Federation of European Accountants
Fédération des Experts comptables Européens

Ms Claire Bury
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cc: Tobias.Mackie@ec.europa.eu

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Dear Ms Bury,

Re: Review of the Third Anti-Money Laundering Directive: solicitation of stakeholder views

Thank you very much for your letter of 15 July 2011 to Karen Silcock, Chair of the FEE Anti-Money Laundering Working Party. FEE (the Federation of European Accountants) is pleased to provide you below with its comments on the above review and in particular on the three points raised by you.

FEE (Fédération des Experts-comptables Européens – Federation of European Accountants) is an international non-profit organisation based in Brussels that represents 45 institutes of professional accountants and auditors from 33 European countries, including all of the 27 EU Member States. FEE has a combined membership of more than 700.000 professional accountants, working in different capacities in public practice, small and big accountancy firms, businesses of all sizes, government and education, who all contribute to a more efficient, transparent and sustainable European economy.

FEE commends the EC for having put in place a consultation of stakeholders on its proposals to review the third Anti Money Laundering Directive. It welcomes the opportunity that is being provided to participate through stakeholder consultation meetings and by providing written comments.

1. Beneficial ownership

We strongly support the requirement to establish the beneficial ownership of customers which are other than natural persons. However, as you observe, this can in many cases be a time consuming and challenging exercise for obliged entities to perform.

The key challenges we have experienced include the following.

- Uneven implementation of AML/CTF regulation in different countries outside the EU causing customers in some countries to challenge or resist the need to disclose information to accountants (for example, issues of this type are sometimes faced in dealing with customers and intermediaries in the USA and Switzerland as accountants in those countries are not subject to the same AML/CFT requirements as financial institutions). We appreciate this is not capable of resolution by unilateral action of the EC but urge this point to be taken up in discussions at FATF and other suitable opportunities.

- Companies and other legal persons/legal arrangements being unaware of their own beneficial ownership. Neither companies/other legal persons, nor their executives and managers, currently have any obligation to record their beneficial ownership, or enquire into it. As a result, accountants and others are then obliged to attempt to find advisers or legal owners who are able and/or prepared to provide information which may ultimately lead to discovery of beneficial ownership details.

- Varying provisions in different countries as regards the amount of ownership information recorded on public registries.

There is no single solution to this issue, but we discuss below a range of measures that, if adopted, would in our view considerably ease the challenges we face.

We remain concerned that the European Commission and Member State governments have not taken all available opportunities to provide support to obliged entities that would genuinely assist in minimising costs, particularly to smaller and medium-sized businesses. The areas where, at present, there is considerable duplication of effort and potentially such high information barriers as to prevent some businesses taking full advantage of simplified CDD opportunities are in:

- establishing country equivalence;

- the supervisory status of financial institutions in equivalent jurisdictions; and

- the assessment of whether stock exchanges meet the specified disclosure obligations.

There has been limited support on country equivalence produced from EC discussions, and we support recent discussions concerning this list and how to improve its quality through greater transparency of criteria employed. However, this remains incomplete, and there is no available centrally provided support on the supervisory status and stock exchanges issues. This is an area where co-operation between Member State governments in the EU and on a wider basis through FATF could provide a valuable information resource for all obliged entities which would promote take-up of the full range of opportunity provided by the risk-based approach.

In addition, we urge the EC to work with EU Member States and other countries to campaign for increased availability of public domain corporate and business information via free on-line registries. However, we support the need for legitimate confidentiality for beneficial owners of businesses to be protected, and would not advocate compulsory disclosure of this in the public domain. Whilst protecting legitimate confidentiality from public domain disclosure, governments (at least throughout the FATF) could better support the regulated sector by working to educate business and other organisations as regards the need to disclose full details of beneficial ownership when engaging with a regulated person.

