Expert Group on Automatic Exchange of Financial Account Information

Meeting on 30 October 2014
Centre de Conférences Albert Borschette
Rue Froissart 36 - 1040 Brussels
SUMMARY RECORD
1. **INTRODUCTION**

The Commission welcomed the members of the Commission expert group on Automatic exchange of financial information (AEFI group) to its first meeting and presented the agenda:

1. Roundtable introduction of the members of the group;

2. The way ahead for the amended Directive 2011/16/EU on administrative cooperation in (direct) taxation (‘DAC2’);

3. Main features of DAC2 and the differences between the Global standard on automatic exchange of information\(^1\) and DAC2;

4. Suggestions from experts for the work plan of the group.

COMM welcomed the broad composition of the group which included members from organisations representing financial sector businesses which will be required to implement the new Directive and stakeholder organisations representing good governance in tax matters including combating tax evasion and tax fraud.

COMM then presented the draft standard rules of procedure of the group for their approval. AIMA and ACCA requested clarity on the article on confidentiality in the rules, in particular whether the members of the group would be able to share the issues raised in the meetings of the group with colleagues in their organisations or with other organisations outside the group. COMM replied that there is no problem for participants to share with colleagues in the same member organisation. However, when it comes to disclosing information to organisations which are not members of the group, in line with the requirement of confidentiality, the members can only provide general information which does not reveal specific positions taken by the participants. This will be the approach taken in the minutes of the meeting which will be published when finalised. COMM added that it was also consulting the appropriate service in the Commission about the draft rules of procedure and would in this context clarify the scope of the confidentiality rule.

COMM reminded the members that for the group to be successful and to deliver high quality results, all members will have to participate actively in the meetings and contribute to the work of the group.

COMM noted that one of the main objectives of this group was to assist the Council and Member States to ensure that EU legislation on automatic exchange of financial account information is effectively aligned and fully compatible with the OECD global standard on automatic exchange of financial information, with a view to minimising the administrative burden for financial intermediaries while preserving the specific needs of the EU Internal Market. In particular, the aim is to explore how:

- to improve tax compliance in order to combat tax evasion and tax fraud;

• to limit the administrative burden on market operators concerning the implementation of the aligned EU legislation;

• to ensure compatibility with EU data protection rules;

• to ensure a level playing field for market operators.

2. THE WAY AHEAD – DAC2

COMM provided a brief overview of the developments on the OECD Global standard and its approval by the OECD Council on 15 July 2014. Political agreement had been reached in Council (ECOFIN) on 14 October 2014 on the adoption of a DAC2 as regards mandatory automatic exchange of information which is aligned with the Global standard. Council Directive 2011/16/EU (referred to hereinafter as ‘DAC1’) already provides for the mandatory automatic exchange of information between Member States on certain categories of capital and income, mainly of a non-financial nature, that taxpayers hold in Member States other than their state of residence on the basis of availability. DAC2 introduces categories of financial information which will be subject to automatic exchange of information which will not, as is now the case for DAC1, depend on availability of the data.

DAC2 is likely to be formally adopted in December. On the adoption of DAC2 it is expected that Member States will invite COMM to propose the repealing of the Savings Directive and to coordinate the smooth transition from the Savings Directive to DAC2, while avoiding timing gaps in the reporting. On the formal adoption AT may obtain a derogation to apply DAC2 as from 1 January 2017 instead of 1 January 2016.

Simultaneously COMM has been in negotiations with the five European third countries during 2014 on updating the current Savings agreements. COMM intends to reach a stabilised text for the agreements by the end of 2014 and will present a report on these negotiations at the December ECOFIN. These agreements will reflect the provisions of DAC2 and the global standard. In order to maintain a level playing field for financial institutions in the EU, it is important to arrive at a firm commitment for the implementation of the revised agreements as soon as possible, while taking into account the DAC2 implementation timeline.

COMM asked whether the members had any questions.

AIMA requested information on the timelines for adoption of DAC2 and whether the revised Savings Directive would be implemented. BETTER FINANCE wanted to know how the savings agreements with the dependent and associated territories would be revised.

