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By email taxtreaties@oecd.org

22 April 2016

Dear Sirs

Re: Treaty entitlement of Non-CIV Funds

1. Introduction

I am writing to you on behalf of the British Private Equity Fund and Venture Capital Association ("the BVCA") which is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 600 firms, the BVCA represents the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers.

2. The Public Discussion Draft dated 24 March 2016

We have reviewed the Public Discussion Draft *Treaty Entitlement of Non-CIV Funds* dated 24 March 2016. This has clearly taken into account a broad range of responses and suggestions relating to the proposed changes and we are pleased to offer further comments in relation to each of the various proposals.

The key themes of the document are concerns about tax avoidance, specifically the concept of "treaty shopping", and the notion that non-CIV funds could be used as vehicles to defer tax. Whilst we support the work of the OECD to combat aggressive tax avoidance, we remain unclear as to whether there are any specific examples of abuse which have given rise to these concerns.

As we have previously noted in our response to the Public Discussion draft dated 21 November 2014, private equity and venture capital funds by their very nature are unlikely to be used as vehicles for tax avoidance for the following reasons:

- Private equity and venture capital funds are formed for genuine commercial reasons, not dissimilar to traditional CIV funds;
- Such funds will be marketed to a genuinely diverse range of institutional investors;
- Such institutional investors are likely to be tax exempt or, broadly entitled to treaty benefits under different provisions;
- Fund managers are unlikely to have the relevant information to 'treaty shop' on behalf of a subset of investors; and
- Fund managers are generally regulated by the European Alternative Investment Fund Managers Directive or US Securities Exchange Commission and generally prohibited from discriminating between investors.

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As such, we consider that the private equity fund model should present a low risk of treaty abuse.

As a general matter we would observe that most of the information requested in the discussion draft has already been provided in our responses to previous consultations. However, we have provided detailed answers to each of the questions raised in the discussion draft in the attached appendix.

We draw your attention to our recommendations as to matters to be addressed in the commentary to the PPT, an approach to formulating a derivative benefits provision to the LOB, and an alternative to the Global Streaming Fund proposal

We would welcome an opportunity to meet with you to discuss any specific concerns and/or provide further information regarding the commercial arrangements of private equity funds. We would be pleased to work with stakeholders to refine the proposals made in our submission in order to ensure that they are practical.

3. Summary of our comments

We have provided detailed answers to each of the questions raised in the discussion draft in the attached appendix and offer the following summary of our comments:

Private equity and the low risk of treaty abuse

- Private equity funds are diversely held. The majority of capital committed to private equity funds is sourced from pension funds and other institutional investors which would usually be expected to qualify for treaty benefits. Private equity funds are not vehicles for treaty abuse or tax avoidance more generally; they are vehicles formed for genuine investment and risk diversification. As such there should be a low risk of treaty abuse inherent in the private equity business model.

- Private equity funds are evaluated by investors on the basis of Internal Rate of Return on cash. Furthermore, private equity fund executives are incentivised by a carried interest model, one component of which will be the need to distribute cash, often against a running "hurdle rate". Taken together, these features make clear that private equity funds are incentivised to distribute cash as early as is practicable in the majority of circumstances. As such there should be a low risk of deferral inherent in the private equity business model.

- It is still not clear to us, therefore, why the OECD considers treaty abuse and deferral to be significant concerns, and whether these concerns arise in relation to genuine private equity or some other activity which may fall within the wider non-CIV concept. It would be helpful if specific (but anonymous) examples of concern could be given and discussed.

The PPT

- We support a PPT approach over an LOB approach but recognise that different states will have different preferences as to how to meet the minimum standard, and therefore subject to the comments below, it may be necessary to develop both approaches as to how they deal with private equity funds.

- Although we do prefer the PPT, we remain concerned that the PPT is excessively subjective and will result in fiscal authorities reaching a range of inconsistent views on similar sets of facts. The OECD have recognised that inconsistency is undesirable in itself. The PPT should be amended to be a test of the single principal purpose of a particular arrangement.

- We have proposed amendments to the commentary which seek to increase consistency and reduce subjectivity in circumstances where the PPT has been failed.

The LOB

- We consider that an exception for a non-CIV Fund will be the most effective in balancing the need to give assurance that there is not an unacceptable risk of treaty abuse, whilst giving funds assurance on their access to treaty benefits where certain criteria are met. We have previously put forward a "good fund" proposal which seeks to provide this balance.

