

## EBF TAX CONFERENCE 2024

### “Banks as taxpayers and as auxiliaries to tax authorities in the digital era”

Brussels, 23 January 2024

### FOLLOW-UP PAPER



## Executive Summary



On 23 January 2024, the European Banking Federation (EBF) held a landmark conference that brought together leading experts and policymakers to discuss developments in the EU tax landscape and the associated implications for financial institutions and financial markets. The event was made possible through the support of key sponsors and EBF knowledge partners: Deloitte, EY, KPMG, and PwC, all of which provided moderators, speakers, and panellists to contribute extensive insight and expertise to the day's discussions. Speakers explored the role of banks in tax processes in the digital era and discussed key policy questions of relevance ahead of the next EU legislature.

In active exchanges between policymakers and industry experts, speakers included Philip Kerfs from the OECD, Marc Clercx and Henrik Paulander from the European Commission, Mervi Kujanpaa from the Finnish Tax Administration, and Christian Schleithof from the German Ministry of Finance. The policymaking presence at the Conference was supplemented by numerous MEP assistants, as well as Fiscal Attaches to Permanent Representations from eight Member States, present in the audience.

One of the key insights that become clear throughout the day was the importance of tax as a key public policy instrument. The central role banks play as taxpayers and key contributors to public budgets, and as auxiliaries to tax authorities, was evident. As auxiliaries, banks provide tax authorities with information about clients' accounts in the tax reporting context and also act as financial intermediaries in withholding tax processes.

Another aspect that was highlighted across multiple discussions at the Conference was the importance of taxation being – at its core – fair, as well as taking into consideration the environmental and societal impact of business activities. It was clear that taxation is critical to achieving the twin transition towards a green and digital economy, society, and future. As the twin transition is a central component of EBF's work and policy priorities, the digitalisation of withholding taxes played a welcome central role in discussions.



Ahead of the next EU legislature, it was also evident that policymakers need to consider the challenge of strengthening the ability of European banks to finance the EU's economy and compete globally while enhancing the efficiency and integration of the EU internal market, as emphasised by Wim Mijs, EBF CEO, in his welcoming speech. The finalisation of the Capital Markets Union (CMU) and the removal of remaining tax obstacles in this context were particularly important components of discussions throughout the conference.

Against this background, the conference unfolded around two key topics: (1) the complexities of withholding tax relief and refund procedures and (2) the lessons to be drawn from a decade of application of Automatic Exchange of Information (AEOI). Concerning the former, it was clear that complex withholding tax relief and refund procedures remain a major obstacle to cross-border investment across the EU. This tax hurdle has been under discussion for over 25 years and has been included in the Commission's Action Plan on the CMU as one of the challenges to be addressed. Potential solutions and best practices on the matter arose from the discussion on the OECD TRACE Implementation Package and the Finnish practical experience of the initiative. Subsequently, a fruitful discussion of the FASTER proposal took place. Concerning the latter, an afternoon session was dedicated to the lessons to be drawn from the decade of AEOI under the US FATCA, the Common Reporting Standard (CRS), and the Directive on Administrative Cooperation (DAC), with particular focus on the challenges arising from compliance and GDPR requirements.

After an opening speech delivered by Paul Radcliffe, Partner, Business Tax Advisory (BTA) at Ernst & Young LLP, on "How to manage operational tax risk in today's environment", the conference presented forward-looking views considering the impacts that ongoing and future tax policy developments may have on European banks and the links to key societal objectives in this context.



## Lessons Learnt from the Finnish TRACE Experience

Moderated by Alexandre Havard, Partner: Banking Consulting at Deloitte, the panel discussion involved Philip Kerfs, Head of Unit at the Centre for Tax Policy and Administration of the OECD, and Mervi Kujanpää, Senior Adviser, Finnish Tax Administration.



