167 Fleet Street, London EC4A 2EA, UK
+44 (0)20 7822 8380
info@aima.org

aima.org

Ms Fabrizia Lapecorella
Chair of the Code of Conduct Group (Business Taxation)
General Secretariat of the Council
Rue de la Loi
Wetstraat 175
B-1048 Brussels
Belgium

Sent by email to:

16 May 2018

Dear Ms Lapecorella

Annex II to Council conclusions (adopted on 5 December 2017 and subsequently updated) on the EU list of non-cooperative jurisdictions for tax purposes

Inclusion in section 2.2 (Existence of tax regimes that facilitate offshore structures which attract profits without real economic activity) of jurisdictions with substantive investment funds regimes

The Alternative Investment Management Association (AIMA)[1] would like to provide technical observations to the Code of Conduct Group on issues surrounding the inclusion of jurisdictions[2] which (among other economic activities) have significant operations as fund domiciles in section 2.2 of Annex II, also known as the grey list, to the Council conclusions adopted on 5 December 2017 and most recently updated on 13 March 2018.

Several well-established fund jurisdictions have been listed under section 2.2 which identifies concerns that these jurisdictions have in existence tax regimes that facilitate offshore structures which attract profits without real economic activity. AIMA argues that it is necessary to examine the functioning of individual industry and financial sectors when evaluating this criterion. A tax regime may not be objectionable with regard to offshore structures set up on a commercial basis to provide tax neutrality for legitimate purposes

[1] AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. The ACC currently represents over 80 members that manage $500 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors). For further information, please visit AIMA's website, www.aima.org.

[2] Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Isle of Man and Jersey.

(such as collective investment schemes, securitisation and repackaging issuers and similar special purpose vehicles) whose activities are passive in nature and management of which is delegated.

AIMA would like to set out how the establishment and operation of investment funds should be analysed in that context, leading to the conclusion that in this regard such jurisdictions do not give cause for concern and that any remedial measures required to be implemented by these jurisdictions should not extend to their fund regimes.

The investment fund management industry is global in terms of the location of investors, the fund management team and the portfolio investments. The fund, as a collective investment scheme, needs to be domiciled in a jurisdiction where as few as possible additional constraints will result in comparison to the investors holding portfolio investments directly and which offers an efficient legal system with the appropriate measure of regulatory protection. In the case of institutional and other sophisticated investors, a fund established in an offshore fund jurisdiction may provide greater flexibility in terms of investment strategy than is permitted to a fund established in an onshore fund jurisdiction. The offshore fund jurisdictions have, as with onshore fund jurisdictions, developed their legal, accountancy and consultancy sectors to provide a concentration of expertise and fund servicing business.

We believe that the way in which offshore funds operate does not amount to breach of the criterion for section 2.2, that the jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction[3]. We note that a jurisdiction can only be deemed to have failed the assessment under this criterion when such offshore structures or arrangements arise from "rules or practices, including outside the taxation area, which a jurisdiction can reasonably be asked to amend, or are due to a lack of those rules and requirements needed to be compliant with this test that a jurisdiction can reasonably be asked to introduce"[4].

The fund vehicle is set up in an offshore jurisdiction (such as those listed in section 2.2) with the purpose of gathering subscriptions from investors in multiple jurisdictions which are pooled, invested and managed on their behalf, for which the investment manager receives a fee. The fund itself does not accrue any intrinsic profit (as distinct from the investment return) which should be taxed in its jurisdiction of domicile. The fund does not serve to shift profits from one jurisdiction to another nor does it enable tax avoidance, since its investors remain subject to tax in their own jurisdictions of residence[5].

The fund generates an appropriate amount of real economic activity within its country of domicile which may include fees payable to local legal and accountancy firms and other service providers, including independent directors, for providing services required by funds.

Various jurisdictions in addition to those listed in section 2.2 offer similar models where funds are registered in the jurisdiction and may be managed from a different jurisdiction. For instance, in the case of the European Union, the Alternative Investment Fund Managers Directive (2011/61/EU) expressly acknowledges that cross-border structures and operations by funds and managers may exist. The jurisdictions where funds are registered accommodate, in a cost-efficient way, investors from all over the world within the complex parameters of tax and securities laws that apply to those investors. These jurisdictions also offer tax neutrality and do not impose their own duplicative layer of taxes on the fund.

---

[3] ECOFIN Council Conclusion on 8 November 2016

[4] ECOFIN February 2017

[5] The fund management industry globally is required to comply with anti-money laundering and other such regimes and to report financial account information under FATCA and the Common Reporting Standard. It is therefore extremely low risk as a means of tax evasion and tax avoidance.

It is not necessary for a fund (or other collective investment scheme) to have substantial economic activity of its own in its jurisdiction of domicile, since fund management is the primary economic activity connected to any fund. This can be properly organised by relying on services provided by a manager based in a different jurisdiction. Such a structure does not create a tax advantage or constitute base erosion and profit shifting (BEPS). The fund manager, which may be based in the EU or elsewhere, falls to be treated as an independent agent. Consequently, the activity of fund management is appropriately taxed in the jurisdiction where the manager is resident or carrying on business.

The arguments we have made above are set out in more detail in our enclosed briefing note *Transparent, Sophisticated, Tax Neutral: The truth about offshore alternative investment funds*.

We would welcome the opportunity to meet you to discuss these issues further.

Yours sincerely,

Paul Hale
Managing Director, Global Head of Tax Affairs