COMM replied that it is likely that the revised Savings Directive would not now be implemented. DAC2 would likely be implemented according to the timetable provided in the working document which means that financial institutions will be required to start collecting data as from January 1, 2016 for the purposes of DAC2 while the first exchange of information will take place by September 2017. Regarding the third country agreements, LIE and SM have already joined the earlier adopters initiatives which was signed by 51 jurisdictions this week in the Global Forum meeting in Berlin while the other third countries (Switzerland, Monaco, Andorra), are committed to the Global Standard. Regarding the associated and dependent territories, COMM confirmed that many of these jurisdictions signed the earlier adopters’ initiative in Berlin. The savings
agreements with the dependent and associated territories are bilateral agreements between each Member States and each individual territory. COMM will ask Member States how they would like to proceed: if MS would like to conclude agreements between the EU and each territory then they should provide COMM with a mandate to enter into negotiations. Naturally we should ensure that there are no gaps between the scopes of DAC2, the agreements with third countries, and those with the dependent and associated territories. Furthermore, the Global Forum also stressed its commitment to helping developing countries through measures like capacity building and technical assistance in order for them to obtain the benefits of automatic exchange of information.

INSURANCE EUROPE wanted to know whether the five non-financial information categories in DAC1 would now be included in the revised agreements with European third countries. COMM replied that this was not the case but may be included at some later stage depending on global developments in exchange of information.

EFAMA and ISDA advised that for both the Global standard and DAC2 to be effective there should be lists drawn up of participating and non-participating jurisdictions to enable financial operators to comply effectively. EBF suggested we should check with the FATCA agreements on the definitions used there. COMM agreed that having workable definitions of participating and non-participating jurisdictions was essential - for example, how should an 'agreement in place' be defined (i.e. signed the multilateral agreement, put in place legislation, started applying the due diligence rules)? However, we should consider that all MEMBER STATES, including Austria which may wish to implement DAC2 under transitional arrangements, would be participating jurisdictions.

ACCA and PE raised concerns that the US may not be able to provide reciprocity under the Global Standard. COMM replied that the US had clarified its commitment to the Global Standard in a statement in the Global Forum in Berlin. In addition, the Global Forum has a peer review mechanism which ensures that jurisdictions are applying the Global Standard satisfactorily. COMM noted that under section 1 of the Global Standard if a jurisdiction is not fully compliant then it will not be regarded as a participating jurisdiction.

BBA sought clarity on how a passive NFE should be defined. COMM agreed that we also need input from the group on this definition.

AIMA called on COMM to provide clarity on the timetable for adoption of the international instruments for automatic exchange of information. Cayman Islands are signed up to FATCA, and will continue to apply the Savings agreements, while at some later stage it may be required to implement the updated bilateral agreements with Member States that take into account the Global standard and DAC2. Some of AIMA's members are relatively small operations in terms of locations in which they operate and personnel. Often the members will manage structures which include financial institutions ('FIs') based in the Cayman Islands, may have minimal obligations under the Savings Directive (because the funds are 'non-UCITS'), and/or have a relatively small investor base with a narrow geographical spread. Typically third party administrators will have assisted with any historical reporting obligations and as a result such businesses will not have in place systems, procedures or resources that can address or be enhanced to cover multi-lateral reporting. AIMA therefore request that we avoid having duplicate information reporting systems which would place disproportionate compliance burdens

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on FIs. COMM replied that both FATCA and DAC2 are closely aligned with the Global standard which should minimise the administrative burden on FIs.

OXFAM considered it important that the Directive to be signed by Member States in December should also be linked with a successful outcome of negotiations with the five European third countries in order to ensure a level playing field. Furthermore, we should work to bring these and other third country jurisdictions into the multilateral agreement, so as to ensure a level playing field at a global level and ensure that jurisdictions also exchange information with developing countries that have little negotiating power. COMM replied that the adoption of DAC2 is not linked with signing an agreement with CH although as explained COMM would like to conclude negotiations on signing such an agreement as soon as possible. In addition, it is not a condition that CH must first sign the multilateral competent authority agreement. COMM noted that the EU has already set up the IT infrastructure/exchange forms under the Savings Directive which could be rolled out to other jurisdictions around the world in order to facilitate automatic exchange of information.

