Expert Group on Automatic Exchange of Financial Account Information

Meeting on 21 April 2015
Centre de Conférences Albert Borschette
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WORKING DOCUMENT
1. INTRODUCTION

The AEFI expert group has published its first report on issues which should be considered by Member States for the implementation of DAC2. The primary objective of the meeting of 21 April is for experts to consider how best the recommendations of the report should be carried forward.

In section 2) of this document the Commission has provided contributions on how it intends to follow up on the findings of the report, in particular with Member States. The Commission has also provided suggestions on how the AEFI group could follow up on its findings in its own work plan. Experts should bear in mind that some of the findings may need quick follow-up given the timing of the implementation of DAC2. A second review of the Group's recommendations could be considered at the next meeting of the Group which is planned to take place in September 2015.

2. FINDINGS OF THE FIRST AEFI EXPERT GROUP REPORT

2.1. Time lines

Recommendation 1: The Council and the Member States are urged to provide an achievable implementation timetable. Consideration should be given to a phased approach to implementation: pushing back reporting by 1 year, with the reporting being made in 2018 in respect of both 2016 and 2017 data.

The Commission intends to hold a meeting of the Commission WPIV expert group, which is comprised of the national tax administrations of Member States, in June, to discuss the findings of the report. Member States will be informed about the concerns of FIs that implementing legislation should be made available as soon as possible, because if not this could have important consequences for the effectiveness of DAC2, in particular as regards the quality of data exchanged. The meeting could be used as a stock-taking exercise in which to gauge the progress of Member States in drafting national legislation and, where appropriate, implementing guidelines. This meeting should also help to identify any issues that should be further addressed and allow Member States to benefit from the best practices of other Member States. The Commission will remind Member States that the dates which have been adopted in DAC2 for transposing DAC2 into national legislation should be strictly adhered to so that FIs can implement and test systems in a timely way in order to meet the agreed reporting dates under DAC2.

Question: Do experts have any comments on the approach to be taken and any other suggestions for monitoring the progress of Member States in implementing the timetable?

http://ec.europa.eu/taxation_customs/taxation/tax_cooperation/mutual_assistance/financial_account_in formation/index_en.htm

http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=953&NewSearch=1&NewSearch=1
2.2. Data protection and privacy issues

**Recommendation 2:** The Commission, the Council and the Member States must conduct a careful analysis of legal, constitutional and data protection implications of DAC2 and ensure that all steps have been taken to comply with data protection rules. Member States should adopt a common approach to develop objective criteria for assessing whether a third country’s legal framework provides an appropriate protection of the data transferred under AEOI.

DAC2 contains detailed provisions providing for the protection of personal data. These provisions were prepared following discussions of the Council Presidency with the Article 29 Working Party and the EDPS, in cooperation with the Commission.

In the negotiations with the 5 European non-EU countries, the Commission has introduced strict data protection safeguards which are designed to reflect the level of protection of personal data in each of these countries.

The Member States must now implement DAC2 in a manner compliant with their national laws implementing the Data Protection Directive. This means that they need to implement both the data protection safeguards included in DAC2 and any additional specific data protection safeguards provided in their national laws and practices in the area of data protection.

Member States are also obliged to ensure that their arrangements for AEOI with third countries respect the EU data protection principles.

As the above remaining data protection issues are within the competence of the individual Member States, the most appropriate forum for their discussion is the Article 29 Working Party, which is composed of representatives of the Member States' data protection authorities and the EDPS. DG TAXUD follows closely the work of the Working Party and provides input where required.

On 4 February this year, the Working Party issued a statement (see Annex I to this document) on the data protection aspects of AEOI. The Working Party refers the Member States to the guiding principles it has already included in its earlier comments on the CRS. At the same time it acknowledges that further guidance is necessary in order to achieve a coherent approach within the EU. Therefore, it intends to send questionnaires to the competent authorities in the Member States so as to obtain information on the current legal frameworks in Member States enabling data to be exchanged for tax purposes, and to detect the current data protection gaps in this area and any possible differences in the instruments operated by the different Member States.

The Working Party also suggests work on the issue of a uniform Privacy Impact Assessment approach at EU level and/or recommendations to Member States from the European Commission.

The Working Party confirms its openness to discussing with the Commission in the coming months the different techniques to obtain more consistency at EU level in order to limit the data protection liability risk of the Member States' tax authorities and to ensure a more consistent approach on data protection within the EU. Questions:
Do experts have any comments on the approach outlined above that is aimed at addressing the data protection aspects of the implementation of AEOI?

Have stakeholder organisations been in contact with their national data protection authorities with respect to the data protection elements of the implementation of the CRS?

