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TO	OECD International Co-operation and Tax Administration Division Centre for Tax Policy and Administration *taxpublicconsultation@oecd.org*
SUBJECT	**Public consultation on new tax transparency framework for crypto-assets and amendments to the Common Reporting Standard**
DATE	29 April 2022

Dear OECD Secretariat and Working Party no. 10 delegates:

Chiomenti law firm ("**Chiomenti**") welcomes the opportunity to contribute to the public consultation on the discussion draft *Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard* (the "**Consultation Document**").

About Chiomenti

Chiomenti, with offices in Rome, Milan, London, New York, Brussels, Shanghai and Beijing, has always worked to ensure that businesses and institutions achieve their most complex objectives in compliance with the applicable law thanks to a team of professionals organized to make the most of a multiplicity of skills. 300 professionals with one common objective: hard work and dedication to achieving excellence, which have characterised our Firm since its outset. These principles, together with our innovative and constructive approach, allow us to provide our clients with integrated and multidisciplinary advice, helping them seize opportunities through a complete understanding of the myriad legal complexities that affect their business decisions. Chiomenti's clients include leading Italian and foreign industrial, banking, insurance and financial groups. Chiomenti has always been an adviser to the key Italian public institutions, to foreign governments and public authorities, and to international organisations. Chiomenti is among the founders of the "European Network", together with independent market-leader law firms: Cuatrecasas in Spain and Portugal, Gide Loyrette Nouel in France and Gleiss Lutz in Germany. Chiomenti is the member firm in Italy for "Lex Mundi", the world's leading network of independent law firms with representative firms in more than 100 countries.

Comments on *Crypto-Asset Reporting Framework*

I. In general

We believe the *Crypto-Asset Reporting Framework* ("**CARF**") is well written and solid in its content. It is based on concepts and due diligence requirements already imposed under the Common Reporting Standard ("**CRS**") and under Anti Money Laundering ("**AML**") rules based on the Financial Action Task Force ("**FATF**") Guidelines.

As elaborated below, **we recommend to fully align CARF's reporting requirements with the CRS and with FATF Recommendations**. This will clearly reduce the burden on intermediaries, although there is obviously an important burden imposed, as IT and other investments will be required to adapt to the reporting framework. This should be properly accounted for implementing the rules: sandboxes and phased-in approaches should also be considered to provide appropriate lead-time, facilitate implementation and compliance with the rules. For example, CARF rules could exempt new entrants which meet certain conditions for the first period of operation, and then impose reporting requirements only when there is actually a risk for tax compliance. The imposition of reporting requirements could itself be phased-in after appropriate lead time has been provided. For example, in the first period of application only information about taxpayers holding Crypto-Assets could be requested to only subsequently expand the range of information to be provided. This will avoid stifling innovation and preventing new players from entering the market with new ideas and solutions.

Further, we believe that the introduction of reporting requirements for Crypto-Assets should be accompanied by other policy actions, namely:

(i) **Clarifying the tax treatment of transactions involving Crypto-Assets**: as recommended by the OECD itself in the 2020 report *Taxing Virtual Currencies*, countries should introduce rules or publish detailed guidance regarding the tax treatment of acquisition, holding and disposal of Crypto-Assets. Unfortunately, the appropriate direct and indirect tax treatment is still not clear in several instances. It would seem logical to clarify the tax treatment of Crypto-Assets in parallel with the introduction of information reporting obligations. This should be done via legislation, taking into account also developments in other areas, namely AML/CFT and regulatory supervision, to ensure coherence among different fields.

(ii) **Considering Voluntary Disclosure initiatives for the past**: as the tax treatment for Crypto-Assets becomes clear and a reporting framework is in place, consideration should be given to voluntary disclosure initiatives in relation to the past. In a context in which tax rules are still not clear and no intermediaries were reporting relevant information, it is rather likely that income or assets may have not been reported (properly). As with the introduction of the

CRS a few years ago, and even more given the uncertain tax treatment in many instances, voluntary disclosure initiatives could be an appropriate mechanism to start with a clean sheet and ensure that as many taxpayers as possible become part of the new reporting framework. Amounts involved may be substantial, an issue particularly relevant given the current conditions of public finances in many jurisdictions.