BBA and FBF suggested that the timetable for implementation was unrealistic and recommended that the first reporting should take place occur in 2018. In particular there could be problems in applying the due diligence rules under DAC2 for new accounts of passive NFEs. Similarly financial institutions may be forced to follow-up with NFEs if it later appears that they reside in a non-participating jurisdiction and would need to be reported under DAC2. In addition, an unnecessary burden would be for FIs to treat Investment Entities in non-participating jurisdictions that have however committed to participate in the global AEOI system, as Passive NFEs: this would imply obtaining detailed information on the “Controlling Persons” whereas the status of such Investment Entities as Passive NFEs may change as soon as the non-participating jurisdiction turns into a participating jurisdiction. In addition to delaying the reporting until 2018, FBF suggest that the “White List” solution applied by the US for FATCA should also be explored.

Furthermore, the OECD commentaries are not sufficient as guidance. While some jurisdictions, like the UK, will provide guidance on the implementation of the Global standard3, other jurisdictions have not been as pro-active, therefore this will give rise to implementation problems.

COMM agreed that while there is a lot of political support behind an agreement there is still a great deal of work to be done to implement DAC2. COMM will set up the IT structure to exchange information under DAC2; however as it is a Directive, Member States would be required to establish implementing rules. The work of this group could include best practices in drafting such guidelines. All MEMBER STATES would need to provide a list of Non-Reporting Financial Institutions and Excluded Accounts for Annex I of DAC2. Member States will notify the Commission of such entities and accounts and this issue will not be subject to a comitology procedure. As suggested, this list could be aligned with the lists used in FATCA. For new accounts there is an extra administrative burden; however, financial institutions would need to apply AMLD provisions in any case and therefore the self-certification process could combine the requirements for both pieces of legislation.

3 Due in January 2015
EFAMA noted that not all entities are subjected to the relevant AMLD provisions. For example, in some countries regularly traded investment entities are not required to identify controlling persons, and therefore these entities will face additional work. EUSIPA noted that implementing guidelines should provide explanations on the definitions used in DAC2 including that the income is defined under the national rules of the reporting country. In particular the term 'gross proceeds' should clearly indicate that this is not equivalent to taxable income, like interest or dividends. In some jurisdictions, problems have occurred when the tax administration receives such information and automatically assumes that it is taxable income. This guidance should be prepared before the system is put in place.

INSURANCE EUROPE was concerned that there could be a lack of consistency between Member States in the preparation of Annex I (“Reporting and Due Diligence Rules for financial account information”) regarding insurance and pension products. Only insurance products below 50 K Euro would be excluded which means it could well be that there are insurance products which are low risk from a tax evasion perspective but which could nonetheless be included in an Annex I list (of Non-Reporting Financial Institutions and Excluded Accounts) by some Member States and not included by others. We should attempt to seek consistency between these lists.

PENSIONS EUROPE noted that the lists of Non-Reporting Financial Institutions and Excluded Accounts developed for FATCA IGAs by MEMBER STATES concerned should be the same for the purposes of DAC2. COMM indicated having asked MEMBER STATES to send their lists before 30 June 2015. Business said they wished to be consulted on such lists since any departure from the FATCA IGAs lists could entail significant operational burdens. COMM replied that Member States will send the lists to COMM by simple notification but that ultimately there could be a remedy procedure in the long term with the ECJ through the infringement process. Stakeholders should keep their Member States informed on entities that should be on these lists.

EBF noted that it was preparing a table indicating whether Member States are issuing guidance for their financial institutions for the Global standard. The UK is at an advanced stage in issuing guidance. In addition there are also other issues that could usefully be followed up in particular the domestic legal instruments used to implement the Global standard and the data privacy review undertaken by the national data protection supervisors.

COMM noted that the suggestion on the need for Member States to envisage a privacy impact assessment was communicated to the Member States by COMM through the Article 29 working party.

