European Banking Federation

Chief Executive

EBF_005884

To the European Union's Finance Ministers in the G5

Brussels, 17 January 2014

Subject*:** ***Automatic Exchange of Information (AEOI)

Dear Minister,

I am writing to you in my capacity as Chief Executive Officer of the European Banking Federation (EBF), the voice of European Banks, representing national banking associations from 32 countries covering some 4,500 banks operating in the European Union (EU).

The EBF supports the development by the Organisation for Economic Cooperation and Development (OECD) of a multilateral Automatic Exchange of Information (AEOI) regime and notes governments' desire to implement an AEOI regime quickly. There are three key aspects of the present approach which we consider should be addressed to ensure a practicable and sustainable outcome for governments, tax authorities, financial services institutions and EU citizens/taxpayers/customers.

1. Ensuring a single and proportionate AEOI regime
2. Ensuring a consistent, operable and sustainable AEOI framework
3. Ensuring the implementation timetable is achievable for governments and business alike

1. Ensuring a single and proportionate AEOI regime

- **Ensuring EU-OECD alignment.** The development of EU standards[1] in parallel with OECD standards may ultimately lead to multiple, overlapping obligations, which could distort intra and extra EU competition and international business. Such an outcome would not be efficient or cost-effective from either a government or business perspective. The EBF would urge EU Member States (MSs) to commit to a single, international AEOI regime. Such a commitment should also entail halting the amending Directives to DAC and EUSD and legislating for a sunset clause on EUSD to take effect when the Common Reporting Standard (CRS) and revised Directive on Administrative Cooperation (DAC) are in place.

- **Adopting a proportionate and practicable system.** The CRS must strike a pragmatic and reasonable balance between the G20's policy objective and the practicability of requirements imposed on FIs and tax authorities. Presently, the proposed CRS due diligence requirements lack proportionality and will create multiple reporting requirements. This will place a burden on tax authorities as well as FIs. The EBF has made a number of proposals, such as simplifying the indicia approach, limiting the multi-country reporting and introducing de minimis thresholds as

[1] Such as the amending Directive on Administrative Cooperation (DAC) and the amending Directive on the European Union Savings Directive (EUSD)

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tools to focus AEOI on higher risk areas. We urge that an impact assessment is undertaken with respect to the volume of data that is likely to be generated and the costs of processing and cross checking that data. A targeted risk-based regime would be supported by other initiatives to collect data such as plans to introduce a registry of beneficial ownership.

2. Ensuring a consistent, operable and sustainable AEOI framework

- **Analysing legal and constitutional implications, including privacy issues.** Domestic legislation will be necessary in many countries before data, such as tax residence and other personal information, can be collected and reported. There may also be legal restrictions as regards privacy. We recommend the OECD canvases member governments on their legal and constitutional preparedness or likely timeline for legal and constitutional preparedness. It is also unclear what is meant by "have in place appropriate safeguards to ensure that the information received pursuant to this Agreement remains confidential" and how a breach of this requirement is established in addition to what the consequences of a breach are.

  To ensure adequate protection of the individual, the EBF considers that it may be appropriate to devise efficient resolution mechanisms for cases where two countries claim tax on the same income. It may also be necessary for an explicit rule in the international model agreement stipulating that the individual should be informed by the tax authorities of what has been sent to other countries by AEOI. In addition, the EBF considers that the OECD and participating governments should contemplate the communication of the regime to citizens/taxpayers/customers, to address the inevitable questions that the regime will trigger, such as in relation to the definition of tax residency.

- **Ensuring consistency and a level playing field.** Consistency across jurisdictions is essential both in the adoption of reporting standards developed by the OECD and in the interpretation of AEOI's requirements. Any fragmentation will significantly increase costs for tax authorities and Financial Institutions (FIs), harm the efficacy of the system in preventing tax evasion and distort competition. We are concerned that the AEOI regime may not ultimately be consistently applied as the CRS and Model Competent Authority Agreement concepts provide certain flexibilities for the partner jurisdictions to agree on specific derogations. Additionally we see risks in the conclusion of hundreds of bilateral agreements rather than agreement through a multilateral instrument. While we accept that certain limited local exceptions or practices may be required, this should not preclude a single, consistent, coherent international framework.

- **Adopting a big bang approach.** Consistency among jurisdictions must also include consistency with respect to timing and we would strongly urge MSs to agree a common start date. The introduction of new partner jurisdictions to the AEOI regime at different dates would entail excessive disruption and costs, as the addition of each new jurisdiction would necessitate a new review of client files. Should a big bang approach not prove achievable, we would urge that supporting legislation be enacted to enable local FIs to collect and hold all tax-residency information for clients to avoid the duplicative efforts of reviewing and documenting such accounts and/or contacting clients multiple times. These clients, already identified, could then be reported to the appropriate jurisdictions as these jurisdictions join the AEOI regime. The going live date of new joining countries should be coordinated accordingly so that Agreements always come into effect as of Jan. 1st each year for example, whereas the account review procedures then would have the same timeline meaning that the accounts for various countries that newly joined the CRS would only have to be reviewed once.