We support the FATF in its consideration as to whether to oblige companies and other legal persons to ascertain and hold information concerning their beneficial ownership and urge the EC to consider this in relation to the review of the Directive. At present, the burden of completing complex enquiries into beneficial ownership is frequently borne solely by the obliged entity, which has only the sanction of refusing to act should it be unable to obtain the required information. The sharing of this burden with the legal persons who benefit from financial services and professional advice is sought.

Finally, whilst we believe the current elements of required CDD are important, we feel that too much emphasis may be placed on the pure “identification” or mechanical elements of CDD and insufficient on ensuring a real understanding of the sources of wealth, activities, business and economic models in relation to customers. Such understanding not only informs decisions on customer take-on, but provides a base of information against which monitoring activity may commence.

2. Politically Exposed Persons (PEPs)

Whilst we believe governments could do much more, individually and collectively, to improve free access to sources of information about PEPs in each jurisdiction, increased emphasis on understanding the background of customers, as set out above, would contribute strongly to effective risk-based approaches, including identification of PEPs with genuinely enhanced risk profiles.

We are supportive of all PEPs, domestic and foreign, being subject to the same treatment and would support inclusion of both in relevant definitions. We would support the proposition that all EU PEPs might be regarded by EU Member States as “domestic”. At the same time, we would encourage the treatment of PEPs to be such that there is a presumption that higher risk procedures will be required for all PEPs unless information gathered can, through a risk-based approach, support a downgrade to normal risk procedures. It would be for obliged entities to make appropriate assessments and be prepared to demonstrate to their supervisors their sufficiency.

The blanket requirement to apply high risk procedures to all foreign PEPs, but not domestic PEPs, is not logical and runs counter to a true risk-based approach. We urge the EC to consider this issue and to debate it with the FATF in the current round of review and negotiation.

3. Tax crimes as a predicate offence

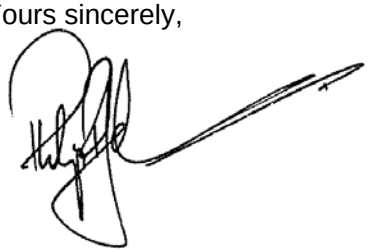
The current EU Directive definition of the serious crimes classified as predicate crimes for money laundering presents considerable challenges. By classifying on the basis of sentencing, rather than type of crime, greatly increased technical legal knowledge is required to apply the correct filter to identify correctly which criminal incidents are reportable as money laundering, and which are not. Accordingly, where Member States have implemented on the basis of the minimum requirement, a high burden is placed on obliged entities. Given that in many cases, either the reality or the belief is that the protection against breach of professional confidentiality is only provided for reporting of matters falling within the specific definition of money laundering, this potentially creates a high barrier to reporting of suspicious activity.

We highlighted in a survey carried out by FEE in 2008, that the Directive has been transposed very differently among the EU Member States and that there was a very large disparity between accountants in different EU Member States as regards the number of reports of suspicious activities. The levels of reporting in the UK, where the “all crimes” approach is not qualified by length of sentence or otherwise, is much higher than those states who have transposed the minimum requirements of the Directive. This is a disparity that needs consideration, as to oblige entities to undertake all the steps of CDD but to produce little in terms of intelligence to FIUs would not appear to be an optimum cost/benefit balance.

On the specific area of tax crime, this is a complex area, with potential for confusion. For tax crime to be included, we believe it must be very carefully described to ensure that the offence committed is that of intentional dishonesty aimed specifically at depriving Member State fiscal authorities of taxation revenues. This element of intentional dishonesty brings such conduct clearly into the category of criminal behaviour. Conversely, it must be clear that unintentional error in completing tax compliance steps, or legitimate efforts to mitigate tax, are not criminal behaviours to be classified as “tax crime”. We recommend being as precise as possible in the definition, especially when related to the scope of the AML measures to be applied by financial institutions and Designated Non-Financial Businesses and Professions (DNFBPs).

For further information on this letter, please contact Ms Petra Weymüller from the FEE Secretariat (email: petra.weymuller@fee.be, Tel.: +32 (0)2 285 40 75).

Yours sincerely,



Philip Johnson
FEE President