EUSIPA and FBF noted that it should be kept in mind that information collected by MEMBER STATES through the DAC2 and AEOI in general cannot be used by tax administrations to assess tax directly. The objective of DAC2 and AEOI is to assess the likelihood of tax evasion, thus, the information collected would serve only as an indicator. COMM agreed that this indeed should be made clear for example sales proceeds cannot be equated directly with capital gains as the cost should be deducted from the sales proceeds to arrive at the correct capital gain.
3. ALIGNMENT OF EU LEGISLATION TO THE GLOBAL STANDARD

COMM referred to section 2 of the working document and presented the following question:

Question 1) Members are asked to consider whether EU legislation on automatic exchange of financial account information is effectively aligned and fully compatible with the OECD global standard on automatic exchange of information, in particular as regards the following: to improve tax compliance in order to combat tax evasion and tax fraud; to limit the administrative burden on market operators concerning the implementation of the aligned EU legislation; to ensure its compatibility with EU data protection rules; and to ensure a level playing field for market operators.

ESBG wished to know how changes to the CRS in future would be included in DAC2 and on the need for common definitions. COMM replied that DAC2 refers to the commentaries in the OECD Global standard and therefore DAC2 would be dynamic. Although there is a need for consistency for common definitions we should remember that there are sound reasons why certain definitions are left to Member States, for example in the case of sales proceeds. We should also avoid gold plating where Member States go beyond what is necessary for the operation of the Directive.

ACCA was concerned that there was no limit in DAC2 regarding how long tax authorities in a receiving country could access data provided under exchange of information rules. The statute of limitation differs widely between Member States and therefore it would have been useful to have some time limit on the access to this data (i.e. lower of pre-defined time limit or the prevailing time limit in the reporting Member States). EBF and FBF suggested that DAC2 should contain a statute of limitation in its provisions for AEOI purposes and should not refer to the statute of limitations in the domestic legislation of the reporting country. COMM noted that in the Directive there is a reference to the data being retained only as long as it is necessary for the purposes of the Directive. COMM noted that the Article 29 working party may comment further on DAC2 including the issue of the statute of limitation which is used for domestic tax purposes.

ISDA suggested that there was a need to have the same treatment for entities under the Global Standard not just within the EU but in third countries and that this could be taken into account for national guidance provisions citing the difference of the treatment in the definition of a qualified credit card issuer in the CRS which creates an un-level playing field between a stand-alone credit card company compared to a bank which also deals with similar transactions.

EBSG underlined the need to have clear rules and guidance in place before the start date of the application of the Directive from 1 January 2016. If not then it could be very problematic, not only from a data protection perspective, to obtain information from non-resident customers on the opening of accounts when issues discussed today like purpose limitation regarding the use of data have not already been resolved and accepted by domestic legislators. EAPB noted that in DE financial institutions were not entitled to collect information for residents which are not in participating jurisdictions. However, if these jurisdictions would then be deemed participating jurisdictions, customer databases would have to be searched again. COMM noted that it is the responsibility of national data protection authorities to provide guidance.
FBF and EBF commented regarding the data privacy issue that not all the information to be supplied under DAC2 would be used by Member States and that the core identification data such as the account number should be sufficient.

FBF and EBF added that issues like data privacy should be addressed in a report that could be prepared by the group outlining the main issues that were considered the most important for the implementation of DAC2 and would also advise Member States on the necessary steps for swift implementation. BBA, EBF and the whole Group supported this suggestion. COMM welcomed this pro-active approach and said it would prepare a follow-up e-mail after the meeting requesting views on the issues to be contained in the report and volunteers for writing up sections of the report.

FBF asked whether a TIN would need to be requested from controlling persons under DAC2 for pre-existing account holders when local law did not require such information to be collected. COMM referred to Section 1(D) of the CRS which states that the TIN only has to be requested if one has been issued by the relevant Member State or other jurisdiction of residence.

BBA noted that there was no text in DAC2 on dormant accounts and wondered whether the provisions from the OECD commentaries would be carried over. COMM noted that the OECD commentaries are relevant to DAC2 and should be taken on board when the national implementing provisions are drafted by Member States. More generally, COMM explained that DAC2 would make a direct reference to the OECD’s CRS Commentary for interpretation purposes (except for cases where the DAC2 sets forth prescriptive provisions).