- Requirements relating to the diversity of investors, regulatory frameworks, levels of substance and reporting requirements along with additional rules relating to targeted anti avoidance rules are all potentially sensible ways of providing safeguards against treaty abuse

- If an exception is not acceptable then we consider that derivative benefits for qualifying non-CIV funds are essential if the LOB is to be applied.

- The ultimate beneficial owner approach would represent a material change and challenge to the existing private equity fund model. Although significant quantities of information are gathered and analysed in respect of investors in order to satisfy automatic exchange of information reporting regimes such as FATCA, CDOT and imminently CRS, as well as "know your client" and similar procedures, this information does not extend to identifying the treaty characteristics of all direct and indirect investors. Therefore we do not support the UBO model as presented in the discussion draft.

- However as an alternative we consider that it would be possible to supplement existing information requirements described above in order to provide a reasonable basis by which to qualify a fund under a derivative benefits test. This would be different to TRACE, which was not designed for private equity funds and is not suitable for them.

- We consider that each investor would be required to self-certify the following information:
    - Its name and address;
    - any country in which it is resident for tax purposes;
    - any country in which it has a "permanent establishment"; and
    - whether it is subject to tax on income distributed by the fund.

- These features are those which many double tax treaties would use as a starting point for ascertaining whether a particular party should be afforded treaty benefits. Furthermore these features would be looked at on their own merits for this purpose, rather than considering the terms of any particular double taxation treaty, and could then form the basis of either a “threshold” or “proportionate” derivative benefit provision. We believe that this will provide sufficient comfort, when combined with a realistic understanding of the abuse risks inherent in private equity as described above, that no significant inappropriate treaty relief was being granted.

- We understand that other industry groups including the Private Equity Growth Capital Council in the US and Invest Europe, also support a self-certification approach. We would be pleased to be involved in the more detailed design of a suitable framework, if self-certification is agreed to be a suitable starting point.

The global streaming fund proposal

- We have considered the idea of a global streaming fund, recognising that it is a new idea and that agreeing such a model may be practically challenging. We believe that the model as presented could be simplified, but the principle at the core of the proposal – that the fund itself essentially takes responsibility for administering appropriate withholding based on investor characteristics – is something which could form the basis of a new fund model. However, this would require strong political consensus to overcome some of the very obvious challenges presented by such a framework, including that, in effect, and depending of course on how such a proposal was refined, recipient states could become responsible for oversight of the withholding regimes of source states, including collecting and paying over the appropriate amount of tax.

An alternative approach

- Given the concerns with all of the approaches put forward to date, as summarised above, we propose an alternative regime for non-CIV funds.

- Broadly this would operate based on a new self-certification regime: investors into funds would be required to self-certify their treaty status via new self-certification documentation similar to the US W8-BEN form, which funds currently use to ascertain treaty status where the fund may receive US source payments. These forms would be held by the fund manager and used as the basis for determining the appropriate withholding to be applied at a portfolio company level. These forms would be available for audit both in the state where the fund manager is resident and source states via information exchange provisions, which would allow fiscal authorities to gain comfort that the regime was operating correctly, and indeed challenge the operation of the scheme where necessary.

- This approach would result in source states collecting the “right” amount of tax based on the treaty characteristics of fund investors, without the need to rely on the recipient state fiscal authority. In other words, investors would be in the same withholding position as they would have been had they invested in an underlying investment directly.

- This proposal represents a significant change from our previous submissions, and it is important to note that the additional burden put upon fund managers and indeed investors would be material both in time and cost of administration. As such it would be important that the alternative regime was elective rather than mandatory. However, we consider that this additional burden would be preferable to the very real risk that the approaches contemplated thus far result in a decline in capital invested into funds, which would carry with it negative consequences for the growth of businesses requiring investment worldwide.

Thank you for taking our comments into account. If you have any additional questions regarding any of the points raised, please do not hesitate to contact me. I would reiterate our willingness to be involved in any further work in order to refine these ideas into a regime which is workable for the industry.

Yours faithfully,

David R Nicolson

David R Nicolson

Chairman of the BVCA Tax Committee

Appendix 1: Response to specific queries

Suggestion that certain treaty benefits be granted to regulated and/or widely held non-CIV funds

1. *What would be the threshold for determining that a fund is widely held for the purpose of such a proposal?*

It is our view that as private equity and other non-CIV vehicles typically have a diverse investor base, hold a diverse portfolio and are subject to significant regulation, they are generally not used as vehicles for tax avoidance. We would therefore recommend that there is a Genuine Diversity of Ownership Test, similar to that which already exists for other purposes in the UK. This test would consider the proposed basis for marketing the fund and whether there is a genuine intention for the fund to be widely held. If a fund is marketed with the intention of being widely held, it is a strong indicator that the purpose of the fund is not to facilitate tax avoidance.