2.3. Implementing guidelines

Recommendation 3: Consistent implementing guidelines must be developed with a view to achieving a level playing field notably in the definitions of financial income. The AEFI Group emphasizes that the commentary of the Common Reporting Standard (CRS commentaries) is not sufficient in terms of guidance and that more detailed guidelines are necessary. It also urges Member States to have in place the necessary legal framework and related Guidance well ahead of the 1 January 2016 deadline.

Soon several Member States will issue implementing guidelines for the CRS. The Commission’s Working Party IV meeting with Member States that is planned for June could be used as an opportunity to see how Member States are progressing with their development of implementing guidelines and to find out what issues they have identified as requiring special attention. This meeting should also allow Member States to exchange best practices and help them with the preparation of their own implementing guidelines.

In preparation for the WPIV meeting, experts in the AEFI Group could usefully prepare a model of implementing guidelines for Member States, in particular regarding the reporting of entities. The OECD has also recently released a FAQ3 for the CRS which clarifies issues raised by business which could provide input for the model. A model prepared by this Group could elaborate on the main issues that Member States should include in implementing guidelines such as the following:

- Reporting on payments and accounts to passive NFEs and investment entities in non-participating jurisdictions;
- Reporting on payments and accounts attributable to Controlling Persons under the Directive;
- Reporting on trusts under the Directive, for example: reporting duties regarding Controlling persons of the trust when an FI is the trustee, and treatment of different types of trusts i.e. discretionary trusts (with different scope and level of discretion) and trusts where there is an obligation to make a payment;
- Definitions of financial income, in particular treatment of income from derivatives, in accordance with national definitions;
- Options to be decided on by Member States for DAC2;
- Self-certification forms/guidance to be used;
- Approach to be taken regarding which of the involved FI maintains an account;

- Tax residency for entities (i.e. transparent/opaque) and Financial institutions under DAC2 – possible set of examples

The model could also elaborate on issues like single wave due diligence for all customers irrespective of whether they are resident in participating and non-participating jurisdiction, and issues that have been left open in the AEFI report as needing further consideration such as how best to ensure effective due diligence for publically traded funds.

It should be noted that the lack of precision in the customer data to be collected under the Savings Directive was mainly confined to the first phase of implementation and that this problem was remedied via closer monitoring and the availability of more detailed implementing rules.

The experience from the Savings Directive demonstrates that FIs will have a vital role in liaising with customers under DAC2, above all regarding tax residence and in order to comply with rules on data privacy and protection. The model guidelines to be prepared by the AEFI could also, in the longer term, include a template of the information that FIs should provide to customers.

Questions:

Following on from the first AEFI report, do experts consider that it would be useful for the AEFI group to develop the main issues raised in the first report with a view to assisting Member States in the preparation of their implementing guidelines?

Do experts consider if there are other issues which would need development?

Are the experts involved in developing on behalf of their stakeholder organisations information explaining DAC2 to customers? Do they consider that the AEFI Group could provide useful input to such an industry standard?

2.4. Definition issues in the context of the CRS

**Recommendation 4:** The definitions of key concepts, in particular Investment Entity and Financial Account, must be clarified with a view to ensuring a consistent implementation of the CRS across all Member States.

These definition issues could feed into a Model of implementing guidelines (see Recommendation 3).

The Commission agrees that inconsistencies in the definition of Investment Entity could potentially create situations of dual reporting or non-reporting. That issue can be discussed with Member States in the margins of WP IV. COM is interested to hear from the Group in more detail about the reasons for such different interpretations.

Question: Do experts have any other suggestions for following up on this issue?

2.5. Guidance of due diligence on existing accounts – Treatment of non-participating jurisdictions – Best practices on self-certifications

**Recommendation 5:** The due diligence procedures for pre-existing accounts which are meant to create operational efficiencies for Participating Jurisdictions’ Financial Institutions (PJIFIs) must be adapted in order to ensure that these operational efficiencies
are achieved. As a preliminary recommendation, the AEFI Group suggests that a “Best Practice” model of self-certification form according to the type of business and lines of business may be developed for suggested use across all Member States. This model should be reflected in all Member States guidance. Only mandatory fields of such a self-certification should be validated under the reasonableness test.

The BIAC Group has recently issued a guidance form explaining the data elements that need to be collected for self-certification purposes for DAC2 in respect of the following parties: Entities (Commercial-Banking-Credit Institutions); Controlling Persons; Simple Trusts; Complex trusts & funds; Insurance and Intermediary/Nominees. This guidance could provide input to the draft Model implementing guidelines discussed under point 2.3. above.