The session first outlined the history of the Treaty Relief and Compliance Enhancement (TRACE) standard. This introduction was followed by a discussion of TRACE versus Faster and Safer Relief of Excess Withholding Taxes (FASTER), concluding with the Finnish experience and insights regarding the actual usage of TRACE.

## ***History of TRACE***

The OECD had pushed for an efficient system of withholding tax relief and refund procedures for many years, with the TRACE package being released in 2013 and adopted in one jurisdiction (Finland) for the first time in 2021. TRACE aims to streamline withholding tax relief and refund processes that are pivotal to the implementation of the OECD standards governing the taxing rights applicable to cross-border payments of dividends and interest.

In this context, the discussion began with-- outlining key lessons drawn from the resilience required to formulate an effective implementation of TRACE.



With January 2021 marking the first adoption of TRACE by a country, , the panel proceeded to outline the rationale behind the Finnish decision to move first – and alone – on the adoption.

Following this assessment from the sole country adopter of TRACE, the discussion expanded on these developments, stressing the contrast to financial institutions having extensively and successfully implemented the US Qualified Intermediary (QI) regime over the preceding 15 years.

## ***TRACE vs. FASTER***

The EU had issued a proposal for a Council Directive on FASTER. With TRACE already being in place in Finland, the panel expanded on how it is planned to harmonise both systems. Key lessons learnt from TRACE could inform elements of the FASTER proposal. The discussion focussed on whether or not TRACE could be considered outdated, and identifying key best practises that should be incorporated from it into FASTER.



## ***Actual Usage of TRACE***

An in-depth overview of the current usage of TRACE in Finland was provided thereafter, focussing on whether available statistics indicated positive progression over the years and investigating initial 2023 trends that could be seen.

The discussion concluded with an outlook on what TRACE could become. In particular it interrogated whether the OECD could envisage re-aligning the package with FASTER best practices after 1-2 years of observation.

## The Potential of FASTER to Modernise Withholding Tax Procedures in the EU

Moderated by Mark Huyan, Global Head of Tax Product, Asset Servicing at State Street, and Vice-Chair of the EBF Fiscal Committee, the panel covered: (1) the policy and political process behind FASTER; (2) the operational and tax technical considerations of the proposal; and (3) the outlook for compliance and auditing. Panellists included: Marc Clercx, Teamleader, Sector 1 in Unit D2, DG TAXUD; Dr Christian Schleithoff, Head of Limited Tax Liability Division at the Federal Ministry of Finance, Germany; Marcello Topa, Director, Market Policy and Strategy, Citi – Securities Services, and Chair of the EBF Post-Trading Expert Group; Nenad Ilic, Partner, Banking & Capital Markets Tax Leader, PwC; and Reinhart Devisscher, Director: Financial Services Tax, EY.



## ***Policy and Political Process***

The discussion began with an interrogation of the overarching policy rationale for the directive, the evolution of the proposal, and an outline (to the extent allowed) of the policy trajectory in terms of approval of the directive.

Thereafter, the discussion continued concerning the policy rationale for the initiative from a single country perspective, presenting the key aims and objectives, and the background thereof.

An industry response was then presented regarding the key policy aims and the balancing of these aims with operational burden.

In this context, the discussion provided a walkthrough of historical developments (TRACE/Finnish TRACE/Qualified Intermediary regimes) relevant to the discussion.

The section concluded with a discussion of technical issues or challenges that had been seen historically as regards withholding tax in the EU and how FASTER might address these.



## ***Operational and Tax Technical Considerations of the Proposal***



The second section of the panel discussed the implications for financial intermediaries arising from the due diligence obligations: (i) as they apply to determination of the “registered owner” bearing in mind the chain of custody; (ii) the challenges associated with identification of “other financial arrangements”; and (iii) liabilities arising from those obligations.

A specific technical interpretation of issues relevant to “linked financial arrangements” was then presented, with a focus on technical issues arising from the due diligence of registered owners, particularly bearing in mind the chain of custody.