Finally, **we also recommend that the Working Party evaluates the use of blockchain-based or distributed-ledger technology ("DLT") for information collection and sharing**. This relates to CARF but also to the CRS itself, and eventually to Pillar 1 and Pillar 2 of the renewed BEPS Project. All these initiatives could definitively benefit from the use of a (permissioned) blockchain or DLT, managed by the OECD, in which all different actors would contribute to make the infrastructure secure and efficient.

II. Responses to Public Consultation Questions

A. Crypto-Assets in Scope

1. *Does the CARF cover the appropriate scope of Crypto-Assets? Do you see a need to either widen or restrict the scope of Crypto-Assets and, if so, why?*

CARF's definition of Crypto-Asset revolves around the technology and partially departs from FATF Recommendations. Indeed, for CARF purposes, "***Crypto-Asset***" means "*a digital representation of value that relies on a cryptographically secured distributed ledger or a similar technology to validate and secure transactions*"; by contrast, the FATF defines "***Virtual Asset***" as "*a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes. Virtual assets do not include digital representations of fiat currencies, securities and other financial assets that are already covered elsewhere in the FATF Recommendations*".

The elimination in the definition of Crypto-Asset of the reference to their use for "*payment or investment purposes*" will broaden the range of assets covered, with potentially little benefit for tax administrations. This is the case for example of tokens that have been acquired neither for investment nor for payment purposes, e.g. governance tokens, sport fan tokens, gaming tokens, vanity tokens and several others that should not pose any issues for purposes of tax compliance. We struggle to see the interest of tax administrations in obtaining information about these tokens and fear that it will overload compliance officers with information that is not useful. In light of this, we recommend inserting in the definition of Crypto-Asset a reference to its use for "*payment or investment purposes*".

We also recommend clarifying in the Commentary that Crypto-Assets in scope are only those actively traded on an established market and not all those that in principle "*can be traded or transferred* (…) *in a digital manner*", as by definition any digital asset can be transferred digitally.

Finally, we recommend that the perimeter of the Crypto-Assets in scope may be further reduced via the introduction of a *de minimis* threshold to avoid having to report negligible amounts.

2. *Does the definition of Closed-Loop Crypto-Assets contain the correct criteria for identifying Crypto-Assets that operate in a closed-loop environment?*

We recommend modifying the definition of *"Closed-Loop Crypto-Asset"* to ensure that conditions b) and c) are alternative and not concurrent (*i.e.* "and" should become "or"). This is because there are Closed-Loop Crypto-Asset that could be exchanged among participants and that should be excluded from the scope of the CARF given their irrelevance for tax compliance.

3. *Are you aware of existing types of Crypto-Assets, other than Closed-Loop Crypto Assets or Central Bank Digital Currencies that present a low risk from a tax compliance perspective and should therefore be excluded from the scope?*

See above in relation to Question 1.

4. *An NFT is in scope of the FATF Recommendations as a virtual asset if it is to be used for payment or investment purposes in practice. Under the Crypto-Asset Reporting Framework, an NFT would need to represent value and be tradable or transferable to be a Crypto-Asset. On that basis it is expected that relevant NFTs would generally be covered under both the CARF (as a Crypto-Asset) and the FATF Recommendations (either as a virtual asset or a financial asset). Are you aware of any circumstances where this would not be the case, in particular, any NFTs that would be covered under the definition of Crypto-Assets and that would not be considered virtual assets or financial assets under the FATF Recommendations or vice versa?*

See above in relation to Question 1.