- **Exploiting synergies with TRACE.** Significant efficiencies could be achieved for both business and governments by aligning implementation of AEOI and TRACE simultaneously. TRACE provides at-source tax relief and simplified procedures for governments to ensure the tax relief claims are appropriate. The simplification benefits from TRACE would not only represent an offset for many of the additional compliance costs that would be associated with AEOI but would reduce administrative tasks within governments, complimenting a worldwide AEOI tax compliance system.

3. Ensuring the implementation timetable is achievable for governments and business alike

- **Providing for sufficient lead-time.** Governments should not underestimate the resource implications of AEOI for both tax authorities and FIs. Neither should it be forgotten that FIs will only be able to implement the CRS when appropriate domestic legislation, including data protection or privacy laws, have been enacted or amended. Based on experience with US FATCA and IGAs we would expect that once the final AEOI requirements and commentary have been reflected in local law, FIs and tax authorities will need at least 18 months to implement.

- **Providing for a proper and timely consultation.** Our experience of FATCA, the adoption of which followed 4 years of discussions on Regulations and Intergovernmental agreements, has shown that using a fast-track procedure to adopt important legislation with such a global reach is unrealistically ambitious. We strenuously urge that consideration is given to delaying either the commencement date and associated reporting date, or both. We would stress that the data is for identifying tax risk, not to charge tax directly. Consequently tax authorities would be required to assess this tax risk, whether the risk is assessed on 2015 or 2016 data should not alter the level of tax risk nor the cases identified for investigation and tax authorities would still be able to request earlier years information for accounts identified as high risk e.g. 2015 data (even where the account was moved as records are maintained of these transfers). Alternatively, we recommend the OECD includes a review clause in the CRS as it is the case in the OECD Model Tax Conventions.

We draw your attention to the circumstance that we have sent a similar letter to your respective counterpart in the other G5 member jurisdictions and that we intend to convey, in a second step, a comparable message to your respective counterparts of the G20.

Yours sincerely,

Guido Ravoet

European Banking Federation

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APPENDIX:
OUTSTANDING TECHNICAL ISSUES WITH THE COMMON REPORTING STANDARD

The EBF would like to emphasize some of the pending issues we have with the Common Reporting Standard (CRS), which the OECD may not have discretion to treat in the Commentary:

- Need for a phased-in approach;
- Need to treat new accounts for pre-existing individual clients as pre-existing individual accounts;
- Absence of *de-minimis* threshold in the due diligence procedures for pre-existing individual accounts;
- Reporting to multiple tax jurisdictions resulting from indicia approaches under due diligence procedures for pre-existing individual accounts;
- High-Value Accounts procedures (HVA);
- Reporting of Active NFEs under due diligence procedures for new entity accounts.

As regards those 5 points which are included in the BIAC draft cover letter, we would like to make a number of comments, in particular on:

- Data privacy issues
- Consolidated guidance
- TRACE

▪ Phased-in approach

Because the operational challenges may be huge depending on the number of CAAs to be signed, a 3-stage phased-in approach for Reporting requirements should be provided as per FATCA in order to allow sufficient time for Governments and FIs to implement the necessary legislative changes and to adapt their IT systems:

- First reporting period: reporting of identification information on account holders and account balances;
- Second reporting period where income would be added;
- Third reporting period where gross proceeds would be added.

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- **Need to treat new accounts for pre-existing clients as Pre-existing Individual Accounts**.

Self-certification on new account opening for pre-existing accountholders induces disproportionate implementation costs, in relation to the associated risk of tax evasion. Reasons:

- In the modern world clients use Internet and don't see a bank officer when they open an account.
- Account opening is part of the bank's product systems, not of the CRM system
- After initial client onboarding, client is free to open additional accounts without further identification.

CRS would require us to implement a "self-certification module" into every product system that the bank has in place. An average bank has dozens of product systems (sometimes 100+). The modification costs of each system varies with the complexity, between €150k and € 1 million+ per system. Plus a yearly maintenance cost of approximately 15% of the initial investment.

