

Brussels, 6 April 2022

EFAMA COMMENTS ON THE EUROPEAN COMMISSION'S PILLAR TWO PROPOSAL - ENSURING A GLOBAL MINIMUM LEVEL OF TAXATION FOR MULTINATIONAL GROUPS IN THE EUROPEAN UNION

Initial remarks

With the release of this proposal, the Commission is replicating the OECD / BEPS Inclusive Framework (OECD) Pillar Two Global Anti-Base Erosion (GloBE) [Model Rules](#) that came live in December 2021 and addresses how Member States will implement them in a coherent and consistent way across the EU. **The work of the Commission and the alignment with the work of the OECD / BEPS Inclusive Framework are to be welcomed.**

EFAMA very much welcomes the agreement reached to include investment funds in the list of Excluded Entities, 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.

EFAMA fully supports the Commission's initiatives to ensure a global minimum level of taxation for multinational groups, provided the tax neutrality in respect of investment funds is preserved as a "*widely recognized principle that underpins the design of the international tax rules*".¹

EU negotiations state of play² - documentation review and implementation timeline

We have been monitoring the negotiations at the Council and the agreement on the [compromise text reached on 12 March 2022](#). At the time we are writing, stakeholders are being called to review the work of the technical teams both at the [OECD](#) and [EU levels](#).

Relevant stakeholders, including EFAMA members, are being called to review/digest at the same time all the information that has been released, including the OECD [model rules](#), [commentary](#), [examples](#) (that were recently released on 14 March 2022) and the [EU legislative proposal](#).

In face of this challenging task, the new time limit for transposition by Member States being set for 31 December 2023 is to be welcomed.

¹ OECD (2020), "Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project", OECD Publishing, Paris – section 2.3, para. 76.

² The steps of procedure 2021/0433/CNS can be followed [here](#).

To ensure a common approach and consistent implementation internationally, we urge the Commission to press the OECD and the Inclusive Framework to agree upon a common date for implementation of the GloBE rules.

We understand that policy choices made in the Model Rules are now final (with nil or limited room for amendments). Both at an EU and OECD level now **the focus is on ensuring the GloBE Rules can be implemented and applied in a consistent and coordinated manner while minimising compliance costs.**

In this vein and aiming to contribute to this debate, EFAMA is calling for clarity and consistency in the way our industry needs will be addressed at a global and national level.

EFAMA is raising its voice to raise awareness on the pivotal role our industry will play in the economic recovery of the European Union and the further development of the Capital Markets Union. To boost the latter and protect the tax neutrality that is to be granted to investment funds, care needs to be taken in the implementation of the Pillar Two model rules.

EFAMA stands ready to engage with the relevant stakeholders both at EU/OECD level and exchange views on the implementation framework on:

- i) **situations where further administrative guidance is needed;**
- ii) the design of rules/measures to be implemented regarding the compliance requirements under the Model Rules (to **maximise efficiency, accuracy and verifiability of information reporting while taking into account compliance costs**);
- iii) mechanisms to **maximise rule co-ordination, increase tax certainty and avoid the risk of double taxation.**

EFAMA is calling relevant stakeholders to address the following issues:

- **Use the OECD Commentary as a source of illustration and interpretation:** for sake of clarity and consistency in implementing the model rules, Member States should add a recital to the Directive recommending the use of the Commentary on the GloBE Model Rules and examples, developed by the OECD, as a source of illustration and interpretation.
- **Investment funds definition:** in line with the OECD Commentary, scenarios with single seed investor should be covered by the requirement of Article 3 (25) paragraph (a) of the Commission's proposal and the tests mentioned under OECD commentary (39) should be applied in a consistent and harmonized manner.
- **Excluded Entities and Investment Entities definitions and scope – Ownership and Activities tests:** for the purposes of the implementation of definitions included in article 2 (3) (b) (c) and in article 3 (24) (b) (c) of the Commission's proposal (where the use of "or" and the use of "and" is not consistent with the Model Rules), an entity should not need to meet both the 95% and 85% thresholds to be considered an "Excluded Entity".
- **Qualified Income Inclusion Rules (QIIR):** care needs to be taken by Member States when assessing the equivalence of the domestic law of third countries with the Income Inclusion Rules (IIR).
- **Minimise disruptions with national fund taxation rules:** rules should be designed in a way that adequately reflects national tax principles of fund taxation. Care needs to be taken if Member States want to ensure the Pillar Two rules will work in line with domestic tax rules and do not end in double taxation i.e. ensure the implementation of Pillar Two will not have a negative impact on the tax neutrality of Investment Entities.