Policymakers responded to the interventions of industry participants, presenting the Commission’s and Germany’s rationales for the issues outlined above. This involved a bifurcation from the perspective of specific countries versus what the Commission hoped to achieve as a minimum standard in the directive.

## ***Compliance and Auditing – What does success look like?***

The way FASTER dealt (or did not deal) with compliance auditing was discussed in the light of the relevant aspects of the QI regime and the experience thereof. Panellists presented their different views on how they thought compliance with the regime should be determined.

The industry participants expanded on the important role of technology to simplify and digitise paper-based processes, as well as on the benefits of a single reporting portal. The use of technology was expected to be harmonised via implementing acts.

The discussion made clear that complex withholding tax procedures with respect to cross-border securities income remain a major obstacle to the completion of the CMU. FASTER needed to be reviewed accordingly to yield genuine simplifications for both investors and financial intermediaries.



## Striking the Correct Balance Between the Fight Against Tax Evasion and Data Protection



Moderated by Marta Borrat i Frigola, Senior Legal Counsel, ABN AMRO Bank, the panel included two outstanding speakers: Camille Seillès, Secretary General of the Luxembourg Bankers' Association (ABBL), and Chairman of the EBF Fiscal Committee, and Mario Guglielmetti, Legal Officer, European Data Protection Supervisory (EDPS). This panel discussion presented an open exchange of views on the topic, specifically covering: (1) the proportionality principle; and (2) the current and future framework.

It began by setting the scene in terms of the differing obligations of banks and their role when it came to taxation (reporting etc.), as well as outlining initial thoughts on the difficulty to balance this with data protection obligations.

It was noted that banks are not only taxpayers but also auxiliaries to tax authorities in the fight against tax fraud in the sense that they are required to identify customers and report to tax authorities personal and financial information relating to clients and counterparties under the DAC and FATCA. The reported information is eventually exchanged between tax authorities.

The current framework had been initiated following the 2008 financial crisis where G20 countries agreed on the automatic exchange of information to complement the exchange of information on demand set out in bilateral double tax treaties.

FATCA and the CRS were the crystallization of this transparency agenda. Technical standards are very similar, and both target individual taxpayers who hold financial accounts outside their home jurisdiction, with FACTA extending its scope of application to encompass US citizens on top of non-resident account holders. FATCA is made effective by means of bilateral agreements between the US and partner jurisdictions, while the CRS is implemented on the basis of technical standards defined by the OECD and made effective by means of a multilateral agreement signed by participating jurisdictions. Within the EU, the CRS is embedded in the DAC (DAC 2), which had been amended to that effect in 2014 and been applied since 2016.



The DAC has subsequently been amended several times to cover additional items. DAC 6 and DAC 8 are of particular relevance for financial institutions in addition to DAC 2. Beyond the DAC, payment service providers, including banks, are also required, effective 2024, to report information on cross border payments under the Central Electronic System of Payment information (CESOP) to combat VAT fraud. Overall, the EU framework pertaining to the automatic exchange of information for tax purposes can be considered one of the most comprehensive globally.

Concerning the balance between data protection obligations and reporting requirements under the automatic exchange of information, tax authorities on the one hand should have the tools necessary to perform their duties and effectively counter tax fraud by having access to relevant information not otherwise available. Clearly, the necessity of the exchange of information for tax purposes is unquestionable. Nevertheless, the discussion stressed that such information should be limited to what is strictly necessary under data protection rules and privacy rights. It was clear that there is therefore a fine balance to be struck between a public interest objective such as tax compliance and the fundamental right to privacy and data protection. Critical here is the question of proportionality under EU law.

The purpose of the CRS should be to effectively serve as a deterrent to tax fraud by providing tax authorities with conclusive indications on the existence of foreign bank accounts. Reportable information under DAC 2 is comprehensive and not limited to the identity of relevant accountholders and balances. It additionally covers detailed financial information regarding the accounts at hand, including interests, dividends and other income generated by such accounts. The scope has been further expanded under DAC 8.



