



Federation of European Accountants
Fédération des Experts comptables Européens

To:

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7 November 2013

Ref: WPS/ AKI/ PWE/ NTA

Dear Mr Kariņš

Dear Ms Sargentini

Re: Proposed amendments to the European Commission's proposal for a directive on the prevention of the use of the financial system for the purpose of money-laundering and terrorist-financing

We at FEE¹ are writing to you further to our previous letters of 19 March² and 3 September³ 2013 regarding the aforementioned proposal for a fourth anti-money-laundering (AML) directive.

Please find below our comments on some of the proposed amendments in the opinion recently adopted by the European Parliament's committee on development (DEVE) and in the draft opinion issued by the committee on legal affairs (JURI). We kindly invite you to take our views into consideration when drafting your joint report for the committees on economic and monetary affairs (ECON) and civil liberties, justice and home affairs (LIBE).

¹ FEE is the Fédération des Experts comptables Européens (Federation of European Accountants). It represents 45 professional institutes of accountants and auditors from 33 European countries, including all 28 EU member states. In representing the European accountancy profession, FEE recognises the public interest. It has a combined membership of more than 700,000 professional accountants working in different capacities in public practice, small and large firms, government and education – all of whom contribute to a more efficient, transparent and sustainable European economy.

FEE's ID number in the European Commission's register of interest representatives is: **4713568401-18**.

² http://www.fee.be/images/publications/anti-money/FEE_Comments_on_EC_proposal_on_Fourth_AMLD_20130319.pdf

³ http://www.fee.be/images/FEE_comment_letter_on_DEVE_and_ECON_draft_opinions.pdf

DEVE amendment 7 – information on beneficial ownership

The proposed directive represents an important step forward with regard to information on beneficial ownership. The provisions in the proposed article 29 – requiring that member states of the European Union ensure that corporate or legal entities established within their territory obtain and hold adequate, accurate and current information and that this information can be accessed in a timely manner by competent authorities and obliged entities – are both practical and cost-efficient.

Although we acknowledge that complete and up-to-date information in company registers would assist competent authorities and obliged entities in fulfilling their AML obligations, we remain of the opinion that the objectives of the proposed directive do not render it necessary for such information to be made available to the general public. We believe that the Commission's proposal recognises a reasonable right to privacy for beneficial owners whilst improving accessibility for obliged entities. For this reason, we do not support DEVE amendment 7, which states that information on companies' beneficial ownership should be 'made publicly available in [the] form of a public registry'.

Given that business registers already exist in member states, we would like to reiterate our support⁴ for the interconnection of such registers, as required by Directive 2012/17/EU.⁵ We believe that, by building upon this existing legal framework, obliged entities could be better supported in their efforts to fulfil their AML obligations.

DEVE amendment 11 – protection for reporters

The addition of the term 'whistleblowers' does not appear appropriate in this context, as recital 29 of the proposed directive concerns protection for those who make money-laundering reports. To avoid doubt as to the inclusion of principals – ie, sole traders and other business-owners – we recommend that the term 'reporters' be substituted for 'employees' in the original draft directive.

⁴ FEE's response to the online questionnaire on the Single Market Act:
http://www.fee.be/images/publications/sme-smp/EC_DG_MARKT_110228_EC_Single_Market_Act2320111810241.pdf

⁵ Directive 2012/17/EU on the interconnection of central, commercial and company registers:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:156:0001:0009:EN:PDF>

DEVE amendments 13, 14 and 23 – tax crimes and ‘aggressive tax-planning’

In accordance with the revised recommendations by the Financial Action Task Force (FATF), the Commission’s proposal specifically includes crimes related to direct and indirect taxes as predicate offences. Tax crimes are generally covered by the third AML directive,⁶ which refers to the proceeds of ‘criminal activity’ and sets out a range of ‘serious crimes’. The explicit inclusion in the proposed directive of tax crimes as predicate offences is therefore a welcome clarification. We do not support DEVE amendments 13 and 14 – which would delete the reference in article 3(4)(f) of the proposed directive to ‘tax crimes related to direct taxes and indirect taxes’ and include it instead as a separate point – as the matter is adequately covered in the Commission’s proposal.