- **Minimise compliance and administrative burden on businesses and tax authorities:** It is critical that there is common implementation and coordination of rules within the EU and globally, with explicit alignment between the GloBE rules and any Qualifying Domestic Minimum Top-Up Tax regimes, to minimise the compliance burden, as well as functioning exchange of information regimes from day one to minimise duplicative reporting and effective use of safe harbours to eliminate low or zero risk entities/jurisdictions from the regime.

Please refer to **Appendix I** where you will find **EFAMA's detailed comments, concerns and recommendations on the text of the proposal**, with **practical examples of situations that could be addressed** ahead of its implementation.

This comment paper is being shared with the Commission, with all Fiscal Attachés/Ministers of Finance of the 27 EU Member States, as well as with the OECD Secretariat.

EFAMA stands ready to assist and discuss the issues raised in this document with the technical teams of the relevant stakeholders that will work in the upcoming negotiations of this proposal.

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Appendix I

#1 investment funds definition

<u>OECD Model Rules</u>	<u>OECD Commentary, Examples</u>	<u>Commission's proposal</u>
<p>Article 10.1.</p> <p>Investment Fund means an Entity that meets all of the criteria set out in paragraphs (a) to (g) below:</p> <p>(a) it is designed to pool assets (which may be financial and non-financial) from a number of investors (some of which are not connected);</p> <p>(b) it invests in accordance with a defined investment policy;</p> <p>(c) it allows investors to reduce transaction, research, and analytical costs, or to spread risk collectively;</p> <p>(d) it is primarily designed to generate investment income or gains, or protection against a particular or general event or outcome;</p> <p>(e) investors have a right to return from the assets of the fund or income earned on those assets, based on the contributions made by those investors;</p> <p>(f) the Entity or its management is subject to a regulatory regime in the jurisdiction in which it is established or managed (including appropriate anti-money laundering and investor protection regulation); and</p> <p>(g) it is managed by investment fund management professionals on behalf of the investors.</p>	<p>Comments* (36) to (45) p.199 - 201</p> <p>* No comments on the "investment entity" definition.</p> <p>Paragraph (a)</p> <p>38. Paragraph (a) requires the entity or arrangement to be designed to pool assets (financial and nonfinancial) from a number of investors (some of which are not connected). An investor could contribute cash or other kinds of liquid assets, or non-liquid assets such as immovable property to an Investment Fund.</p> <p>39. Paragraph (a) requires that some of the investors of the fund be unconnected. A facts and circumstances test should be applied to determine whether two or more investors are connected. In any case, an investor should be treated as connected to another investor if it meets the test set out in Article 5(8) of the OECD Model Tax Convention (OECD, 2017[1]). That test provides that two persons are connected if one possesses directly or indirectly more than 50% of the beneficial interest in the other (or in the case of a company, more than 50% of the aggregate vote and value of the company's share or the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50% of the beneficial interests in each person (or in the case of a company, more than 50% of the aggregate vote and value of the company's share or the beneficial equity interest in the company).</p> <p>Furthermore, two investors that are individuals are considered to be connected if they are part of the same family including a spouse or civil partner, siblings, parents, and ancestors and lineal descendants such as grandparents and grandchildren. In some instances, a fund will only have one investor for a short period of time, even though the fund is designed to pool assets for more than one unrelated investor. For example, a fund might have a single investor when the entity is within the initial offering period or in the process of liquidation. A fund in these circumstances with only one investor will meet the criteria of paragraph (a) provided that the fund was designed to pool assets from a number of investors (some of which are unconnected).</p>	<p>Article 3 (25)</p> <p>(25) 'investment fund' means an entity or arrangement that meets all the following conditions:</p> <p>(a) it is designed to pool financial or non-financial assets from a number of investors, some of which are non-connected;</p> <p>(b) it invests in accordance with a defined investment policy;</p> <p>(c) it allows investors to reduce transaction, research and analytical costs or to spread risk collectively;</p> <p>(d) it is primarily designed to generate investment income or gains, or protection against a particular or general event or outcome;</p> <p>(e) its investors have a right to return from the assets of the fund or income earned on those assets, based on the contribution they made;</p> <p>(f) it, or its management, is subject to the regulatory regime including appropriate anti-money laundering and investor protection regulation for investment funds in the jurisdiction in which it is established or managed; and</p> <p>(g) it is managed by investment fund management professionals on behalf of the investors;</p>