As detailed in our response to question 12 below, such a test could be based on the Private Placement Memorandum ("PPM") issued by the fund. The PPM is a formal legal document, so the test would be relatively easy to assess. The key advantage of this approach, as identified by a number of other contributors, is that it does not rely on the technical analysis of where individual investors would be treated resident.

As identified in paragraph 8, an additional safeguard could take the form of a rule that would deny treaty benefits if, for example, 10% or more of the fund was owned by a single investor.

2. *What types of regulatory frameworks would be acceptable in order to conclude that a fund is "regulated" for the purposes of such a proposal? For instance would these include the types of regulatory requirements described in paragraph 16 of the 2010 CIV report (i.e. "regulatory requirement relating to concentration of investments, restricting a CIV's ability to acquire a controlling interest in the company, prohibiting or restricting certain types of investments and limiting the use of leverage by the CV") as well as disclosure requirements relating to distribution of interests (e.g. "know your customer" rules)?*

In the European Union, private equity funds, venture capital funds, hedge funds, real estate funds and other alternative investment funds are subject to the Alternative Investment Fund Managers Directive. This imposes the same types of regulatory requirements on non-CIV funds as is required by CIV funds, with the critical difference between the approaches to regulation being the entity that is regulated. Typically with a CIV fund the fund itself will be regulated, whereas with a non-CIV fund it will be the fund manager, rather than the fund that is regulated.

Similarly, in the US, private equity funds are subject to an extensive range of regulatory supervision, including the US Securities Act, the Foreign Corrupt Practices Act, and the US Investment Advisers Act as amended by the US Dodd-Frank Wall Street Reform and Consumer Protection Act. In addition, equivalent regulatory regimes will also apply to non-CIV funds which are established and regulated in the Channel Islands.

Not all of the regulatory requirements in paragraph 16 necessarily apply to private equity funds or other non CIV funds, for example the investment objective of a private equity fund is to take a controlling stake in a target company and therefore restrictions on the acquisition of controlling stakes and/or the use of debt would not be appropriate. However, key activities undertaken by the fund manager, including providing financial advice, the organisation and governance of the fund manager and reporting requirements are covered by these regulatory regimes. We would therefore recommend that the requirement that a qualified fund is regulated is derived from the existing regulation regimes imposed by the EU Alternative Investment Fund Managers Directive, US Securities and Exchange Commission and similar regimes where appropriate.

3. *Since the proposed exception would apply regardless of who invests in the funds, it would seem relatively easy for a fund to be used primarily to invest in a country on behalf of a large number of investors who would not otherwise be entitled to the same or better treaty benefits with respect to income derived from that country. How would this treaty-shopping concern be addressed?*

As mentioned previously, private equity and other non-CIV vehicles are commercial ventures which are typically not used for tax avoidance. As such, while it is difficult or impossible to prove a negative, comfort should be taken that the risk of abuse is low.

We suggest that a definition of a "qualifying fund" could include the following features to give comfort that such funds are not being used as vehicles for tax avoidance and/or to prevent funds from engaging in treaty shopping:

- Firstly, the diversity of investors test set out in response to question 1 would require that the fund managers market the fund as genuinely diverse fund and that no more than 10% of the fund was owned by a single non-equivalent beneficiary. This requirement would prevent, say, a single dominant investor or group of investors using the fund for the purpose of treaty abuse.
- Secondly, the regulatory frameworks set out in response to question 2 would provide comfort that only genuine investment businesses meet the definition of qualified funds. In this regard we would note that the administrative burden and financial cost of obtaining appropriate regulatory approval would act as a significant disincentive to abusing the qualification.
- Thirdly, a substance condition could be imposed requiring any holding structure to be subject to a minimum standard of investment in the local economy, measured, for example, in terms of locally incurred expenditure commensurate with investment activity. This would provide comfort that holding structures are not mere shells and that real business is being carried on. Again the costs of maintaining substance in these jurisdictions would give assurance that the fund is not engaging in treaty shopping.
- Finally, a reporting requirement could be imposed so that in order to be a qualifying fund, the fund would elect to participate in a reporting regime. This reporting regime would be designed to deliver information about investors and underlying investments. This requirement will enable authorities to scrutinise the activities of funds, and again work as a disincentive for using a non-CIV structure as a tax avoidance vehicle.