The question of whether this additional information is necessary in its entirety to fulfil the initial purpose of the CRS was questioned throughout the remainder of

the panel. The panel stressed the centrality of the proportionality principle in this assessment. In the first instance it was important to bear in mind that specific information on individual taxpayers can be obtained on request by tax authorities under the exchange of information on demand. Moreover, a sizeable proportion of the financial information reporting under DAC 2 cannot be used automatically by tax authorities for tax assessment purposes. Financial income reported under DAC 2 – interest, dividend, and other income – is defined according to the laws of the member state where the reporting financial institution is established, with invariable differences across countries. This serves as a source of confusion and creates inefficiencies.

In terms of general reflections on the state of the current framework, the moderator and panellists reflected that a huge volume of information is already exchanged and is generally underused by tax authorities, with only a fraction of member states performing a structured analysis of the incoming data. Moreover, the cost of implementation is reportedly borne disproportionately by financial institutions, rather than member states. Therefore, it was stressed that rules needed to remain proportionate and manageable in their implementation, whilst also retaining legal certainty regarding compatibility with the EU data protection framework.



## Lessons Learnt from a Decade of Automatic Exchange of Information and of Existing DACs

Moderated by Mark Huyan, the panel covered: (1) the context; (2) data quality issues; (3) data parity issues; and (4) data privacy/harmonisation of laws. Panellists included: Henrik Paulander, DG TAXUD, European Commission; Peter Grant, Partner, KPMG; and Alexander Havard, Partner, Deloitte.



### Context

The discussion began with outlining that, approximately 10 years since the Foreign Account Tax Compliance Act (FATCA) and 8 since the introduction of Common Reporting Standard (CRS), it was a timely moment to take stock of automatic exchange of information (AEOI) regimes, their effectiveness, and whether they are achieving intended policy goals. This was particularly relevant when seeing the introduction of incremental reporting requirements proposed by the OECD and introduced in the EU under DAC 8.

## **Data Quality**

The discussion outlined the policy rationale behind the introduction of additional reporting datapoints; concerns around data quality and balancing this against the reporting burden; and the fact that there was an upcoming evaluation of the DAC.

, The panel discussed techniques for the review of data, and the potential for government to be marrying multiple sources of information reported (for tax and other purposes).

The panel then expanded on the industry experience with tax authority reviews and queries to both taxpayers and reporting FIs.



## **Data "Parity"**

After an introduction of the high-level context with the formulation of DAC 7 and DAC 8 broadening AEOI to new asset classes, the panel discussed the importance of maintaining a level playing field (referring, for example, to the case of e-money), the introduction of reporting for novel asset types (for example, DAC 8 and the Crypto-Asset Reporting Framework (CARF)), and the considerations on other categories of income/assets not yet covered.

Some of the challenges – tax technical or practical – were then detailed around scoping in new asset classes, for example, derivatives and certain digital assets.

## **Data Privacy/Harmonisation of Laws**

The discussion continued with considerations about the need to ensure AEOI laws within the EU are harmonised with other laws, such as AML. Industry participants relayed experiences around how other laws, such as data privacy, might interact with tax reporting rules – particularly in the context of financial institutions taking a risk-based approach and default reporting.

The panellists discussed the continuing challenges associated with FATCA (such as no Taxpayer Identification Number (TIN)/accidental Americans) and whether the latest proposed US crypto reporting rules indicated convergence with CRS.

From the discussion it was clear that while banks as taxpayers contribute significantly to public finances, they are requested, under FATCA, the OECD Common Reporting Standard (CRS), and EU Directive on Administrative Cooperation (DAC), to support the information exchange efforts by acting as auxiliaries to tax authorities. In these instances, such obligations must be efficient, well-calibrated, clearly framed, and coordinated.

A more proportionate, principle-based approach to the automatic exchange of information of financial account information is required. Before considering the adoption of any further amendments to the tax reporting framework, stakeholders such as the OECD and Commission should consider possible data protection implications, ensure proportionality, and strike an adequate balance between tax reporting and GDPR requirements.

