



First Report of the Commission AEFI expert group on the implementation of Directive 2014/107/EU for automatic exchange of financial account information

March 2015

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1. EXECUTIVE SUMMARY

The Commission's Expert Group on Automatic Exchange of Financial Account Information¹ for Direct Taxation Purposes (AEFI Group) was set up in October 2014 with a view to:

- Providing advice to ensure that EU legislation on automatic exchange of financial account information is effectively aligned on and fully compatible with the OECD global standard on automatic exchange of financial account information², with a view to minimising the administrative burden for financial intermediaries while preserving the specific needs of the EU Internal Market;
- Contributing to the periodical review process of this EU legislation;
- Providing advice on other tax compliance proposals affecting financial account information.

Automatic exchange of information involves the systematic and periodic transmission of “bulk” taxpayer information by the source country to the residence country concerning various categories of income (e.g. dividends, interest, etc.). It can provide timely information on non-compliance where tax has been evaded either on an investment return or the underlying capital sum, even where tax administrations have had no previous indications of non-compliance.

On 23 February 2014, the G20 Finance Ministers endorsed the Common Reporting Standard (CRS) which provides for a conceptual framework for automatic exchange of tax information.

On 29 October 2014, 51 jurisdictions signed the multilateral competent authority agreement (MCAA), which is a multilateral framework agreement to automatically exchange information, with the subsequent bilateral exchanges coming into effect between those signatories that file the subsequent notifications.

On 9 December 2014, Member States adopted Directive 2014/107/EU³ on administrative cooperation in direct taxation ('DAC2') which provides for mandatory automatic exchange of financial information as foreseen in the OECD global standard. DAC2 amends the previous Directive on administrative cooperation in direct taxation, Directive 2011/16/EU ('DAC1').

This first report of the AEFI Group includes a list of the major outstanding issues regarding the implementation of DAC2 and provides recommendations or preliminary comments in respect of these issues. It reflects the views of the AEFI Group as of 9 February 2015. It may be updated later on, in particular in view of the steps taken by Member States for implementation.

¹ http://ec.europa.eu/taxation_customs/taxation/tax_cooperation/mutual_assistance/financial_account_information/index_en.htm

² <http://www.oecd.org/tax/exchange-of-tax-information/automaticexchange.htm>

³ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0107&from=EN>

1. Time lines

The Council and the Member States are urged to provide an achievable implementation timetable. Consideration should be given to a phased approach to implementation. This could be achieved by pushing back reporting by 1 year, with the reporting being made in 2018 in respect of both 2016 and 2017 data.

2. Data protection and privacy issues

The Commission, the Council and the Member States must conduct a careful analysis of legal, constitutional and data protection implications of DAC2 and ensure that all steps have been taken to comply with data protection rules. Member States should adopt a common approach to develop objective criteria for assessing whether a third country's legal framework provides appropriate protection of the data transferred under automatic exchange of information (AEOI). Member States should expressly authorize financial institutions to perform one single search of their customer base and to collect self-certifications of all customers regardless of whether they are resident in a participating or non-participating jurisdiction.

3. Implementing guidelines

Consistent implementing guidelines must be developed with a view to achieving a level playing field notably in the definitions of financial income. The AEFI Group emphasizes that the commentary of the Common Reporting Standard (CRS commentary) is not sufficient in terms of guidance and that more detailed guidelines are necessary. It also urges Member States to have in place the necessary legal framework and related Guidance well ahead of the 1 January 2016 deadline.

4. Definitional issues in the context of the CRS

The definitions of key concepts, in particular Investment Entity and Financial Account, must be clarified with a view to ensuring a consistent implementation of the CRS across all Member States.

5. Guidance on due diligence on existing accounts – Treatment of non-participating jurisdictions – Best practices on self-certifications

The due diligence procedures for pre-existing accounts which are meant to create operational efficiencies for Participating Jurisdictions' Financial Institutions (PJFIs) must be adapted in order to ensure that these operational efficiencies are achieved. As a preliminary recommendation, the AEFI Group suggests that a "Best Practice" model of self-certification form according to the type of business and lines of business may be developed for suggested use across all Member States. This model should be reflected in the guidance of all Member States. Only mandatory fields of such a self-certification should be validated under the reasonableness test.

6. Lists of excluded accounts and entities and ensuring a level playing field

Member States are called to ensure the coherence of and a level playing field regarding the lists of excluded accounts and entities. They should provide drafts for consultation well ahead of the 31 July 2015 deadline.

7. Minimising the administrative burden and aligning the compliance regime

In order to ease compliance by Financial Institutions (FIs) and minimise their administrative burdens, the AEFI Group calls on Member States to harmonize the compliance regime starting with the introduction of a standard programme of internal audit review requirements. Early Adopters jurisdictions are also invited to consider starting implementation with a soft landing period.

8. IT issues and schema for reporting

The schema for reporting under the CRS/DAC2 and solutions on other IT-related issues must be developed in close consultation with the financial industry. The key principle of applying one truly global standard must also be reflected on the reporting format: financial institutions must be able to implement global reporting IT solutions within the EU, with third countries and domestically. The technical specifications developed by the Commission should fully reflect this concern. The report provides a number of recommendations in this respect.

9. Treaty relief at source

Concurrently with the implementation of DAC2, some members of the AEFI Group would like to invite the Commission, the Council and the Member States to consider implementing a Treaty Relief at source system.

10. Capacity building and statistics

The Commission, the Council and the Member States are invited to provide developing countries with support for AEOI, notably by assisting these tax authorities and building expertise in the field of statistical analysis.

11. Way forward to include third countries in OECD global standard network

The Commission, the Council and the Member States are urged to create a more effective global system of AEOI that limits the administrative burden, enhances the level playing field and pays sufficient attention to the needs of developing countries. Among others, the AEFI Group calls on Member States to promote the universal use of the Multilateral Competent Authority Agreement (MCAA) and to start Global Forum pilot projects with developing countries that are not ready to sign or implement the MCAA.

2. MAIN REPORT RECOMMENDATIONS

Recommendation 1 - Time lines

FATCA has demonstrated that financial institutions face an uphill struggle to implement complex regulatory programmes in a short timeframe. The implementation calendar currently envisaged for DAC2 means that DAC2 will have to be implemented in a much shorter timeframe than for FATCA. There are fundamental differences between DAC2 and FATCA, with the result that large have substantial IT projects to plan, budget for, build/source and roll out – all of this in a very short space of time. Ultimately, if the reporting is rushed, the quality of data that governments will be exchanging will be lacking.

As adopted, DAC2 provides that a Member State will be in compliance with the Directive to the extent that it has enacted implementing legislation by 31 December 2015 and this for a date of entry into force of 1 January 2016. Past experience suggests that there is a real risk that many Member States will go right to the wire with the release of such implementing legislation. More urgently, Member States have a deadline of 31 July 2015 by which they should provide the list of Non-Reporting Financial Institutions and Excluded Accounts to the Commission. This will be a good barometer of the preparedness of Member States.

Financial institutions need clear rules and guidance on the in-scope entities, what data they will need to capture and ultimately report to the relevant authorities. The larger financial institutions will typically be looking to software vendors for reporting solutions. These vendors will not be able to finalise their products before regulations and the necessary schema are final. Therefore, in addition to the legislation, it is imperative that comprehensive guidance (which enters into considerably more detail than the Commentaries to the CRS) be published by domestic authorities in early 2015 (and at the latest by mid-2015). At the same time, financial institutions will need to receive detailed technical specifications for reporting formats and communications channels.

Generally, financial institutions require a lead time of at least 18 months in advance of the effective date, starting from the time the final guidance has been released. In respect of the entry into force of the DAC2 provisions in Member States, and thus for “new accounts” (i.e. 1 January 2016), that 18-month deadline has already passed. In the same vein, testing or reporting mechanisms with the respective domestic authorities would have to take place during Q2 2016 in order to allow for effective final transfer of data from financial institutions to local tax administrations in early to mid-2017.

Clear guidance is required on how financial institutions resident in the “early adopter” jurisdictions should treat entities (particularly deemed-passive NFEs) that are resident in second wave adopter jurisdictions. A single definition for “pre-existing” and “new” accounts (independent of whether the jurisdiction is an “early adopter” or not) would give welcome certainty, meaning that early adopter country financial institutions would need to carry out only a single due diligence wave covering all pre-existing accounts.

It is crucial that Member States are made aware of the need for there to be a clear timetable for implementation at national level, with the necessary legislation and (detailed) guidance being in place in sufficient time for financial institutions to be able to report the required information on time and in an effective manner (that avoids rework by financial institutions and domestic authorities alike).

We would suggest that the Directive includes a requirement which sets a date not only for effective transposition of the Directive within the Member States' domestic law, but also for the corresponding amendments of domestic law that would ease this implementation burden. Many financial institutions have operations in a number of Member States. With this in mind, the AEFI group would ask that the EU provide consolidated information on how, where and when the local law becomes applicable in each Member State, such that there is clarity on the legal framework for each Member State.

In the event that Member States are unable to have the necessary legislation and guidance in place within the timeframes envisaged above, serious consideration should be given to a phased approach to implementation. Reporting could be pushed back by 1 year, with the first reporting to be made in 2018 and to include data in respect of both 2016 and 2017. This does not seem unreasonable, as a similar approach has been taken by some countries in their FATCA IGA negotiations with the United States. Where the necessary implementing legislation for the relevant FATCA IGA would not be in place in time for reporting to take place by the deadline contained in the agreement, the information which would otherwise have been required to be reported could – subject to agreement with the United States – be reported by the following year. Failure by a Member State to communicate the required list of Non-Reporting Financial Institutions and Excluded Accounts would also be sufficient grounds on which to consider a delay to the reporting deadline.

A timeline is enclosed in **Appendix I**.

Recommendation 2 – Data protection and privacy

Need for DAC2 to respect fundamental rights

It is crucial to ensure that DAC2 is fully compatible with privacy and data protection rules which are fundamental rights under EU law (Charter of fundamental rights of the European Union, European Convention on Human Rights, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data 108/1981, Article 16(1) of the Treaty on the Functioning of the European Union, Data Protection Directive 95/46/EC) and are a condition for the validity of EU legislation⁴. Rights to privacy and data protection are two separate and distinct rights in the EU framework, which require separate analysis and application⁵.

While the AEFI Group welcomes the fact that the second version of DAC2 recognizes a number of data protection aspects (notably reflected in the recitals), it believes that there are still serious concerns as regards data protection and privacy aspects that could jeopardize the implementation of DAC2.

Because legal security for all players is a key factor, it is crucial to ensure that DAC2 is not in breach of data protection and privacy rules and does not bear the risk of being challenged before the CJEU. Prior to the implementation of DAC2, national Governments and EU Institutions alike should carefully consider the terms of the statement adopted by the Article 29 Working Party on 4 February 2015. Particular attention should be paid to the proportionality of data processing and retention, controllership and security measures, and onward transfers-related issues:

⁴ See “Guidelines on data protection in EU financial services regulation” from the European Data Protection Supervisor (nb 3).

⁵ See “Guidelines on data protection in EU financial services regulation” from the European Data Protection Supervisor (nb 13 and 15).

- a) On many aspects, DAC2 may be compared with the Data Retention Directive which has recently been declared illegal by the CJEU. DAC2 must respect the principle of proportionality according to which any data transfer is only allowed in case it is appropriate and not redundant. In its letter of 4 February 2015, the Article 29 Working Party considers that in order not to violate the proportionality principle, it is necessary to demonstrably prove the necessity of the foreseen processing and that the required data are the minimum necessary for attaining the stated purpose and thus avoid an indiscriminate, massive collection and transfer of the data. A legal challenge might arise from the current version of DAC2 mainly because of the magnitude of the data to be collected and reported and the fact that it does not guarantee taxpayers a permanent access to their data and a mandatory notification in case of breach. DAC2 must respect the principle of sufficient cause, i.e. the verification of indicia for a non-compliant behavior of tax payers. In its current version, DAC2 might be challenged because it does not request the existence of such sufficient cause or indicia of unlawful behavior.
- b) Member States should clarify the pending questions around the provision by financial institutions and by authorities (as data controllers) of information to clients concerning the implementation of DAC2.
- c) Certain non-EU countries may not have appropriate data protection rules and confidentiality arrangements in place. For political reasons, the transfer of account holders' data to such countries may be a sensitive issue. DAC2 does not provide any effective mechanisms to assess whether a third country's legal framework provides an appropriate protection of the data transferred under AEOI. Member States should adopt a common approach to develop objective criteria for such an assessment.
- d) The AEFI Group is concerned that information exchanged may happen to be irrelevant for taxation purposes in the receiving jurisdiction (home country) under domestic law and that reporting in such cases might be considered as being in breach of data protection law. Even in such cases, some AEFI Group's members point out that in the context of cross-border portfolio investments, such information may still be considered relevant for tax relief in the source country under double tax treaties.