4. *Is it correct that investors in a non-CIV are typically taxable only when they receive a distribution? Would there be mandatory distribution requirement for a fund to be eligible for the proposed exception and if yes, would intermediate entities be required to distributed earnings up the chain of ownership on a mandatory basis? If not how would concerns about deferral of tax be addressed?*

To a large extent the capital invested into private equity funds is sourced ultimately from pension funds, sovereign wealth funds, and similar organisations which are broadly not taxable on investment returns due to the relevant domestic provisions in the jurisdictions in which they are formed. Conversely, investment by private individuals into private equity funds is modest. This question does need to be considered in this light as it is not clear to us why deferral is considered to be a concern.

The term "non CIV-funds" covers a broad range of investment activities. Whilst the tax rules will vary between jurisdictions and entities, typically we would expect to see a large amount of non-CIV funds set up as transparent entities meaning that taxable investors in a non-CIV fund are typically taxable on the investment returns received by the fund regardless of whether or not there is a distribution. Broadly, we would therefore not expect non-CIV funds to be taxed strictly on a distribution basis.

Whilst theoretically, underlying holding companies could be used to 'block' investment returns from flowing up to the transparent funds (and therefore the investors), in practice fund managers are keen to return funds to investors as soon as possible. The reason for this is that the prompt return of profits increases the Internal Rate of Return ("IRR") on which the performance of the fund is based. The IRR of a fund affects, amongst other things, the ability of the fund manager to raise future funds and ultimately the amounts payable to the fund manager through carried interest and co-investment arrangements.

Finally, many funds will specifically state in the fund documentation that returns on investments are to be returned to investors as soon as possible and strictly prohibit proceeds of disposal from being re-invested other than in very narrow circumstances.

On this basis, a mandatory distribution requirement seems unnecessary, given the strong commercial incentives that fund managers have to distribute cash.

5. *States that support the inclusion of LOB rules in their treaties are unlikely to agree to a broad exemption from the LOB that would apply to any widely held fund, even if it is regulated especially since that exception would seem more generous that exception already provided for publicly listed companies. What feature could be incorporated into a specific non-CIV exception to make it more acceptable to these states?*

It is not clear why such an exception could be considered to be more generous than that afforded to publicly listed entities.

The proposed exemption for non-CIV funds from the LOB is largely for the benefit of large institutional investors which would usually be considered to be "good investors" if investing directly. Taking the proposed features identified in response to question 3, as well as being regulated and having a diverse investor base, the non-CIV fund must be able to demonstrate significant substance in the relevant state along with submitting to a reporting regime.

These last two points should give the states assurances over the exception being granted to non-CIV funds on the basis that they will be undertaking genuine commercial activity due to the substance requirement and that the relevant authorities will have a significant degree of oversight due to the reporting requirements. This should give states comfort that these vehicles are not being used as a mere tax avoidance mechanism.

6. *One argument that was put forward in relation to suggestions for a specific LOB exception for non-CIV funds was that it would avoid or reduce the cascading tax when investment is made through a chain of intermediaries. In practice, what is the intermediate entity-level tax, if any that is typically payable with respect to income received from a State of source? Are there any special purpose vehicles that are commonly used by funds to invest indirectly? How are intermediary typically funded, debt or equity? If debt, is it unrelated party financing?*

Given the diversity of investment activity undertaken by private equity funds it is difficult to say what tax might typically be paid by intermediate entities.

It is commonly the case that where a private equity fund makes an equity investment a number of holding companies are used to hold the underlying investment. There are numerous reasons for this, and the balance of these reasons will determine the structure. The factors may include debt security, facilitating the management team of the underlying business to participate in equity, ensuring that cash can be extracted efficiently, etc.

The manner of the investment into any given company will depend on the characteristics of the investment opportunity and as such this may include a mixture of debt and shares. Intermediate companies may well take on third party debt as part of this capital mix.

