

For the attn. of:  
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OECD – BEPS - Public consultation on  
Secretariat Proposal for a “Unified Approach” under Pillar One

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## I. INTRODUCTION

EFAMA\* is grateful for the opportunity to comment on the OECD Public Consultation on Secretariat Proposal for a “Unified Approach” under Pillar One “, an initiative inserted in the Programme of Work to develop a consensus solution to “the Tax Challenges of the Digitalisation of the Economy” (TFDE).<sup>†</sup>

The approach taken in the proposal covers highly digital business models but goes wider – broadly focusing on and impacting consumer-facing businesses. EFAMA fully supports the work undertaken by the OECD in relation to the taxation of the digital economy and would kindly ask the OECD to keep in mind the specific features of investment funds and the asset management industry as a whole and ensure that new tax rules will not adversely impact our Industry.

As stated in our previous response to the OECD, the main specific features of our industry are as follows:

- The economies of scale from investments held through investment funds give access to markets, appropriately diversified, in which investors would otherwise not be able to invest. Where investors had to invest directly, they would incur substantial time and costs, not to mention the potential real risk through lack of market diversification. In the current investment climate it is imperative that investors are able to diversify risks across investments and international markets. Many territories encourage this type of activity and we therefore ask that explicit confirmation is provided that investment fund structures are not intended to be within the scope of the rules.

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\* The European Fund and Asset Management Association, EFAMA, is the voice of the European investment management industry, representing 28 member associations, 59 corporate members and 23 associate members. At end 2018, total net assets of European investment funds reached EUR 15.2 trillion. These assets were managed by almost 62,000 investment funds, of which more than 33,000 were UCITS (Undertakings for Collective Investments in Transferable Securities) funds, with the remaining funds composed of AIFs (Alternative Investment Funds). [www.efama.org](http://www.efama.org)

<sup>†</sup> Please refer to EFAMA’s [comments](#) from March 2019.

- The investment fund industry is a highly regulated industry underpinned by rules mainly set by important international regulation (such as Directive 2009/65/EC for UCITS, and Directive 2011/61/EU for AIFMs and Directive 2014/65/EU on investment firms or on service providers distributing financial products) and are reflected in the contractual arrangements entered into between various entities and intermediaries.
- From a tax perspective (apart from investment funds themselves whose tax treatment is designed to be tax neutral) it should be borne in mind that taxation arises at all levels in an investment fund structure namely, through withholding taxes applied to investment returns at source, at the investor level and at the level of management companies, investment managers, distributors, etc... in line with the obligations set by the above mentioned regulatory framework.

In addition, it is very important that any new tax legislation on digital activities is not borne by the end-investors. Any new rules should be defined very carefully so that any new tax will not be a tax on European consumers. Investor are already encountering tax costs (e.g. transaction taxes) resulting in automatic reductions on investment returns.

With regard to the proposal of the Secretariat, the views and high-level concerns of the European investment management industry are set out below.

### **Structure of the industry**

In terms of defining businesses that may be in the scope of the Secretariat proposal, a clear distinction should be made between the investment funds activities of a fund, and asset management activities.

Investment funds, both CIVs and non-CIVs, hold assets under management that are ultimately owned by their investors and not by any group the investment fund would be managed by or be linked to by name. In other words, an investment fund or an investment fund structure cannot be considered as part of an MNE group and a fund and a fund manager should not be regarded as comprising parts of the same MNE group as defined for consolidation requirements purposes or in the context of the Country-by-Country Reporting. Funds are not businesses in the sense envisaged by the proposals, but are rather financial accounts in which savers invest and therefore should be scoped out of the Pillar 1 proposals.

Asset management activities, management companies in charge of managing investment funds together with other service providers to which they delegate functions (marketing of units, investment management of the funds' assets, central administration) may often (but not always) belong to the same group of entities that would qualify as an MNE group. In this respect, considering the work already done in the context of Country by Country Reporting, total consolidated revenue equal or higher than € 750.000.000 threshold determined therein may be a starting point for the discussion. However, additional granularity from both business activities and regional perspectives would need to be considered as a revenue threshold only consideration might lead to unintended outcomes.<sup>‡ §</sup>

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<sup>‡</sup> It may be mentioned that whatever the level of the threshold would be, the tax system would have to be profitable and efficient, i.e. the new tax system would have to be economic to administer from the States perspective.

<sup>§</sup> Despite the relevance of consolidated financial statements, only recurring group profits would be relevant for the calculation of the various amounts. Indeed, consumers/users are not participating to the creation of non-recurring profits such as capital gains or other non-recurring items. It would be logical that loss relief should follow the same internal recharge structure that the reallocation of profits

In general, the international (cross-border) asset management industry is operated on a B2B basis, with investments being made by the end investor (consumer) through local intermediaries (investment advisors, broker dealers, etc.) In a majority of cases, value is created through offering investment funds’ units or shares to the retail market (consumer) through a local market network of professionals in the financial sectors that act as intermediaries, requiring a local presence in line with legal and regulatory requirements in the relevant investor country. To the extent distribution activities are undertaken by in-country subsidiaries or branches of the fund manager, they will under existing transfer pricing methodologies typically be allocated a very substantial fraction of the total revenues arising on that business. Additionally, where third party intermediaries (e.g. local broker dealers) are used, arms-length fees are agreed with such intermediaries, resulting in appropriate allocation and effective taxation of profits in such jurisdictions. Therefore, to apply the Pillar 1 proposals to the industry would create additional and significant compliance costs which would ultimately have little or no impact on the allocation of taxable profits.

