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EBF Comments on the adopted Amendment of the Directive on Administrative Cooperation

The European Banking Federation (EBF), which is the voice of European banks, takes note of the publication of the Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC 6) in the Official Journal of the European Union on 5 June 2018. We would like to take this opportunity to comment on the newly adopted EU-disclosure rules.

The EBF supports the Commission's agenda to enhance tax transparency within the EU with the aim to tackle tax abuse and resulting distortions in the internal market. European banks are committed to the due and timely implementation of international standards pertaining to the automatic exchange of information in the field of taxation and have already invested significant resources to achieve this goal.

In our letter of 8 March 2018, we have identified and raised a number of serious issues with regard to the proposed Directive, including the retroactive effects of the directive and the legal uncertainty due to the broad definition of intermediary.

In response to our concerns, Commissioner Moscovici stated in his reply letter that "*financial institutions which only provide the service of maintaining a bank account for a customer will not qualify as an 'intermediary' under the DAC*".

We very much welcome this statement which adds clarity for financial institutions throughout Europe. Any legal uncertainty would encourage protective reporting as a defense against penalties, increasing unnecessarily the reporting volume and potentially diminishing the quality of the reported data.

In order to ensure a harmonized transposition of the DAC 6 into the domestic laws of 27 EU Member States and to avoid differing interpretations of the term "intermediary" (as defined in Art. 3 Point 21 DAC 6), we ask the Commission to inform Member States accordingly (for example by providing Member States with a copy of the letter sent to the EBF highlighting the statement quoted above).

Furthermore, in reference to recital 16 of DAC 6 we would like to encourage the Commission to work not only on standard forms but to also cooperate with Member States towards a uniform set of transposition and/or interpretation guidelines to help achieve a

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level playing field within the EU and to ensure the proper functioning of the internal market.

Preliminary considerations

We would like to stress that it is the current policy of many banks **not** to provide tax advice to their clients and to refrain from relying on aggressive tax planning structures. This means that nowadays many banks focus solely on providing banking services and are not actively involved in tax planning structures of their clients. Banks do not design, promote, sell, market or give advice regarding such arrangements. Tax and/or legal advisors, as well as their clients should thus constitute the primary target of the Directive, considering its objectives.

In this context, we would like to submit in the following paragraphs our understanding of certain aspects of the DAC 6.

Definition of "intermediary" (Art. 3 Point 21 DAC 6)

According to the objectives of the Directive, only parties that are actively involved in a potential aggressive tax planning scheme are in scope of the definition of "intermediary". All elements in the definition ("designs, markets, organises, makes available for implementation, manages the implementation") require an **active** involvement. No such active involvement exists, if financial institutions provide banking services (including but not limited to payment services, treasury services, asset management, custody services, execution-only brokerage, etc.) without providing any tax advice in relation to these services.

We understand that active involvement is also required within the second part of the definition of "intermediary": "It also means any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation (…)".

As a consequence, a financial institution are not required to examine whether an arrangement contains any hallmarks within the meaning of the Directive, if it has not been actively involved with respect to designing, marketing, organising, making available for implementation or managing the implementation of an arrangement.

Hallmarks (Annex IV DAC 6)

The hallmarks can only be taken into account by parties that have sufficient information on the potential aggressive tax planning arrangements. Parties that do have that

information available are the taxpayers themselves and their tax and/or legal advisors. The fact that financial institutions providing banking services are not in an information position that allows them to take the hallmarks into account underlines that these financial institutions do not fall under the scope of the definition "intermediary".

Our understanding is also underlined by paragraph 6 "Costs of Preferred Option" of the Explanatory Memorandum. The paragraph assumes that the information is available for the intermediaries ("The costs for intermediaries should be very limited because the reportable information is likely to be available in the summary sheets that promote a scheme to taxpayers. Only under a limited set of circumstances would taxpayers be required to report themselves such schemes and incur costs related to the reporting obligations.").

In addition, our understanding is underlined by the fact that intermediaries are required to "file information that is within their knowledge, possession or control". As set out above, no such information is available to financial institutions providing banking services.

Legal professional privilege (Art. 8ab Para 5f DAC 6)

According to Art. 8ab Para 5 DAC 6, Member States may give intermediaries the right to a waiver from reporting on a cross-border arrangement where such reporting would breach the legal professional privilege. If an intermediary invokes his right to such a waiver, he is required to notify any other intermediary or the relevant taxpayer of their reporting obligation.

With respect to this provision we are concerned that certain intermediaries and/or their clients would use this text to shift their respective reporting obligations under DAC 6 onto financial institutions.

We would like to point out that where an advisor invokes professional privilege, absent multiple intermediaries, the principal obligation to report the transaction or scheme should fall to the relevant taxpayer. It is noted that in such scenarios the client is in a position to waive professional privilege.

Therefore, we call on the Commission and Member States to ensure that intermediaries who might be able to invoke professional privilege cannot transfer the burden of disclosure onto financial institutions.

Retrospective aspects (Art. 8ab Para 12 DAC 6)

In our letter as of 8 March 2018, we raised concerns regarding the retroactive effects of the proposed amendments of the DAC 6. In his answer Commissioner Moscovici stated that "the text agreed does not provide for retroactive effects".

It is true that the provisions of the DAC 6 would only affect reportable cross-border arrangements the first step of which was implemented between the date of entry into force

(25 June 2018) and the date of application of this Directive (1 July 2020, see Art. 8ab Para 12 DAC 6).

In this respect we would like to point out that Members States have to adopt the provisions of the DAC 6 by the end of 2019. Therefore, it would be reasonable to expect that the domestic legal measures transposing the DAC 6 provisions would come into effect after 31 December 2019, including the provision to file information on reportable cross-border arrangements implemented between 25 June 2018 and 1 July 2020.

Given final Member State regulations are unlikely to be published prior to 25 June 2018, Art. 8ab Para 12 DAC 6 will have a **retrospective effect** as it will require intermediaries to look back in time and evaluate whether or not they were actively involved in a reportable cross-border arrangement based on non-contemporaneous guidance.

Financial institutions providing banking services do not have information available to allow them to take the hallmarks into account. If these financial institutions were to be included in the definition of "intermediary", they would have to ask for additional information from their clients in order to be compliant, for which there is no legal basis as DAC 6 states that only information that is available to the intermediary needs to be reported. This underlines that financial institutions are not in scope of the definition of "intermediary", as they will not be able to keep record of information as of 25 June 2018 because that information is simply not available.

We would very much appreciate it if these remarks could be taken into consideration by the Commission and by Members States in the course of the transposition process of the DAC 6 and of the work on any accompanying guidelines.