Furthermore some of the issues regarding due diligence of pre-existing accounts, e.g. publicly traded investment funds in non-Participating Jurisdictions and self-certification “best practice”, could be raised at the above mentioned Working Party IV meeting with Member States with a view to ensuring that operational efficiencies are made. Nevertheless, any simplifications must adhere to the text of DAC2 as adopted by the Council.

| Question: Do experts consider that the BIAC self-certification guidance is a suitable model to be used for DAC and would any information fields need to be modified for the purposes of DAC2? |
| Do experts have any other suggestions for following up on this recommendation? |

### 2.6. List of excluded accounts and entities

**Recommendation 6:** Member States are called to ensure the coherence and a level playing field in the lists of excluded accounts and entities. They should provide drafts for consultation well ahead of the 31 July 2015 deadline.

In its management action plan for 2015, TAXUD proposes to undertake a study on the eligibility of lists prepared for Annex I of Directive 2014/107/EU. It is likely that the study will be launched in the second half of the year after the publications of the lists by Member States.

Furthermore, the AEFI Group could discuss what input they could contribute in the review of the lists to be published by Member States in July, in particular for the meeting of WPIV in June. The review of this list could be scheduled for the next meeting of the Group planned for September 2015.

| Questions: Could experts identify the main criteria to measure eligibility of the lists to be drawn up by Member States for DAC2, including lists drawn up for FATCA purposes, in particular with a view to ensuring a level playing field for market operators and jurisdictions implementing DAC? |

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4 Study on eligibility of the lists prepared by Member States of entities and accounts that shall be treated, respectively, as Non-Reporting Financial Institutions and Excluded accounts for Annex I of Directive 2014/107/EU
What role can the experts provide in the review of the lists to be provided by Member States – during the next meeting of the AEFI group scheduled for September or before?

2.7. Minimise the administrative burden and aligning the compliance regime

Recommendation 7: In order to ease compliance by Financial Institutions (FIs) and minimise their administrative burdens, the AEFI Group calls on Member States to harmonize the compliance regime starting with the introduction of a standard programme of internal audit review requirements. Early Adopters jurisdictions are also invited to consider starting implementation with a soft landing period.

The Commission proposes to follow up on this issue with Member States in the WPIV meeting in June.

The standardised programme of internal audit review requirements can indeed alleviate the burden on smaller FIs. COM is nevertheless uncertain whether that should come from the business side, or from the national MS legislators. Any “soft landing” will have to be assessed against the criteria for faithful implementation and enforcement of the EU legislation in Member States within the foreseen deadlines.

Question: Do experts have any other suggestions for following up on this issue?

2.8. IT issues and schema for reporting

Recommendation 8: The schema for reporting under the CRS/DAC2 and solutions on other IT-related issues must be developed in close consultation with the industry. The key principle of applying one truly global standard must also be reflected on the reporting format: FIs must be able to implement global reporting IT solutions within the EU, with third countries and domestically. The technical specifications developed by the Commission should fully reflect this concern. The report provides a number of recommendations in this respect.

On 12 February, the Working Group on Administrative Cooperation in Taxation, comprising experts from the 28 EU national tax administrations, endorsed a Master Plan as regards the implementation of DAC2. The Master Plan covers:

- The problem statement: general, European and international contexts, interaction between EU and international contexts and business needs;

- The project description: objectives, interrelations and dependencies, outcomes and benefits, detailed scope, impacts, deliverables, assumptions, constraints, risks, roadmap; and

- The methodology and governance: activities, governance, respective roles of the Commission and Member States, review cycles and change management, collaboration between Member States.

Concretely, the project will mainly consist for the Commission Services of:

- The production of the detailed (functional and technical) specifications for the DAC2 system, under the form of deliverables that need to be (i) in line with the usual EU
level of details as well as (ii) fully consistent with the Standard from a technical point of view (in particular the schema which should be deemed as fixed), and

- The extension to this system of the other usual EU policies, tools and provisions (terms of this expert group in collaboration, service level agreements, security policy – incl. data protection –, test and evaluation) necessary to make the system work within the EU or comply with the DAC2 provisions as regards AEOI.

An overview of the project will be presented at the AEFI meeting on 21 April 2015.

The important remark concerns the scope of the project, i.e. the project will concentrate only on the common domain (i.e. at the level of national tax administrations): any development specifically related to the national domain is excluded. For example, the gathering of the data from the economic operators, the means of communicating with the third parties and the integration of the data in the national databases are activities outside the scope of this project.

Further to recent discussions with Member States, the focus will initially be on the preparation of the detailed (functional and technical) specifications and, in particular, the question of the corrections. The OECD will be systematically invited as an observer to the meetings and contacts will be made to ensure that developments on the EU side remain aligned with other developments at the side of the OECD.

