request is received at the offices of the Coordination-General for International Relations of the RFB (Corin), the request is forwarded on to the EOI Unit, where it is verified that the signatory of the request is the requesting country's competent authority and that the information requested falls within the scope of the relevant EOI agreement. It is also verified that the request complies with the requirements of Article 5(5) of the OECD Model TIEA. In cases where a request is unclear or incomplete, contact is

made with the requesting jurisdiction, usually via encrypted email. Where email contact is not possible, a letter is sent.

365. Once the EOI request has been verified and the EOI Unit is satisfied that it is complete, all details, such as requesting country, subject of the request, date received, date forwarded to local unit, and information requested are entered into "SIFE", a secure online system. The receipt of the request and details of where it has been forwarded to are also entered into "Comprot", which permits the tracking of the request by its physical location within the Ministry of Finance. A hard copy file for each request is also opened in the offices of the EOI Unit as located within Corin.

366. In the case that the information requested is directly accessible from the taxpayer database, this information is accessed immediately by the EOI Unit and forwarded to the requesting jurisdiction. Basic information such as name, taxpayer number, address, residency status and as to whether or not the entity has filed tax returns can all be accessed directly by the EOI Unit officials from the taxpayer database. Over the review period 12 requests were completed from information directly accessible to the EOI Unit. However, in most cases, the information requested is of a more complex nature and the request has to be forwarded to the local unit of the RFB where the subject of the request is registered. Within the RFB, there is one central taxpayer registry, ten states registries and 600 local units. The request is forwarded via the internal mail system and is marked as strictly confidential. Once received by the local unit, a local auditor will be assigned to the matter and will proceed to deal with the request.

367. Once the request has been satisfied at the local unit, all information is marked as information protected by tax secrecy, placed in sealed envelopes and sent back to the EOI Unit within Corin. Once a request has been received from the local unit, all the information is reviewed by the competent authority and provided to the requesting jurisdiction in the form of a letter with documents attached where relevant. The letter and any accompanying documents are placed in a sealed envelope and dispatched to the requesting jurisdiction via registered mail. A receipt of postage is maintained by the EOI Unit and placed on the hard copy file for the request.

368. Brazil's competent authority, however, has experienced difficulties in receiving information from the local units in a timely manner, due to the lack of priority set for exchange of information casework. These difficulties have negatively affected the competent authorities' ability to respond to requests on a timely basis. It is therefore, recommended that Brazil monitors the implementation of an effective action plan which highlights the importance of Brazil's exchange of information program and establishes priority guidelines for the local units staff in relation to exchange of information casework to ensure that information is provided expeditiously to the EOI Unit.

369. It is noted that Brazil has revisited its internal procedures in order to increase the efficiency in the processing of EOI requests. In the event that Corin does not have access to the information requested from the taxpayer database, the request will be referred on to the *Coordinator for Programme of Tax Studies* (*Copes).* Copes, as the tax investigation unit, has access to a much greater amount of taxpayer data than the EOI Unit. In many cases this will mean that the request can be dealt with more expeditiously rather than having to send to one of the 600 local tax units to be processed. In the event an EOI request must still be processed at the local tax unit level, Copes is also responsible for monitoring the oversight of the time taken by the local units. Since the implementation of this new process, in January 2013, Copes has been able to respond to all EOI requests directly and, on average, the time taken to respond to the treaty partner with the full information was 40 days. However, as this initiative has commenced outside of the review period its effectiveness could not be assessed.

Resources

370. The coordination of all inbound requests received by Brazil is handled by one person. This person is responsible for coordinating EOI requests, accessing information directly from the taxpayer database, where possible, and if not, forwarding the requests to the local units. This person also monitors the timelines of the EOI requests, the receipt of the requested information from the local units and the forwarding of the information to the requesting party once received from the local unit.

371. Training takes the form of on the job and hands on training. A new EOI official was appointed to this role in August 2011 and had a three month handover period from the prior official in order to be effectively trained for this role. The new official has also attended a seminar on EOI held in Mexico in September 2012 and training on EOI in May 2013. The previous EOI official had also attended seminars and EOI training as offered by the Global Forum.

372. Brazil has indicated that the resource levels are set at an appropriate level to deal with the information exchange requests received. Due to the uncertainty in determining projected future request activity, the advance recruitment of further staff members is not projected. There is a contingency arrangement in place that should the amount of information exchange requests increase dramatically this will be adequately met by the allocation of other RFB personnel to Corin or the secondment of RFB staff on a temporary basis. However, given the current delays in response times and the steady increase in the amount of incoming EOI requests, it is recommended that Brazil closely review its current staffing levels to assess their adequacy for responding to all EOI requests in a timely manner.