When implementing DAC2, Member States must respect data protection rules and provide substantive data protection safeguards. In particular, the current wording of the purpose limitation in DAC2, which may be too vague, should be fine-tuned. In order to achieve a robust and sustainable AEOI system, the Group also calls on Member States to undertake a thorough legal analysis with respect to their legal and constitutional frameworks to confirm that the AEOI envisaged under DAC2 is not in breach of the EU Charter and their domestic law. If need be and to the extent possible, Member States should adjust their law to the needs of AEOI.

Collecting and storing TINs, tax residency information and self-certifications

The principles of data reduction and data economy which are enshrined in some jurisdictions' data protection laws may prevent financial institutions from collecting and storing Tax Identification Numbers (TINs), tax residency information and self-certifications when clients are resident in a non-

participating or an initialled jurisdiction or when the relevant legal instruments are not yet in effect. As a consequence, financial institutions may not be able to search the whole customer base in one step and may have to reiterate this exercise each time a jurisdiction effectively becomes a participating one. Member States should therefore expressly authorize financial institutions to perform one single search of their customer base and to collect self-certifications of all customers regardless of whether they are resident in a participating or non-participating jurisdiction (“wider approach”).

Developing countries

Member States should coordinate their efforts to provide developing countries with technical support in many areas to be able to analyse and use the information but specifically in the area of data protection, bringing this to an acceptable standard for information exchange which would permit as many countries as possible join the multilateral system on a specific target date.

The attached Appendix II gives further detail in relation to the AEFI Group’s concerns in respect of these topics.

Recommendation 3 – Implementing guidelines

Some governments believe that they do not need to issue any further guidance beyond the OECD CRS Commentary or amend domestic legislation. The AEFI Group calls on each Member State to issue detailed guidance in order to clarify procedures and provide definitions.

In order to level the playing field, the AEFI Group recommends Member States to adopt common guidance following the same and consistent format so as to ease compliance by financial institutions operating in multiple Member States.

Financial institutions need to know the details of clear guidance before starting to adapt and develop their systems in order to comply with the due diligence and reporting requirements. In many cases no detailed budgeting process to secure the funds to implement the CRS can be approved internally or finalised until there is a final legal framework and obligation to implement under local law in each country concerned. For example, accounting rules will not allow for “provisions” based on expected changes in anticipation of final laws yet to be passed. It would also help if there was an understanding of which EU countries must amend domestic legislation in order to bring DAC2 into effect.

The AEFI Group would like to reflect further on how reporting requirements should be implemented. Interpretation is currently missing and additional guidance is needed. In addition, in stating the scope clearly for financial institutions it is possible that in areas where there is a lack of harmonization in taxation between Member States, it may only be possible to exchange information about the pure existence of financial investments/assets (like futures and options within a custodial account) in which a taxpayer is engaged, particularly where these may give rise to a future tax liability which is neither currently taxable nor is currently quantifiable.

The Financial Industry, NGOs and Governments have repeatedly called for one truly global standard across the world where exchange of information is concerned, thus recognizing that consistency and a level playing field are key elements for the effectiveness of the system.

DAC2 will be implemented by the 28 Member States, i.e. a large part of the “Early Adopters’ group”. We note that the Member States made certain choices with respect to options that are left open by

the CRS or its Commentary. In particular, DAC2 grants to financial institutions the ability to apply the so-called “B1 procedure” for pre-existing Individual accounts, or the 250.000 \$ *de minimis* threshold for pre-existing Entity accounts. In the CRS and its Commentary, these are options that countries may or may not grant but the AEFI Group would recommend that they are retained and their use is left as optional for the financial institutions in all adopting countries. In addition, some of the CRS’ Commentary which was considered important was made mandatory in Annex II of DAC2.

To ensure a consistent approach worldwide, the Group strongly recommends that Member States commit to apply the “DAC2 standard” as described above for the purposes of exchanges of information with non-UE Countries. In the absence of this, financial institutions would end up applying different standards and due diligence processes depending on the country of residence of the beneficiary. It would also prevent them from being able to carry out the “screening” of pre-existing accounts once and for all. In fact, the Group notes that applying different options from the ones made in DAC2 would simply be impossible as it would create a circular situation where financial institutions would be required to carry out different due diligence processes depending on the tax residency of the account holders ... an element which itself is not known until you have completed the due diligence process.

For these reasons, the Group’s recommendation to apply the “DAC2 standard” also extends to exchanges of information between non-UE Countries as it would still affect financial institutions operating across the globe (including in and outside the EU).

Recommendation 4 – Definitional issues in the context of the CRS

It is essential for consistency between all participating countries to confirm that the OECD commentary to the CRS also applies to DAC2 and to highlight any divergences, if any, as divergent interpretations of any definitions from one Member State to another could potentially lead to important distortions within the Internal Market.

Any divergent interpretation should be identified and resolved by appropriate consultation between EU Member States as early as possible, in any case before the deadline for the transposition of the directive into national laws has lapsed (or even earlier for definitions relevant to excluded entities and accounts) to provide certainty for financial institutions implementing the CRS.

In this respect, there are two key terms that we consider need further work in the CRS. These are the definitions of Investment Entity and Financial Account. Investment entity is considered further in this section, while Financial Accounts are considered in the context of excluded accounts and entities within section 6.

A clear and unequivocal interpretation of the concept of Investment Entity, when applied in particular to private investment companies and trusts, is instrumental for the purpose of the implementation of the CRS, as the material scope ascribed to this definition may otherwise vary significantly, depending on the prevailing interpretation. Whatever the interpretation chosen, this interpretation would need to be applied consistently throughout the EU so as to ensure an effective level playing field across Member States.

The CRS provides, as is the case under FATCA, that the definition of Investment Entity shall be interpreted in a manner consistent with similar language set forth in the FATF Recommendations⁶.

⁶ <http://www.fatf-gafi.org/topics/fatfrecommendations/>

The Commentary currently does not elaborate on this interpretative reference to the definition of “financial institution” in the FATF Recommendations when applied in relation to the definition of Investment Entity in the CRS. As a result, the definition of Investment Entity in the CRS is currently open to more than one interpretation, and a certain number of entities that do not fall within the scope of the definition of “financial institution” under the FATF Recommendations potentially qualify as such for the purpose of the CRS, depending on the interpretation chosen. Hence these definitions must also be considered within the scope of the policy framework of the excluded entities considered in section 6.

Entities have already been confronted with comparable complications in the context of FATCA⁷, and it is regrettable that these have not been settled conclusively in the Commentary for the purpose of the CRS. The issue is of particular relevance for private investment companies and trusts which, depending on the prevailing interpretation, would qualify either as an Investment Entity or as Passive NFE. On the latter question, existing national guidance documents published in the context of FATCA provide for opposite conclusions⁸. EU Member States should therefore strive to agree on the most appropriate qualification for private investment companies and trusts in the context of the CRS. The choice of the appropriate qualification should be guided by practical and pragmatic considerations.

Should private investment companies and trusts qualify as an Investment Entity for the purposes of the CRS, these entities would generally be required to report all equity/debt holders resident in other Reportable Jurisdictions as Reportable Person for the purpose of the CRS. Applicable reporting requirements would vest to these entities directly, unless appropriate delegation or sponsoring provisions are made available under the CRS, which is currently not the case. This situation, while maximising the reportable information, might affect the quality and comprehensiveness of the exchange of information under the CRS, for two reasons:

- (i) Smaller entities might not always be in a situation to take on the, often complex, obligations vesting to Reporting Financial Institution under the CRS;
- (ii) Tax authorities would have to deal with a significant number of Reporting Financial Institutions, their submitted returns and (the not always relevant) data contained within those returns.

Conversely, if private investment companies and trusts were treated as Passive NFE for the purpose of the CRS, the relevant equity/debt holders of any such entity would in that case be reported by the

⁷ As per, for instance, the following series published by Tax Analysts: Peter A. Cotorceanu, “FATCA and Offshore Trusts: the First Nibble”, Tax Notes, 22 April 2013, p. 409; “FATCA and Offshore Trusts: A Second Bite of the Elephant”, Tax Notes, 2 September 2013, p. 1007; and “FATCA and the Underlying Companies: Pin the Tail on the Elephant”, Tax Notes, 3 March 2014, p. 957.

⁸ With respect to the IGA signed by the United Kingdom: HM Revenue & Customs, *Implementation of The International Tax Compliance (United States of America) Regulations 2014, Guidance Notes (28 August 2014)*, section 2.28 and 2.36. *A contrario*, with respect to the Canadian IGA: Canada Revenue Agency, *Guidance on enhanced financial accounts information reporting, Part XVIII of the Income Tax Act*, section 3.10 and 3.12. In the same trend, in the context of the German IGA: D. Eimermann, *Das FATCA-Abkommen zwischen Deutschland und den Vereinigten Staaten – ein Überblick*, Internationales Steuerrecht (IStR), 20/2013, section 5.1.3.

Financial Institution that maintains a Financial Account for the entity, in most, if not all cases, a bank. While the AEFI Group acknowledges that this approach would limit the scope of the reportable information in essence to equity/debt holders that qualify as beneficial owners for AML purposes and would imply greater due diligence and reporting responsibilities on the part of Financial Institutions maintaining a Financial Account for the said entities, it would perhaps help ensure that applicable due diligence and reporting obligations vest to a more manageable number of Reporting Financial Institutions who also have the effective means to take on these obligations.

Recommendation 5 – Guidance on due diligence on existing accounts – non-participating jurisdictions – self-certifications

The attached **Appendix III** gives further detail of the AEFI Group's concerns in respect of due diligence procedures on existing accounts, non-participating jurisdictions, self-certifications and related issues which the AEFI Group is ready to assist in the resolution of. As a summary, the key issues which the AEFI Group invites the Commission, the Council and the Member States to address are as follows:

- The due diligence procedures for pre-existing accounts are designed to create operational efficiencies for Participating Jurisdictions' FI's (PJFI's), but require adjustment in order for such an adjustment to be realised. For example, collection of the TIN, Date and Place of birth means FI's need to contact pre-existing individual customers in any event. We ask that the Commission consider simplification of and clarify the requirements in this area.
- In this respect, we suggest that to reduce the financial burden for MSFI's, analysis is undertaken to establish if Member States could agree to a position that TIN numbers and date/ place of birth only need to be collected for new, rather than pre-existing individual accounts in those jurisdictions where it is required to be collected. Furthermore, we suggest that in order to support existing electronic customer due diligence processes guidance is made clear that Member States' financial institutions can rely on documentary evidence provided by a credit reference agency outside of any MSFI or PJFI, and that positive affirmation by the customer of their address in response to an FI's communication to his client be acceptable, rather than the need to obtain a self-certification. This latter point is particularly relevant in the insurance sector.
- In support of these points it is worth noting that in the retail banking environment a large percentage of customers will open additional accounts with their FI over a period of time. This additional data would of course be collected at that point as part of account servicing. Furthermore, where FI's hold relevant data already and can legally report it they will do so.
- In relation to Investment Entities under Section V111 A (6) (b) of the CRS a PJFI must treat these types of Investment Entity as passive NFEs if they are not located in a participating jurisdiction. This means we need to understand the controlling persons. Given that existing AML rules in a number of EU Member States do not require any additional due diligence to identify the controlling persons or senior managing official notably of regulated funds and the chain of ownership, it will be difficult, if not impossible, to obtain self-certifications from the underlying investors in such funds. The AEFI Group suggests that alternative documentation arrangements (other than the self-certification) be made available for Member States financial institutions and

that financial institutions in jurisdictions which have not yet signed the MCAA⁹ be waived from the requirement to collect these data.¹⁰

- The CRS envisages the use of self-certifications. Where this data is not electronically collected there is a current market issue in that many paper forms have been developed causing confusion in the market place for both MSFI's and customers. In order to have a consistent approach and allow effective and efficient processes within MSFI's a best practice approach may consist in the development of a suggested draft of self-certification "best practice", which could be published in Member State guidelines.
- Additional Member State guidelines are needed in the area of the "reasonableness test" as it may raise significant legal and operational uncertainty. In particular, it should be clarified that only the core data fields of the self-certification form should be submitted to the reasonableness test.

Recommendation 6 – Lists of excluded accounts and entities and ensuring a level playing field

A general point is that financial institutions should not be obliged to apply two sets of excluded accounts and entities, one under DAC2, and one under the CRS, as applied vis-à-vis non-EU jurisdictions. It is therefore crucial that the list established for purposes of DAC2 can also be applied for the purpose of the CRS on a global basis. However, as FATCA and the CRS are new regimes we have only limited practical experience on how the rules will operate and consequently the list must not be considered as fixed but must be monitored on a regular basis.

