Brussels, 29th April 2022

EACB comments on the OECD Public consultation document "Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard"

EACB appreciates the opportunity to respond to the public consultation by the International Co-operation and Tax Administration Division of the OECD Centre for Tax Policy and Administration on a new tax transparency framework for the reporting and exchange of information with respect to crypto-assets and proposed amendments to the Common Reporting Standard (CRS).

At this stage, given the very early stages of the Crypto-Asset Reporting Framework (CARF) initiative, our comments will focus on the changes to the CRS. We believe that it should be envisaged to submit to public consultation on the CARF at a later stage.

On the other hand, we have some concerns on specific aspects of the proposal (pp. 61-62 of the consultation document) on the draft amendments to the CRS for the automatic exchange of financial account information between countries. The proposed amendments would affect for instance the appropriate threshold for inclusion of e-money products. These proposed new reporting rules would also introduce changes in the practical functioning of the CRS, including how to report an account that used to have a valid self-certification but then had a change of circumstances; how to report type of account if different types were held under the same account number; whether joint account indicators would apply to trusts; and potential duplicated reporting under the amended CRS and the CARF.

Please see below our answers to some of the specific questions on which this consultation seeks input.

Specified Electronic Money Products

Q1 - Taking into account that the definition of "Specified Electronic Money Product" aims to cover products that do not give rise to gain or loss by reference to the underlying fiat currency, would the proposed definition cover the correct e-money products and be practically implementable? Do you see a need to either widen or restrict the scope or amend the criteria? If so, why and in which manner?

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Q2 - What would in your view be the appropriate account balance threshold to exclude low-risk e-money products from the scope of the CRS and why? Are there any alternative criteria to define low-risk e-money products?

In our view, the threshold value only for e-money is not justified, as continuing to report conventional amounts of money from the first cent does not seem appropriate to us. We therefore demand that - similar to FATCA - banks be given the option of introducing a threshold for conventional amounts of money, e.g., USD 50,000, in order to establish a level playing field.

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Q3 - Consistent with other provisions of the CRS, the de minimis thresholds for e-money would be subject to the account aggregation rules contained in paragraph C of Section VII of the CRS to avoid circumvention of CRS reporting by spreading amounts over multiple e-money products. Alternatively, a (significantly) lower threshold could be considered, that would not be subject to the account aggregation rules. Which of the two would be the most workable option and why?

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Excluded Accounts

Q1 - Do you consider the above proposal to qualify certain capital contribution accounts as Excluded Accounts useful? Are the conditions sufficiently clear and practically implementable?

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Q2 - Are there any other types of accounts or financial instruments that present low tax compliance risks and that should be added to the Excluded Account definition?

According to the German Implementation and Explanatory Note of 2 January 2017 on CRS, retirement savings accounts are not reportable financial accounts (margin note 151). Certified Riester contracts are private old-age provision contracts subsidised by the Federal Republic of Germany through bonuses. Therefore, it is critical to ensure that Riester contracts are also excluded from reporting.

Treatment of non-profit Entities under the Active / Passive NFE distinction

Q1 - While most Active NFEs are not treated as Investment Entities even if they meet the Investment Entity definition, this carve-out does not apply to Entities that are Active NFEs by virtue of being a non-profit Entity as defined in subparagraph D(9)(h) of Section VIII. Representatives from the philanthropy sector have highlighted that this can lead to highly undesirable outcomes, requiring genuine public benefit foundations to apply due diligence procedures in respect of all beneficiaries of grant payments and report on grant payments to non-resident beneficiaries, such as for instance disadvantaged students receiving scholarships. At the same time, concerns have been expressed by governments that simply extending the carve out from the Investment Entity definition to all non-profit Entities described in Subparagraph D(9)(h) of Section VIII could give rise to situations where Investment Entities would circumvent their reporting obligations under the CRS by improperly claiming the status of non-profit Entities. Are there other measures or criteria that could be envisaged to ensure that genuine non-profit Entities are effectively excluded from reporting obligations as an Investment Entity in a manner that would not give rise to potential circumvention?

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Reliance on AML/KYC Procedures for determining Controlling Persons

Q1 - Are there still instances where Financial Institutions do not apply AML/KYC Procedures that are consistent with 2012 FATF Recommendation for the purpose of determining Controlling Persons of Entity Account Holders?