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

373. Exchange of information assistance should not be subject to unreasonable, disproportionate, or unduly restrictive conditions. As noted in Part B of this Report, there are no aspects of Brazil's domestic laws that appear to impose additional restrictive conditions on effective EOI that would be incompatible with the international standard. Feedback from peers has not indicated that Brazil has created any restriction on the exchange of information in this respect in practice.

Determination and factors underlying recommendations

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

Phase 2 rating	
Partially Compliant.	
Factors underlying Recommendations	**Recommendations**
Although Brazil has made significant progress in response times over the three-year period, in many instances the competent authority has been unable to answer incoming requests in a timely manner. The current EOI structure and processes for handling EOI requests, in particular the lack of an appropriate level of resources and the lack of clear monitoring of timeframes for obtaining and providing information, has inhibited expedient responses to EOI requests.	Brazil should endeavour to improve its resources and streamline its processes for handling EOI requests and ensure that the EOI Unit is clearly monitoring the timelines of all EOI requests as they are being processed to ensure that all EOI requests are responded to in a timely manner.
Brazil does not always provide an update or status report to its EOI partners within 90 days in the event that it was unable to provide a substantive response within that time.	Brazil should ensure that a new internal procedure is put in place to provide status updates to EOI partners within 90 days in those cases where it is not possible to provide a complete response within that timeframe.

Summary of Determinations and Factors Underlying Recommendations

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities *(ToR A.1)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant.		
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements *(ToR A.2)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant.		
Banking information should be available for all account-holders *(ToR A.3)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant.		

Determination	Factors underlying recommendations	Recommendations
Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information) *(ToR B.1)*		
Phase 1 determination: The element is in place.	There are some uncertainties as to whether the attorney-client privilege may unduly limit access to information acquired by attorneys.	Brazil should clarify the scope of the attorney-client privilege provision to ensure consistency with the standard.
Phase 2 rating: Compliant.		
The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information *(ToR B.2)*		
Phase 1 determination: The element is in place, but certain aspects of the legal implementation of the element need improvement.	There are no exceptions to the prior summoning procedure for accessing detailed bank account information. To require in all cases that the taxpayer be first approached, and thus notified, may unduly prevent or delay the effective exchange of information in urgent cases.	It is recommended that certain exceptions from prior summoning procedure for accessing detailed bank information be permitted (e.g. in cases in which the information requested is of a very urgent nature or the notification is likely to undermine the chance of the success of the investigation conducted by the requesting jurisdiction).
Phase 2 rating: Partially Compliant.		

Determination	Factors underlying recommendations	Recommendations
Exchange of information mechanisms should allow for effective exchange of information *(ToR C.1)*		
Phase 1 determination: The element is in place, but certain aspects of the legal implementation of the element need improvement.	Of the 40 EOI agreements signed by Brazil, 28 provide for exchange of information to the standard. Of these 28 EOI agreements, 19 are in force. Brazil has taken necessary steps to renegotiate the 12 EOI agreements which do not meet the standard.	Brazil should ensure that all its agreements provide for exchange of information to the standard.
	Of the 40 EOI agreements signed by Brazil, 31 are in force. The ratification of EOI arrangements is delayed on some occasions and can take several years.	Brazil should ensure the ratification of all EOI arrangements signed with counterparts expeditiously.
Phase 2 rating: Largely Compliant.		
The jurisdictions' network of information exchange mechanisms should cover all relevant partners *(ToR C.2)*		
Phase 1 determination: The element is in place.		Brazil should continue to develop its EOI network with all relevant partners.
Phase 2 rating: Compliant.		
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received *(ToR C.3)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant.		

Determination	Factors underlying recommendations	Recommendations
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties *(ToR C.4)*		
Phase 1 determination: The element is in place.	There are some uncertainties as to whether the attorney-client privilege may unduly limit access to information acquired by attorneys.	Brazil should clarify the scope of the attorney-client privilege provision to ensure consistency with the standard.
Phase 2 rating: To Compliant.		
The jurisdiction should provide information under its network of agreements in a timely manner *(ToR C.5)*		
Phase 1 determination: This element involves issues of practice that are assessed in the Phase 2 review. Accordingly no Phase 1 determination has been made.		
Phase 2 rating: Partially Compliant.	Although Brazil has made significant progress in response times over the three-year period, in many instances the competent authority has been unable to answer incoming requests in a timely manner. The current EOI structure and processes for handling EOI requests, in particular the lack of an appropriate level of resources and the lack of monitoring of timeframes for obtaining and providing information, has inhibited expedient responses to EOI requests.	Brazil should endeavour to improve its resources and streamline its processes for handling EOI requests and ensure that the EOI Unit is clearly monitoring the timelines of all EOI requests as they are being processed to ensure that all EOI requests are responded to in a timely manner.