Also, in the interest of an effective level playing field among FI's across the EU and in line with precedent considerations in the context of section 4 of the present report (definitional issues), the AEFI Group strongly recommends submitting the lists of exempt entities and products to be compiled by each EU Member State. The AEFI Group strongly recommends that these lists be published for consultation well ahead of the 31 July 2015 deadline as any divergence with the "FATCA lists" may entail significant changes in the scope of accounts covered and financial institutions concerned within groups. Dialogue in this field should be encouraged between Member States.

We note some detailed examples in **Appendix IV** concerning the problems created by differences in entity classifications, the necessity to include low risk products such as pensions in Annex 1 and examples of areas where there is an unintentional un-level playing field between Financial Institutions operating in the same business area.

⁹ Jurisdictions which are engaged in the process of implementing the CRS but have not yet signed agreements.

¹⁰ A minority view amongst AEFI Group members consists of an alternative paragraph which would read: "We therefore ask that the commission consider an explicit alignment between AML rules and DAC2 and that a financial institution should only be required to collect information regarding controlling persons if it is also required to do so under AML rules. Alternative documentation arrangements, other than self-certification, should be made available for MSFI's. The Commission should consider including an exception from treating Investment Entities as passive NFEs if they are located in a jurisdiction which is not yet a participating jurisdiction, nevertheless requires financial institutions to collect the above data and is committed to adopting the CRS."

Another element is the sponsoring concept under FATCA. The absence in the CRS of sponsoring provisions, whereby, essentially, a given entity agrees to perform certain obligations vesting to another entity on behalf of such an entity, may create significant and unnecessary complications for entities currently acting as sponsors under FATCA, to the extent that the same entities might not be able to offer a comparable service for the purpose of the global automatic exchange of information. In the interest of a smooth and effective implementation of the automatic exchange of information, it might therefore be appropriate to consider the inclusion of sponsoring provisions comparable to those foreseen under FATCA in the context of the CRS, whereby a certain number of sponsoring entities meeting certain predefined prerequisites would perform the obligations that would otherwise vest to the entities so sponsored.

There is a potential risk of regulatory arbitrage should the EU adopt an approach to the Annex 1 provisions which would put the EU radically out of step with the rest of the world. This has significant competitive implications for the EU economy and the financial institutions currently operating here.

We would suggest that the EU adopt general principles to guide any Annex 1 product exclusions based, for example, on one of the following criteria:

- Income subject to domestic reporting;
- Tax deductible amounts;
- Regulated and controlled;
- Government tax incentivised products.

In respect of excluded entities, we further consider the issue of investment entities which solely act as investment advisors and issue no reportable or financial accounts. We note that the CRS, in contrast to FATCA/IGA regulations, does not provide for investment entities whose “sole activity is provide investment advice to, or act on behalf of or manage portfolios for, customers [subject to certain conditions]” to be treated as “deemed compliant”. Under the IGA framework, provided that entities satisfy the conditions, they are effectively non-reporting financial institutions with a minimal compliance burden provided that no onerous registration or “nil” reporting is required. Under the CRS, such entities will be defined as financial institutions/investment entities although (again subject to conditions) equity interests in such entities may not be “financial accounts” [section C (1) (a)]; and, subject to the precise business model, it is probable that many such entities will not have any reportable financial accounts. This “deemed compliant” classification under the IGAs is relevant to, and has been applied to, many entities within investment management businesses and structures, and to have a different interpretation/provision under the CRS would create both a greater compliance burden and a greater risk to managers, with only minimal benefits in terms of the quality and comprehensiveness of the exchange of information.

The Final FATCA Regulations exclude from the definition of a Financial Account debt or equity interests in an investment entity that are regularly traded because such interests are typically held by or through other financial institutions. A later exception was provided for interests that, even if publicly traded, are not held in custodial accounts (interests whose holders - other than financial institutions acting as intermediaries - are registered on the books of the investment entity itself). The CRS in Section VIII C(1)(a) creates a material departure from FATCA in that holdings in publicly traded funds (such as Exchange Traded Funds – ETFs - or UK Investment Trusts) are never excluded from the definition of Financial Accounts and are therefore clearly reportable under the CRS. Whilst this means in principle that, under both FATCA and CRS, publicly traded CIVs are subject to reporting requirements with reference to their holdings held directly by the end investor (and not by or

through financial institutions), in practice this has not been the position in Europe under FATCA because the IGAs in force typically exempt *all* publicly traded holdings. Hence, an entirely new practical problem arises, with these direct investors, in applying CRS to the EU Member States. Publicly traded holdings, which may be continually traded, are inherently impractical to document completely and so the publicly traded funds sector has a particular problem that affected Member States will need to engage with business in providing a solution for the funds sector. Ideally it would be useful if consideration could be given to amending the definition to align with that of FATCA. However, in any case, there is strong need for clear guidance by Member States on (1) who shall be responsible to gather and provide the relevant information for or to the publicly traded funds or (2) under which circumstances the publicly traded fund can rely on an exempt status, even if not all of the fund units are held through financial institutions.

Transposition of the Directive

The implementation burden and costs to financial institutions will be exponentially increased if financial institutions cannot collect, document and report all tax residences and controlling persons information from day one of the regime, and are forced to repeatedly re-examine all accounts for new jurisdictions joining the regime. Therefore domestic laws must be amended to ensure that clients should only need to be contacted once to collect all tax information and consequently financial institutions must be able to retain that information until required for reporting. EU Member States need to adopt requirements enabling financial institutions to collect the necessary information and allow for multiple residency data. This is essential for successful and efficient implementation, and has already been accomplished in the UK within the European Data Protection framework - we strongly recommend this is achieved in all other EU Member States.

Business projects to implement tax and regulatory change in financial institutions can also only really begin when participating countries publish their domestic legislation implementing the context of their agreements, guidance notes and reporting requirements. This is a significant concern for those financial institutions that operate globally, as all are needed to ensure a coherent implementation for the FI, from systems build to staff training programmes.

Recommendation 7 – Minimising the administrative burden and aligning the compliance regime

The Commission should encourage tax administrations to produce guidance in respect of the audit policies and procedures that they will follow. In particular the review process should be consistent: for example an FI should just be able to demonstrate that they have followed their relevant policies and control procedures. FI's should not be expected to have to employ external auditors to review the activities of the various jurisdictions in scope.

Additionally, it should be noted that FI's are likely to have tactical solutions when implementing the CRS, due to the lack of time available between the issuance of requirements, implementing legislation, and local country guidance against the commencement date. It will take 2 to 3 years for FI's to fully address these system issues. Therefore, there should be a "soft landing" period of 2 years for financial institutions located in the EU or Early Adopters during which tax administrations and financial institutions would both seek to achieve a fully operational system. Financial institutions confirm that they will remain committed to making best endeavours to implement the CRS during such a period. At the end of this period, the full compliance regime would be implemented.

Recommendation 8 – IT issues and the schema for reporting

The OECD has developed a technical solution to support the Common Reporting Standard (CRS) which comprises (i) a schema (the “CRS XML Schema”) and (ii) a User Guide. The CRS XML Schema must be used between Competent Authorities to automatically exchange the requested information pursuant to the Global Standard.

DAC2 states that the automatic exchange of information shall be sent using a standard computerised format aimed at facilitating such automatic exchange and based on the existing computerised format pursuant to the “Savings Directive”. The European Commission (EC) intends to work on more detailed technical specifications for intra EU exchanges under DAC2. The AEFI Group wishes to provide recommendations on certain key principles, as well as to underline some concerns:

Key principles

- One key principle is to ensure a truly Global Standard at international level and to allow financial institutions to implement global reporting IT solutions: thus, the standard computerized format “pursuant to the Savings Directive” must not diverge from the OECD’s CRS XML Schema, and the technical specifications developed by the EC should not provide for additional requirements as compared to the OECD’s CRS XML Schema. It is the AEFI Group’s understanding that the Commission intends to take over the CRS XML Schema as such for the purposes of DAC2. This would enable financial institutions to build global IT solutions.
- In addition, schemas built by financial institutions based on the EC’s format and technical specifications should also be deemed usable for reporting with third countries.
- It is also understood that the CRS XML Schema must be used between Competent Authorities but is not necessarily required for domestic data transfers / reporting in view of the Global Standard. However, financial institutions should always have the choice to use the CRS XML Schema for domestic data transfers.
- In addition, a number of countries have developed their own “FATCA-like” XML schema to accommodate domestic reporting and the CRS reporting. This creates a risk of divergences and may hinder efforts of the FI for a global reporting solution. Again, financial institutions should always have the choice to transfer data using the CRS XML Schema.
- In the absence of these key principles, financial institutions will not be able to implement a global reporting solution which would work for both intra EU exchanges and exchanges with third countries.
- Business strongly suggests consultations with business be held on the technical specifications developed by the EC as soon as possible: while Governments may consider that urgency to finalize reporting solutions is not required, it should however be borne in mind that if at outset systems cannot capture all the required information for reporting, financial institutions will be unable to provide the information required in due time.
- Whilst we understand the attraction of a consistent global schema to Competent Authorities “proportionality” is a key consideration for businesses. The transition from the FATCA/IGA

framework to multilateral reporting and compliance will mean that numerous businesses for which the compliance burden has, to date, been minimal, will need to incur time, expense and allocate resource and potentially, for the first time, build and implement reporting systems to comply with CRS reporting requirements. EU should consult with businesses on an alternative “light touch” reporting system and process for smaller scale operations.

Concerns

The EC expressed its intention to take over the CRS XML Schema as such for the purposes of DAC2 and to further liaise with the OECD as regards technical aspects. The AEFI Group strongly recommends that the standard computerized format “pursuant to the Savings Directive” should indeed replicate the CRS XML Schema, enabling financial institutions to build a global IT solution.

Besides, it is expected that concerns may arise with the CRS XML Schema which was developed under a fast-track procedure. In such cases, use of the EC technical specifications to resolve difficulties may be beneficial. One important example the AEFI Group wishes to underline is the fact that the Residence country is a “Validation” requirement in the CRS XML Schema with respect to Controlling Persons: this may entail the automatic rejection of the reports when such information is not available even when financial institutions have carried out best efforts to comply.

These types of concerns clearly underline the need for a consultation at EU level with Business on the EC technical specifications.

Recommendation 9 – Cross-border withholding tax relief at source

In light of the new system for automatic exchange of information between EU member states and some OECD member countries the political heart of these agreements reflects a notion of ‘no more borders’ and it is clear tax authorities will be working even closer together to address cross border tax matters.

Members of the AEFI Group believe that transparency of taxpayer information should not only serve governments' aims of combating tax evasion, but also the interests of savers and investors across the EU to be able to access the treaty benefits to which they are entitled. The current initiatives should serve to address the needs of citizens throughout Europe as highlighted in the numerous reports published on this subject since 2001. Governments should therefore take steps to implement a standardised and harmonised tax relief at source system and simplified tax refund procedures simultaneously with the CRS.

Primarily the EU should work towards developing the most effective tax relief at source system possible, and ensure governments recognise the benefits of a harmonised tax relief at source system.

The most advanced work in this area has been the development by the OECD Member State governments of the TRACE Implementation Package (TRACE IP)¹¹ of which certain features, such as the ability for financial institutions to voluntarily participate in the relief system, should be retained. The AEFI Group invites the Commission and EU Member States to conduct further analysis in an EU context. This analysis should pay particular attention to the need for a level playing field in accessing the EU treaty relief at source system and should consider the work of the OECD in regards to TRACE. The CRS reporting and the reporting imposed due to the future tax relief at source and tax refund system should if possible be harmonized and affect the financial institutions as little as possible from a risk perspective.

Given the prior work in this area, the analysis should start now and should not take more than six months. The AEFI Group believes that the application of a relief system should not be limited to investors that are resident in another E.U. Member State as this would result in the need to run two systems in parallel and increase costs for tax authorities, financial intermediaries and investors. For example TRACE allows for foreign financial institutions to voluntarily participate in the relief system and similarly enable governments to exclude financial institutions from participation. The AEFI Group believes that any standardised and streamlined system should remain voluntary for financial institutions.

Recommendation 10 – Capacity building – benefits of automatic exchange of information - support for developing countries for AEOI (statistical analysis)

The risk of creating new tax havens

It is in the interests of all that automatic information exchange becomes a global standard, with all jurisdictions participating as soon as possible. It is also widely accepted that developing countries will face challenges in joining the AEOI system. Both for the EU and developing countries the stakes

¹¹ http://www.oecd.org/ctp/exchange-of-tax-information/TRACE_Implementation_Package_Website.pdf

are high, as potential loopholes in the global system of AEOI could be devastating. Creating a system where developing countries are effectively excluded risks the creation of new tax havens, as well as depriving developing countries of the information for them to effectively enforce their tax systems.