EFAMA's Concerns with Investment entities and investment funds definitions

- When delivering comments on the OECD/G20 Inclusive Framework public consultation on the Pillar One and Pillar Two blueprints, EFAMA already raised its concerns with the risk of double taxation regarding single investor funds.
- Condition (a) of the definition helpfully uses the words 'designed to' which when read with the Commentary, based on our member discussions appears broad enough to capture various scenarios. Notwithstanding, in case the above quoted commentaries of the OECD remain unclear in the implementation of the Pillar Two model rules at a national level. Care needs to be taken by Member States that should agree the requirement of Article 3 (25) paragraph (a) includes scenarios with single seed investor.

Recommendation

- Member States should add a recital to the Directive recommending the use of the Commentary on the GloBE Model Rules. **To increase tax certainty and avoid the risk of double taxation**, EFAMA calls Member States to agree the requirement of Article 3 (25) paragraph (a) includes scenarios with single seed investor and that the tests mentioned under OECD commentary (39) are applied in a consistent and harmonized manner.
- Since the definition of "investment funds" provided for in the OECD GloBE Model Rules is drawn on the AIFMD definition (see par. 36 of the OECD Commentary), an alignment of this definition to ESMA would also be welcomed – please refer to ESMA "Guidelines on key concepts of the AIFMD" (ESMA/2013/611, parr. 17-19).

#2 Excluded entities and investment entities definitions and scope – Ownership and Activities tests

OECD Model Rules	OECD <u>Commentary</u> , <u>Examples</u>	<u>Commission's proposal</u>
<p>Article 1.5.2. (a) (b)</p> <p>An Excluded Entity is also an Entity: (a) where at least 95% of the value of the Entity is owned (directly <u>or</u> through a chain of Excluded Entities) by one or more Excluded Entities referred to in Article 1.5.1 (other than a Pension Services Entity) and where that Entity:</p> <p>i. operates exclusively or almost exclusively to hold assets or invest funds for the benefit of the Excluded Entity or Entities; or</p> <p>ii. only carries out activities that are ancillary to those carried out by the Excluded Entity or Entities; or</p> <p>(b) where at least 85% of the value of the Entity is owned (directly or through a chain of Excluded Entities), by one or more Excluded Entities referred to in Article 1.5.1 (other than a Pension Services Entity) provided that substantially all of the Entity's income is Excluded Dividends or Excluded Equity Gain or Loss that is excluded from the computation of GloBE Income or Loss in accordance with Articles 3.2.1(b) or (c).</p> <p>Article 10.1.</p> <p>Investment Entity means:</p> <p>(a) an Investment Fund or a Real Estate Investment Vehicle;</p> <p>(b) an Entity that is at least 95% owned directly by an Entity described in paragraph (a) or through a chain of such Entities and that operates exclusively or almost exclusively to hold assets or invest funds for the benefit of such Investment Entities; and</p>	<p>Comments (43) to (56) p. 21 - 23</p> <p>43. Article 1.5.2 is an extension of the definition of an Excluded Entity in Article 1.5.1 that covers Entities owned by an Excluded Entity. Article 1.5.2 recognises that Excluded Entities may be required, for regulatory or commercial reasons, to hold assets or carry out specific functions through separate controlled entities. For example, commercial or regulatory requirements may prevent an Investment Fund referred in Article 1.5.1(e) from investing directly in an asset and may require the investment to be made through a separate vehicle to limit the Investment Fund's liability. The rule in Article 1.5.2 addresses these types of situations and may permit such a holding vehicle to qualify as an Excluded Entity. Article 1.5.2 is divided into two paragraphs:</p> <p>a. Paragraph (a) addresses the situation where an Excluded Entity under Article 1.5.1 sets up an Entity to hold its assets or invest its funds, or to carry out activities that are ancillary to the Excluded Entity's activities.</p> <p>b. Paragraph (b) addresses the situation where an Excluded Entity sets up an Entity whose financial accounting net income would otherwise be excluded from the GloBE computations because it is composed of Excluded Dividends or Excluded Equity Gain or Loss. (...)</p>	<p>Article 2 (3) (b) (c)</p> <p>This Directive shall not apply to the following entities ('excluded entities'): (...)</p> <p>(b) an entity that is owned at a minimum of 95 % by one or more entities referred to in point (a), directly <u>or</u> through several such entities, except pension services entities, and that:</p> <p>(i) operates exclusively, or almost exclusively, to hold assets or invest funds for the benefit of the entity or entities referred to in point (a); or</p> <p>(ii) exclusively carries out activities ancillary to those performed by the entity or entities referred to in point (a); or</p> <p>(c) an entity that is owned at a minimum of 85 % by one or more entities referred to in point (a), directly <u>or</u> through one or several such entities, provided that substantially all of its income is derived from dividends or equity gains or losses that are excluded from the computation of the qualifying income in accordance with point (b) of Article 15(2)."</p> <p>Article 3 (24)</p> <p>(24) 'investment entity' means:</p> <p>(a) an investment fund or a real estate investment vehicle;</p> <p>(b) an entity that is at least 95 % owned, directly <u>or</u> through a chain of such entities, by an entity referred to in point (a), and that operates exclusively or almost exclusively to hold assets or invest funds for their benefit; or</p>