Determination	Factors underlying recommendations	Recommendations
Phase 2 rating: Partially Compliant *(continued)***.**	Brazil does not always provide an update or status report to its EOI partners within 90 days in the event that it was unable to provide a substantive response within that time.	Brazil should ensure that a new internal procedure is put in place to provide status updates to EOI partners within 90 days in those cases where it is not possible to provide a complete response within that timeframe.

Annex 1: Jurisdiction's Response to the Review Report[32]

Brazil would like to extend its appreciation to the assessment team for their dedication and hard work throughout the course of conducting this review. Brazil also wishes to sincerely thank our colleagues in the Peer Review Group and our exchange of information partners for their valuable contributions and the useful observations they have made in ensuring that the Phase 2 report is an accurate reflection of Brazil's practical implementation of the international standard for transparency and exchange of information.

The report confirms Brazil's continuing and genuine commitment to the principles of transparency and exchange of information for tax purposes, and the effective implementation of the standards in practice. Brazil agrees with the report, takes note of the recommendations made and looks forward to working closely with the Global Forum to continue implementing further improvements in its EOI framework and practice.

The ratings exercise seemed to have brought a broad, clear view of the commitment of the assessed jurisdictions and would serve as a comparison element for the desired progress in terms of transparency and exchange of information.

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

Annex 2: List of All Exchange Of Information Mechanisms in Effect

Bilateral and multilateral agreements

List of EOI agreements signed by Brazil as at March 2013, including Tax Information Exchange Agreements (TIEAs), Double Tax Conventions (DTCs) and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAC). The EOI agreements listed below do not limit, nor are they limited by, provisions contained other EOI arrangements between the same parties concerned or other instruments which relate to co-operation in tax matters.

The chart of signatures and ratification of the Multilateral Convention is available at www.oecd.org/document/14/0,3746,en_2649_33767_2489998_1_1_1_1,00.html.

	Jurisdiction	Type of EoI arrangement	Date signed	Date entered into force
1	Albania	MAC	1 Mar 2013	Not in force
2	Argentina	DTC	17 May 1980	7 Dec 1982
		MAC	3 Nov 2011	In force in Argentina (1 Jan 2013)
3	Australia	MAC	3 Nov 2011	In force in Australia (1 Dec 2012)
4	Austria	DTC	24 May 1975	1 Jul 1976
5	Azerbaijan	MAC (Original)	26 Mar 2003	In force in Azerbaijan (1 Oct 2004)
6	Belgium	DTC	23 Jun 1972	13 Jul 1973
		MAC	4 Apr 2011	Not in force
7	Bermuda	TIEA	29 Oct 2012	Not in force

	Jurisdiction	Type of EoI arrangement	Date signed	Date entered into force
8	Canada	DTC	4 Jun 1984	23 Dec 1985
		MAC	3 Nov 2011	Not in force
9	Cayman Islands	TIEA	19 March 2013	Not in force
10	Chile	DTC	3 Apr 2001	24 Jul 2003
11	China	DTC	5 Aug 1991	6 Jan 1993
12	Colombia	MAC	23 May 2012	Not in force
13	Costa Rica	MAC	1 Mar 2012	Not in force
14	Czech Republic	DTC	26 Aug 1986	14 Nov 1990
		MAC	26 Oct 2012	Not in force
15	Denmark	DTC	27 Aug 1974	5 Dec 1974
		MAC	27 May 2010	In force in Denmark (1 Jun 2011)
16	Ecuador	DTC	26 May 1983	28 Dec 1987
17	Finland	DTC	2 Apr 1996	26 Dec 1997
		MAC	27 May 2010	In force in Finland (1 Jun 2011)
18	France	DTC	10 Sep 1971	10 May 1972
		MAC	27 May 2010	In force in France (1 Apr 2012)
19	Georgia	MAC	3 Nov 2011	In force in Georgia (1 Jun 2011)
20	Germany	MAC	3 Nov 2011	Not in force
21	Ghana	MAC	10 Jul 2012	Not in force
22	Greece	MAC	21 Feb 2012	Not in force
23	Guatemala	MAC	5 Dec 2012	Not in force
24	Guernsey	TIEA	6 Feb 2013	Not in force
25	Hungary	DTC	20 Jun 1986	13 Jul 1990
26	Iceland	MAC	27 May 2010	In force in Iceland (1 Feb 2012)
27	India	DTC	26 Apr 1988	11 Mar 1992
		MAC	26 Jan 2012	In force in India (1 Jun 2011)
28	Indonesia	MAC	3 Nov 2011	Not in force
29	Ireland	MAC	30 Jun 2011	Not in force