In recognition of this the EU and its Member States should ensure that the principles of Policy Coherence for Development, as established under the Lisbon Treaty, are followed in respect to AEOI. Through the G8/G20 and Global Forum¹² many EU Member States have also committed to assisting developing countries to benefit from AEOI. These commitments should give developing countries the guarantee that support will be there when they make the commitment to AEOI.

Capacity building is one of the primary needs for developing countries and any technical barriers to taking part in the global system of AEOI should be overcome sooner rather than later. The scale of the challenge facing developing countries is significant. It is estimated that Sub-Saharan Africa would need around 650.000 more tax officials to reach the world average¹³. Both this human resources challenge, along with the need for improved IT are among the main capacity barriers identified by the Global Forum (GF) roadmap for AEOI for developing countries.

Facilitating developing countries' access to information

Both Africa and Latin America are estimated to have over 25% of their residents assets held offshore whereas the volume of offshore assets held in the poorest countries is negligible (e.g. Nigeria with one of the most developed financial sectors in Africa has less than 1% of the bank assets of the UK)¹⁴.

Developing countries need to be receiving data in order to address this. One way of enabling this would be with a phased approach to AEOI for the poorest countries (those with GNI per capita of less than \$4.125) in full recognition of the common goal to curb tax evasion and the differentiated responsibilities. Technical assistance – side-by-side instruction as, for example, is envisaged through the tax inspectors without borders program – for developing country tax authorities and investigative/prosecutorial personnel should be geared towards demonstrating how AEOI information can be used to identify trends.

The goal of such efforts should be to prepare countries for full cooperation in a global CRS without fear of sanction during the phasing in period. A phased approach should be limited in duration and provide for safeguards both to identify any capital flight and for EU Data Protection and constitutional rules. It is important to stress that objective standards on confidentiality need to be applied. GF peer review has found many developing countries to be fully compliant on confidentiality and some developed countries to be only partially or largely compliant, the majority of them being compliant.

Cost-benefit and statistical analyses

¹² <http://www.oecd.org/tax/transparency/>

¹³ Study commissioned by the Norwegian Development Agency (Norad): <http://www.cmi.no/publications/file/4045-taxation-mozambique-tanzania-zambia.pdf>

¹⁴ Global Forum's roadmap for developing countries (p.9) <http://www.oecd.org/tax/transparency/global-forum-AEOI-roadmap-for-developing-countries.pdf>, where this Boston Consultancy Group study is quoted: <http://www.bcg.de/documents/file135355.pdf>

EU Member States should encourage developing countries to participate by conducting cost-benefit analyses on AEOI. The costs in developing countries related to adopting AEOI will clearly differ country by country. These include costs for the government when developing the systems to send information out both in terms of administration and in legal frameworks, and at the financial institution level as local institutions will have to provide information on foreign account holders.

Potential benefits for developing countries can be assessed by identifying the assets from developing country residents held overseas, for example using the data of the Bank of International Settlements¹⁵. EU Member States can also provide aggregate statistics on the functioning of AEOI, including but not limited to the volumes of data being exchanged, the number of individuals and the size of the assets concerned. These statistics would give citizens, journalists, politicians, and organisations i.e. the Global Forum an idea about the impact of AEOI. Research on the deterrent effect would very likely prompt countries to prioritise participating in the global system.

Recommendation 11 - The way forward - including third countries in the OECD's global standard on AEOI

AEOI will be more efficient if all countries are brought together within a single global system, governed by one multilateral agreement. This greatly reduces the risks of inconsistency and unnecessary administrative burdens. It also prevents developing countries from having to negotiate several bilateral treaties to implement AEOI, which would be problematic because on their own they have limited bargaining power vis-a-vis financial centres. Therefore, EU Member States should promote the position that AEOI is implemented by all via the Multilateral Competent Authority Agreement (MCAA).

Regarding the inclusion of third countries, three categories of countries should be distinguished:

The first category includes non-EU jurisdictions that function as regional or global financial centres. Financial centres as such may be defined on the basis of the total value of cross-border deposits and other foreign financial accounts held in a jurisdiction. Ensuring that these jurisdictions are included will benefit EU Member States and other countries by providing their authorities with relevant information about financial accounts held in those financial centres. Moreover, it creates a more level playing field between financial institutions operating in the EU and in non-EU financial centres. A key criteria to identify such jurisdictions includes whether they effectively exchange information with EU Member States, and with all third countries that EU Member States exchange information with, before a certain deadline. A focus on effective information exchange helps to prevent defensive administrative measures by financial centres, such as specifying excessive data safeguards. EU Member States should consider developing a common pressure mechanism to motivate financial centres that fail to cooperate.

The second category includes non-EU jurisdictions that are not financial centres. Bringing in these countries will increase the use of data collected by financial institutions and the social benefits of the AEOI system. It will also reduce the administrative burden for EU financial institutions, because they will not have to identify controlling persons of investment entities in third countries that participate in AEOI. Furthermore, it prevents EU residents from hiding assets by opening accounts in non-participating jurisdictions that are not (yet) recognised as financial centres. EU Member States should jointly express their intention to exchange information with all signatories of the MCAA that

¹⁵ As sufficiently disaggregated data is not available publicly only government led research is possible here.

have indicated to the OECD Secretariat they have the necessary laws and measures in place to implement the CRS and ensure data confidentiality.

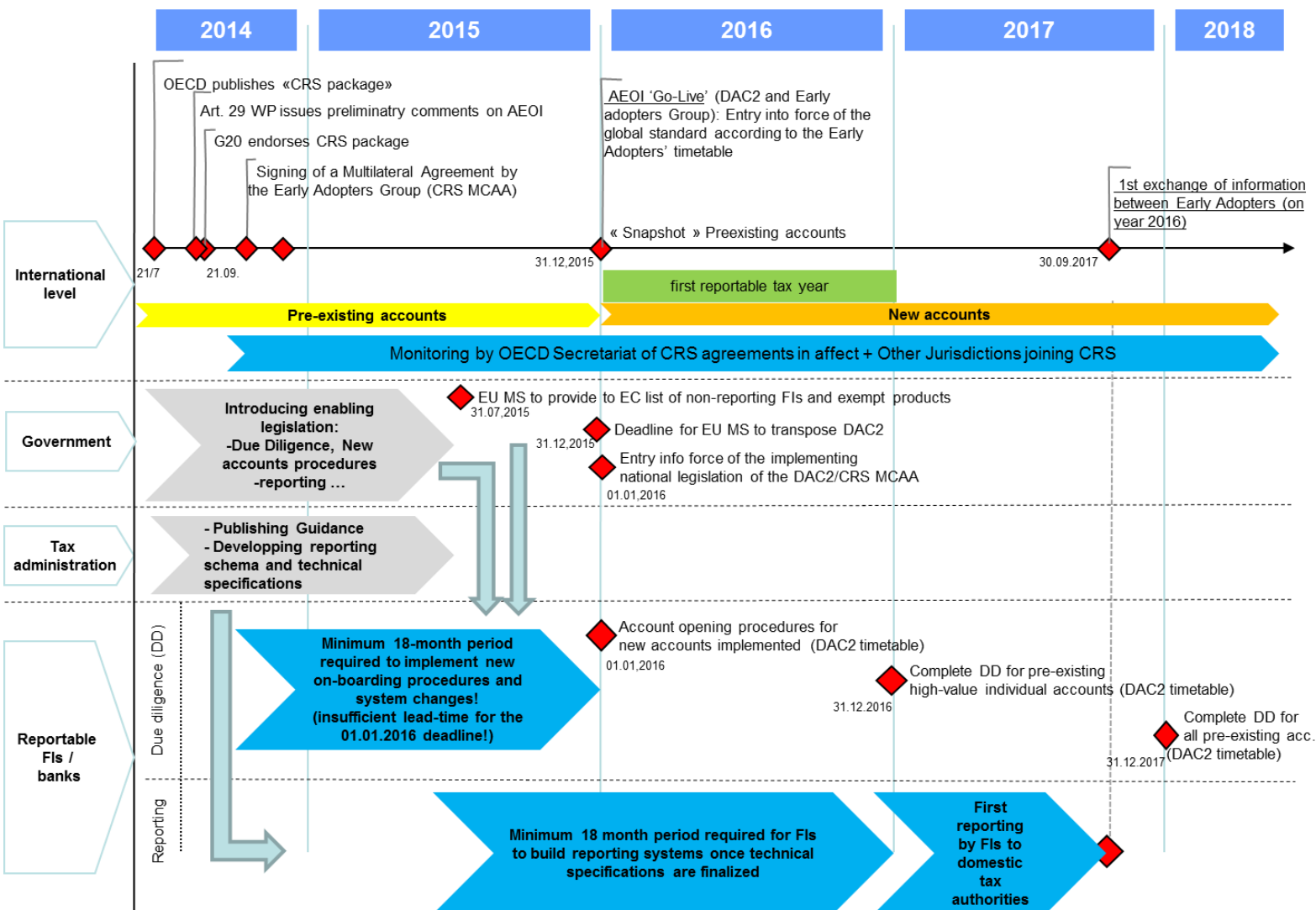
The third category consists of developing countries that are currently unable to implement the MCAA requirements. Special attention is needed to involve these countries as they are key to creating the global fabric of AEOI. Very few of them are currently meaningfully engaged. While allowing developing countries to remain outside the AEOI process may be expedient for the rapid introduction of AEOI, it creates problems in the future, as the challenges to integrating developing countries and their specific needs will remain. EU Member States should therefore start Global Forum pilot projects with developing countries that are not yet ready to sign or implement the MCAA, as described in the Global Forum's report "A roadmap for developing country participation".¹⁶ This will increase developing country engagement in AEOI, focusing on realising benefits first, and gradually complying with all the requirements. To promote developing country participation in the global AEOI system in a more structural way, EU Member States should contemplate the possibility for a soft-landing period for developing countries to enable them to adapt to the global standard. This soft-landing period would be in the same spirit as a "soft-landing" period for financial institutions located in the EU or in Early Adopters jurisdictions. Special attention should be paid to the fact that such initiative should comply with EU Data protection and constitutional rules, making sure there would not be any misuse of information received by developing countries.

¹⁶ <http://www.oecd.org/tax/transparency/global-forum-AEOI-roadmap-for-developing-countries.pdf>.

APPENDICES

APPENDIX I Recommendation 1: Timelines

AEOI: Early Adopters – Simplified Governments’ timetable



Extremely challenging timetable for all stakeholders

- not only the financial institutions are challenged, but as well the Governments and the tax administrations: the domestic implementing legislation and the guidance has to enter into force in time: a minimum 18-month period is required for financial institutions to implement new on-boarding procedures and system changes once the legislation and guidance are finalized + a

minimum 18-month period is also required for them to build reporting systems once technical specifications are finalized.

- List of Non-reporting financial Institutions and exempt products may be known on 31 July 2015 which does not leave sufficient time for financial institutions to adjust the scope of entities concerned within groups as well as the scope of products / types of accounts impacted or not
- Dependence on external providers: for a technical implementation in time, a timely supply of the system software is key.
- Importance of one single standard and synchronization of the EU regulatory measures (including termination of the EU savings tax).

The main elements of the OECD standard

Competent Authority Agreement (CAA)

- Bilateral / multilateral agreement
- Links the CRS and the legal basis for the exchange (Convention, tax treaty)
- Specifies the scope of information to be exchanged and the modalities of the exchange
- Governs the cooperation between governments
- Guarantees data protection, the adherence to the principle of specialty and reciprocity
- Can also be implemented as a multilateral or non-reciprocal agreement

Common Reporting Standard (CRS)

- Reporting and due diligence standard
- Sets out the scope of—
 - Financial information to be reported
 - Account holders subject to reporting, and
 - Financial institutions required to report
- Defines important terms (“financial institutions”, “reportable person”, etc.)
- Must be translated into local regulations and guidance

Commentaries on Model CAA and CRS

- Interpretation of the Model CAA and CRS
- Specification of certain rules and provisions
- Examples
- Aims to ensure a consistent application of the standard across different jurisdictions

CRS Schema and User Guide

- Minimum standard
- Should guarantee an appropriate level of data securities and ensure a secure and compatible exchange of information

APPENDIX II Recommendation 2: Data protection and privacy

Need for DAC2 to respect fundamental rights

It is crucial to ensure that DAC2 is fully compatible with privacy and data protection rules which are fundamental rights under EU law (European Convention on Human Rights, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data 108/1981, Article 16(1) of the Treaty on the Functioning of the European Union, Data Protection Directive 95/46/EC) and are a condition for the validity of EU legislation¹⁷. Right to privacy and data protection are two separate and distinct rights in the EU framework, which require separate analysis and application¹⁸.