<p>(c) <i>an Entity where at least 85% of the value of the Entity is owned by an Entity referred to in paragraph (a) provided that substantially all of the Entity's income is Excluded Dividends or Excluded Equity Gain or Loss that is excluded from the computation of GloBE Income or Loss in accordance with Articles 3.2.1 (b) or (c).</i></p>	<p>* No comments on the "investment entity" definition.</p>	<p>(c) <i>an entity that is owned at a minimum of 85 % of its value by an entity referred to in point (a) provided that substantially all of its income is derived from dividends or equity gains or losses that are excluded from the computation of the qualifying income for the purpose of this Directive;</i></p>
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EFAMA's Concerns with the scope and definition of excluded entities (ownership and activities tests)

- The OECD Model rules and Commission's proposal "**excluded entities**" and "**investment entities**" definitions are **not aligned** which raises concerns and challenges in its implementation.
- As mentioned above, the definition of "investment entity" was not covered by the OECD commentaries. Even after reading the OECD commentary (43) to article 1.5.2 (which should be seen as "*an extension of the definition of an Excluded Entity in Article 1.5.1 that covers Entities owned by an Excluded Entity*"), **EFAMA is concerned the mechanics of these 85%/95% thresholds** included under article 2 (3) (b) (c) of the Commission's proposal (article 1.5.2 of the Model Rules) **may not be applied in a consistent and harmonized manner.**
- For the purposes of the implementation of definitions included in article 2 (3) (b) (c) of the Commission's proposal (article 1.5.2. (a) (b) of the Model Rules) and in article 3 (24) (b) (c) of the Commission's proposal (article Article 10.1. of the Model Rules) - **it remains unclear if certain investment funds subsidiaries will be covered by the exclusion rules as they might not be deemed as excluded investment entities, even if these entities pass the above mentioned ownership and activities tests.**
- The Commission's proposal fixed the inconsistency by using 'or' in both definitions but Member States and all jurisdictions implementing the GloBE Model Rules may be misled by the above mentioned divergencies.

Recommendation

- **To increase tax certainty**, for the purposes of the implementation of definitions included in article 2 (3) (b) (c) and in article 3 (24) (b) (c) of the Commission's proposal (where the use of "or" and the use of "and" is not consistent with the Model Rules), an entity should not need to meet both the 95% and 85% thresholds to be considered an "Excluded Entity".