Non-CIV Funds Set up as Transparent Entities

7. *Where an entity with a wide investor base is treated as fiscally transparent under the domestic law of a State that entered into tax treaties, the application of the relevant tax treaties raises a number of practical difficulties. Are there ways in which these difficulties could be addressed? Are there other practical problems that would prevent the application of the new transparent entity provision in order to ensure that investors who are residents of a State are entitled to the benefits of the treaties concluded by that State?*

Although this approach is supported in principle, this gives rise to two key practical difficulties. The first is that jurisdictions adopt different approaches for considering whether an entity is fiscally transparent or opaque. As private equity funds are widely held and invest in a variety of jurisdictions, this will require contracting states to recognise fund entities, whatever their legal form, to be treated as tax transparent. This is likely to cause conflict with existing local legal/fiscal practices.

The second difficulty is that this would require investors to make separate treaty claims rather than relying on a single treaty claim made by a fund. In order for investors to make this claim they would require a detailed allocation of payments amongst investors with detail of the income received, the jurisdiction this arose from and the amount of taxes withheld. This level of detailed accounting is currently not required, and a requirement to account for all withholding taxes on an investor by investor level would be a significant compliance burden.

A potential solution to mitigate the administrative burden would be to allow the fund to make the treaty claim as 'agent' for its investor. This approach would allow the fund to separate the investors into 'sleeves' of 'good investors' and 'bad investors' and ensure that claims are made on behalf of the treaty investors to ensure that they are in no worse a position.

An alternative would be for countries to provide relief at source systems, rather than refund systems. This would allow investors to obtain relief at source and reduce the compliance burden (and therefore costs) at fund level.

Suggestion that the LOB include a derivative benefit rule applicable to certain non-CIV funds

Questions related to certain aspects of the proposal

8. *The rationale that was given for the above proposal refers to the fact that "investors in Alternative Funds are primarily institutional investors, and are often entitled to benefits that are at least as good as the benefits that might be claimed by the Alternative Fund". What is the meaning of "institutional investors" in that context? In particular, does it include taxable entities or other non-CIVs? Absent a clear definition of "institutional investors", how can it be concluded that institutional investors "are often entitled to benefits that are at least as good as the benefits that might be claimed by the Alternative Fund"? Also, is it suggested that "institutional investors" are less likely to engage in treaty-shopping and, if yes, why?*

There is no set definition of institutional investors, but generally it is understood to mean large institutions that invest funds on behalf of 3rd party beneficiaries, typically meaning pension funds, sovereign wealth funds and insurance companies. It often also includes 'fund of funds', i.e. funds designed to invest into a broad range of non-CIV funds which are in turn marketed at smaller investors who would be unable to meet the individual capital requirements.

To put this in context, private equity funds managed in the UK raised around £10.8bn of capital in 2014. The biggest sources of fundraising were pension funds (£2.7bn); sovereign wealth funds (£1.0bn); funds of funds (£1.6bn) and insurance companies (£0.5bn). The vast majority of funding, around £9.5bn, came from overseas sources.

Broadly, whilst there is no set definition of an institutional investor, it can be seen that the types of investors identified (pension funds, sovereign wealth funds and insurance companies) would be entitled to benefits that are at least as good as the benefits that might be claimed by a non-CIV fund.

Institutional investors are seen as less likely to engage in treaty shopping as, broadly, the major institutional investors are based in developed countries (as opposed to jurisdictions considered to be tax havens) and therefore likely to have full access to treaties in most other developed jurisdictions. Therefore to the extent that any holding structure reduce source jurisdiction withholding tax by virtue of double taxation agreements, in the majority of cases it is likely that this simply has the effect of reducing administrative cost for both the source fiscal authority and the investor in obviating the need to reclaim withholding tax.

9. *Unlike CIVs, which are defined in paragraph 6.8 of the 2010 Report on CIVs, the term "non-CIV" has no established definition. What would be the main types of investment vehicles to which the proposal could apply?*

The concept of non-CIV funds is, to our knowledge, only relevant to the OECD's work on treaty access for funds. It is not a concept included in AIFMD or UK tax legislation, for example.

It is relevant to note that the concept of CIV funds is largely based on the TRACE project which developed proposals which were designed to apply to CIV funds but explicitly excluded private equity from its remit. CIV funds are defined in the 2010 report as funds that are widely held, hold a diverse portfolio of securities and are subject to investor-protection regulation including "fund of funds". A wide variety of alternative investment funds, such as private equity, venture capital, real estate and infrastructure funds all broadly share similar characteristics with a CIV fund but as they do not meet the CIV definition would fall under the non-CIV description.

