1st June 2021

IFSP - MBB comments for the European Commission's DAC 8 Consultation

The Malta Business Bureau (MBB) and the Institute of Financial Services Practitioners (IFSP) are pleased to provide feedback in the consultation process on a proposed amendment to the DAC.

Principal Considerations

While we understand that the purpose of the amendment is to monitor the assessment to tax of income derived from the holding and transfer of crypto-assets, as well as of e-money, in order to reduce tax evasion, while striving to alleviate the compliance burdens related to reporting and exchange of information, the principles of subsidiarity and proportionality should be the drivers in any Directive amendments.

It is of vital importance that this objective is balanced with the need for the EU to remain an attractive avenue for business, which in turn would reap greater revenues, thus addressing investor and business compliance concerns.

The introduction of disclosure and exchange requirements in terms of this amendment stands on two pillars, namely the extension of the definition of the term "intermediary" and the introduction of "crypto assets" and "e-money". We submit that the scope should align with the updates to the FATF guidance in relation to crypto-assets, the amendments to the Anti-Money Laundering Directive, in particular AMLD5 (although the latter singles out virtual currencies), as well as the upcoming OECD Common Reporting Standard update in relation to crypto assets.

Also, a gradual, considered approach would have better prospects for alignment, certainty in application and stability from an investor/market perspective.

Without prejudice to the above, it would be strongly recommended that the following considerations be borne in mind in drafting any amendments.

"Crypto assets" and "e-money"

The definition of crypto assets under the proposal for an EU Regulation on Markets in Crypto-assets (MICA) published in September 2020 already includes a definition of crypto assets, namely "a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology". Ensuring alignment through the use of one definition requires that the definition is fit for more than one purpose, which at present is dubious.

In the context at hand, this definition gives rise to a number of open issues. Primarily, the broad wording of the definition encompasses assets that do not necessarily have a cryptographic element. In this respect, we submit that a distinction ought to be made between a 'digital representation' and a 'cryptographic representation', also to avoid overlap with previous amendments to the Directive, given that the phrase 'or similar technology' is not sufficient to ensure clarity. To this point, the introduction of e-money in this amendment is understood to be read in line with the MICA definition of e-money tokens such as stablecoins and is intended to address any loopholes in reporting obligations. Should this be the case, the term 'e-money' should be appropriately defined as 'e-money tokens' given that the terms are not interchangeable. Indeed, the term 'crypto assets' is understood to include e-money tokens without the necessity of express clarification or inclusion.

Further, the diverse nature of the entitlement arising from the holding or from transactions with different crypto assets begs a distinction among the diverse types of crypto-assets in keeping with the context of sharing information for tax purposes. Differentiation of various classes of assets based on their utilization, technological design and core characteristics could enable the targeting and limitation of the scope of exchange of information based on their different risk profiles. This could help ensure that the proposed expansion and implementation of the Directive is simplified and targeted to meet the desired objectives, without undue burden on low-risk investments and transactions.

The definition also fails to distinguish between centralised and decentralised crypto systems. The replication of a centralised approach is notable throughout the questionnaire and is expected to create significant difficulties in application and enforcement of the Directive. Decentralisation was the original intention behind distributed ledger technologies and is expected to become the norm. We recommend that a deeper assessment of the application of reporting obligations on decentralised systems is undertaken to ensure a considered approach. We recommend also that crypto-assets are defined bearing in mind technological processes and advancements, with the intention of ensuring that any legislative or regulatory intervention is dynamic, and remains pertinent to emerging technologies as they evolve.

"Intermediary"

This requirement for precise scoping is also relevant for determining which intermediaries would be tasked with reporting, and whether the taxpayer should have the ultimate reporting liability in cases where no intermediaries are involved. It would be essential for effectiveness that the underlying technological processes and the roles of the various service providers are clearly identified and defined.

In this vein, to ensure a level playing field across regulated sectors, it is expected that reporting obligations would apply to equivalent service providers and tax points, rather than be extended to anyone who has a touch point with crypto assets. We submit that once crypto assets become regulated across jurisdictions, including through MICA and at institutional level by the OECD, the industry would become more structured and synchronised, enabling the regulator to better achieve its objectives while respecting the inherent nature and purpose of

distributed ledger technology and similar. In the meantime, over-regulation in terms of exchange of information may not have the desired impact on the industry.

