Mr Michael Lennard,
Secretary,
Committee of Experts on International Cooperation in Tax Matters,
Financing for Development Office,
2 U.N. Plaza (DC2-2170),
New York, N.Y. 10017, U.S.A
Email: taxffdoffice@un.org

Mr. Armando Lara Yaffar
Chairman of the UN Tax Committee, Deputy General Director for Treaty Negotiations and Projects
Ministry of Finance and Public Credit
Avenida Hidalgo 77,
Edificio 4, piso 3
Mexico City, D.F. Mexico
Email: armando. lara@sat.gob.mx

21st August 2014

Dear Mr Lennard and Mr Yaffar,

Automatic Exchange of Information (AEOI)

The BBA is the United Kingdom's ('UK') leading association for the banking sector. The UK banking sector is diverse – there are more foreign banks (250) in the UK than in any other international centre. Banks located in the UK comprise the 4th largest banking sector in the world and hold more than 30 per cent of all banking assets in the European Union ('EU'). The UK has the largest single international financial centre for cross-border lending, with 18% of global activity, while 41% of foreign exchange transactions and half of all OTC interest rate derivatives transacted globally occur in the UK market.

The BBA notes that during the Ninth Session of the UN Committee of Experts on International Cooperation in Tax Matters ('the Committee'), the International Chamber of Commerce ('ICC') was asked to provide input on the subject of Automatic Exchange of Information ('AEOI') and on Article 26 of the UN Model Convention. The BBA has actively participated in the development of various AEOI intiatives, including the EU Savings Directive ('EUSD'), the US Foreign Account Tax Compliance Act ('FATCA'), the UK's Intergovernmental Agreements ('IGAs') with the Crown Dependencies and Overseas Territories and the new OECD global standard on automatic information exchange, the Common Reporting Standard ('CRS'). In light of our experience, we hope that we may offer some observations on the CRS to assist the Committee.

1. Towards one global AEOI-standard

The BBA fully supports the G20 Governments' aim of combating international tax evasion, for which AEOI is an essential pillar. There are nearly 200 independent sovereign states in the world and when

FATCA surfaced in 2009, the BBA at once recognised the significant risk to the global financial system of potentially 200 variants of FATCA. From that point we have championed a multilateral solution, on the basis that a single, consistent AEOI regime was preferable to unilateral action which would: significantly increase costs for tax authorities, Financial Institutions (FIs) and consumers of financial services; distort competition; and harm the efficacy of efforts to prevent tax evasion.

The BBA felt it could support a properly constructed, broadly adopted, consistently applied, and proportionate multilateral AEOI regime. We also felt that a multilateral regime devised with financial sector input would be better than the alternative. As such, we have engaged constructively with the OECD's process for developing the CRS. While it may not be entirely as we would want it to be, we believe that the CRS is the best means by which to avoid the proliferation of different and overlapping standards of automatic exchange.

The benefit of a multilateral regime lies in consistency – of rules, application, and timing. Without these elements the CRS starts to look more like a series of unilateral arrangements which, as discussed above, implies costs and inefficiencies. For instance, unless domestic enabling legislation permits FIs to capture all information about the customers' residence rather than only that pertaining to those participating in the regime, the subsequent addition of each new jurisdiction at different dates would necessitate a new review of all FI client files, at excessive cost and disruption to the industry and customers. As FIs will be reviewing millions of customer relationships globally, it will be essential that they are not required to employ an additional data search every time a new country adopts the CRS. In the UK this necessitated a change in local law requirements to overcome potential Data Protection issues in collecting and retaining tax residence information where this is not essential for current tax reporting requirements.

Consistent timing will also stop the flight of recalcitrant customers from early adopters to late adopters or even, without further controls, to non-adopters. Even if there is a significant time gap between jurisdictions joining the CRS, this will negate the effectiveness of the CRS as it will provide the opportunity for further tax evasion by moving assets to non participating jurisdictions during this period .