Principle of purpose limitation

As a derivative of the constitutional rules of the EU Charter on privacy and data protection, the Data Protection Directive (95/46/EC) translates the primary aim to regulate the vertical relation between citizens and Government and the secondary aim to specify the rights of actors in the horizontal relations between individuals and private companies. Therefore, when governments access data of their citizens, the obligation to apply and respect the proportionality test is triggered by the question as to whether these data are protected by privacy and data protection rules or not, irrespective of whether governments are accessing these data directly at the level of the citizens themselves or via a third party like a financial intermediary.

Compatibility with EU law

- **Digital Rights” Ireland Case (C-594/12)**

On 8 April 2014, in the “Digital Rights” Ireland Case (C-594/12), the Grand Chamber of the Court of Justice of the European Union (CJEU), highlighting the criteria under which an access to data covered by privacy and data protection rights under the European Charter on Fundamental Rights¹⁹ is possible, declared the European Data Retention Directive (2006/24/EC) invalid. Many aspects in this court decision match the concerns of the AEFI Group with DAC 2.

- **Proportionality principle**

According to the CJEU, “the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives”.

- Under DAC2, data to be collected may be considered as unspecific in terms of the definition of investment income (and its taxation) in the recipient country. Gross proceeds from sales transactions will be part of the reporting, independent of the fact whether those forms of

¹⁷ See “Guidelines on data protection in EU financial services regulation” from the European Data Protection Supervisor (nb 3).

¹⁸ See “Guidelines on data protection in EU financial services regulation” from the European Data Protection Supervisor (nb 13 and 15).

¹⁹ Judgment of the Court (Grand Chamber) of 8 April 2014: Case C-293/12 Digital Rights Ireland and C-594/12

income are subject to taxation in the recipient jurisdiction. In this context, a lot of misleading and unnecessary data will thus be exchanged, creating suspicions about taxpayers to the detriment of the economic freedoms of the EU treaty and the fundamental rights of the EU citizens enshrined in EU Charter.

- Under DAC2, financial institutions have to screen their client base using a number of indicia, while “profiling” of citizens by Governments is illegal²⁰.

Principle of the sufficient cause / indications.

This requirement can be found in CJEU, as well as in national Court decisions, including recent ones from the Belgian Constitutional Court and the German Federal Constitutional Court. One of the fundamental principles governing the legitimacy of the collection of data is that indicia for an incorrect behaviour of persons must exist. As these requirements are unalterable, data collections without cause, at random, may simply be unconstitutional.

Role of Article 29 Working Party

Prior to the implementation of DAC2, Governments should carefully consider the terms of the statement adopted by the Article 29 Working Party on 4 February 2015. Particular attention should be paid to the proportionality of data processing and retention, controllership and security measures, and onward transfers-related issues.

Compliance of national legislation with privacy and data protection rules

All efforts should be made to remove any legal uncertainty risk arising from any conflict between DAC2 and privacy / data protection requirements, before any legislation implementing it is in force. The risk of invalidation and the legal uncertainty it would create could have various undesirable circumstances, some foreseeable, some unforeseeable.

First, due to the importance of the right at stake, there is a great risk of liability for the public authority that imposes this law. Second it could be extremely difficult to repair the damage done to the citizen should the legislation be invalidated. This could lead to numerous legal challenges from taxpayers vis-à-vis their national tax authorities and financial institutions which may pose a great threat to the success of the measures. Last but not least, tax administrations and financial institutions would be required to implement costly processes, only to see them invalidated at a later stage.

Legal security for all players – tax administrations, taxpayers and financial institutions – is a key factor. In addition to the EU law, constitutional frameworks of each country implementing the CRS should also be taken into account²¹: different constitutional traditions within Member States influence the interpretation of the Data Protection Directive. Member States could fail to adjust their national legislation to the needs of the automatic exchange of information to the data protection laws in a formally valid manner.

²⁰ <http://www.privacy-europe.com/blog/profiling-what-is-the-european-data-protection-authorities-direction/>, see also the Huber case of the ECJ (524/06)

²¹ we note for instance a recent decision of the French Constitutional Court of 13 March 2014 which simply cancelled the creation of a national register of loans to individuals as unconstitutional (see Conseil Constitutionnel, Decision nb 2014-690 DC, 13 march 2014).

In particular, a legal challenge may arise as to the collection and reporting of the magnitude of the data requested: In light of Recital (10) of DAC2, one main objective of the DAC2 is to identify tax evaders: one may however object that the data relating to the identification of the client may be sufficient to meet this objective.

As regards the other objective of “assessing the likelihood of tax evasion”, one may challenge the fact that the magnitude of financial data (i.e. the data other than the identification information) may be considered excessive and that e.g. reporting of the account balance may be sufficient in this respect.

The AEFI Group would also like to emphasize the fact that the objective of the exchange of information under the Annex of DAC2 is not to allow tax administrations to directly assess the tax liability of a taxpayer based on the data received, but only to serve as an indicator: further verification, possibly including a tax audit, are necessary to verify the tax declarations and the tax liability of the taxpayer concerned. It should be noted that the characterization and computation of the financial data transferred by the source country is done according to its domestic rules: therefore such data cannot be used as such by the residence country to assess the tax liability of a taxpayer.

Standards for the protection of data in third countries

There is a risk that the data of account holders transferred to countries outside the EU, where data protection provisions comparable to those in the EU may not exist, may not be properly protected in these countries where the data could be used for purposes other than combating tax evasion. Data protection and confidentiality arrangements may be inadequate in some countries, although there is a provision which provides for non-transfer if countries security does not meet OECD standards.

In addition, automatic exchange of information may not always be relevant: for instance, nationals of certain countries may be residents of other countries for political reasons and it may not be reasonable that exchange of information occurs with respect to their data, for safety reasons.

Yet, the DAC2 does not have any effective mechanism to protect the data of account holders transferred outside the EU. For all these reasons, a review mechanism, such as a peer review, should be put in place so as to monitor these sensitive issues.

An objective standard on confidentiality should be developed. This would enable developing countries to know what they have to meet and would help avoid multiple assessments by different EU Member States.

Technical support to developing countries

Member States should make strong commitments to provide technical support to developing countries, again with a view to make as many countries join the multilateral system as soon as possible. Preferably they should do this in a coordinated manner, with a coordinated target date for developing countries to join the system. Technical support should give priority to data protection, allowing them to receive information, and data processing, enabling them to use it.

Conclusion

Given the objectives at stake and the legal uncertainty which derives from the issues described above, the AEFI Group calls for a thorough legal analysis to be undertaken by Member States with respect to their legal and constitutional frameworks to confirm that the AEOI envisaged under DAC2 is not in breach of the EU Charter and their domestic law. The AEFI Group invites Member States to take into consideration the requirements and guidelines provided by the Article 29 Working Party in its letter of 4 February 2015.

APPENDIX III Recommendation 5: Guidance on due diligence.

Guidance on due diligence on Pre - existing accounts

In respect of pre-existing, individual low value customers, the Common Reporting Standard (CRS) facilitates PJFI's a less onerous standard of customer due diligence for remediation purposes than for new accounts. We believe a less onerous standard is also intended in respect of entity accounts. However, some of the guidance in relation to pre-existing entities is unclear, and further clarifications are required in this area.

In respect of individuals, the Pre Existing low value Accounts B1 Procedure (Documentary Evidence) implementation guidelines should clarify documentary evidence requirements necessary for application of the B1 procedure, in particular:

- The CRS details the B1 residence address test, and the B2 Indicia test. However, it is unclear from a straight interpretation of the commentary if the residence address based on documentary evidence under the B1 procedure can be that provided by a credit reference agency outside of the PJFI. It would be useful if this point was clarified particularly for jurisdictions such as the UK that rely on Evid, - an electronic customer due diligence process.
- A further difficulty is that although the B1 and the B2 procedures were designed to reduce need for customer interaction and cost, the current provisions within the CRS make this difficult. There is a requirement on financial institutions to reach out to their customers for a TIN and Place of Birth in many Member States which would oppose the relief afforded by the B1 and B2 procedures. The CRS sets out the core requirements for self-certifications being name, address, jurisdiction of residence for tax purposes, TIN with respect to each reportable jurisdiction, and date of birth (in the case of individuals). The date of birth is only required where local domestic law requires it to be obtained and reported. The TIN is not required where it is not issued by the relevant reportable jurisdiction or the domestic law of the relevant reportable jurisdiction does not require its collection. It may be useful therefore to reduce the financial burden for MSFI's if Member States could agree to a position that TIN numbers and date of birth only need to be collected for new, rather than pre-existing accounts (the same relief should be accepted under the MCAA).
- Additionally, would positive affirmation by the customer of address in response to an FI's communication to his client be acceptable? Bearing in mind an insurer cannot enforce a policyholder to provide a self-certification we should be able to report on the pre-existing data held on the policy holder, including from 3rd parties. This is on the basis that under contract law it is not possible to withhold a payment for this purpose or cancel an insurance contract.

Treatment of non-participating jurisdictions

Section V111 A (6) (b) of the CRS sets out the term “Investment Entity” and outlines that PJFI must treat these type of Investment Entity as passive NFEs if they are not located in a participating jurisdiction. This will therefore require the look through of that type of investment entity to identify the controlling persons or senior managing official. Many of the type of investment entity that will fall under the definition of passive NFE will be regulated funds. Existing AML rules in a number of EU Member States do not require any additional due diligence to identify the controlling persons or senior managing official of regulated funds therefore it would be helpful if the guidance on self-certification can outline that no additional due diligence for these type of investment entity is required (e.g. for US mutual funds). Specifically many of these regulated funds will be using financial institutions to act as a custodian for custody cross border portfolio investment, and will likely have documented themselves with their financial institution (account provider) with documents to satisfy US FATCA requirements, for example W series forms. We would urge the consideration of acceptance of a W series form in lieu of a self -certification for this type of investment entity.

Finally it will be essential for states to outline the expected treatment for when the jurisdiction in which the Investment entity is located becomes a participating jurisdiction. Perhaps introduction of a grandfathering rule for the countries committed to adoption of the CRS and / or introduction of an owner documented FI category and/or an introduction of a “white list” of countries expected to become a participating jurisdiction.

Self-certifications - (Work on a “Best Practice” self-certification form)

Where a PJFI is not collecting the required self-certification information electronically, a problem has arisen amongst the PJFI community i.e. in the collection of paper declarations. The AEFI Group therefore supports development of a self-certification “Best Practice”, provided that such a form is voluntary and valid in local languages.

A number of PJFI’s have designed their own form, some of which are missing the vital data or have incomplete instruction. There is also a vast element of customer confusion where a customer uses more than one PJFI and is in receipt of different forms for the same ultimate purpose. For example, it is inevitable that account holders who are routinely faced with different forms, even within the same EU Member States will encounter additional substantial costs where they may have to use the services of an advisor before they are able to complete the forms for the relevant FI.

The current situation also prevents any market Information Technology system provider from being able to develop a solution to validate the forms. In order to aid compliance efforts, some PJFI’s would ideally use such a system to validate the forms and perform the reasonableness test envisaged under the CRS.

In order to have consistency across the participating jurisdictions, including within members states, and avoid confusion there is a need to agree a common set of data-fields that are recommended for any self-certification (along with the mandatory ones which are name, address, jurisdiction(s) of residence, TIN with respect to each Responsible Jurisdiction, signature), and a set of fields that are simply optional.

Therefore, the AEFI Group makes an initial recommendation that for the purposes of facilitating the due diligence requirements of the DAC a “Best Practice” model of self-certification form is developed according to the type of business and lines of business, for suggested use across all Member States. Some work is already under way in this area amongst a collaboration of experts in this field from various Financial Institutions, representing the various types of business in scope under the CRS. This would be able to be amended by PJFI’s but should include all the mandatory data-fields (name,

address, jurisdiction(s) of residence, TIN with respect to each Responsible Jurisdiction, signature) and the recommended ones that are detailed in the “Best Practice” model of self-certification.

Guidance on the “Reasonableness test”

The AEFI Group believes that additional guidance is needed in the area of the “reasonableness test” as it may raise a lot of legal and operational uncertainty

It should be reminded that the five core data fields required for the validity of a self-certification in the OECD’s CRS Commentary (p.138) are the: name, address, jurisdiction(s) of residence, TIN with respect to each Responsible Jurisdiction, and signature.

The reasonableness test deals with the relevant facts or statements contained in the self-certification (p.149 of the Commentary). The DAC2 should be consistent with these requirements: therefore, it should be clarified that only the core data fields should be submitted to the reasonableness test.

Besides, it should be underlined that the reasonableness test shall only consist of a consistency check between the self-certification and other documentation, and does not include any legal analysis from the FI (especially, for the data field “jurisdiction(s) of residence”).

APPENDIX IV Recommendation 6: Lists of excluded entities and accounts

Entities with different categorisations under FATCA/CRS

There are several areas where the CRS entity categorisation differs from that applied under FATCA.