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EACB would encourage the International Co-operation and Tax Administration Division to consider the example of Germany that has implemented the Financial Action Task Force (FATF) Recommendations in the national Money Laundering Act.

Collection of TIN for Pre-existing Accounts

Q1 - The inclusion of the TIN of Reportable Persons (if issued by the jurisdiction of residence) significantly increases the reliability and utility of the CRS information for tax administrations. Although not included in the current proposal, the OECD is still exploring feasible measures to ensure the collection and reporting of TINs with respect to Pre-Existing Accounts. What approaches could Financial Institutions take to collect TIN information in respect of Pre-Existing Accounts, while mitigating potential burdens for Reporting Financial Institutions?

We would like to point out that in the past member banks were not obliged to ask tax questions concerning TINs of their clients. Moreover, it is currently under the responsibility of (pre-existing) clients to fulfil their own tax obligations. EACB members therefore consider further burdensome reporting obligations on financial institutions to be inappropriate.

Dual-resident Account Holders

Q1 - The proposed changes to the Commentary foresee that Account Holders that are resident for tax purposes in two or more jurisdictions under the domestic laws of such jurisdictions declare all jurisdictions of residence in the self-certification and that Reporting Financial Institution must treat the account as a Reportable Account in respect of each jurisdiction. The OECD is still considering whether an exception to this rule should apply where the Account Holder provides the Reporting Financial Institution with government-issued documentation to resolve cases of dual residence under applicable tax treaties. Are there instances where Reporting Financial Institutions have received such documentation and, if so, in what form (e.g., a letter issued by one or more competent authorities)?

Up to now it has been the experience of our member institutions to inquire their clients in a mass procedure in which states they are tax resident. It is important to note that our member institutions are not able to carry out in-depth checks of the documentation issued by governments in individual cases. To do so, all banks would have to possess the knowledge of all the double taxation agreements in force between the states and check them intensively in individual cases or obtain expensive legal advice from lawyers. Therefore, given that tax law knowledge with regard to the individual tax law relationships of their clients cannot be provided by banks in mass procedures, EACB rejects the proposed approach.

Integrating CBI/RBI guidance within the CRS

Q1 - Are there any additional and/or alternative questions, other than those already in the CBI/RBI guidance, that would be useful to include in the Commentary to the CRS, for purposes of requiring Financial Institutions to determine the jurisdiction(s) of residence of a CBI/RBI holder?

EACB would like to express our concern with regard to the proposed approach of obliging institutions to detect CBI/RBI cases. Rather, we consider that the right approach is for states to commit to no longer using such programmes. We are convinced that it would not be appropriate for banks to uncover and report any unwelcome consequences of this practice. Furthermore, we doubt that the increased enquiries with the customers are necessary.

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Transitional Measures

Q1 - Are the proposed transitional measures in Section X appropriate for Reporting Financial Institutions to update their processes and systems to comply with the proposed amendments to the CRS?

As regards the statements under point 33, our understanding is that there will be three types of accounts for a transitional period, i.e., old accounts (before 2016), existing accounts (before 2023) and new accounts (from 2023). If our interpretation is correct, EACB strongly opposes the proposed amendment as this would mean even more bureaucracy for the member banks.

Other comments

Q1 - Are there any other measures that could be taken to ensure the seamless integration of the CRS with the Crypto-Asset Reporting Framework?

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Q2 - Comments are also welcomed on all other aspects of amendments to the CRS.

As for the new proposed requirement for member banks to disclose the role of controlling persons in relation to the account holder, we would like to point out that in most countries this information can be obtained from publicly accessible registers (for instance, the commercial register or the transparency register in Germany). Therefore, we are concerned with a negative effect on banks of such burdensome periodic reporting.

As regards the proposed requirement for member banks to report in future whether the account is pre-existing or a new one and whether a valid self-certification has been obtained, EACB members would like to emphasise that a report of the account - regardless of whether it is an existing or a new account - should always give the tax administrations reason to check the customer. Accordingly, we see no added value for the tax administrations of such reporting by banks and for this reason oppose the proposed amendment.

As stated in point 15, the CRS does not provide for a fall-back due diligence procedure in the event that a reporting financial institution has not complied with the requirement to obtain a valid self-certification. Our members disagree with this description for the reason that an institution may be fined in case if it fails to report the client correctly. Therefore, if the bank wants to avoid this fine, it will always require the client to self-certify or separate from the client.

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