Consistency not only applies to adoption of the CRS, but in the delivery of consistent and mutually reinforcing policies. Both the CRS and FATCA are residency-based tax compliance systems designed to tackle cross-border tax evasion. However, income from cross-border investments, particularly investments in equity and debt securities, can be subject to withholding tax from a source country, that a cross-border portfolio investor may be entitled to relief from under a double taxation agreement (DTA). Neither the CRS, nor FATCA are designed to assist investors in collecting any cross-border tax relief to which they may be legitimately entitled. Instead, solutions to this are proposed in the Tax Relief and Compliance Enhancement project (TRACE).

The OECD has pointed out:

> *"The amount of cross border portfolio investment exceeds 35 trillion USD. To encourage growth and cross-border investment more than 3000 tax treaties around the world based on the OECD Model reduce source taxation on a reciprocal basis. In practice, however, claiming withholding tax relief under treaties and domestic law is often cumbersome, time and resource intensive for the bulk of foreign portfolio investors and thus often does not happen. After several years of work with governments and businesses around the world and in close co-operation with the EU, the OECD has developed and approved a standardised system of effective treaty and domestic relief including a complete implementation package for countries to move forward ("TRACE"). This is a major step in streamlining processes, reducing costs, and giving investors their rights while improving tax compliance."* OECD, February 2013

The TRACE system can be used for claiming tax relief under tax treaties and under the domestic law of a source country. It allows FIs to enter into an agreement with the source country's tax authority and claim tax relief for their customers on a "pooled" basis. The system also lays down the documentation and due diligence procedures that the FI must follow together with the information reporting that is required; specifically the FI must provide detailed investor reporting to the source country's tax authorities on an annual basis. The source country's tax authorities then exchange taxpayer information with the customer's country of residence.

TRACE envisages the automatic exchange of taxpayer information and notes that, to the extent that information is exchanged in a timely fashion, the residence country could quickly inform the source country of an investor who claims to be resident thereof but is in fact not. It also argues that countries receiving detailed investor specific information would be "equipped with additional tools to focus their enquiries on the specific tax payers that may present issues".

To implement the CRS, countries generally will need to introduce legislation addressing both customer due diligence and information collection, information retention, and information reporting. By simultaneous implementation of CRS and TRACE, governments would deliver a coherent regime for AEOI.

2. Confidentiality safeguards and technical assistance

Confidentiality

For AEOI to be effective, it is crucial for a single and harmonised standard to be applied and for it to be proportionate to the pursued objectives and compatible with the national legal frameworks around the world. Legal security for all – tax administrations, taxpayers and FIs – is a key factor.

A number of the BBA's counterparts in the EU have raised questions as to the compatibility of the CRS with the legal frameworks of their countries, with particular attention to the right to privacy and to the protection of personal data. They have flagged a recent decision of the Grand Chamber of the Court of Justice of the European Union (CJEU) on 8 April 2014, which led to the invalidation of the so-called "Data retention Directive" on the basis of the European Charter on Fundamental Right.[1] Limitations on the exercise of the rights conferred by this Charter are subject to the principle of proportionality. According to the CJEU*, "the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives"*. The BBA is aware that comparisons have been made with the key aspects of the invalidated directive with the main provisions of the CRS: it appears that there may be a risk that the latter could constitute a disproportionate harm to the fundamental right to privacy and to the right of protection of personal data in the EU.

In addition to EU law, the constitutional frameworks of each country implementing the CRS should also be taken into account. For instance, a recent decision of the French Constitutional Court of March 13, 2014[2] cancelled the creation of a national register of loans to individuals as unconstitutional[3]. The French Constitutional Court concluded that "*having regard to the nature of the recorded data, the extent of its processing, the frequency of its use, the large number of people that may have access to it and the lack of guarantees concerning the access to the registry, the*

[1] Judgment of the Court (Grand Chamber) of 8 April 2014: Case C-293/12 Digital Rights Ireland and C-594/12
[2] Conseil Constitutionnel, Décision n° 2014-690 DC, 13 mars 2014.
[3] It was also supposed to identify the information on repayment incidents related to loans to individuals not acting for business purposes and the information relating to over-indebtedness and bankruptcies.

provisions challenged constitutes an infringement to the right to privacy that cannot be regarded as proportionate to the pursued aim."