This is because of the way such funds are structured and the way fund management activities are regulated. For example in private equity funds formed under English law it is typical for the fund manager to be the regulated entity, rather than the fund itself, which excludes these entities from the definition of a CIV as it currently stands.

A definition of non-CIV fund could be agreed if necessary, but we consider that leaving the term as a residual concept – i.e. it includes all funds which are not CIV funds – does not obviously raise any particular treaty concerns.

10. *Paragraph 17 above refers to the possible inclusion of "specific anti-abuse rules". What would these rules be?*

So long as such rules targeted clear instances of abuse, such as where arrangements are contrived or artificial with the sole purpose of obtaining benefit under the treaty where it would not have otherwise been available, then this would be an acceptable addition.

The risk is that a broadly drafted 'purpose' or 'intention' test could result in a 'hybrid' set of rules that has all the drawbacks of the LOB and PPTs, i.e. technical complexity and uncertainty/inconsistency in application, whilst retaining none of the strengths.

11. *What would constitute a "bona fide investment objective" for the purpose of paragraph 17 above?*

In determining what constitutes a bona fide investment objective, the question ultimately is whether the fund in question is constituted for tax avoidance purposes or is it constituted to pursue a commercial investment objective. Another way of approaching this question would be to consider why an institutional investor would invest via a non-CIV fund instead of investing directly. Is this for a tax avoidance reason (i.e. treaty shopping) or is this in pursuit of a bona fide investment objective?

Typically private equity and venture capital business may focus on a specific area of investment, for example consumer goods or life sciences, or concentrate on a specific region (e.g. Western Europe, USA). These areas of expertise can be relatively niche, and fund managers can gain large amounts of experience working in specific markets and tracking available assets. While large institutional investors such as pension funds may have investment committees with a broad range of investment experience they may not have the detailed knowledge of all businesses in all sectors and markets, and may also lack the experienced team necessary to execute the acquisition, management, development and sale of such assets. Private equity and venture capital funds therefore offer institutional investors the opportunity to gain exposure to a specific segment of the market, where internal investment expertise in the areas might be limited. Typically institutional investors will invest across a range of funds to ensure a diversified portfolio. "Fund of funds", broadly replicate this approach, investing in a variety of funds and offering investments to both institutional investors and private investors alike.

Typically we would therefore expect the 'bona fide investment objective' to include the following:

- Investing in unlisted companies in specific sectors (for example life sciences, technology start up, retail, energy, although the remit may be broader)
- Investing in unlisted companies in specific regions (Western Europe, although the remit may well be global)
- Investing in 'special opportunities', i.e. distressed companies
- Investing in distressed debt with a view to taking a controlling stake in a company
- Investing in small companies who have passed 'start up' and have entered the 'growth' phase of the business cycle (i.e. venture capital).

12. How would it be determined that a fund is "marketed to a diverse investor base" for the purpose of paragraph 17 above?

As part of setting up a fund, a Fund Manager will produce, amongst other documents, a private placement memorandum (also often referred to as an offering document) setting out the nature of the fund, its targeted investors and the underlying risks. This document will set out the profile of the targeted investors along with details of the likely structure and a summary of tax impacts in the regions where investments are proposed. The document will give significant information about the investment strategy and the type of investments the fund is likely to undertake.

Similarly, marketing documentation accompanying the PPM or used as part of the investment raising process (e.g. slides used in presentation) can provide additional assurance that the fund was in fact marketed at a diverse investor base.

Questions related to the identification of the investors in a non-CIV

13. *Is the ownership of interests in non-CIV funds fairly stable or does it change frequently like the interests in a typical collective investment fund that is widely distributed?*

Broadly, interests in non-CIV funds are fairly stable. As mentioned previously private equity and venture capital funds are generally aimed at institutional investors with the capacity to seek longer term returns. Investment returns are typically generated by investing in unlisted companies and growing the underlying business before selling the assets or listing them. As such the typical life span of a private equity or venture capital fund is between 5 and 10 years. Investments in other classes of alternative investment, such as infrastructure funds can have significantly longer life spans.

In addition, typical structures involve the use of limited partnerships, which unlike shares in an investment company or units in a unit trust are not easily transferable. Therefore there is not generally considered to be a freely traded market in partnership interests. Although there are secondary markets, these are usually aimed at facilitating exits due to, say, an inability of an investor to meet a capital call, rather than trading partnership interests as a business activity in itself.

