

# EFAMA COMMENTS ON THE TAX CHALLENGES ARISING FROM DIGITALISATION

OECD/G20 INCLUSIVE FRAMEWORK  
PUBLIC CONSULTATION ON

REPORTS ON THE PILLAR ONE  
AND PILLAR TWO BLUEPRINTS

14 DECEMBER 2020

## I – Background information

EFAMA, the voice of the European investment management industry, is grateful for the opportunity to comment on the OECD / G20 Inclusive Framework (IF) on BEPS [public consultation](#) on the Reports on [Pillar One](#) and [Pillar Two](#) Blueprints.<sup>1</sup>

With respect to **Pillar One** proposals:

- We have explained the structure of our industry (the specific features of investment funds and the asset management industry) and asked for an explicit exclusion from the scope of the OECD Secretariat's Proposal for a "Unified Approach".
- **The fund and asset management industry is a highly regulated industry operating under significant and specific legal, regulatory, transfer pricing and tax frameworks.**
- The industry is not highly digitalised, is not heavily reliant on intangible assets or data and user participation is not fundamental to business models.
- The application of a new nexus and new profit allocation rules would be totally inappropriate to the way the industry operates.

When commenting on **Pillar Two** proposals:

- We have explained why investment vehicles should explicitly be carved out from the Global Anti-Base Erosion (GloBE) proposals and asked for an impact analysis of these proposals at an EU level.
- **Investment funds are structured as tax neutral investment pooling vehicles as a matter of public policy.**
- **The role that investment funds have to play in providing investors with a diversified portfolio and global market access is crucial and not to be underestimated.**
- The GloBE proposal should not risk all the achievements reached at the level of the OECD when it was called to address several challenges on the tax treatment of investment structures. In particular, members of the inclusive framework should be aware of the work of the OECD Committee on Fiscal Affairs, regarding the granting of treaty benefits for CIVs and the subsequent work on the principal purposes test or "PPT" rule.

## II – General comments

In general, **EFAMA is very supportive of the work of the OECD Secretariat and members of Inclusive Framework with respect to investment management industry** that is being acknowledged and catered for in the blueprints, in particular: i) Paragraphs 135 to 140 of the report on Pillar One blueprints; ii) Paragraphs 71 to 83 of the report on Pillar Two blueprints.

With respect to Pillar One, the OECD and the Inclusive Framework should agree that **all type of activities of investment managers do, and should, fall outside the scope of Consumer-Facing Business.**

With respect to Pillar Two, **EFAMA very much welcomes the efforts made by the OECD Secretariat and members of the Inclusive Framework to include investment funds in the list of excluded entities.**

**EFAMA welcomes in particular the clear message that is agreed by all the countries participating in the negotiations - the scope exclusion rules are being designed to providing the industry with the**

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<sup>1</sup> It is not the first time EFAMA is engaging with the OECD in this respect. Please refer to EFAMA's responses to the Public Consultations launched in [March 2019](#) and more recently in November 2019 (on [Pillar One](#)) and in December 2019 (on [Pillar Two](#)).

**desired result to preserve the tax neutrality in respect to investment funds** (which is a “widely recognised principle that underpins the design of the international tax rules” - please refer to paragraph 76 of the report on Pillar Two blueprint).

### III – EFAMA remaining concerns

EFAMA takes the opportunity to call on the OECD and the countries participating in the negotiations within the Inclusive Framework to understand our remaining concerns with respect to the reports on the blueprints.

**On Pillar One** - for the purposes of the design and implementation of the rules that are being proposed, **the fund and asset management industry should always be deemed to be an highly regulated industry operating under significant and specific legal, regulatory, transfer pricing and tax frameworks.**

In fact, retail asset management (being the sale of investment funds) is a highly regulated activity, largely carried out by intermediaries in the form of banks, insurers and brokers. Broadly speaking, fund products are sold by banks, insurers, asset managers and all of them rely on the same regulatory commissions, this to say that there is no real distinction between any component part of financial services sector. The level of regulation is therefore consistent for all areas of financial services. For the reasons highlighted by the OECD, the effect of financial regulation in the area of retail asset management is that these activities are largely carried out locally. EFAMA welcomes the approach followed by the OECD on Pillar One, where the right path is being followed and the Financial Services sector activities are being carved-out as a whole.

**On Pillar Two** - to make sure the tax neutrality that should be granted to investment funds remains untouched, **EFAMA members and industry representatives have already identified some issues/concerns that could be considered by the OECD and by the Inclusive Framework when fine-tuning the design of the proposed carve-out rules, with respect to Pillar Two “excluded entities”** in particular.

EFAMA members are working together to understand how the definitions that embody the carve-out rules for “investment funds” and “excluded entities” are intended to work in practice.

