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EBF comment letter on the consultation on disincentives for advisors and intermediaries for potentially aggressive tax planning schemes

The European Banking Federation (EBF), which is the voice of the European banks, thanks the Commission for the opportunity offered to express views on whether there is a need for EU action aimed at introducing more effective disincentives for intermediaries engaged in operations that facilitate tax evasion and tax avoidance.

As an umbrella organisation representing the whole European banking sector, we have difficulties to answer the questionnaire of the consultation which seems to be directed to individual companies and legal firms.

In this context, we thought it appropriate to remind the Commission of the role of banks as obliged entities for AML purposes as well as their involvement in tax processes, the latter element having increased dramatically over the past years.

The EBF fully supports the objectives of AML and the fight against tax evasion.

We are in favour of the protection of the integrity and stability of the international financial system. Money laundering and terrorist financing are serious threats to global security and to the integrity of the financial system. Resources available to terrorists and those engaged in crime should be cut off. Banks can only live in an environment where the rule of law is fully applied.

The EBF strongly condemns tax evasion and tax fraud. They create distortions in the single market for financial services and pose a great danger to the rule of law.

The EBF experts are actively involved in international expert groups on anti-money laundering and tax transparency, both at the level of the OECD and of the EU. In these fora, we assist governments and institutions by providing expertise and workable solutions, seeking clarity on the legal and compliance requirements imposed on banks, while taking into account operational constraints, the competitive dimension, potential de-risking and the need to ensure an appropriate level of data protection and data security.

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The banking sector is today one of the most regulated sectors in the economy, and there is good reason for that. Since the crisis, regulations, including the rules on anti-money laundering and tax transparency, have been overhauled.

Over the last decade, the role of banks as tax collectors, reporting financial institutions and obliged entities under AML has increased significantly. Recent changes in banks' practices are mainly due to the changed attitude of banks towards non-resident customers and (their) off-shore activities reflected by the regulatory changes in the last years. Non-compliance with these regulatory provisions can have severe consequences including fines that might even threaten the financial institution's capacity to survive.

The intervention of banks as obliged entities in the fight against money laundering, crime and terrorism has radically changed since the conclusion of the G20 London Summit in 2009 and the evolution of banking secrecy laws that began with bilateral agreements between States. Banks more closely cooperate with Financial Intelligence Units (FIUs) than any other categories of obliged entities. For example, the 2015 TRACFIN Report shows that in France banks made 31.276 suspicious transactions reports while no report was made by law firms during the same period. To better fight against money laundering and tax evasion, a "new deal" might consist in a more purposive cooperation between the relevant authorities and obliged entities, which in most cases do not receive any feedback from FIUs on their suspicious transactions reports.

The involvement of banks in tax processes, which mainly results from their activities as paying agents and custodians, has dramatically increased over the last few years and, with FATCA and the Common Reporting Standard, has just entered the era of the Automatic Exchange of Information.

Over the last few years, banks have significantly adapted their customer due diligence procedures and are still in the process of implementing such adaptations in order to comply with many new legal and regulatory requirements. Today and in the near future, a lot of information will be made available to AML and tax authorities. These new requirements include the obligation for banks to apply enhanced due diligence requirements in relation to high-risk third countries.

Each bank has its own rules of governance, which have been developed in compliance with its domestic legal and regulatory framework. In general, rigorous internal procedures are in place to require a review of existing and new establishments of the bank (subsidiaries, branches or representative offices) in non-cooperative countries. Such procedures apply when an establishment is set up in a non-cooperative jurisdiction and when a country is placed on a list of non-cooperative jurisdictions where it was not previously listed. According to such procedures, the situation is submitted to a high-level body within the group (the board of directors or the supervisory board), which may either authorize the operation or decide where appropriate of the closure of such establishment.

Overall, supervisory bodies (of the country of the parent company) require transparency of banks' off-shore branches and subsidiaries and on some operations which are made in uncooperative jurisdictions in the area concerned by the classification of that jurisdiction in this specific list of uncooperative jurisdictions. In this case the bank has to apply to those operations specific supervisory/monitoring requirements defined by the international community.

Money laundering, terrorist financing, tax evasion and tax fraud are global problems, which require a global solution. Those who launder money or evade taxes exploit loopholes and

differences among national systems. They move their funds to or through jurisdictions with weak or ineffective legal and institutional frameworks.

A global approach is a must.

Binding lists of High Risk Countries and non-cooperative countries – that is those not complying with international standards in each of the areas concerned (AML, Common Reporting Standard, etc.) - must be established in a multilateral framework and in a transparent manner. We clearly see the need for appropriate measures to prevent the misuse of legal constructions – such as blacklisting of uncooperative jurisdictions and offshore constructions that represent an effective risk of being used for facilitating illicit activities.

Since global issues require global solutions, EU measures (Anti-Money Laundering Directive AMLD and Directive on Administrative Cooperation DAC2) should not deviate from the recommendations of the Financial Action Task Force (FATF) and the OECD standards (Common Reporting Standard – CRS). A level playing field should be ensured between European banks and non-European banks, particularly U.S. banks. In this respect, the U.S. FATCA Regulation and associated Intergovernmental Agreements, which impose specific due diligence and reporting requirements on non-U.S. Financial Institutions without requiring a proper reciprocity from U.S. banks on assets held by non U.S. persons in the USA, are a source of competitive distortions.

Looking to the future, there is a huge task to adapt the measures on AML and tax transparency and make them future-proof. The keyword here is 'digital'. A truly digital agenda must keep the door open to further progress to ensure technology neutrality and a smooth transition to new technologies. This is in particular the case for customer e-identification. Or, as we say in the AML framework, the 'Regtech' developments. These would certainly be helpful for the implementation of Know-Your-Customer rules in a non-face-to-face, digital environment. In addition, the EBF considers that alternative technologies to those specifically mentioned in the eIDAS Regulation should be allowed, at least when they are approved by the competent authority.

As obliged entities, banks need enhanced legal certainty and more adequate tools to fulfill their AML/CFT compliance requirements. Obliged entities should not be expected to compensate the deficiencies of the AML framework. This requires more clarity of AML measures, the provision of publicly available lists of Politically Exposed Persons (PEPs), the provision of exhaustive lists of uncooperative jurisdictions and associated measures, etc. There has been a longstanding call from the EBF for enhanced transparency on beneficial ownership of companies and entities.

Customer due diligence procedures should be further calibrated on a risk-based approach rather than consist of a collection of information on all customers which may dilute relevant information in the mass of data. Requiring the application of enhanced customer due diligence procedures in cases where risks of illicit activities are low may lead to de-risking with detrimental consequences for developing countries. In addition, the lack of proportionality of those requirements could give rise to infringements to data protection rules and hence increase the obliged entities' legal uncertainty.

About EBF

The European Banking Federation is the voice of the European banking sector, uniting 32 national banking associations in Europe that together represent some 4,500 banks - large and small, wholesale and retail, local and international - employing about 2.1 million people. EBF members represent banks that make available loans to the European economy in excess of €20 trillion and that securely handle more than 300 million payment transactions per day. Launched in 1960, the EBF is committed to creating a single market for financial services in the European Union and to supporting policies that foster economic growth.

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