ACCA suggested that financial institutions should have a transitory regime as far as sanctions are concerned given the amount of work involved in the implementation of DAC2. OXFAM and BBA suggested whether it would be preferable that financial institutions should be required to collect all foreseeable information under DAC2/the global standard when a new account is being opened, even if the clients are resident in a non-participating jurisdiction, so as to avoid the need for additional due diligence when a non-participating becomes a participating jurisdiction. COMM suggested they raise these issues in the report. However, ultimately Member States can ultimately decide whether to provide the option in the implementing domestic legislation to collect all information that may foreseeably be required under the global standard for all new accounts at some later date.

FBF asked whether financial institutions would be able to choose the application of B1 and B2 rules. COMM confirmed FIs would have the choice to apply B1 or B2 rules and that Member States could not forbid the use of one or the other procedure.

EFAMA/IMA noted the problem that there is not necessarily any link between AMLD rules and DAC2. For example publically traded funds would incur additional burdens due to the DAC2 due diligence rules as often the information required to be validated is not available and has never needed to be provided under any other legislation including AMLD rules. In some EU jurisdictions the identity of individuals holding the account is required to be recorded while in other jurisdictions this is not the case. There is also a problem for old accounts where such information has not been collected under AMLD rules. COMM agreed that it would be important to include this gap in information and possible solutions in the report to be compiled by the AEFI group.
COMM briefly outlined section 3 of the working document on areas which the group could consider for future work. Members were asked to consider the priorities of the work for the group going forward including the issues raised above, the main tasks of the group detailed in question 1) of the working document (see above), and any other issues which they deem relevant. Members should consider how the work of the group could help deliver synergies/best practices for their stakeholder organisation/their members and the wider community they represent.

As noted above, the group and COMM agree that a report outlining the priority issues should be prepared as soon as possible.

BBA noted that UK dependent and associated territories have already created a self-certification form and that there may be a danger when individual jurisdictions create such a form and they do not match. The BIAC group is currently working on a possible “Best Practice” model of self-certification focused on the data fields needed on such a self-certification form in a harmonised way rather than imposing a mandatory form on FIs. BBA therefore recommends that this group should indicate the data fields to be used on such self-certification forms and that this should be included in the report to be produced by the group. FBF indicated that “Best Practice” forms should only include the data fields to be completed rather than prescribing the use of a mandatory form.

EUSIPA considered that the tasks of the group should also include how the taxpayer could challenge the information transferred from the source Member State to their Member State of residence. COMM confirmed that, under DAC2, FIs would need to inform their clients about the exchange of data and to do so in sufficient time to allow the exercise of data protection rights.

ISDA noted that it was important that the Member States should take into account the wider international perspective when drawing up their lists of participating/non-participating jurisdictions. COMM noted that the report could recommend having lists which go beyond the EU.

FBF emphasised the need for reporting and the experts to be consulted on the technical specifications of the reporting formats since COMM will be involved in producing the technical specifications governing the transfer of data between national authorities. FBF would like to know if it was possible for COMM to produce a working document for this for the next meeting of the group in February 2015. COMM agreed that the group could consider best practices of Member States in issuing reporting and technical guidelines. Naturally the development of national provisions implementing DAC2 will only take place after the Directive is adopted in December. COMM will be involved in producing the technical specifications governing the transfer of data between national authorities.

ACCA noted that some EU jurisdictions may have resource constraints relating to the proper implementation of DAC2 and therefore that we should consider if private tax experts can be involved in joint meetings held by COMM regarding the development of technical specifications.

INSURANCE EUROPE considered that any self-certification form should be optional and not mandatory. A distinction should be made between self-certification forms needed for individuals and entities. BBA was in agreement with the use of a standardised industry coding system.
COMM provided details on the work undertaken in the EU and at the OECD on a simplified system of relief at source from withholding taxes (the “FISCO” and “TRACE” projects”) under which financial institutions could claim DTA-reduced rates of withholding tax on securities income on behalf of their clients at the time when payments are made. COMM considers that the synergies with DAC2 would be useful for the group to explore. COMM raised the following questions:

- Does business have information on steps already being taken by EU Member States in the direction of relief-at-source systems and are the steps that the countries in question are taking satisfactory from their perspective?

