association of the luxembourg fund industry

Luxembourg, 17 June 2015.

The Association of the Luxembourg Fund Industry (ALFI) has taken note of the OECD Revised Discussion Draft on Action 6: Preventing Treaty Abuse" dated 22 May 2015 (the "**Revised Discussion Draft**"). This Revised Discussion Draft was issued further to the release of the report "BEPS Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances" in September 2014 (hereafter referred to as the "**September Report**") and the "Follow-up Work on BEPS Action 6: Preventing Treaty Abuse" dated 21 November 2014 (the "**Follow-up Discussion Draft**").

ALFI is pleased to provide its comments on the Revised Discussion Draft. These comments mainly focus on the situation of collective investment vehicles ("CIV") being widely-held, diversified, and subject to investor-protection regulation in the country of establishment of the CIV, as previously defined by the 2010 OECD report on treaty eligibility for investors in CIVs (the "2010 Report").

We would like also to draw your attention to the comments that we have made to the OECD in our previous submission on 8 January 2015 which are still valid.

- Definition of CIVs and non-CIVs

CIVs are defined as "funds that are widely-held, hold a diversified portfolio of securities and are subject to investor-protection legislation in the country in which they are established." We understand that, so far, there is no consensus on the distinction between CIVs and non-CIVs. In particular, the qualification will clearly depend of certain criteria, e.g. the notion of widely distributed. The final report should clearly foresee how this criterion has to be applied, i.e. according to the law and regulatory system, according to the statutes of the CIVs or on a factual basis. For example, a fund that is owned by a single investor would be deemed to be widely distributed by some States, provided that its statutes and the law allow for the distribution to a wider number of investors. In other words, it is not the actual composition of the shareholder base that counts but the principle or the law under which the fund is established.

- CIVs: application of the LOB and treaty entitlement

Subparagraph 2 f) of the LOB rule provides for the inclusion, in the list of "qualified persons", of a provision dealing with CIVs which shall be either drafted, or omitted, based on how CIVs are treated in the Convention and are used and treated in each Contracting State. The Commentary on the LOB rule includes a number of alternative provisions that correspond to the various approaches included in the 2010 OECD Report "The Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles".

We still believe that certain CIVs should per se be considered as qualified persons for the purpose of the LOB provision, according to the position described in paragraph 13 of the Revised Discussion Draft.

In particular, we are of the view that a widely-held open ended CIV is indistinguishable in practice from a company quoted on a recognized stock exchange. Maintaining a distinction in the LOB between CIVs listed on a stock exchange (so called Exchange Traded Funds or ETFs) and other CIVs creates potential distortions which are based on an arbitrary distinction.

As a result, the final report on Action 6 should contain the relevant provisions to ensure that all CIVs set up as UCITS or non-CIVs with similar characteristics will automatically qualify as resident for the purpose of the application of Article 1 of the OECD Model Tax Convention and the LOB clause / simplified LOB clause.

- TRACE

We believe that the proposed amendment of the OECD Model Tax Convention and the LOB provision should not be implemented without the implementation of the TRACE program. The current procedures in certain States are complex, onerous and time consuming – not in line with the constraints of CIVs. We believe that the OECD should do what it can to ensure that the TRACE program is implemented in parallel, in order to avoid having individual OECD Member States defining their own distinctive rules for the practical application of the LOB clause.

- Non-CIV Funds

As stated above, we recommend that the final report on Action 6 should foresee that all widely-distributed non-CIVs whose characteristics are similar to those of UCITS will automatically qualify as resident for the purpose of Article 1 of the OECD Model Convention and that they will also be considered as qualified residents for the purpose of the LOB clause and the simplified LOB clause.

For other non CIVs, we welcome the proposal in paragraph 24 to address these vehicles specially.

- Issues related to the derivative benefits provision and new concept of "special tax regime"

Paragraph 53 of the Revised Discussion Draft suggests including a new concept into the OECD Model Tax Convention: the concept of "special tax regimes". According to the proposal, income which falls under one of these regimes would be denied the benefits provided in Article 11 (interest), Article 12 (royalties) and Article 21 (other income).

As an introductory comment, we are concerned that the introduction of this new concept at such a late stage does not allow for thoughtful review and comment. Submitting comments is all the more difficult that the new provisions have been inserted in the Revised Discussion Draft without any further proposed commentaries or guidelines explaining the contemplated definitions or scope (e.g., the concept of "preferential effective rate of taxation" is not defined, same for "administrative practice", etc.).

According to the Revised Discussion Draft, the aim of this proposal would be to address some of the objections to the addition of a derivative benefits provision in the LOB rule. The derivative benefits provision is however not included in the simplified LOB (only in the "standard" draft LOB). We recommend that a derivative benefits provision is included in the simplified LOB.

We appreciate the fact that a carve-out has been inserted for vehicles that facilitate investment in widely-held entities that hold real property (immovable property), a diversified portfolio of securities, or any combination thereof, and that are subject to investor-protection regulation in the Contracting State in which the investment entity is established. However, we consider that this additional restriction on treaty benefits constitutes an additional layer of legal uncertainty for tax payers, so we do not recommend the introduction of this new concept in the OECD Model Tax Convention. Should such clause be maintained in the final report, we would recommend to ensure that the definition of investment funds which is used is consistent with the definitions of CIVs (and non-CIVs) that will be used for the purpose of the other provisions of the Model Tax Convention and in particular for the LOB rule. We refer in this respect to our comments above. In addition, we recommend that the clause is amended in order to ensure that Member States have the possibility to clarify which type of investment fund will actually benefit from such a carve-out, by adding an exhaustive list of investment funds during their bilateral negotiations.

Finally, we do not see what would be the benefit of the introduction of such new concept as we have already the LOB provision / simplified LOB and PPT rules with, in practice, the same objective. On top of that, we consider that such provision should not be implemented in the Multilateral Instrument and therefore it should only be put in place on a bilateral basis. As a result, OECD' Member States should be aware of this specific tax regime and could act accordingly in the bilateral agreement.

- Action 15 and Multilateral Instrument

The "simplified" LOB rule should be applied by OECD' Member States that would like to combine LOB / PPT rule. The question of the incorporation of the simplified LOB provision in the articles of the OECD Model Tax Convention has been covered in section 6 and the Annex. However, our concern is the articulation of the LOB, the simplified LOB and action 15. The Multilateral Instrument should be sufficiently precise to cover all the cases that could be applied differently in practice by each individual OECD Member State.

- EU law

We are of the view that EU law matters are essential in formulating Action 6. Failure to take these into account will create uncertainty and potentially protracted litigation on EU law matters.

For example, on the simplified LOB, in subparagraph 3, it seems necessary to us to apply the same threshold (50%) as in subparagraph 2 (e) for EU residents. Equally in paragraph 40 of the Revised Discussion Draft, we believe that the threshold in subparagraph 2 a) (ii) should be the same (i.e. 50%) for EU resident beneficiaries.

- Additional recommendation

ALFI suggests to include a statement that Contracting States are encouraged to consider that UCITS and comparable non-CIVs will not be considered as creating opportunities for treaty shopping.