B. Intermediaries in Scope

1. *Do you see a need to either widen or restrict the scope of the intermediaries (i.e. Reporting Crypto-Asset Service Providers)?*

We have some doubts regarding the alignment among different definitions. In particular, the definition of Reporting Crypto-Asset Service Provider ("**RCASP**") makes reference to a smaller set of transactions (*i.e.*, Exchange Transactions) compared to the perimeter covered by the definition of the transactions in scope (*i.e.*, Relevant Transactions) which also covers *Reportable Retail Payment Transactions* and other *Transfers of Relevant Crypto-Assets*. Indeed, according to the Consultation Document:

(i) "**Reporting Crypto-Asset Service Provider**" means "*any individual or Entity that, as a business, provides a service effectuating Exchange Transactions for or on behalf of customers, including by acting as a counterparty, or as an intermediary, to such Exchange Transactions, or by making available a trading platform."*

(ii) "**Relevant Transactions**" means "*any: a) Exchange Transaction; b) Reportable Retail Payment Transaction; and c) other Transfer of Relevant Crypto-Assets.*"

(iii) "**Exchange Transactions**" means *"any a) exchange between Relevant Crypto-Assets and Fiat Currencies; and b) exchange between one or more forms of Relevant Crypto-Assets*."

This would mean that if an individual or an entity only provides Reportable Retail Payment Transaction services (or staking opportunities) but not Exchange Transactions, then it would not be covered by the CARF reporting obligations. In our opinion, the risk here is to create an unlevel playing field or to drive choices regarding the business model adopted.

More importantly, additional guidance would be needed on how to apply the CARF rules to Decentralized Finance ("**DeFi**"). The CARF appears to rely on the latest FATF guidance and makes reference to "*making available a trading platform*".

The Commentary states that this in practice means the following: "*An individual or Entity will be considered to make available a trading platform to the extent it exercises control or sufficient influence over the platform, or otherwise having sufficient knowledge (e.g. by virtue of acting as an interface providing access to the platform for purposes of an Exchange Transaction or acting as an aggregator), allowing it to comply with the due diligence and reporting obligations with respect to Exchange Transactions concluded on the platform. Such control or sufficient influence includes cases where:*

(i) the individual or Entity is subject to AML/KYC regulations, or subject to supervision, in respect of the platform pursuant to domestic rules that are consistent with the FATF Recommendations; or

(ii) the individual or Entity has the ability to develop or amend software or protocols governing conditions, pursuant to which, Exchange Transactions can be concluded on the platform."

Given the above, in our view the concepts of control and significant influence are far from being clear in practice. In addition, the explanations provided in the Commentary have the potential to unduly broaden the range of intermediaries in scope. Specifically, even an individual that develops software or protocols governing conditions for the benefit and eventually use by the community would potentially fall within the above definition. As we believe this is not the intention of the drafters, we suggest clarifying this point.

Clarifications would also be needed in relation to the application of the rules to DAOs and so-called "whales" to provide a clear landscape and avoid disputes in practice.

2. *Are there any circumstances in which multiple (affiliated or unaffiliated) Reporting Crypto-Asset Service Providers could be considered to effectuate the same Relevant Transaction with respect to the same customer? If so, which types of intermediaries (e.g. the one with the closest relationship with the client) would be best placed to ensure reporting?*

In case it happens, it would certainly be easier for the intermediary with the closest relationship with the client to comply. We wonder, however, how the rules would apply in case of a group of individuals is considered to make a trading platform available.

3. *Do the nexuses described in paragraph A of Section I of the CARF ensure a comprehensive coverage of all relevant Reporting Crypto-Asset Service Providers? If not, under what circumstances would relevant Reporting Crypto-Asset Service Providers not have a nexus in any jurisdiction? In your view, should this be a potential concern, and if so, what solutions could be considered to address it?*

In our opinion, this topic should be addressed together with the topic of the consequences of not complying with the CARF.

C. Reporting requirements

1. *Do intermediaries maintain valuations on the equivalent Fiat Currency fair market values of Crypto-Assets? Do you see challenges in reporting on the basis of such fair market value? If yes, what do you suggest to address them?*

In our experience, intermediaries do maintain such valuations. The challenge may be due to the fact that different intermediaries may use different valuation approaches or standard (for instance, a different point in time during a given day) and therefore a reconciliation mechanism should be adopted for tax purposes.

2. *Are there preferable alternative approaches to valuing Relevant Transactions in Crypto-Assets?*

We note that the approach for valuing Relevant Transactions should be in line with the applicable substantive tax treatment of the asset/transaction.