One area of particular concern is the difference in approach relating to entity accounts. The potential for repeated due diligence (repapering) exercises of entity customers will generate substantial burdens for financial institutions.

For illustration, financial institutions are currently implementing US FATCA and this requires them to identify US controlling persons of some entities, the CRS will require these accounts to be repapered but with the intention of identifying and monitoring any changes for all non-domestic controlling persons. Furthermore, where the local legislation does not permit the retention of this data, then this exercise will have to be repeated as each new territory joins the CRS. Even where the data may already be held, it may not be possible for it to be used for the purpose of tax reporting unless this intention was made clear to the customer at the point the data was acquired. The treatment of charities is another area of potential variation which needs to be addressed

Exclusion of pension products

DAC 2 requires Member States to inform the Commission by July 31, 2015 of the list of accounts that should be treated as “excluded accounts.” We strongly recommend that these lists be published for consultation well ahead of the 30 June 2015 deadline as any divergence with the “FATCA lists” may entail significant changes in the scope of accounts covered and financial institutions concerned within groups.

The AEFI Group believes that pension plans and tax-favoured retirement products (2nd and 3rd pillar) should be exempt from automatic information exchange because of the very low risk of tax evasion associated with such products. The US FATCA has recognised this under Annex II of the Model IGA implementing FATCA in the EU, which effectively excludes European pension plans from its scope.

DAC2 does not automatically exclude European pension products, as is outlined in Annex II of the Model 1 IGA, because the conditions in DAC2 to qualify as an excluded retirement and pension account are too strict (Annex 1 - Section VIII- Paragraph C - subparagraph 17(a)). In particular, the \$50,000 threshold for annual payments is not workable in Europe, as many European pension products do not contain thresholds on annual contributions.

This being said, the AEFI Group believes that national lists of “low risk” excluded accounts prepared by each participating jurisdiction should include European pension products outlined in Annex II of the Model IGA.

Exclusion of general insurance products

General insurance products (e.g. car or home insurance) present no risk to evade taxes as they do not operate in any sense like investment accounts where premiums can be refunded with an enhanced value for investment returns. P&C policies cover risks associated with the occurrence of

fortuitous event where policy claims are subject to detailed review by the insurers prior to payment, and claim payments reimburse policyholders for losses those policyholders have already incurred.

DAC 2 requires EU insurance customers to subject themselves to documentation, due diligence and reporting requirements in order to purchase or maintain so-called “cash value insurance contracts”. “Cash value” arises if the policyholder would be entitled to receive an amount (even €1) upon termination of the contract unless that amount is for: (1) Personal injury, sickness, death or indemnity benefits; (2) Refund of previously paid premiums due to cancellation (other than for investment-linked insurance contracts or annuity contracts); (3) Policyholder dividends (other than for life insurance contracts); (4) Advance premium as long as the premium does not exceed the amount of the next annual payment.

This being said, the AEFI Group is concerned that in view of some tax authorities some general insurance products might be subject to reporting obligations, because they have minimum “cash value” cover as a result of various pro-consumer benefits (e.g. dividend programs, premium payment plans etc.). FATCA managed to solve this problem by introducing a \$50,000 *de minimis* threshold. As a result, EU insurance customers are not required to endure documentation, due diligence and reporting procedures for routine, low-risk insurance purchases under FATCA.

Having regard that it is not possible to introduce a *de minimis* threshold, to address this concern the AEFI Group recommends that Member States include general insurance products on their national lists of low risk excluded accounts (if they share this view). In any case, clear and consistent guidance in all Member States (with useful examples) as to what is and what is not a cash value insurance contract.

Qualified Credit Card Issuer (QCCI)

Despite the best efforts of the OECD to create a level playing field between an entity that only issues credit cards and a bank or other FI that also issues credit cards, some issues remain that impose a significant additional burden on these other financial institutions. The sections dealing with this in the Commentary treat the QCCI as a Non Reporting FI (Section VIII B (8)) meaning that it has no reporting to do where it has the appropriate policies and procedures in place. However in attempting to replicate this for the bank or other FI that would otherwise meet all the same requirements on policies and procedures, these are applied on an “account by account” basis to enable the accounts to be treated as an “Excluded Account” (section VIII C 17(f)). This means that such an FI must carry out due diligence on an account by account basis to ensure that the account remains excluded within that definition and would require the filing of either a nil return or a return detailing where the procedure may have failed and hence the account becomes reportable. This is a level of due diligence far in excess of the QCCI.

A further discrepancy arises in the aggregation rules where the QCCI only aggregates against its credit card products whereas the FI must identify where there could be an identifier for the client that would require aggregation across any other bank products as well as any other credit card accounts.

In the UK HMRC recognises that the intention of the OECD is to create a level playing field between these two types of FI and that this is a drafting issue, consequently the forthcoming UK Guidance is expected to address this. However guidance is required at an EU level to ensure this is applied consistently across the EU.

Entities invested in real estate

Typically entities that invest in real estate hold property through wholly owned subsidiaries. There are various legal and commercial reasons why intermediate holding entities may be required. It would be helpful if Member States could clarify that, for the purpose of defining ‘Investment Entity’ and ‘Financial Asset’ (in Section VIII.A.7 of Annex I of the Directive), ‘direct interest’ means direct-line of ownership - i.e. this can include real property that is indirectly held through intermediate entities. This approach would be consistent with the interpretation given to this section of the DAC2/CRS by the United Kingdom and the Crown Dependencies and above all, we believe that DAC2 should be implemented in a consistent manner across the EU Member States.

Also, new entities that are set up for the purpose of investment in real estate should benefit from a certain period of time to invest in real estate. Therefore, they would remain excluded even if their funds are temporarily invested in financial products during the first months.

Investment entities acting as investment advisors but with limited own funds under management

In the discussions under Section 6 we are aware that there is a further group of investment entities who would meet the definition of investment advisor already given but for the need to manage a similar asset portfolio to pay its own staff bonuses. Again this is an example of a potential un-level playing field in the treatment of these entities when compared with the recommended treatment of such investment advisors generally.

APPENDIX V Recommendation 8: IT issues: standard reporting software to be used by financial institutions; consultation with financial institutions on CRS/DAC2 schema.

The OECD has developed a technical solution to support the Common Reporting Standard (CRS) which comprises:

- A schema (the “CRS XML Schema” – our comments are based on the v. 1.0.) which is a data structure for holding and transmitting information electronically and in bulk. The use of Extensible Markup Language is required.
- A User Guide which explains the information to be included in each CRS data element to be reported in the CRS XML Schema. It also contains guidance on how to make corrections of data items within a file that can be processed automatically.

The CRS XML Schema must be used between Competent Authorities to automatically exchange the requested information pursuant to the Global Standard.

The Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation integrates the Global Standard for the EU framework. It states in Article 1. (3). that the automatic exchange of information shall be sent using a standard computerised format aimed at facilitating such automatic exchange and based on the existing computerised format pursuant to Article 9 of Directive 2003/48/EC (the “Savings Directive”), to be used for all types of automatic exchange of information. The European Commission (EC) intends to work on more detailed technical specifications for intra EU exchanges under the revised DAC.

The AEFI Group wishes to provide recommendations on certain key principles, as well as to underline some concerns:

Key principles

- One key principle is to ensure a truly Global Standard at international level and to allow financial institutions to implement global reporting IT solutions: thus, the standard computerized format “pursuant to the Savings Directive” must not diverge from the OECD’s CRS XML Schema, and the technical specifications developed by the EC should not add additional requirements as compared to the OECD’s CRS XML Schema. For instance, where the OECD format allows for free text fields, the EC should refrain from imposing structured fields even when such structured fields are already requested under the Savings Directive reporting format (FISC 153). It is the AEFI Group’s understanding that the EC intends to take over the CRS XML Schema as such for the purposes of DAC2. This would enable financial institutions to build global IT solutions.
- In addition, schemas built by financial institutions based on the EC’s format and technical specifications should also be deemed usable for reporting with third countries: the latter should

therefore accept such schemas and refrain from adopting non-harmonized technical specifications.

- It is also understood that the CRS XML Schema must be used between Competent Authorities but is not necessarily required for domestic data transfers / reporting in view of the Global Standard. Member States and third countries should remain free to use a different format - as an option - for the transfer of data from the financial institutions to their local authorities (this is particularly true for countries which already have domestic reporting in place). However, this should be an option since financial institutions (in particular the ones using a global IT solution) should always have the choice to transfer data using the CRS XML Schema.
- In addition, a number of countries have developed a “FATCA-like” XML schema which would also accommodate domestic reporting and the CRS reporting. This creates a risk of divergences and may hinder efforts of the FI for a global reporting solution. Where these situations exist, again, financial institutions should always have the choice to transfer data using the CRS XML Schema.
- Absent these key principles, financial institutions will not be able to implement a global reporting solution (implying for them a unique standardized format) which would work for both intra EU exchanges and exchanges with third countries.
- Business strongly suggests consultations with business be held on the technical specifications developed by the EC: while Governments may consider that urgency to finalize reporting solutions is not required, it should however be borne in mind that if at outset systems cannot capture all the required information for reporting, financial institutions will be unable to provide the information required in due time.
- Whilst we understand the attraction of a consistent global schema to Competent Authorities, “proportionality” is a key consideration for businesses. The transition from the FATCA/IGA framework to multilateral reporting and compliance will mean that numerous businesses for which the compliance burden has, to date, been minimal, will need to incur time, expense and allocate resource and potentially, for the first time, build and implement reporting systems to comply with CRS reporting requirements. EU should consult with businesses on an alternative, “light touch” reporting system and process for smaller scale operations.

Concerns

The EC expressed its intention to take over the CRS XML Schema as such for the purposes of DAC2 and to further liaise with the OECD as regards technical aspects. The AEFI Group strongly recommends that the standard computerized format “pursuant to the Savings Directive” should indeed replicate the CRS XML Schema, enabling financial institutions to build a global IT solution.

Besides, since Business was not fully consulted when the CRS XML Schema was developed, some concerns will arise regarding this format. In such cases, use of the EC technical specifications to resolve difficulties may be beneficial.

One important example the AEFI Group wishes to underline is the fact that the Residence country is a “Validation” requirement in the CRS XML Schema with respect to Individual Account Holders or Controlling Persons (it is not for Entities).

While it may be understandable in a residency-based system to require this item of information and because it also indicates to which jurisdiction the report should be sent, an issue may however arise in this area since financial institutions may not hold this data for pre-existing Controlling Persons (they may not have been requested by law to hold such information, or they may not have been requested to hold such information under a certain threshold) and may not be able to obtain such information from Controlling Persons which are NOT their clients (pre-existing Controlling Persons may refuse or fail to provide the requested information).

Additionally, and we have elaborated on this point in other parts of this report, the reporting treatment of Controlling Persons in particular of Investment Entities located in non-participating countries will need consistent treatment for reporting and the imposition of validation rules in this scenario will be extremely difficult to apply, particularly where it is widely expected that this information will not be obtainable.

When these situations arise despite the best efforts of financial institutions, the AEFI Group believes it is neither justified nor legitimate that the financial institutions’ reports, which are otherwise complete, be automatically rejected because of the “Validation” requirement. Instead, financial institutions should be able to file their report and to the extent the local tax authorities require further information, the FI can explain the process and the reasons for the lack of available information, (e.g. the Controlling Person refuses or fails to provide the requested information despite the requests of the FI or perhaps the controlling person is themselves what is known as a Politically Exposed Person (PEP)).

While it might be considered that modifying the “Validation” rule in the CRS XML Schema may not be the preferred solution, the EC may seek to tackle this problem by setting forth interpretation rules in its technical specifications. E.g.: financial institutions should be allowed to use whatever address they hold for the Controlling Person e.g. mailing address (this rule is already provided for as far as we understand), or last known address, or address as it appears on KYC or other documentation held by the FI, or address as indicated by the Passive NFE. Financial institutions may also be able to report the address of the “Senior Managing Official” (in accordance with the “default rule” in the Commentary on Section VIII nb 133 of the CRS Commentary which deals with cases where no natural person exercising control of the Entity is identified). As financial institutions may not always have this information, they should be able to report the address of the Passive NFE itself, as a last resort solution. However, the report would then be sent to the jurisdiction of the Passive NFE presumably as being an “undocumented account” (or “recalcitrant”). Yet, it is noteworthy that the account may not be “undocumented” for FATCA purposes and the Entity may not be a “Passive NFFE” under FATCA.

Of course, other solutions may be further explored to deal with this important issue.

These types of concerns clearly underline the need for a consultation at EU level on the EC technical specifications. Furthermore it will be essential that this consultation commences immediately. The reporting output is a key factor in system development, thus it will be essential to ensure systems capture all the required information for eventual reporting. So while Governments may consider that because reporting is not due, at the earliest, until 2017, urgency to finalize reporting solutions is not required, it should however be borne in mind that if at outset systems cannot capture all the required information for reporting, or if there is deviation from a standard, this will affect the

upstream system coding and, as such, financial institutions will be unable to provide the information required.