#3 Definition - Qualified Income Inclusion Rules (QIIR)

<u>OECD Model Rules</u>	OECD <u>Commentary, Examples</u>	<u>Commission's proposal</u>
<p>Article 10.1</p> <p><i>Qualified IIR means a set of rules equivalent to Article 2.1 to Article 2.3 of the GloBE Rules (including any provisions of the GloBE Rules associated with those articles) that are included in the domestic law of a jurisdiction and that are implemented and administered in a way that is consistent with the outcomes provided for under the GloBE Rules and the Commentary provided that such jurisdiction does not provide any benefits that are related to such rules</i></p>	<p>Comments (119) to (127) p. 212 - 213</p>	<p>Article 3 (15)</p> <p><i>(15) 'qualified IIR' means a set of rules that is implemented in the domestic law of a jurisdiction, provided that such jurisdiction does not provide any benefits that are related to those rules, and that:</i></p> <p><i>(a) is equivalent to the rules laid down in this Directive or, as regards third country jurisdictions, the OECD Model Rules in accordance with which the parent entity of an MNE group or large-scale domestic group computes and pays its allocable share of top-up tax in respect of the low-taxed constituent entities of the group;</i></p> <p><i>(b) is implemented and administered in a way that is consistent with the rules laid down in this Directive or, as regards third country jurisdictions, the OECD Model Rules;</i></p>

EFAMA's Concerns with the US GILTI regime not qualifying as BEPS compliant

- Stakeholders that are US inbound (e.g. with investment strategies organized in the way many EFAMA members are structured) may expect these rules to be applied to US top-down level (e.g. for being a US top-down headquartered company).
- However, our industry is concerned with the risk for end-investors of having additional tax burdens in European holding/sub-holding structures due to the uncertainties on whether the GILTI regime will be grandfathered by the Model Rules.
- The [BIAC](#) has been working closely with the OECD/Commission on these model rules to address fundamental technical issues/policy inconsistencies and other elements which could result in double taxation with unintended consequences to our industry and an adverse impact on end-investors.³
- EFAMA agrees with the point made by BIAC: *"if it were ultimately determined that the U.S. Global Intangible Low-Taxed Income (GILTI) regime was not a Qualified IIR, as defined in the Model Rules, then further work will also need to be done to reduce uncertainty and instability to the greatest extent possible."*

Recommendation

- **To increase tax certainty and avoid the risk of double taxation**, EFAMA is raising awareness on the care that needs to be taken by Member States when assessing the equivalence of the domestic law of third countries with the Income Inclusion Rules (IIR).

#4 Minimise disruptions with national fund taxation rules

OECD Model Rules	OECD Commentary , Examples	Commission's proposal
<p>Article 7.6</p> <p><i>Taxable Distribution Method Election</i></p> <p>7.6.1. At the election of the Filing Constituent Entity, a Constituent Entity-owner that is not an Investment Entity may apply the Taxable Distribution Method with respect to its Ownership Interest</p> <p><i>in a Constituent Entity that is an Investment Entity if the Constituent Entity-owner can be reasonably expected to be subject to tax on distributions from the Investment Entity at a tax rate that equals or exceeds the Minimum Rate.</i></p> <p>(...) 7.6.5. For purposes of Article 7.6,</p> <p><i>(a) the Tested Year is the third year preceding the Reporting Fiscal Year;</i></p> <p><i>(b) the Testing Period is the period beginning with the first day of the Tested Year and ending with the last day of the Reporting Fiscal Year that the Ownership Interest was held by a Group Entity;</i></p> <p><i>(c) a deemed distribution arises when a direct or indirect Ownership Interest in the Investment Entity is transferred to a non-Group Entity and is equal to the proportionate share of the Undistributed Net GloBE Income attributable to such Ownership Interest on the date of such transfer (determined without regard to the deemed distribution); and</i></p>	<p>Comments (99) to (117) p. 175 - 178</p>	<p>Article 41</p> <p><i>Article 41 Election to apply a taxable distribution method</i></p> <p>1. At the election of the filing constituent entity, a constituent entity-owner of an investment entity may apply a taxable distribution method with respect to its ownership interest in the investment entity, provided that the constituent entity-owner is not an investment entity and can be reasonably expected to be subject to tax on distributions from the investment entity at a tax rate that equals or exceeds the minimum tax rate.</p> <p>2. Under a taxable distribution method, distributions and deemed distributions of the qualifying income of an investment entity shall be included in the qualifying income of the constituent entity-owner that received the distribution.</p> <p><i>The amount of covered taxes incurred by the investment entity that is creditable against the tax liability of the constituent entity-owner arising from the distribution shall be included in the qualifying income and adjusted covered taxes of the constituent entity-owner that received the distribution</i></p> <p><i>The share of the constituent entity-owner in the undistributed net qualifying income of the investment entity arising in the third year preceding the fiscal year (the "tested year") shall be treated as</i></p>