	Jurisdiction	Type of EoI arrangement	Date signed	Date entered into force
30	Israel	DTC	12 Dec 2002	21 Sep 2005
31	Italy	DTC	3 Oct 1978	24 Apr 1981
		MAC	27 May 2010	In force in Italy (1 Mar 2012)
32	Japan	DTC	24 Jan 1967	31 Dec 1967
		MAC	3 Nov 2011	Not in force
33	Jersey	TIEA	28 Jan 2013	Not in force
34	Korea, Republic of	DTC	7 Mar 1989	21 Nov 1991
		MAC	27 May 2010	In force in Korea (1 Jul 2012)
35	Luxembourg	DTC	8 Nov 1978	23 Jul 1980
36	Malta	MAC	26 Oct 2012	Not in force
37	Mexico	DTC	25 Sep 2003	30 Nov 2006
		MAC	27 May 2010	In force in Mexico (1 Sep 2012)
38	Moldova	MAC	27 Jan 2011	In force in Moldova (1 Mar 2012)
39	Netherlands	DTC	8 Mar 1990	22 Nov 1991
		MAC	27 May 2010	Not in force
40	New Zealand	MAC	26 Oct 2012	Not in force
41	Norway	DTC	21 Aug 1980	26 Nov 1981
		MAC	27 May 2010	In force in Norway (1 Jun 2011)
42	Peru	DTC	17 Feb 2006	14 Aug 2009
43	Philippines	DTC	29 Sep 1983	7 Oct 1991
44	Poland	MAC	9 Jul 2010	In force in Poland (1 Oct 2011)
45	Portugal	DTC	16 May 2000	5 Oct 2001
		MAC	27 May 2010	Not in force
46	Romania	MAC	15 Oct 2012	Not in force
47	Russian Federation	DTC	22 Nov 2004	Not in force
		MAC	3 Nov 2011	Not in force
48	Slovakia	DTC	26 Aug 1986	14 Nov 1990

	Jurisdiction	Type of EoI arrangement	Date signed	Date entered into force
49	Slovenia	MAC	27 May 2010	In force in Slovenia (1 Jun 2011)
50	South Africa	DTC	8 Nov 2003	24 Jul 2006
		MAC	3 Nov 2011	Not in force
51	Spain	DTC	14 Nov 1974	3 Dec 1975
		MAC	11 Mar 2011	In force in Spain (1 Jan 2013)
52	Sweden	DTC	25 Apr 1975	29 Dec 1975
		MAC	27 May 2010	In Force in Sweden (1 Sep 2011)
53	Trinidad and Tobago	DTC	23 Jul 2008	Not in force
54	Tunisia	MAC	16 Jul 2012	Not in force
55	Turkey	DTC	16 Dec 2010	9 Oct 2012
		MAC	3 Nov 2011	Not in force
56	Ukraine	DTC	16 Jan 2002	25 Apr 2006
		MAC	27 May 2010	Not in force
57	United Kingdom	TIEA	28 Sep 2012	Not in force
		MAC	27 May 2010	In force in the UK (1 Oct 2011)
58	United States	TIEA	20 Mar 2006	19 Mar 2013
		MAC	27 May 2010	Not in force
59	Uruguay	TIEA	24 Oct 2012	Not in force
60	Venezuela	DTC	14 Jan 2005	Not in force

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

Constitution

1988 Federal Constitution

Civil and Commercial laws

Decree-law No. 4.657/42 (Introductory Law to the Civil Code)

Decree-Law No. 200/67

Law No. 5.674/71

Law No. 5.869/73 (Civil Process Code)

Law No. 6.015/73 (Public Registration Law)

Law No. 6.385/76

Law No. 6.404/76 (Joint Stock Company Law)

Normative Instructions CVM Nos. 89/88, as amended by Normative Instructions CVM Nos. 212/94 and 261/97

Law No. 8.021/90

Law No. 8.934/94

Normative Instruction CVM No. 310/99

Normative Instruction DNRC No. 81/99

Resolutions CFC No. 837/99 and 920/01

Resolution CMN No. 2.689/00

Law No. 10.406/02 (Civil Code)