It is also very clear that a permanent solution addressing the issue of Accidental Americans under FATCA is needed.



## Concluding remarks

The conference presented fiscal policy insights in both the forward- and backward-looking contexts. The past decade has seen dramatic developments in the field of taxation policy. This includes generational changes to the global tax framework with the common goal of restoring taxation in instances where funds would otherwise go untaxed. As a result, comprehensive standards have now been crafted as part of the OECD Action Plan on Base Erosion and Profit Shifting (BEPS) and now ensures more effective taxation of corporate profits. In parallel, access to bank information for tax purposes is increasingly widely granted to tax authorities around the globe, heralding a significant blow to cross border tax evasion. Particularly concerning the latter, banks have been instrumental implementation of the necessary policies to successfully achieve this. They have become de facto auxiliaries to tax authorities, performing extensive due diligence and reporting on clients and other counterparties. This has meant that more robust and effective safeguards are increasingly in place in order to secure tax revenues and effective tax collection by fiscal authorities. These backward-looking reflections also informed the insights for the future derived from the conference proceedings.



**“A strong banking sector is evidently critical to a flourishing economy in Europe. An enabling tax framework that allows banks to best play their role in financing the economy is a critical element here”,** said Camille Seilles, Chair of the EBF Fiscal Committee.

Similarly in this context, **specific levies on the banking sector should be avoided**. Levies of this nature negatively impact bank’s profitability, as well as their resilience and ability to undertake credit provision. The recent proliferation of windfall takes on bank profits is also therefore concerning when considering the detrimental impacts on financial stability. The recent rises in banks’ profits as a result of rising interest rates under changing monetary policy conditions could swiftly dissipate if asset quality deteriorates. Furthermore, at a time when the EU is seeking to develop its financial and capital markets in order to meet key economic and autonomy needs, specific levies on financial transactions/activities should also therefore be avoided. It has been comprehensively demonstrated that levies of this nature put strain on the liquidity and efficiency of financial markets.



It is clear that **current tax obstacles to the completion of a single market for capital should be addressed** and would be welcomed as a priority as a part of the next EU legislature. **The Commission’s initiative to create new rules to make withholding tax procedures in the EU more efficient and secure is to be welcomed. However, the current FASTER proposal requires careful review to ensure it yields genuine simplifications for investors and financial intermediaries.**

Another ever-present agenda item is **the modernisation of the VAT treatment of financial services. With applicable rules dating back to the 1970s, a full review of the matter is arguably necessary in order to achieve greater neutrality and remove barriers to economic efficiency.** The current VAT cost for banks is a factor of competitive distortion with new entrants and needs to be urgently addressed after multiple unsuccessful attempts over the previous two decades.

**European banks are playing an important role in the fight against tax evasion under the auspice of AEOI. After a decade, it marked a reasonable point to assess the current framework to ensure obligations are well-calibrated, clearly framed, and coordinated. Before considering further extensions to the legal framework, potential data protection implications should be tested to ensure a balance is struck between tax disclosure and privacy rights to guarantee long term sustainability.**

Moreover, **EU initiatives in the field of corporate taxation should prioritise consistency with OECD standards and need to take specific features of the banking model into account.** Distortive outcomes with significant shifts in profit allocation between EU Member States should be avoided.

**Future initiatives in the field of EU taxation should therefore focus on administrative simplification as opposed to the creation of new layers of complexity. Taxation should be a lever to ensure competitiveness and qualitative growth, incentivising the significant investments needed to realise the digital and green transitions.**

#### **Contact persons:**

- Roger Kaiser, Head of Tax & Compliance, EBF, [r.kaiser@ebf.eu](mailto:r.kaiser@ebf.eu)
- Nicholas Soutar, Policy Adviser, Compliance, AML & Sanctions, EBF, [n.soutar@ebf.eu](mailto:n.soutar@ebf.eu)

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