³ Please refer to the [letter](#) from the Business at OECD (BIAC) Committee on Taxation and Fiscal Affairs regarding Pillar Two Issues.

<p><i>(d) the Local Creditable Tax Gross-up is the amount of Covered Taxes incurred by the Investment Entity that is allowed as a credit against the Constituent Entity-owner's tax liability arising in connection with a distribution from the Investment Entity.</i></p>		<p><i>qualifying income of that investment entity for the fiscal year. The amount equal to such qualifying income multiplied by the minimum tax rate shall be treated as top-up tax of a low-taxed constituent entity for the fiscal year for the purpose of Chapter II.</i></p> <p><i>(...)</i></p> <p><i>The undistributed net qualifying income of an investment entity for the tested year shall be the amount of qualifying income of that investment entity for the tested year reduced, up to zero, by:</i></p> <p><i>(a) the covered taxes of the investment entity;</i> <i>(b) distributions and deemed distributions to shareholders that are not investment entities during the period starting with the first day of the third year preceding the fiscal year and ending with the last day of the reporting fiscal year in which the ownership interest was held (the "testing period");</i></p> <p><i>(c) qualifying losses arising during the testing period; and</i></p> <p><i>(d) any residual amount of qualifying losses that has not already reduced the undistributed net qualifying income of that investment entity for a previous tested year (the "investment loss carry-forward").</i></p>
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EFAMA's Concerns with disruptions with national fund taxation rules

- Art. 41 of the Directive as well as 7.6 of OECD Model Rules are not sufficiently aligned with national taxation rules and thus may trigger unintended "double" taxation situations (e.g. in Germany certain income may be taxed at the level of the fund and consequently distributions, accumulated income as well as capital gains on disposal of the fund units related to already taxed income will be (partially) tax exempt at investor).
- We do have concerns that tax incurred by the fund cannot be used as covered taxes, because the taxes at the fund level are excluded from all ETR computations. In other words, whereas the income of the fund (provided it is distributed or deemed to be distributed) is attributed to the investor, the tax incurred by the fund is not. As a consequence, under the rules of Art. 41 a top-up tax is likely to be triggered where the investor is resident in a jurisdiction that exempts (deemed) distributions in order to achieve the tax neutrality of the fund.
- In jurisdictions where (certain) undistributed income is taxed at a later time than the defined three years period a strict application of this three years period would be contrary to national tax principles (e.g. in Germany certain undistributed income will be attributed after 15 years).

Recommendation

Rules should be designed in a way that:

- they also account for tax regimes which tax-exempt (deemed) distributions by investment funds,
- tax incurred by the fund may be included in the adjusted covered taxes amount of the investor and
- the period until the income of the fund has to be distributed is not strictly limited to three years but provides flexibility to adjust to existing national rules with regard to undistributed income.



ABOUT EFAMA

EFAMA, the voice of the European investment management industry, represents 28 member associations, 58 corporate members and 24 associate members. At end Q1 2021, total net assets of European investment funds reached EUR 19.6 trillion. These assets were managed by more than 34,600 UCITS (Undertakings for Collective Investments in Transferable Securities) and almost 29,600 AIFs (Alternative Investment Funds). At the end of 2020, assets managed by European asset managers as investment funds and discretionary mandates amounted to an estimated EUR 27 trillion.

More information is available at www.efama.org

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