APPENDIX VI Recommendation 9: Cross-border withholding tax relief at source

Current State

When the various projects to look at cross border tax relief procedures started it was widely acknowledged, and reflected in the various studies undertaken by the EU Commission and the OECD that, in practice, claiming withholding tax relief under Double Taxation Agreements and/or a country's domestic tax laws is often cumbersome and time and resource intensive for governments, financial institutions, and foreign portfolio investors. As a result, end investors often are effectively forced to forego the tax relief due them and this has adverse effects, not only on the investor, but also on the source country (due to its reduced ability to attract investment) and the residence country (due to its lack of information about the income of its resident or the excessive foreign tax credits it may end up having to give).

In our experience the process for claiming withholding tax relief has deteriorated over time in many countries, resulting in increased costs and protracted delays for cross-border portfolio investors to collect the tax relief due them. The types of burdensome procedures increasingly faced by investors include:

- extensive, non-standardized documentation requirements, often for each income payment;
- the need to hire local counsel to pursue relief procedures;
- requirements for residence country tax administrations to provide certificates tailored to requirements of the source country;
- unclear or unreasonably complicated requirements for withholding tax relief on payments to CIVs, contrary to the OECD's recommendations; and
- lack of an effective refund procedure.

Where the complexity and cost of obtaining the tax relief to which an investor is legally entitled are too great, full withholding at the maximum tax rate is often the outcome. Even though the financial intermediary has access to accurate customer information and is subject to high compliance regulation standards, obtaining tax relief to which its customers are entitled is often not practicable. This undermines the objectives of treaties to reduce disincentives to cross-border investment, but it also can contribute to erosion of the investor's residence country tax base in the absence of some mechanism to ensure information about the investor's income is conveyed to his home country tax administration.

Reporting of financial account information under an AEOI initiative will go some way to address residence country taxation, at least where investors utilize financial intermediaries that are subject to reporting obligations.

Withholding tax relief procedures are the subject of one the harmonisation activities of the Target 2 Securities Advisory Group (AG).

They write that the persistence of national rules hampering market access for foreign intermediaries can negatively affect competition and efficiency in the T2S environment. In particular, national tax rules reserving tax withholding responsibilities for local intermediaries and thus "forcing" foreign intermediaries to use local fiscal agents may cause that: i) remote access to issuer central securities depositories (CSDs) for foreign intermediaries may be discouraged; ii) foreign intermediaries are at a

disadvantage vis-à-vis local ones; and iii) the location of the issuer CSD could potentially be restricted to local CSDs.

Harmonisation of withholding tax relief procedures is considered by the AG as a priority 2 harmonisation activity for T2S, i.e. although it is not an essential condition for safe and efficient cross-CSD settlement in T2S, the AG considers it to be instrumental for enhancing the competitive environment and the single market dimension of T2S.

As part of the monitoring work in October 2013 the T-BAG group provided an update on the current state in the EU regarding tax relief procedures.

Benefits from introducing a tax relief at source mechanism

- Savings due to economies of scale: The costs of implementing an exchange of information system will require each adopting country to make significant investments in technology, assign resources to implement legislation and issue local guidance - all of which would be required to implement a common mechanism for tax relief at source as envisaged under the T-BAG and TRACE proposals.
- Customers of financial institutions who operate a tax relief at source mechanism would be incentivised to identify their residence for tax purposes. This increases the probability that they will themselves report information to their home country's tax authorities. These factors will provide governments with yet more tools to crosscheck information. By leveraging on the CRS and DAC Financial Institutions will only need to register with foreign tax administrations but may send the information to their domestic tax administration.
- By restricting the operation of a tax relief at source system to an Authorised Intermediary located in a country with which the source country has a bilateral agreement comparable to the CRS would have the effect of encouraging more financial centres to adopt the CRS.
- Governments may argue that a tax relief at source system will require extraterritorial approaches to audits of their respective tax collection systems. It would appear that those seeking to audit outside of their home country will likely use the Mutual Agreement Procedures in double tax treaties. Because of global information sharing agreements such as US FATCA/IGAs and CRS/DAC and it is clear that such extraterritorial audits will be supported by governments.

Why now

Automatic exchange of information (AEOI) with enhanced AML procedures are being imposed under the DAC. These requirements remove one of the barriers to tax relief at source systems because simply because the amended Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (DAC) requires Member States to implement rules to require their financial institutions to implement reporting and due diligence rules which are fully consistent with those included in the CRS and document the tax residency of each customer.

As a result all banks and intermediaries will now be required under the DAC to collect and report residency information about all of its customers.

Customers will be required to ‘self-certify’ their tax status. Member States should examine the benefit to them of the need to provide certificates of tax residence (CORs) to their tax residence that may be claiming cross border tax relief. This would alleviate the administrative burden on tax administrations that are routinely required annually to provide in excess 1 million CORs. Many of these CORs are unused and subsequently destroyed. These points have been noted in both the T-BAG and the TRACE reports.

- Without a harmonised and streamlined tax relief at source system such as that envisaged under TRACE, investors and intermediaries will continue to face the increasingly costly administrative burdens of varying domestic procedures, excess tax will often be withheld, source countries will be less attractive to investors, and residence countries will see their base eroded and will continue to face costs in the form of processing certificates of residence, underreporting of income, and/or over reporting of foreign tax credits. Source country governments which continue to operate tax reclaim systems will continue to bear the costs associated with such a system, such as the stamping and certification of tax reclaim forms and processing refund payments. Information aligning the implementation of an AEOI system with a streamlined tax relief at source system would eliminate many of these costs.
- AEOI initiative implies a very substantial investment of money and resources on the part of governments and the financial industry to put into place the systems necessary to achieve the objectives of that initiative. If the elements necessary to implement a system are not built into the systems from the outset, the natural result will be resistance to reopening that design effort at a later date. Significant efficiencies could be achieved for both business and governments by covering both AEOI and a tax relief at source system simultaneously. This means taking into account the information requirements of both residence and source countries when implementation of AEOI.

Background to the work undertaken by governments and the Commission to review the inefficiencies related to cross border tax relief procedures.

Tax Relief and Compliance Enhancement (TRACE)	The work of FISCO ²² and the EU Commission Recommendations.
<ul style="list-style-type: none"> • In December 2006, OECD Committee on Fiscal Affairs (CFA) created the Informal Consultative Group (ICG) on Taxation of Collective Investment Vehicles (CIVs). • The ICG was asked to consider; <ol style="list-style-type: none"> 1. Technical issues relating to the granting of treaty benefits with respect to the income of CIVS. 2. Possible improvements to current procedures for claiming treaty benefits by all cross border portfolio investors • ICG produced a report outlining the need for improvements to existing processes. • In January 2009, CFA approved creation of a 'Pilot Group' to develop standardised documentation to implement best practices as outlined in the report • The Pilot Group worked through a series of recommendations including language to clarify treaty entitlement for CIVs and solutions to harmonise tax relief procedures • July 2010 new OECD model treaty published. • In January 2010, CFA agreed to take the pilot group actions forward. • They created The Tax Relief and Compliance Enhancement Group (TRACE). • July 2010 new OECD model treaty published. • The TRACE group published the TRACE Implementation Package (IP) in 2013 following the endorsement by the OECD's Committee on Fiscal Affairs. • Since 2013 no government has adopted the TRACE system yet the procedures to operate cross border treaty relief have 	<ul style="list-style-type: none"> • EU work commenced following the 2001 and 2003 Giovannini Reports which pointed to “domestic withholding tax regulations serving to disadvantage foreign intermediaries” as one of the 15 barriers to efficient cross-border clearing and settlement. • 2005 the EU created the EU Clearing and Settlement Fiscal Compliance Experts' Group ('FISCO'). Its key objective was the resolution of Giovannini Barriers 11 and 12. • The FISCO Group published two reports which described as a serious problem the fact that withholding tax collection and relief procedures vary considerably between Member States and that different procedures often apply even to different classes of securities within the same Member State. • In 2009 the EU Commission adopted its Recommendation on Withholding Tax Relief Procedures (COM (2009) 7924 final) and the Commission formed the Tax Barriers Business Advisory Group in June 2010. • The T-BAG mandate was to suggest workable solutions to implement the principles outlined in the Recommendation (COM (2009) 7924 final) and to see if the removal of some of the tax barriers laid out in the Giovannini and FISCO reports, could be achieved. • T-BAG was asked to look to at ways to <u>simplify and where possible harmonise Withholding Tax procedures and suggest proposals to remove Barrier 11 where it was suggested that all financial intermediaries established within the EU should be allowed to offer withholding agent services in all of the Member States</u> to ensure a level playing field between local and foreign intermediaries. <p>The T- BAG report was published in May 2013 and reviewed</p> <ol style="list-style-type: none"> 1. The legal basis under which cross border tax simplification could be implemented

²² http://ec.europa.eu/finance/financial-markets/clearing/compliance/index_en.htm;

http://ec.europa.eu/finance/financial-markets/clearing/tbag/index_en.htm

<p>worsened.</p>	<ol style="list-style-type: none"> 2. Lack of adequate or consistent interpretive guidance from Member States 3. Lack of a consistent tax relief model between Member States 4. A plethora of procedures, forms and information requirements from Member States 5. Lack of a mandate for the use of automation and standards. 6. Lack of standard remedial tax reclaim processes of Member States thus contribute <p>The work was never taken any further. One of the reasons many EU Member States maintained that they could not operate the T-BAG recommendations (TRACE like system) was because data privacy and no AEOI between governments.</p>
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What is TRACE?

The TRACE IP It is a self-contained set of agreements and forms to be used by any country that implements the proposed Authorised Intermediary (AI) system.

The AI system can be used for claiming tax relief under tax treaties and under the domestic law of a source country.

It allows for foreign financial institutions (FIs) to voluntarily enter into an agreement with the source country's tax authority and claim tax relief for their customers on a 'pooled' basis.

The system lays down the documentation and due diligence procedures that the FI must follow together with the information reporting that is required; specifically the FI must report detailed investor reporting to the source country's tax authorities on an annual basis.

It is envisaged that the source country's tax authorities then exchange taxpayer information with the customer's country of residence.

The TRACE system envisages the automatic exchange of taxpayer Information and notes that, to the extent the information is exchanged in a timely fashion, the residence country could quickly inform the source country of an investor who claims to be resident thereof but is in fact not.

The TRACE IP also argues that countries receiving detailed investor specific information would be "equipped with additional tools to focus their enquiries on the specific tax payers that may present issues".

Analysis on cross border portfolio investors

The OECD's "The Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles" report (The OECD Report) adopted by the CFA in April 2010 discusses the issue of tax treaty access for CIVs, which is reflected in the July 2010 new Model Tax Convention.

It notes that portfolio investors such as pension funds are increasingly making and holding investments in equity and debt securities via Collective Investment Vehicles (CIVs) rather than investing and holding these investments directly.

The OECD Report concludes that CIVs could claim treaty relief (either in their own right or on behalf of their investors) It notes that some residence-country governments were concerned that investors in CIVs that did not receive the treaty relief to which they are entitled, would claim tax credits against their country of residence for both the source country

tax that should have been withheld and the tax that should have been recovered. This outcome could transfer tax revenues from the investor's residence country to a source country.

The CIV report explains that depending on the structure of the CIV and how it is distributed one could conclude it can be one of the following:

the CIV is treaty eligible in its own right;

or the CIV can be treated as treaty eligible to the extent that its underlying investors are themselves treaty eligible under a treaty between the investor's residence country and the source country (so called equivalent beneficiaries);

Or can be treated as transparent, thereby enabling the CIVs investors claim treaty relief in their own right.

The OECD Report acknowledges that governments may take different approaches to determine the treaty eligibility of a CIV and the procedural requirements for CIVs to claim that relief. The reality is that there is no standardised mechanism.

T-BAG and TRACE comparative analysis was included in the T-BAG report and is summarised here.