Due to the nature of the institutional investors, the medium to long term nature of these investors and the lack of an active market for trading interests, the ownership of non CIV funds is typically quite stable, albeit there will be fluctuations in activity in line with economic and other conditions.

14. *How would the proposal address the concern, expressed by some commentators, that many non-CIV funds would be unable to determine who their ultimate beneficial owners are and, therefore, would not know the treaty residence and tax status of these beneficial owners?*

Broadly, the issue is likely to relate to a minority, rather than a majority or indeed all of a funds investors. Where a fund is unable to determine the ultimate beneficial owner and/or treaty residence of a particular investor then the proposal would, presumably, require an assumption to be made that they are not entitled to treaty benefits. Thus, so long as the minimum percentage of investors could be identified as satisfying the requirements, the derivative benefit rule should still apply.

15. *What information do those concerned with the management and administration of non-CIV funds currently have concerning persons who ultimately own interests in the fund (for example under anti-money laundering, FATCA or common reporting standard rules)?*

Fund managers will be under an obligation to collect information to comply with anti money laundering/KYC procedures as well as to comply with international exchange of information regimes such as FATCA and the Common Reporting Standard.

Typically as part of the on boarding process of new investors, the fund manager will undertake standard KYC procedures to identify their clients and to complete anti-money laundering procedures. Although the exact documents a fund will collect will vary depending on the state the fund is based in and the how the manager is regulated, this process will broadly involve the following:

- Identifying and verifying the customers identity on the basis of documents, data or information obtained from a reliable and independent source;
- Identifying where applicable any beneficial owners and verifying their identities using a risk based approach; and
- Obtaining information on the likely source of the funds/origins of the fund.

These processes will usually be outsourced to a professional administrator. It is worth noting that reference to 'beneficial owners' above also requires identifying the fund manager when the investor is a fund of funds, given its ability to control the fund. In this context, reliance can generally be based on representations from the fund manager and there will not be individual identity checks on each of the funds' investors.

The FATCA regulations require all groups to self-assess and classify each of the entities in their structures, identifying any non-US financial institutions. Where entities are identified as financial institutions, they are required to undertake due diligence on all 'account holders' and make reports of any and all US specified persons along with certain details including account opening and closing balances and distributions made during the year. Most jurisdictions have entered into agreements where this information is reported to the local jurisdictions' tax authorities and this information is exchanged by the local tax authority with the IRS. Other jurisdictions have opted to report directly to the IRS.

There is no set approach to gathering the information for the due diligence process. Many funds outsource this process to the administrators which will typically send out a standard questionnaire which cover off the various FATCA classifications. Other funds may use the US W8 forms for the purpose of determining this information whilst others have adopted questionnaires devised by professional advisors or organisations such as the BVCA.

The UK and the Channel Islands and Crown Dependencies have entered into similar arrangements ("CDOT") with the first year of reporting in 2016. The first year or reporting under the Common Reporting Standard ("CRS") is 2017. These automatic exchange of information regimes broadly use the same framework as FATCA in terms of analysing the underlying institutions, classifying them, performing due diligence on account holders and reporting specified account holders to the relevant tax authorities.

FATCA, CDOT and CRS, along with traditional KYC means that non-CIV funds already undertake a large amount of analysis of their investors. Whilst the exact nature of information held will vary between jurisdictions, typically we would therefore expect a fund to hold the following information in respect of each investor as a result of KYC procedures:

- Details of the legal identity of an investor;
- Address and contact details;
- Where an entity is controlled by a beneficial owner, details of that beneficial owner; and
- Details relating to the source of invested funds.

In addition we would expect a fund to hold the following information in respect of each investor as a result of compliance with automatic exchange of information regimes:

- The FATCA, CDOT and CRS classification of each investor;
- Whether any of the entities are reportable persons for each regime, or whether they are passive non-financial entities controlled by reportable persons;
- The opening and closing account balances of each investor along with amounts distributed during the year; and
- Where there are US withholding tax considerations or where W8-forms have been used to identify FATCA information, specific information about treaty residence of investors.

As such it can be seen that funds already hold a broad range of information about their investors in line with the various tax and regulatory regimes that they are subject to.

16. Is this information currently sufficient for relevant parties to identify the treaty benefits that an owner would have been entitled to if it had received the income directly? If not, what types of documents and procedures could be used by a non-CIV to demonstrate to tax authorities and/or payors that the residence and treaty entitlement of its ultimate beneficial owners are such that the non-CIV qualifies for treaty benefits under that suggested derivative benefits rule? What barriers would exist to the communication of these documents or the implementation of these procedures? In particular, does intermediate ownership present obstacles to obtaining information about ultimate beneficial ownership and, if yes, how might these obstacles be addressed?