Any legal uncertainty must be resolved without delay to prevent the early adopters tax administrations and FIs implementing costly processes, only to see them invalidated at a later stage and those authorities and institutions subject to litigation. We therefore suggest that a thorough legal analysis be undertaken by the Governments of the "early adopters" as soon as possible with respect to their legal and constitutional frameworks, and specifically with respect to the EU legal framework. Additionally, or perhaps even alternatively, a revision of certain requirements of the CRS could ameliorate concerns regarding proportionality, such as by reinstating the deminimis threshold in order to exclude low value accounts and target reporting towards real tax risk.

Business Requirements

The BBA's members have identified approximately 200 risks of variances between the information exchange regimes of FATCA, the UK-Crown Dependencies and Overseas Territories ('UK-CDOT') IGAs and the CRS. Even what may appear to be minor differences can have a large impact in terms of costs and system changes for FIs. The differences between the regimes mean that different and/or multiple processes to those under development for FATCA/UK-CDOT IGAs will be needed. The operationalisation of these varying requirements can have a major impact on cost and the time needed for FIs to build IT solutions. Business projects to implement tax and regulatory change in FIs can also only really begin when participating countries publish their domestic legislation implementing the context of their agreements, guidance notes and reporting requirements. All are needed to ensure a coherent implementation for the FI, from systems build to training staff.

To get certainty, facilitate implementation and maximise the quality of the data FIs need:

a) Certainty of requirements

- Consistency across jurisdictions based on a single standard rather than a single minimum standard.
- Legal certainty, and the final CRS requirements enacted in domestic legislation as soon as possible

This is needed before

- Budget process and approval (approximate 4 months lead time)
- Build decisions can be made
- Delivery (minimum 18 months lead time after budget agreed)

b) Sufficient time

- To develop a robust automated system design
- For adequate testing of the system within an FI to ensure it delivers the required data

This will drive

- Tactical solution vs Strategic Solution (insufficient time forces interim tactical manual solution = expensive & less reliable; however the volume of reportable accounts could make a tactical solution impossible)
- Quality of design (Sufficient time allows best solution development, improved controls and maximum automation)

  Efficiency of implementation (Sufficient time allows maximum FATCA reuse & synergies, allows e.g. revision of onboarding and T&C changes within "business as usual programmes" to refresh customer processes, allows for development of stable system through rigorous testing)

3. Revised Article 26 Model UN Convention – Exchange of Information

The BBA endorses the recommendations of the International Chamber of Commerce (ICC) with respect to the possible revision of Article 26 of the Model UN Convention, specifically:

- Currently the text of Article 26 provides that information received by the Receiving State shall be treated as confidential in the same manner as information obtained under the domestic laws of the Receiving State. Confidentiality of information is a crucial issue; taxpayers need to be able to trust that information provided will remain confidential and will not be used for purposes other than for countering tax evasion. Countries may have different standards of treating information as secret, and some countries may not have adequate data protection laws in place. The issue could have a rippling effect where information is passed on to another jurisdiction which may not have adequate data protection laws. It is, therefore, recommended that rather than relying on the Receiving State's data privacy laws, the UN should lay down minimum acceptable standards of confidentiality, and access to information should be denied if such standards are not met.
- Transparency in exchange of information should increase. For example, taxpayers should be provided with reasons for seeking information, and information should be passed on by the country providing information only once it is convinced that the reasons provided are legitimate and justifiable. It is recommended that irrespective of whether information is exchanged on an automatic or a "on request" basis, the UN should come out with a more robust sub Article 26(1) rather than providing wide power to States to exchange information as is "foreseeably relevant".
- It is recommended that rather than leaving it to competent authorities to determine appropriate methods and techniques concerning matters in respect of exchange of information, one universally acceptable reporting standard should be adopted and referred to in the revised Article 26. A globally endorsed standard would highly contribute to tax transparency.

BBA appreciates the opportunity to comment on the AEOI issues as it continues to evolve. We hope that our comments will facilitate a constructive way forward.

Respectfully submitted.

Yours Sincerely,

Sarah Wulff-Cochrane
Director
British Bankers' Association

CC: Mr. Robin Oliver (New Zealand), HM Treasury, HM Revenue & Customs, ICC