Events Covered

Commission Recommendation (high level)	O.E.C.D Implementation Package approach (detailed)	Points for consideration in relation to E.U. adoption
Dividends, interest or other income that securities may generate and that is subject to withholding tax in the source Member State (section 1.2. and 2(a) of the Recommendation)	Dividends and/or interest unless agreed otherwise between the AI and the Source Country (definition of Covered Payment in section III (I) of the Procedures). It follows logically from the purpose of the AI system that the scope is limited to income from securities that is subject to withholding tax in the source country.	Scope of E.U./O.E.C.D proposals appear compatible

Tax Relief Availability

Commission Recommendation (high level)	O.E.C.D Implementation Package approach (detailed)	Points for consideration in relation to E.U. adoption
Treaty relief and domestic law exemptions (section 1.1. of the Recommendation) with the exception of relief pursuant to the parent-subsidiary directive or interest-royalties directive (section 1.3. of the Recommendation). The relief is, in principle, limited to cross-border investors resident in the E.U. (section 1.1 of the Recommendation).	Treaty relief and domestic law exemptions with the exception of reduced rates or exemptions applicable to companies receiving dividends from companies in which they own a specified percentage of the capital or voting rights (Introduction to the IP and Paragraph 6 of the Agreement). The relief is, in principle, available to all cross-border investors and source country residents.	E.U. should consider modifying its proposed approach so that it encompasses: <ul style="list-style-type: none"> • Non-E.U. resident investors entitled to tax relief under treaty or domestic tax law • Source country residents entitled to tax relief under domestic law. Limiting the recommended relief system to investors that are resident in another E.U. Member State would result in the need to run two systems in parallel and increase costs for tax authorities, financial intermediaries and investors.

Tax Relief Processes

Commission Recommendation (high level)	O.E.C.D Implementation Package approach (detailed)	Points for consideration in relation to E.U. adoption
<p>Relief at source as primary relief method. In exceptional cases, where relief at source is not feasible:</p> <ol style="list-style-type: none"> 1. refund applications to the source country tax authorities (section 4 of the Recommendation) or 2. requests for adjustments to the withholding agent (section 10.3 of the Recommendation) 	<p>Relief at source as primary method. In exceptional cases, where relief at source is not feasible:</p> <ol style="list-style-type: none"> 1. applications for refund to the source country tax authorities by means of adjustment at the point of filing end year tax return or tax reclaim application (section VI(A)(3) and B of the Procedures); as well as 2. request for adjustments to the payor (section VI(A)(1) of the Procedures) 	<p>E.U. currently anticipates reporting of investor-specific information to the source country annually or upon request (see 4.14 below). It does not currently envisage the filing of an end year tax return and therefore there is no opportunity to adjust by means of such process, as anticipated by O.E.C.D. This process is beneficial to both financial intermediaries and tax authorities in that it allows for a prompt adjustment. The practical ability to make such adjustments may be further reduced in the event that the E.U. proposal is modified so as to allow reporting via the competent authority in the intermediary's country of operation, similar to the European Savings Directive (see below at 4.14).</p>

Withholding Responsibility

Commission Recommendation (high level)	O.E.C.D Implementation Package approach (detailed)	Points for consideration in relation to E.U. adoption
<p>Any financial intermediary in the custody chain satisfying the conditions at 4.12 below should have the possibility to be authorised to act as withholding agent subject to proportionate and non-discriminatory conditions (section 5.1 and 6.1 of the Recommendation;). The intermediary that is closest to the investor is considered to be best placed to act as withholding agent (section 5.1. of the Recommendation)</p>	<p>Any financial intermediary satisfying the conditions at 4.12 below can agree to assume primary withholding responsibilities (Section V of the application)</p>	<p>As noted at 4.12 below, E.U. arrangements are restricted to intermediaries established in E.U. member states or EFTA countries providing suitable administrative assistance. In practice, the system may have more flexibility if intermediaries can opt whether or not they take on withholding responsibilities regardless of their relationship with the end investor. Any restriction may mean fewer intermediaries are willing to adopt this new system, which would result in duplicate systems.</p>

Adjustment of Initial Withholding

Commission Recommendation (high level)	O.E.C.D Implementation Package approach (detailed)	Points for consideration in relation to E.U. adoption
See 4.6 above for over-withholding.	<p>See 4.6 above for over-withholding. Under-withholding is anticipated to be corrected by means of:</p> <ol style="list-style-type: none"> 3. request for adjustment to the payor (section VI(A)(2) of the Procedures) 4. adjustment with source country tax authorities by means of end year tax return (section VI (B) of the Procedures) 	See comments at 4.6 above. Further consideration is required with regard to corrections of under-withholding under E.U. Recommendation.

Investor tax Documentation

Commission Recommendation (high level)	O.E.C.D Implementation Package approach (detailed)	Points for consideration in relation to E.U. adoption
Source Member States are invited to allow alternative proofs of the investor’s entitlement to relief to certificates of residence issued by the residence Member State. Those alternative proofs could include self-certification by the beneficial owner and KYC documentation (section 7.1 of the Recommendation). The Recommendation does not stipulate any renewal requirement for self-certifications.	Self-certification by the beneficial owner in the form of an Investor Self-Declaration (“ISD”) which generally expires the last day of the fifth calendar year following the year in which the ISD is signed. No relief on the basis of KYC documentation but obligation to review KYC documentation and other information available to determine whether the ISD is unreliable or incorrect (Section V(A)(1) of the Procedures)	KYC documentation should not be a substitute for ISD. It is important for investors and intermediaries to be able to use one single self-certificate under both E.U. and O.E.C.D systems. If the current ISDs / renewal requirements are not satisfactory to E.U. Member States, the E.U. should take a coordinated position towards O.E.C.D and propose changes to the ISDs (in line with section 10.5 of the Recommendation).

Account Structure Requirements for Authorised Intermediaries

Commission Recommendation (high level)	O.E.C.D Implementation Package approach (detailed) (“IP”)	Points for consideration in relation to E.U. adoption
No specific account structure requirements imposed	No specific account structure requirements imposed. Section IV (C) of the Procedures, dealing with the form of tax rate information, anticipates the possibility of a financial intermediary operating a single omnibus account or separate omnibus accounts reflecting relevant withholding rates.	Both the Recommendation and the IP provide similar flexibility as to the account structure that can be used by financial intermediaries. At the same time there appears to be an increasing trend towards capital gains taxes levied at source, which might negate the more efficient account arrangements for withholding tax purposes envisaged by the E.U. and the O.E.C.D. The problems with such capital gains taxes and similar transaction based withholding taxes were described in both FISCO reports (see sections 2.3.1.2.1. and 2.3.1.3. of the first FISCO report and sections 2.4 and 2.5.3. of the second FISCO report).

Information passed between intermediaries

Commission Recommendation (high level)	O.E.C.D Implementation Package approach (detailed)	Points for consideration in relation to E.U. adoption
Financial intermediaries that have been authorised as “information agent” are allowed to pass pooled withholding tax rate information to the next information agent in the chain (section 5.2 of the Recommendation).	Financial intermediaries that have been authorised as AIs are allowed to pass pooled withholding tax rate information to the upstream intermediary (section IV (A) of the Procedures). Further details in respect of the possible form of tax rate information are provided at section IV (C) of the Procedures.	The IP is consistent with the E.U. Recommendation. The E.U. might wish to provide further information in terms of the means by which tax rate information may be passed (as noted by O.E.C.D at IV (C) of the Procedures) and emphasise that where withholding responsibility has been assumed, tax rate information (reflecting a zero rate) is still required to be passed, as noted by O.E.C.D at 6 (d) of Agreement.

Eligibility and Authorisation of Authorised Intermediaries

Commission Recommendation (high level)	O.E.C.D Implementation Package approach (detailed)	Points for consideration in relation to E.U. adoption
<p>Eligibility criteria and conditions for authorisation by the Source Country tax authorities:</p> <ol style="list-style-type: none"> 1. Member States are invited to develop common conditions and obligations governing the approval of financial intermediaries as information agent or withholding agent and such conditions should be proportionate and non-discriminatory (Sections 5.1 and 6.1 and 10.4 of the Recommendation); 2. Financial intermediary must be established in an E.U. Member State or in an EFTA member country that provides for a level of administrative assistance that is equivalent to that provided under relevant E.U. Directives (Recitals (9) and (10) and Section 1.2 of the Recommendation). 	<p>Eligibility criteria and conditions for authorisation by the Source Country tax authorities (see Application for Authorisation to act as an Authorised Intermediary):</p> <ol style="list-style-type: none"> 1. Financial intermediary must be resident in source country or in an eligible country as defined by the source country, taking into account factors including whether the source country has with that country or jurisdiction an effective exchange of information relationship, whether that country or jurisdiction has in effect adequate Know Your Customer Rules, whether the country or jurisdiction is a member of a multilateral organisation or community or grouping of countries that adopt common standards and approaches to issues of tax compliance, including mutual assistance (such as the Member States of the E.U. or O.E.C.D) 2. Financial intermediary must be subject to KYC rules 3. Financial intermediary must have the authority and adequate resources to perform the responsibilities of an AI 4. Financial intermediary must not be subject to legal or contractual prohibition to disclose account holder information as required by AI agreement. 	<p>Both the Recommendation and the IP work on the basis of an authorisation by the Source Country tax authorities.</p> <p>Another possible approach within the E.U. would be to allow authorisation by the competent authority in the intermediary's country of operation. However, such approach would require the adoption of a directive. Therefore, as a practical matter, it may be appropriate to temper this potential approach by adopting enhanced tax relief arrangements that can be implemented in the most expeditious manner. Unlike the IP, the E.U. arrangements are restricted to intermediaries established in E.U. member states or EFTA countries providing suitable administrative assistance. The T-BAG Group regards this limitation as too strict, although this might be a necessary restriction if the E.U. proposal were modified to allow authorisation via the competent authority in the intermediary's country of operation. However, a dual system may possibly be envisaged whereby non E.U. / EFTA intermediaries would apply directly to the source country and E.U. /EFTA intermediaries would apply to the competent authority in the intermediary's country of operation.</p> <p>The O.E.C.D leaves it to source countries to define eligible countries and the E.U. might wish to consider an expanded generic definition of eligible countries – e.g. O.E.C.D member states.</p>

Restrictions on Authorised Intermediaries

Commission Recommendation (high level)	O.E.C.D Implementation Package approach (detailed)	Points for consideration in relation to E.U. adoption
<p>No specific recommendations with respect to intermediaries that are not authorised as information agent or withholding agent</p>	<p>An intermediary that is not acting as an Authorised Intermediary can only obtain relief at source under the AI system provided that:</p> <ul style="list-style-type: none"> - it is subject to KYC rules and can thus be treated as a Contractual Intermediary (Section III (H) of the procedures); - it passes on documentation and detailed payment allocation information from underlying intermediaries and investors (section IV (D) (2) of the Procedures). 	<p>The E.U. needs to elaborate on the handling of intermediaries that are not authorised as information agent or withholding agent and consider whether it wishes to mirror the O.E.C.D requirements.</p> <p>The T-BAG Group considers that the O.E.C.D KYC requirement is a reasonable limitation.</p>

APPENDIX VII: Members of the Expert Group

- Association of Chartered Certified Accountants (ACCA)
- Association of Life Offices (AILO)
- Alternative Investment Management Association (AIMA)
- Association for Financial Markets in Europe (AFME)
- Association of Luxembourg Fund Industry (ALFI)
- British Bankers' Association (BBA)
- Christian Aid and Tax Justice Network
- European Federation of Financial Service Users (BETTER FINANCE)
- European Association of Co-operative Banks (EACB)
- European Banking Federation (EBF)
- European Association of Public Banks (EAPB)
- European Citizens Action Service (ECAS)
- Euroclear
- European Fund and Asset Management Association (EFAMA)
- European Savings and Retail Banking Group (ESBG)
- European Structured Investment Products Association (EUSIPA)
- Fédération Européenne des Conseils et Intermédiaires Financiers (FECIF)
- Financial Transparency Coalition
- French Banking Federation (FBF)
- Insurance Europe
- International Swaps and Derivatives Association (ISDA)
- Investment Management Association (IMA)
- Luxembourg Bankers' Association (ABBL)
- Oxfam International
- Pensions Europe (PE)

APPENDIX VIII: Table of acronyms

AEFI Group:	Commission’s Expert Group on Automatic Exchange of Financial Account Information
AEOI:	Automatic Exchange of Information
AML:	Anti-Money Laundering
MCCA:	Competent Authority Agreement
CJEU:	Court of Justice of the European Union
CRS:	Common Reporting Standard
DAC1:	Directive on Administrative Cooperation (Directive 2011/16/EU°)
DAC2:	Directive on Administrative Cooperation – 2 nd Revision (Directive 2014/107/EU)
MS:	Member States
EU:	European Union
EUSD:	EU Directive on the Taxation of Savings
FATCA:	Foreign Account Tax Compliance Act
FI:	Financial Institutions
IGA:	Intergovernmental Agreement
MCCA:	Multilateral Competent Authority Agreement
MSFI:	Member States Financial Intermediary
NFE:	Non-Financial Entity
OECD:	Organisation for Economic Cooperation and Development
PJFI:	Participating Jurisdiction’s Financial Institution
PEP:	Politically Exposed Person
QCCI:	Qualified Credit Card Issuer
TIN:	Tax Identification Number
TRACE (IP):	Treaty Relief and Compliance Enhancement (Implementation Package)
XML:	eXtensible Markup Language