3. *Are there specific difficulties in applying the valuation rules for illiquid tokens, for example, NFTs or other tokens that may not be listed on a marketplace, to identify a fair market value? If so, please provide details of any preferable valuation methods that could be adopted within the CARF.*

The valuation process is extremely difficult and subjective when an asset is not traded in a liquid market or is thinly traded. As already pointed out above, we recommend to limit the coverage to Crypto-Assets that are actively traded and that are used for "payment or investment purposes". In that light, we would see a benefit in reporting illiquid tokens only to the extent that they became illiquid after a trading period (for instance, in case of "burns").

4. *Regarding Reportable Retail Payment Transactions, what information would be available to Reporting Crypto-Asset Service Providers pursuant to applicable AML requirements (including the FATF travel rule, which foresees virtual asset service providers collecting information on originators and beneficiaries of transfers in virtual assets) with respect to the customers of merchants in particular where the customer does not have a relationship with a Reporting Crypto-Asset Service Provider, for whom it effectuates Reportable Retail Payment Transactions? Are there any specific challenges associated with collecting and reporting information with respect to Reportable Retail Payment Transactions? What measures could be considered to address such challenges? Would an exclusion of low-value transactions via a de minimis threshold help reducing compliance burdens? If so, what would be an*

appropriate amount and what measures could be adopted to avoid circumvention of such threshold by splitting a transaction into different transactions below the threshold?

In case information is available to a RCASP via the application of an FATF-like travel rule, reporting of this information may indeed be possible. In case information is not available to a RCASP via an FATF-like travel rule, reporting will be impossible. An exchange that hosts a business, might not be able to know the customers of that business.

We note that the model rules as drafted would also require the RCASP to consider the customer of its affiliated merchant as its own customer, and therefore apply due diligence and reporting requirements. This would be practically impossible to comply with. The CARF should impose no greater requirements than FATF-style travel rule. Also for this reasons, we recommend a high de minimis threshold and, to avoid circumvention of the rules, that for those only the number of transactions over a given timeframe should be reported. When needed, tax administrations could then use exchange of information on request to obtain additional details.

As a more general point, we consider important to provide further guidance on the relationship between CARF and AML/CFT rules. When these rules exist and are based on FATF standards, they can be relied upon. However, it is not clear what happens when they do not exist or do not reflect FATF standards. The Consultation Document states that the CARF implementing rules should incorporate FATF-like style rules in these cases. However, one may believe that if a jurisdiction has not implemented FATF-like rules for AML/CTF purposes, it may likely not be willing to do that for tax purposes either. This links with the overall issue of the consequences of complying or not complying with the CARF.

5. *Concerning the requirement to report transfers based on certain pre-defined transfer types (e.g. hardforks, airdrops due to other reasons, loans or staking), do Reporting Crypto-Asset Service Providers have the knowledge necessary to identify, and classify for reporting purposes, transfers effectuated according to such transfer types? Are there any other transfer types that typically occur and that are separately identified for customers or for other purposes?*

It may happen that RCASPs do not have adequate knowledge to report transfers based on certain pre-defined transfer types and hence would be unable to comply with CARF reporting obligations. This may possibly happen if an exchange does not keep records of newly created Crypto-Assets that are not supported on its exchange and, therefore, would not be able to identify and classify the transaction for reporting purposes.

6. *Concerning the proposal for reporting with respect to wallet addresses, are there any specific challenges for Reporting Crypto-Asset Service Providers associated with the proposed requirement to report wallet addresses that are the destination of transfers sent from a customer's wallet maintained by a Reporting Crypto-Asset Service Provider? Do Reporting Crypto-Asset Service Providers have, or are they able to obtain, information to distinguish wallet addresses associated with other Reporting Crypto-Asset Service Providers from wallet addresses that are not associated with another Reporting Crypto-Asset Service Provider? The OECD is also considering to require, in addition, reporting with respect to wallet addresses that are the origins of transfers to a customer's wallet maintained by a Reporting Crypto-Asset Service Provider. Is this information available and would providing it materially increase compliance burdens for Reporting Crypto-Asset Service Providers? Are there alternative requirements (e.g. reporting of the public keys associated with Crypto-Asset Users instead of wallet addresses) that could be considered to more efficiently increase visibility over transactions carried out without the intervention of the Reporting Crypto-Asset Service Provider?*

No specific views.