It would be more effective to incentivise self-assessment through education, and encourage the increase of 'intermediaries' by legitimising the sector, thus increasing regulated crypto (and digital in a broader sense) activity through centralisation. The way forward is Industry 4.0 – how is tax cooperation to develop without aligning with the intrinsic character of the technology itself?

Questionnaire

With specific reference to the questions posed, while we have attempted to reflect our feedback in the attached Questionnaire, we set out some further considerations below.

Question 9	With respect to the frequency of information relative to transactions that would be most suitable for standardized reporting by crypto-asset service providers, we propose assessing to what extent tax authorities would appreciate the efficiency of APIs (application programming interfaces) which are essentially script written into the code which enables an authorised person to view an audit trail of the information required at any time.
Question 12	The replies to the statements depend on the jurisdiction that is being assessed. Some jurisdictions have introduced regulation while others have not. Self-assessment tax disclosure obligations apply equally to trade and investment across reportable assets. Further, with the increased use of crypto assets we are experiencing increased enquiries into assistance with compliance with existing reporting obligations. As with any new business activity or industry, the regulator must strive to ensure equal treatment in reporting obligations, and thus home in on what is necessary from a tax assessment perspective in line with the application of the rules to traditional financial services, amongst others.
Question 19	The reply to this question depends on the definition of the term 'use'. Given the context of this Directive, 'use' must refer to a tax point in the jurisdiction at hand. Using undefined terms or allowing for a broad interpretation of such terms goes against the objective of a harmonised, simple and equal playing field. The alignment of the Directive with the OECD's Common Reporting Standard would assist in avoiding duplication and facilitate through lessons learnt thereunder.
Question 23	Further to our reply to Question 22 in the Questionnaire, an exemption for reporting of traditional financial services may be extended to the equivalent crypto asset operations, such as operations involving Government / public entities.

	Further, a hierarchy as with DAC6 may be assessed to avoid multiple disclosures.
Questions 25, 26 and 27	We represent a number of EU Member States. An assessment as to whether the penalties are "effective, proportionate and dissuasive" is beyond the scope of this consultation. We do not believe that *harmonised rules for infringements* should be introduced and, in any case, it is unlikely such harmonised rules would lead to better compliance. Dealing with infringements and the application of remedies for said infringements should remain the competence on the Member States. Coordinated provisions, being based on a Directive, do not imply equal application of those provisions across Member States, and thus would not necessarily make compliance measures easier to understand and more effective.
Question 28	While it is not clear what 'compliance measures' refers to, from a tax perspective compliance measures should mean the facilitation of compliance through guidance and aides to interpretation (such as the OECD's detailed commentary), electronic filings and automation, accessible compliance officers and so forth. Penalties should only be a last resort. The EU already monitors implementation. It may assist Member States with clearer drafting of law and guidance as part of the legislative procedures to facilitate compliance.
Question 32	We believe that the tax cooperation existent in terms of DAC7 is sufficient.

Concluding Remarks

In keeping with the *General Data Protection Regulation* (EU) 2016/679 ('GDPR'), the nature of the reportable information should not exceed what is necessary to achieve the objectives of the Directive amendment. Such limitation on the data to be reported, in line with existing guidance under the GDPR would also assist tax administrations in managing the data received and in exchanging said data, where necessary.

Know-Your-Customer process reconciliation and the convergence of reporting requirements under the Anti-Money Laundering Directive and this Directive would alleviate further any duplicity in information gathering and reporting. Further, we would recommend that any action is aligned with ongoing work being undertaken by the OECD and the FATF on the regulation of cryptocurrencies.

Last but not least, an assessment of the resources available to tax administrations in the Member States should inform the Commission of the current and expected capacity. This is

important when formulating timelines, particularly for the introduction of exchange of information obligations.

We trust that you find our above inputs useful.

Yours faithfully,

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