### IV - Alternative solutions for Pillar Two proposals

Under paragraph 83 of the report on Pillar Two blueprint we can read, as follows: *“The definition of Excluded Entity set out in the box above applies to entities in the MNE Group that are at the top of the ownership chain. This definition, however, does not comprehensively address the issues associated with controlled investment funds (i.e. a fund that is controlled by a Constituent Entity of an MNE Group that is not an Excluded Entity). For example, further technical rules may be required to avoid the potential application of the IIR to a controlled fund under the top-down approach and the split ownership rules. Further guidance may also be required as to the treatment of controlled investment funds under the UTPR.*

***The Inclusive Framework will undertake further technical work regarding the treatment of investment funds to identify whether further rules are needed to preserve the tax neutral outcomes for investment funds under Pillar Two and to consider the application of the GloBE rules to controlled investment funds and the outcomes of this work will be incorporated into the model rules.”***

To take part in this debate, with the aim to address the questions raised in the public consultation document with respect to the treatment of investment funds (Chapter 2 – Scope of the GloBE rules)

EFAMA is concerned with the following **examples of situations where the application of the current GloBE model would not work in practice:**

- **Funds consolidated by MNE Groups / Insurance Funds entities at the top:** We have analysed scenarios where a fund is consolidated by an MNE Group (even where the latter is a minority owner) and, whether it is an investment management entity company or whether it is an insurance fund entity, we have concluded that, unintendedly, certain funds would not meet the requirements to be deemed as excluded entities or where income generated by the fund would be subject to tax under the proposed rules.
- **Single investor funds:** We have also reviewed other scenarios where it is not clear if a single investor fund that was created to pool assets of one or more investors, would be covered by the definition of excluded entities (please refer to the definition of investment funds and to the wording “designed to pool assets from unrelated investors” – Pillar Two blueprint, page 32 and the references made under paragraph 80). Care needs to be taken with respect to the definition of investment funds – even if in a certain moment the fund has a single investor that, alone, should not be sufficient to conclude that investment fund does not meet the requirements to be deemed as an “excluded entity”.

**EFAMA understands that in these situations, the exclusion rules that are being proposed under the existing Pillar Two model would unintendedly risk the creation of an additional layer of tax liability at the fund level jeopardizing the aforementioned tax neutrality principle with unintended consequences to end-investors.**

To solve these issues in the context of the questions set out in the public consultation document, with the aim to assist the OECD and the Inclusive Framework in finalising the technical design of the Pillar Two, EFAMA understands that the OECD working groups may want to find **alternative solutions to ensure the GloBE rules work in practice.** The questions raised in the public consultation document suggest that the fine-tuning of the carve-out rules for investment funds can be made following a transparency principle.

EFAMA supports any solution that aims to preserve the desirable tax neutrality where funds are being consolidated. In case the investor that is consolidating is subject to tax or in case within that calculation effectively includes the incipient coming gains that are happening at the fund level, the GloBE rules should only apply to the share of the MNE Group – meaning that the other investors in the fund (e.g. the minority investors) would remain protected from the creation of unintended tax liabilities.

For EFAMA, **the fine-tuning of the carve-out rules can be improved based on the transparency principle**, as follows:

- In case an MNE Group is consolidating a fund, the latter should be treated as transparent for tax purposes.
- Hence, to the extent that the MNE Group has an interest in the fund (e.g. for instance 60% interest), the same percentage (60%) of the profits of the fund should be taxed at the level of the MNE Group on a flow-through / transparent basis, rather than in the fund jurisdiction (which is the solution that is being proposed under the current model that looks into the profits of the fund).

This alternative GloBE solution through the path of transparency preserves the tax neutrality in respect to the investment funds structures.

**The definition of investment funds should also be amended/fine-tuned to accommodate EFAMA concerns.** Overall, to make sure the policy intent is met and the regime is practical, **it is of central importance that the definition works and that investment funds will be deemed as “Excluded Entities”.** There are a number of detail cases, some already identified and likely more yet to

**emerge, that are likely to fall outside of prescriptive rules and yet which fit the broad policy intent of taxing the corporate investor not the pooled fund.**

In this context, we would stress the importance of providing broadly drafted exclusions for pooled funds. **Funds in Europe are subject to a high level of regulation and supervision and they operate under significant and specific legal, regulatory and tax frameworks regardless of whether they have one or more investors.** Concerning more in particular the tax framework, investment funds are in scope of mandatory automatic exchange of information rules as defined under the OECD Common Reporting Standard and the Foreign Account Tax Compliance Act under which information on financial accounts are exchanged that ensure that taxes are levied where appropriate. They are also in scope of tax transparency packages that are implementing OECD Mandatory Disclosure Rules (e.g. DAC 6).

**We stand ready to assist the OECD and the Inclusive Framework in finalising the technical design of the Pillar 2 making sure the tax neutrality in respect to investment funds is preserved.**

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#### About EFAMA:

EFAMA, the voice of the European investment management industry, represents 28 Member Associations, 60 Corporate Members and 24 Associate Members. At end Q3 2020, total net assets of European investment funds reached EUR 17.6 trillion. These assets were managed by more than 34,200 UCITS (Undertakings for Collective Investments in Transferable Securities) and almost 29,400 AIFs (Alternative Investment Funds). At the end of Q2 2020, assets managed by European asset managers as investment funds and discretionary mandates amounted to an estimated EUR 24.9 trillion.

More information available at [www.efama.org](http://www.efama.org)  
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