AFME feedback in response to the proposed EU Council Directive to amend Directive 2011/16/EU on administrative cooperation in the field of taxation

28 March 2023

The Association for Financial Markets in Europe ("AFME") welcomes the opportunity to respond to the EU proposal to amend the Directive on administrative cooperation in the field of taxation ('DAC') to include crypto assets and amend the Common Reporting Standard ('CRS') to include electronic money products and central bank digital currencies (the "Proposal").

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

AFME is registered on the EU Transparency Register, registration number 65110063986-76.

AFME's response covers the following themes:

1. Extraterritoriality
2. Alignment with the existing CRS and Foreign Account Tax Compliance Act ('FATCA') requirements
3. Practical issues with regards to taxpayer identification numbers ('TINs')
4. Specific compliance issues.

Each of these themes will need to be analysed in detail to assist in implementing DAC8 in a fair and efficient manner.

1. Extraterritoriality

The proposed DAC8 regulations state that where a reporting crypto-asset service provider ('RCASP') is not registered under a market in crypto assets ('MiCA') or otherwise operating in the EU it will be required to register under DAC8 in a Member State in order to report EU clients. This proposal deviates from the Crypto-Asset Reporting Framework ('CARF') and Common Reporting Standard ('CRS') and de facto introduces an extra-territorial impact of DAC8, which would create conflicts with local data protection laws. Accordingly, we ask that you consider the following:

1.1 **Extraterritorial reporting obligation** – DAC8 requires non-EU RCASPs providing a crypto service to the EU to register with an EU member state and adhere to the due diligence and reporting requirements of the member state with whom it registered. While RCASPs resident in jurisdictions that have adopted rules equivalent to DAC8 are excused from this obligation, fundamentally this creates an extraterritorial reporting obligation for entities located outside of the EU to an EU member state. This creates potential privacy and secrecy issues, including a conflict of law if local laws in the jurisdiction where an entity is established place restrictions on the collection of personal information without valid, local legal obligations to do so and/or reporting of personal information to other countries. It is noted that the EU's own General Data Protection Regulation is one example of such data privacy legislation. In February 2012, when the U.S. Treasury Department and Internal Revenue Service ('IRS') issued the "Proposed Regulations to implement FATCA" the EC and EU Member States stated that those regulations could not be applied directly in the EU due to constraints posed by local national laws (i.e.,

no legal bases and data protections issues), so the US Treasury Department developed intergovernmental agreements to alleviate this situation. Therefore, it is recommended that the EU Council reconsiders the extraterritorial scope of its DAC8 rules – particularly bearing in mind both that CRS and FATCA are deliberately predicated on cross-border exchange of information between participating countries based on mutual agreement.

1.2 **Tax Nexus Through Branch** - Section I(A)(5) of Annex III of the Proposal defines a tax nexus as "an Entity or individual that has a regular place of business in a Member State and is not a Qualified Non-Union Reporting Crypto-Assets Service Provider". CARF clarifies that any Branch is to be considered a regular place of business and RCASPs are not required to complete the reporting and due diligence requirements with respect to Relevant Transactions it effectuates through a Branch in a Partner Jurisdiction, if such requirements are completed by such Branch. This would mean that an entity located in a jurisdiction with no regime equivalent to DAC8 with a branch in an EU country would have due diligence and reporting requirements in the branch location on all its relevant transactions, except transactions effectuated through the Branch. (For example, an RCASP has its head office located in Singapore and has a branch in Germany. It seems that based on Section I (A) (5) the head office in Singapore is regarded as a tax resident in Germany and needs to report on all its relevant transactions, except transactions effectuated through the Branch). We ask that the Council clarify this requirement.

2. Alignment with the existing CRS and FATCA requirements.

From an operational perspective it is essential that DAC8 be harmonised as closely as possible with the CRS and FATCA requirements to reduce duplication of effort and an unnecessary burden on financial institutions (FI's) and RCASP's operational teams. Therefore, we ask that the EU Council harmonise the following with CRS and FATCA.