7. *Information pursuant to the CARF is to be reported on an annual basis. What is the earliest date by which information on the preceding year could be reported by Reporting Crypto-Asset Service Providers?*

For the sake of consistency, CARF reporting time periods should be aligned with those under the CRS.

D. <u>Due diligence procedures</u>

1. *The due diligence procedures of the CARF are in large part based on the CRS. Accordingly, the CARF requires Reporting Crypto-Asset Service Providers to determine whether their Entity Crypto-Asset Users are Active Entities (corresponding largely to the definition of Active NFE in the CRS) and, on that basis, identify the Controlling Persons of Entities other than Active Entities. Would it be preferable for Reporting Crypto-Asset Service Providers to instead document the Controlling Persons of all Entity Crypto-Asset Users, other than Excluded Persons? Are there other elements of the CRS due diligence procedures that should be included in the CARF to ensure that Reporting Financial Institutions that are also Reporting Crypto-Asset Service Providers can apply efficient and consistent due diligence Procedures?*

We recommend avoiding overlaps with the CRS for those that may be subject to both. As the CARF is built on the side of the CRS, overlap is indeed possible in case of financial institutions that deal with Crypto-Assets. As in some instances CARF requirements are not fully aligned with the CRS, this may create some practical issues. For example, the validity of information provided by customers is for 36 months under the CARF while it is indefinite under the CRS. On the other hand, the CARF requirement seems to be aligned with the *Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy*. It would be useful to align all of them as their rationale should be the same.

2. *An Entity Crypto-Asset User qualifies as an Active Entity if less than 50% of the Entity's gross income is passive income and less than 50% of the assets held by the Entity produce, or are held for the production of, passive income. The Commentary on the term "Active Entity" provides that passive income includes "income derived from Relevant Crypto-Assets". Are there any specific instances in which such income (e.g. income from mining, staking, forks or airdrops) should qualify as active income?*

We believe income from mining should be considered active income whenever there is a substantial investment in terms of assets and facilities. In other cases, a decision must be made on a case-by-case basis as, for instance, staking may be carried out as business activity or not, depending on the circumstances.

3. *The CARF removes the information collection and reporting obligations with respect to Crypto-Asset Users which are Excluded Persons. The OECD is still considering whether Reporting Crypto-Asset Service Providers should be included in the definition of Excluded Persons. Against this background, would Reporting Crypto-Asset Service Providers have the ability to obtain sufficient information on clients that are Reporting Crypto-Asset Service Providers to verify their status?*

We believe that certain RCASP should indeed be considered Excluded Persons. This information should be based on self-certifications, coupled with proper evidence of the statements included therein. An issue may arise in case one or more individuals that are considered to have control or significant influence on a platform. In such and similar cases there should be mechanisms to distinguish their activities as RCAPs from those in a different capacity.

4. *Section III.D enumerates effective implementation requirements in instances where a Reporting Crypto-Asset Service Provider cannot obtain a self-certification from a Crypto-Asset User or Controlling Person. Notably, these requirements specify that the Reporting*

Crypto-Asset Service Provider must refuse to effectuate any Relevant Transactions on behalf of the Crypto-Asset User until such self certification is obtained and its reasonableness is confirmed. Are there potential alternative effective implementation measures to those listed in Section III.D? If so, what are the alternative or additional effective implementation measures and which persons or Entities would be best-placed to enforce such measures?

We consider that there could be equally effective measures. In any case, it is not clear what consequences would arise if a transaction is effectuated under this scenario.

E. Other elements of the proposal

1. *Comments are also welcomed on all other aspects of the Crypto-Asset Reporting Framework.*

Additional details will have to be provided regarding the incentives and disincentives to comply with the CARF. These could include reduced/increased sanctions, more/less favourable tax treatment, peer pressure, and a set of defensive measures as it was the case for the CRS. This is relevant to ensure a level playing field and avoid that those that comply with the rules are out in a condition of competitive disadvantage.

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We remain at your disposal for any further clarification and take this opportunity to congratulate for the work done so far.