

Brussels, 6 July 2018
EBF_33344



Commissioner Pierre MOSCOVICI
Economic and Financial Affairs,
Taxation and Customs
European Commission
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Dear Commissioner,

SUBJECT: COMMENTS ON THE ADOPTED AMENDMENT OF THE DIRECTIVE ON ADMINISTRATIVE COOPERATION (DAC 6)

The European Banking Federation (EBF), 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.

In the previous letter of 8 March 2018, the EBF identified and raised a number of serious issues with regard to the Directive, including retroactive effects, the legal uncertainty due to the broad definition of intermediary and the fast-paced adoption process.

The banking sector is one of the most regulated sectors in the economy. European banks have proven to be keen to take their responsibility in assisting public authorities to prevent and combat crimes. It is fair to say for instance that the success of AML is broadly due to bank positive role in cooperation with relevant authorities, law enforcement and otherwise. Over the last decade, this role as tax collectors, reporting financial institutions and obliged entities under AML has actually increased significantly.

Still banks are not designers/promoters of tax schemes for their clients (in some member states they are even prevented from providing any tax advise). In this regard we would like to reiterate the understanding of the term "intermediary" with respect to financial institutions. Banks should not be required to actively examine whether an arrangement is aggressive within the meaning of the Directive. Financial institutions do not have the information to determine whether a cross-border arrangement contains one of the hallmarks included in the Annex to the Directive. The obligation to report the information is the responsibility only of the first advisor/ intermediary who has contributed substantially to the arrangement in question.

The EBF takes the view that 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 are not under the scope of the definition of "intermediary".

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With respect to the legal professional privilege, the EBF would like to raise concerns that certain intermediaries and/or their clients would use this provision to shift their respective reporting obligations under DAC 6 onto financial institutions. The EBF points 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.

Hence, the EBF calls 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.

Regarding the retroactivity of the DAC 6, you stated in your reply letter that “the text agreed does not provide for retroactive effects”. Nevertheless, the EBF notices that, given the DAC 6 should be transposed by the end of 2019, and that final Member State regulations are unlikely to be published prior to 25 June 2018, Art. 8ab Para 12 DAC 6 will indeed 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.

We kindly attach herewith detailed comments from the EBF.

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.

Yours sincerely,



Wim MIJS
Chief Executive Officer

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