Another important topic will be the channel of communication, both between the tax administrations themselves and between the financial institutions and their respective tax administrations. The Commission met the OECD Secretariat and is also in discussion with the Global Forum Secretariat in order to examine the possible use of the Open e-TrustEx5 system.

Open e-TrustEx is an open-source platform offered to Public Administrations (at international, European, national and regional level) to set up secure exchange of digital structured and unstructured documents from system to system via standardised interfaces. It allows Public Administrations to replace paper documents or files stored on DVDs and CDs by system-to-system exchange of information, using a technologically advanced platform.

e-TrustEx helps Public Administrations to:

- Switch from expensive registered post to large scale digital exchange of information. This will lead to cost savings and reduced time-to-market.

- Digitise and secure the exchange of information between themselves and with other stakeholders across Europe. This will increase the efficiency of business processes and their transparency.

- Re-use and share lessons learnt, specifications, tools and components. This will contribute to additional cost savings and increased efficiency.

The interfaces of Open e-TrustEx are based on the core components defined by UN/CEFACT.

5 https://joinup.ec.europa.eu/software/openetrustex/home
Questions: Do experts have any other suggestions for following up this issue?

2.9. Treaty relief at source

Recommendation 9: Concurrently with the implementation of DAC2, some members of the AEFI Group would like to invite the Commission, the Council and the Member States to consider implementing a Treaty Relief at source system.

The alignment of TRACE to the CRS was one of the topics discussed in March at a meeting of the OECD Working Party No. 10. Some of the experts in this group were present. Several possible areas of alignment were discussed at that meeting and some (limited) changes to the TRACE implementation package will be made as a result. It was agreed that the possible interaction between TRACE and BEPS action 6 (limitation of treaty benefits) should be examined further.

In the EU a treaty relief at source system could be implemented either via EU legislation or independently by each Member State.

Implementing such a system through EU legislation would ensure implementation by all Member States and consistency in application but an EU-wide system might, as a result of discussions and compromises in the Council, differ from TRACE. Above all, a proposal for EU legislation in this field would need unanimous approval in the Council before it could be adopted. This unanimous agreement would be difficult to achieve without strong evidence of the potential benefits for all Member States.

The Commission has already issued a recommendation proposing that Member States adopt a relief-at-source system so the value of another recommendation is not clear.

One way or another, evidence of the benefits of a relief-at-source system for both financial institutions and tax administrations is needed. The group could help by providing evidence of this nature, based on quantitative data and best practices in Member States.

Questions:

- What is the experts' preferred option for the implementation of a treaty relief at source system:
  - implementation of TRACE (or a system similar to TRACE) through EU-wide legislation;
  - implementation of TRACE by the individual Member States on a voluntary basis, with no binding EU legislation;
  - implementation by all Member States of a best practice relief-at-source system already in existence in one or more Member States?

- Can the experts provide quantitative data on the potential benefits for the Member States if TRACE or an alternative system is implemented?

- What is the assessment of the experts on the possible interaction between TRACE and BEPS action 6 (limitation of treaty benefits)?

- Do experts have any other suggestions for specific following up actions by the Commission on this Project?
2.10. Capacity building and statistics

Recommendation 10: The Commission, the Council and the Member States are invited to provide developing countries with support for AEOI, notably by assisting these tax authorities and building expertise in the field of statistical analysis.

As announced in the new Commission Communication on Tax Transparency\(^6\), the Commission, including Eurostat, will work with Member States to explore how more comparable and reliable data on the scale and economic impact of tax evasion and avoidance could be compiled. To this end, a FISCALIS project group has been launched, with a view to encouraging greater transparency between Member States on their national tax gap data and the methodologies for calculating it. The results of this project could contribute to compliance issues related to AEOI and provide methodologies for developing countries.

The Commission will also participate in the OECD forum\(^7\) for promoting the Global standard for developing countries in particular through capacity building and making use of data.

Questions: Do experts have any other suggestions for following up on this issue? Do experts have any data sources that could be used for point (i) to help with monitoring of fund flows and best practice for the cost-benefit methodology mentioned in point (ii).

2.11. Way forward to include third countries in the OCED global standard network

Recommendation 11: The Commission, the Council and the Member States are urged to create a more effective global system of AEOI that limits the administrative burden, enhances the level playing field and pays sufficient attention to the needs of developing countries. Among others, the AEFI Group calls on Member States to promote the universal use of the Multilateral Competent Authority Agreement (MCAA) and to start Global Forum pilot projects with developing countries that are not ready to sign or implement the MCAA.

See action list for 10) and follow-up of the issue in the WPIV meeting.

ANNEX I – Working Party 29 statement on data protection aspects of DAC2 (see separate document)