- **Absence of *de-minimis* thresholds in the due diligence procedures for pre-existing individual accounts**

We regret that the CRS does not consider the introduction of *de-minimis* thresholds which is a useful tool for both tax administrations and FIs to keep the system administrable. We therefore strongly suggest that *de-minimis* thresholds be maintained as optional filters in accordance with the IGA Model 1. The application of thresholds on an account-per-account level would also limit the burden for governments. From a business perspective, a major objective of making use of such thresholds is also to keep inconvenience to customers small by also reducing the number of customer requests and by reducing the administrative burden for sales, front-, middle- and back-office. The objective to limit the number of customer requests becomes more relevant when considering that TINs need to be obtained and reported with respect to all reportable accounts.

Finally, allowing *de-minimis* thresholds helps reduce costs in the area of reporting for both FIs and tax administrations and in the area of identification for FIs. Costs are likely to be around several millions euros for each large FI for reporting purposes only (based on our experience of FATCA and leaving aside the due diligence costs). Tax administrations are likely to face the same numbers. The cost versus benefit of the system is key.

- **Reporting to multiple tax jurisdictions resulting from indicia approaches under due diligence procedures for pre-existing individual accounts**

The inherent drawback of indicia based approaches is that they entail situations where FIs are not able to identify one single Reporting Jurisdiction. The more indicia and the more complex the indicia are, the worse the result is.

Because conflicting indicia will be occurring and these conflicts might only be solved by manual review of each case (generating cost and customer inconvenience), we consider it as a significant relief that the data elements such as phone number or standing instructions are removed from the indicia list as there are different nomenclatures and structures per country as well as a very high list of false positives. Also a signatory authority is a field requiring indirect searches and often the address of agents is not being retained, thus, the introduction of this field is burdensome. In a multinational information exchange context it will be impossible to analyse the above information reasonably.

We therefore call for a simple default procedure (i.e. a “tie-breaker” rule) or “priority” rule to be introduced in the CRS so that FIs are not required to “reference” an account as being reportable to multiple jurisdictions.

In addition, the case of multiple tax residences (outside the specific case of US citizens) is so exceptional that it should not be requested to obtain and report more than one tax residence, as it will in itself require structural data-base changes not required for FATCA.

We believe that reporting to multiple jurisdictions is also a main operational concern for tax administrations themselves which may entail significant costs.

- **High-Value Accounts procedures (HVA)**

Our experience with the Relationship Manager enquiry for High Value Accounts in FATCA shows that it generates so few “finds” that it would add no value to repeat it on an annual basis as it is currently contemplated.

- **Reporting of Active NFEs under due diligence procedures for new entity accounts**

The requirement to report on “Active NFEs” located in a Reportable Jurisdiction (e.g. on corporations carrying out an industrial or commercial business which do not benefit from the “being regularly traded” exemption) is highly questionable. We believe that tax administrations have ample opportunities to audit the corporate accounting of such companies in a way that would prevent using off-shore accounts for tax avoidance. As a matter of fact, a corporate would hold off-shore accounts in the ordinary course of its international business. It would be very difficult to use such accounts to hide taxable assets. There is currently no requirement to report such corporate accounts under the EUSD, and it would be the best interest of both the FIs and Tax Administrations to focus on “Passive NFEs” and their Controlling Persons rather than overloading the reporting with active corporate accounts.

FATCA rules do not require FIs to distinguish between US Active and US Passive entities and do not require FIs to find out who are the Controlling Persons of a US entity. Those tasks are undertaken by the IRS. The only requirement for FIs is to identify the “US status”, a fairly straightforward procedure for FIs as they are allowed to rely on a US place of incorporation. The “transposition” of this FATCA rule in the CRS does not make sense as the residence Jurisdiction will not undertake the task of determining whether the entity is a “Passive NFE” and to reach out for its Controlling Persons. As FIs are required to perform that task, it would therefore be fair to admit that the requirements of identifying and reporting of “Active NFEs” located in a reportable Jurisdiction should be dropped under the CRS.

- **Data privacy issues**

Domestic legislation and/or binding administrative guidance won't be necessarily sufficient for solving all data privacy issues related to the collection, storing and reporting of personal information. In many, if not all, OECD Member countries, the collection, storing and communication of the said information is subjected to the highest legal and constitutional standards, including, (i) national constitutions, (ii) the European Convention on Human Rights, (iii) the Charter of Fundamental Rights of the European Union and (iv) the Universal Declaration of Human Rights.

- **Consolidated guidance**

Some EBF members have doubt that providing for an additional layer of literature is the most appropriate solution. One should bear in mind that the relevant "single starting source" for interpretation should remain in the first instance the CRS commentary, a document applicable to all signatories to the CRS. Country-specific information could be instead inserted directly in the CRS Commentary, possibly following the applicable practice in the context of the OECD Model Convention, which mentions under each article the observations/interpretations provided by particular jurisdictions.

- **TRACE**

It remains essential to repeat consistently that TRACE must be linked to the CRS.