We support DEVE amendment 23 insofar as it requires obliged entities to examine the background and purpose of all complex, unusual large transactions or patterns of transactions that constitute tax crimes amounting to criminal activity within the meaning of article 3(4)(f) of the proposed directive. As tax crimes are already regarded as predicate offences for the purposes of money-laundering, this part of the amendment would serve as additional clarification.

We have serious concerns, however, about the inclusion of those transactions or patterns of transactions that are deemed to constitute ‘aggressive tax-planning’. DEVE amendment 23 refers to the Commission’s recommendation on aggressive tax-planning,⁷ which states that a key characteristic of such practices is that they ‘reduce tax liability through strictly legal arrangements’ that ‘contradict the intent of the law’. The recommendation adds that this involves ‘taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems’ and can take ‘a multitude of forms’. We are of the opinion that the terms and definitions in the recommendation are too vague to provide the legal certainty required for a directive that imposes sanctions for non-compliance. The general principle of *nulla poena sine lege* demands that the law be clear and unequivocal.

⁶ Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money-laundering and terrorist-financing:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0015:0036:EN:PDF>

⁷ Recommendation C(2012) 8806 on aggressive tax-planning:

http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_fraud_evasion/c_2012_8806_en.pdf

Furthermore, one must not lose sight of the fact that money-laundering offences are based upon predicate offences that generate the criminal property in question. Tax-planning – be it aggressive or otherwise – is not illegal and, consequently, not a predicate offence. If a particular tax-planning measure were to be made illegal, then it would become a tax crime and, if sufficiently serious, a predicate offence (subject to the terms of article 3(4)(f) of the proposed directive). Although DEVE amendment 23 was undoubtedly proposed with good intentions, this failure to distinguish between the legal and the illegal, together with the apparent misunderstanding of the nature of money-laundering offences, would create a great deal of uncertainty and confusion for obliged entities. Aggressive tax-planning is an important and perfectly valid subject for debate. However, this debate must be allowed to continue in the correct context, so that any problems can be addressed appropriately and effectively.

JURI draft amendment 8 – beneficial ownership

Article 3(5)(a)(i) of the proposed directive, which states that a percentage of 25 per cent plus one share shall be evidence of ownership or control through shareholding, is appropriate and reflects current practice – and, in many European countries, the current legal basis – with regard to the identification of beneficial owners. This threshold is also suggested in guidance issued by the FATF.⁸

We are unable to support the deletion of the reference to the threshold suggested in JURI draft amendment 8. The threshold proposed by the Commission is a useful framework that would establish a coherent, harmonised approach to the identification of beneficial owners throughout the EU. For the avoidance of confusion, however, we suggest that the phrase ‘every level of’ be removed in order to ensure correct identification of ultimate ownership.

Furthermore, we do not consider it necessary to lower the current threshold – eg, to 10 per cent plus one share, as suggested in the rejected DEVE draft amendment 47. The risk-based approach, which is increasingly becoming the overarching principle in AML legislation, requires that additional steps be taken in cases in which there is a higher risk of money-laundering. Consequently, it is quite conceivable that the use of a lower threshold would be dictated by the circumstances of a particular case. We are firmly of the opinion, therefore, that the current threshold of 25 per cent plus one share, combined with an intelligent risk-based approach, is the best basis for the identification of beneficial owners with a view to preventing money-laundering and terrorist-financing.

⁸ Interpretive note to FATF recommendation 24 on transparency and beneficial ownership of legal persons: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

Should you wish to discuss any of the issues raised in this letter, please do not hesitate to contact Ms Petra Weymüller by telephone (+32 (0)2 285 40 75) or by email (petra.weymuller@fee.be).

Yours sincerely



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