The asset management industry is largely B2B in nature. In the case of B2C, interactions are largely between consumers and financial intermediaries. These interactions will generally take the form of financial advice, with the consumer acquiring shares or units in an investment fund as a result of that advice. Any interaction between the investment manager and the consumer is indirect, as the investment manager contracts with an investment fund. Furthermore, distribution activities to the retail sector is highly regulated and are almost invariably undertaken in-country. Due to the intensive capital requirements of running a branch network or digital platform targeting retail consumers, investment managers generally do not undertake direct distribution through vertically integrated networks to retail consumers. Where they do, it is often linked to a broader retail offering (e.g. as part of a wider bank assurance group through a related banking or insurance or financial advisory services offering). To the extent any marketing intangible exists locally, it will sit with the intermediary who owns the relationship with the investor and has the power to influence their behaviour. The investment manager does not have visibility of its end-consumers as this data is owned by the intermediary. An investment manager’s marketing effort is typically focused on the intermediary, rather than the end consumer, illustrating the B2B nature of this channel.

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follows. It would be fair to also take into account in the “Unified Approach” existing accounting losses alongside to group profits and how to take into account the negative results into the re-determination of this “new taxing rights”. Clarity of the rules and consistency, as well as simplicity (to the extent possible), throughout the proposed “Unified Approach” and the way it would be applied by all taxpayers and all tax authorities would be key to ensure the efficiency of the system itself and at the same time limit as much as possible double taxation issues which are detrimental to international trade and economic growth.

## Carve-out

Paragraph 20 of the Secretariat’s proposal indicates that “[...] *Further discussion should also take place to consider whether other sectors (e.g. financial services) should also be carved out, taking into account the tax policy rationale as well as other practicalities. Such discussion should also include consideration of size limitations, such as, for example, the €750 million revenue threshold used for country-by-country reporting requirements.*”

EFAMA strongly supports a carve-out of both investment funds and the asset management industry from the scope of the Secretariat’s proposal, but for different reasons. **In summary:**

1. **Investment funds** are overwhelmingly structured as tax efficient investment pools as a matter of government policy. They generate investment returns for their investors, typically in the form of dividends, interest or capital gains. They do not provide services or goods for consumption and do not have consumers. It is self-evident that they are not the intended target of the pillar I proposals.
2. Tax revenues are derived rather from the fee revenue of the **asset managers** who run these funds. Distribution activities are normally conducted in country; either by local third parties who are already subject to local taxation, or by affiliates of the asset manager who are allocated revenue under existing transfer pricing methodologies. Existing commercial norms and tax rules ensure the market jurisdiction is already adequately rewarded with the intermediary typically receiving a commission based on a share of the fee charged by the investment manager to the fund. The local asset management office responsible for maintaining the intermediary relationship will also typically receive an arm’s length reward that reflects its contribution. These arrangements typically reflect the high/value entrepreneurial nature of the local distribution presence of the investment manager. LRD arrangements are rare as a result.

To develop this summary argument further:

- A proper allocation of revenues of the management industry to the various consumer jurisdictions involved would be a challenging exercise. The allocation key in such a case would be the amounts of assets under management owned by investors geographically based in a specific country rather than the “sales” as such. Considering the way the asset management operates i.e. through several layers of professional intermediaries between a fund or its management company, identifying the residency of the ultimate investor would in practice be extremely difficult as well as a time consuming and costly.
- The funds management industry is not a highly digitalised business. In general, the use of technology in the asset management industry is to create efficiency and reduce risk in the investment process. Also, due to applicable confidentiality rules and regulatory constraints, operators in the financial sector are generally not allowed to generate profit from their clients’ data.
- Investment funds and asset management activities are heavily regulated in almost all their aspects and in particular, marketing towards retail investors in the EU (but also outside the EU) is subject to

stringent regulatory authorisation processes and supervision requirements that may also vary from country to country included within the EU. In general, asset managers have substance in the jurisdictions in which they operate with appropriate regulatory capital being maintained and appropriate levels of people employed, resulting in appropriate taxation of such operations.

- In the financial sector and for marketing in particular, profits are more likely driven by the business of the intermediary rather than by marketing intangibles. Considering the variety of the distribution models operating on the market, it seems difficult to define one solution that would fit all types of investment funds and all asset management business models that would allow to determine an adequate allocation of profit. Any solution for the industry sector would probably be complex and would require significant transfer pricing related and tax compliance costs, most likely resulting in little or no adjustment in profit allocations.
- As outlined here above, the fund and asset management industry is a highly regulated industry operating under significant legal, regulatory, transfer pricing and tax frameworks. The industry is not highly digitised, is not heavily reliant on intangible assets and data and user participation is not fundamental to business models. As such, we believe that the application of a new nexus and new profit allocation rules would be totally inappropriate to the way the industry operates. Before implementing any solution of a new nexus and new rules, a cost-benefit analysis balancing the effective appropriate benefits of an allocation of tax revenues to some jurisdictions and the costs for our Industry to implement them is absolutely crucial.

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We are grateful in advance for your attention to the concerns expressed in this letter and we welcome the opportunity to discuss these with you.

Yours sincerely,

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