- What benefits and/or risks would experts see in replacing any such existing relief-at-source systems by a single global TRACE system, or would it be better simply to encourage all Member States to follow the practices of the countries that have relief-at-source systems in place?

- Finally, do experts have any figures on the benefits that tax authorities, investors and financial institutions have derived from the relief-at-source systems that are already in place?

COMM said that it supports the work related to TRACE/FISCO but understands the need to be pragmatic considering the differences in approaches taken by Member States to support a relief-at-source system.

BBA stressed the problems met by investors when investing cross-border given the myriad of forms that need to be filled in and the procedures that investors need to comply with. Even in a country like the UK, which does not apply withholding tax on cross-border payments, the administrative burden of claiming this relief can be high. Financial institutions and investors are aware that the problem should be addressed but the real problem lies in convincing the tax authorities of the benefits of a relief-at-source system. COMM stressed the need to provide evidence of the benefits of a relief-at-source system in order to convince Member States to adopt it.

AIMA noted that its members are not normally concerned about the application of treaty relief provisions and that we should be cautious about putting a compliance burden on financial institutions in addition to the CRS of the Global standard. COMM noted that, like the US QI system, TRACE is optional for financial institutions. ESBG noted that there are several problems with the US QI system that need to be highlighted. ESBG believes that it is imperative that we create a common tax relief at source system which ensures a level playing field by considering amending TRACE to be more aligned with the CRS. The system must become practically attainable for all operators in the market who wish to obtain tax relief at source for their clients. The two key points that would need to change in TRACE are: (i) ensure that communications by FIs are done with the domestic authorities which in turn liaise with the counterpart authority; and (ii) avoid conclusions of direct agreements between FI's and foreign states. COMM noted that indeed it was important that Member States have the necessary data privacy provisions in place to allow the transfer of data to foreign tax authorities but there are good models in place in the EU which could provide best practice.

EUROCLEAR noted that for its members as contractual intermediaries there was a clear case for being a QI. However, ESBG noted that it was not practical for most financial intermediaries to have a direct arrangement with foreign tax authorities. EUROCLEAR asked whether there was any study available on the current effects of withholding taxes.
COMM replied that there is an on-going study commissioned by TAXUD on the compliance costs facing cross-border investors. In addition, COMM will contact their colleagues in MARKT to see if they can assist with details on the income flows between Member States. Statements have been made that in the US tax administration costs have been reduced and tax compliance has improved as a result of the US QI system.

PENSIONS EUROPE noted that the TRACE methodology was not appropriate for every EU jurisdiction as the financial institution did not always know the name of the investor. One should instead consider adapting the TRACE methodology.

5. CONCLUSIONS

As agreed during the meeting COMM will follow-up with Members regarding the issues to be included in the report for the implementation of DAC2. COMM will then produce an outline for the report. Members should consider both general issues faced by FIs and sector specific ones (pensions/insurance etc.). Provisional deadline for the report is by the end of 2014. Members should also consider their interest in writing sections of the report.
Participants

Association of Chartered Certified Accountants (ACCA)
Association of Life Offices (AILO)
Alternative Investment Management Association (AIMA)
Association of Financial Markets in Europe (AFME)
Association of Luxemburg Fund Industry (ALFI)
British Bankers' Association (BBA)
European Federation of Financial Service Users (BETTER FINANCE)
European Association of Co-operative Banks (EACB)
European Banking Federation (EBF)
European Association of Public Banks (EAPB)
Europclear
European Fund and Asset Management Association (EFAMA)
European Savings Banks Group (ESBG)
European Structured Investment Products Association (EUSIPA)
Fédération Européenne des Conseils et Intermédiaires Financiers (FECIF)
Financial Transparency Coalition
French Banking Federation (FBF)
Insurance Europe
International Swaps and Derivatives Association (ISDA)
Investment Management Association (IMA)
Luxemburg Bankers' Association (LBA)
Oxfam International
Pensions Europe (PE)