Law No. 12.016/09

Deliberation CVM No. 472/04Regulated activities and AML/CFT laws

Decree-Law No. 2.848/40 (Penal Code)

Decree-Law No. 3.689/41 (Criminal Procedure Code)

Decree-Law No. 73/66

Law No. 4.131/62, as amended by Provisional Measure No. 2.224/01

Law No. 4.595/64

Decree No. 55.762/65

Law No. 7.492/86 (White Collar Crimes Law)

Law No. 8.112/90

Law No. 8.383/91

Resolution CMN No. 2.025/93

Law No. 8.906/94, as amended by Law No. 11.767/08

Law No. 9.613/98 (Money Laundering Crimes Law)

Normative Instruction CVM No. 301/99, as amended by Normative Instruction CVM No. 463/08

Circulars BACEN Nos. 3.290/05; 3.401/08; and 3.461/09

Tax laws

Law No. 3.470/58, as amended by Provisional Measure n. 2.158-35/01

Law No. 5.172/66 (National Tax Code)

Decree-Law No. 486/69

Law No. 580/01

Decree-Laws Nos. 2.303/86 and 2.308/86

Law No. 8.137/90

Law No. 8.218/91

Law No. 8.981/95

Law No. 9.430/96

Law No. 9.718/98

Law No. 12.683/12

Decree No. 3.000/99 (Income Tax Regulation – RIR/99)

Complementary Laws Nos. 104/01 and 105/01

Decree No. 3.724/01, as amended by Decree No. 6.104/07

Law No. 10.426/02

Normative Instruction RFB No. 197/02

Law No. 10.701/03

Complementary Law No. 123/06

Decree No. 6.022/07

Normative Instruction RFB No. 811/08, as amended by Normative Instruction RFB No. 1.092/2010

Law No. 11.941/09

Normative Instructions RFB Nos. 979/09 and 983/09

Parecer PGFN/CAT No. 2.512/09

Normative Instructions RFB Nos. 1.042/10 and 1.033/10

Decree No. 7.574/11

Normative Instruction RFB No. 1.183/11

Portaria Corin no.1, of 27 July 2012

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

Primary legislation

1988 Federal Constitution

Decree-law No. 4.657/42 (Introductory Law to the Civil Code)

Decree-Law No. 2.848/40 (Penal Code)

Decree-Law No. 3.689/41 (Criminal Procedure Code)

Law No. 5.172/66 (National Tax Code)

Law No. 5.869/73 (Civil Process Code)

Law No. 6.015/73 (Public Registration Law)

Law No. 6.404/76 (Joint Stock Company Law)

Law No. 7.492/86 (White Collar Crimes Law)

Law No. 9.613/98 (Money Laundering Crimes Law)

Law No. 10.406/02 (Civil Code)

Decree No. 3.000/99 (Income Tax Regulation – RIR/99)

Primary government authorities

Minister of Finance (*Ministério da Fazenda*)

Secretariat of the Federal Revenue of Brazil (*Secretaria da Receita Federal do Brasil* – RFB)

National Monetary Council (*Conselho Monetário Nacional* – CMN)

National Council on Private Insurance (*Conselho Nacional de Seguros Privados* – CNSP)

Central Bank of Brazil (*Banco Central do Brasil* – BACEN)

Securities and Exchange Commission (*Comissão de Valores Mobiliários* – CVM)

Superintendence of Private Insurance (*Superintendência de Seguros Privados* – SUSEP)

Annex 5: People Interviewed During On-Site Visit

Minister of Finance *(Ministério da Fazenda)*

Secretariat of the Federal Revenue of Brazil *(Secretaria da Receita Federal do Brasil – RFB)*

Head of the International Affairs Division

Tax officials from International Affairs Division

Tax official from Coordination for Programme of Tax Studies (COPES)

Tax official from General Coordination for Tax Examination (COFIS)

Coordinator General of International Affairs

Attorney General Office representatives

Specialist: General Coordination of Corporate Taxpayer Register (CNPJ)

Specialist: General Coordination of Individual Taxpayer Register (CPF)

Exchange of Information – Head of Unit

Ministry of External Relations *(Ministério das Relações Exteriores)*

Central Bank of Brazil *(Banco Central do Brasil – BACEN)*

Securities and Exchange Commission *(Comissão de Valores Mobiliários – CVM)*

National Trade Register *(Departmento Nacional de Registro do Comércio)*

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Global Forum on Transparency and Exchange of Information for Tax Purposes

PEER REVIEWS, PHASE 2: BRAZIL

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

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 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.***

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