2.1 **Reporting** - The reporting deadline of January 31st following the relevant calendar year is a very short timeframe for a large financial institution. We believe this deadline would create repetition and a strain on the ability to report, as well as creating inefficiencies by not allowing FIs/RCASPs to align the reporting with CRS and FATCA reporting obligations. We would anticipate more efficient compliance and higher data quality reported if this was harmonised with the CRS and FATCA deadlines of May/June as FI's already have processes in place to satisfy those later dates.

2.2 **Penalties** - We would appreciate if there was more harmonisation with CRS and FATCA penalties to provide clarity and consistency of penalties across the regimes.

2.3 **Branch reporting** - We would ask that the EU Council align the branch reporting requirements to that of CRS and FATCA.

2.4 In addition, we would ask that the EU Council aligns the start date for the inclusion of e-money product and Crypto assets into CRS with that of the rest of DAC8 (January 1st 2026).

3. Practical issues with regards to TINs.

Obtaining and reporting TINs has created significant operational issues for FIs due to the different approach member states have regarding their issuance. We highlight below some of those issues:

3.1 **Mandatory TIN collection and reporting** - Previously the requirement for TINs to be mandatory for all new accounts was removed after consultation. However, under the Proposal, TINs are mandatory for all new and existing accounts for reporting from 1 January 2026. TIN collection still poses significant difficulties for FIs and RCASPs as consistently getting TINs from clients has proven extremely difficult and will require significant system/process configuration/alignment in order to comply with the proposed directive. This is because, among other things, some countries do not produce TINs and others do not produce them for certain entity types. The AFME group does not see merits in reintroducing this requirement after it was removed after consultation. Also, if TINs are to remain a

mandatory requirement, then additional clarification as to what is required if a TIN cannot be obtained from a client who has provided all other information points would be needed.

3.2 **TIN Verification tool** - Clarification is required regarding the tool the Commission will develop for Member States allowing them to verify the correctness of TINs. There are concerns that this could create some data protection concerns with regards to the cross-border travel of client data that may need to be addressed, and that the file format of the website may not be easy to use for the market participants. We suggest using a format that is readable and possible to download to use in internal systems by the industry.

3.3 **Differentiation of missing TINs** - There are many situations where TINs are either not issued/required, or they are not able to be obtained due to other valid reasons. We would ask that the EU Council consider some kind of marker or coding system that FIs/RCASPs can use to differentiate these situations vs ones where the client presumably has a TIN but has not provided it.

4. <u>Specific compliance issues</u>

4.1 **A de minimus transaction exception** - Is it necessary to report all relevant crypto asset transactions? We feel that a de minimus exception for all transactions would reduce the burden of reporting on RCASPs and increase the usefulness of the data provided to the tax authorities.

4.2 **Blocking accounts** - Blocking accounts (especially large FIs) could be very difficult from an operational perspective as it may require the blocking of tens or even hundreds of accounts which could have significant knock-on effects to other processes and may be in breach of regulatory and/or contractual obligations. For example, due to local laws in Luxembourg TINs can take over 6 months to obtain, so clients could be blocked due to local laws and not due to their inability to comply with EU tax regulations. We would therefore ask that the EU Council reconsider this requirement and possibly add in other remedial actions (whether aimed at RCASPs and/or the reportable Crypto user (such as reporting to all jurisdictions of identified indicia as is it currently done under CRS)) with blocking accounts as an alternate option where local law/contracts allow.

4.3 **Qualified Non-Union jurisdictions** - Under the proposed directive Annex IV Section 1F, a RCASP that is an Entity is not required to complete the due diligence and reporting requirements in Sections II and III in a Member State it is subject to pursuant to subparagraph A(6), if such requirements are completed by such RCASP in any other Qualified Non-Union Jurisdiction by virtue of it being managed from such Qualified Non-Union jurisdiction. We would ask that the EU Council provide a whitelist of countries that qualify as Qualified Non-Union jurisdictions.

We hope that the above is helpful in framing some of the key points. Furthermore, AFME and its members would welcome the opportunity to meet with you to discuss these topics in greater detail.

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