As set out in response to question 15, non-CIV funds undertake large compliance exercises in relation to the various exchange of information reporting regimes in force. This information is broadly derived from existing KYC procedures but has in recent years been supplemented by specific FATCA (and now CRS) focussed information requests. Non-CIV funds typically have a broad range of information relating to an investors' reporting status for FATCA, CDOT or indeed CRS.

However, this is not necessarily the same information that is required to complete an analysis on whether an investor would be eligible for treaty benefits. The issue here is that the FATCA/CRS system is based on an analysis of entities, with only financial institutions being required to report and only certain types of account holders being reportable. Where a non-CIV fund undertakes due diligence on its investors, it is only required to report on reportable individuals (e.g. US citizens for FATCA). Financial institutions (including most institutional investors such as pension funds, insurance funds and funds) effectively only need to demonstrate that they are themselves registered for FATCA, usually by providing their Global Identification Number ("GIN"). As such whilst the FATCA due diligence has resulted in detailed records for certain type of investors, it has not involved a detailed analysis of the beneficial owners of other financial institutions. Whilst this is an effective process for guarding against tax avoidance/evasion it is not designed to gather the information required to make informed decisions about treaty residence.

A solution to this issue would be to agree a form of certification for an investor's tax treaty status which could be made available to the fiscal authority of the fund manager and thereafter to source state fiscal authorities under exchange of information provisions.

Questions relating to the prevention of treaty-shopping

> *17. Since beneficial interests in non-CIV funds are frequently held through a chain of intermediaries, including multiple subsidiary entities (which is not the case of typical CIVs), how would the proposal overcome the difficulties derived from such complex investment structures with multiple layers and ensure that a fund is not used to provide treaty benefits to investors that are not themselves entitled to treaty benefits?*

Please see our response to questions 3 and 16.

> *18. The proposal would grant treaty benefits if a certain high percentage of a non-CIV is beneficially owned by investors entitled to similar or better benefits. Even a percentage as high as 80% would leave substantial room for treaty-shopping as a 20% participation in a very large fund could represent a significant investment. How could this concern be addressed?*

As mentioned previously, we consider that the combination of the presence of institutional investors and strict requirements to be defined as a qualifying non-CIV fund mean that it is unlikely that private equity or venture capital funds will be used as a vehicle for treaty shopping and/or tax avoidance.

The scenario outlined above considers the possibility of a qualifying fund with as high a figure as 20% of the investors being ineligible for treaty benefit using a private equity fund as a treaty shopping vehicle. This sounds implausible for three reasons:

Firstly, the diverse nature of the investor base makes it improbable that a fund manager currently possesses sufficient information with which to ascertain the consequences of a course of action on all of the investors.

Secondly, were the fund manager able to identify a state that would provide a benefit to some small subset of investors without disadvantaging the remainder of the investors, the substance requirements to be a qualifying fund would make it expensive (and therefore uncommercial) to do so.

Finally, assuming that the combination of a reporting requirement and a targeted anti-abuse rule as discussed above are implemented, this would give local authorities the tools to identify treaty abuse and to prevent it occurring.

We would advocate a threshold of some level is included to give some flexibility where the treaty status of some beneficial owners is not able to be readily determined.

> *19. One of the proposed requirements for the application of the suggested derivative benefits rule would be a 50% base erosion test. Since one of the main concerns expressed by governments relates to the possible use of non-CIV funds for treaty-shopping purposes, wouldn't the 50% threshold proposed for the base erosion test be too generous?*

The base erosion test essentially requires that in order to qualify for treaty relief, less than 50% of an entity's income is distributed to entities that would not be entitled to treaty relief in the originating state, subject to various exceptions for arms' length payments for services.

This is one of a series of measures designed to prevent the risk of treaty shopping. Private equity and venture capital funds are commercial investment businesses with a relatively low risk of treaty abuse due to their diverse investor base. The combination of set criteria relating to the definition of a qualifying fund to ensure it has a diverse investor base, is regulated, has sufficient substance and is part of a reporting regime, along with rules relating to a derivative benefit requirement and the proposed 50% base erosion test ensure that there is a series of stringent tests designed to prevent base erosion.

Questions related to the prevention of deferral

20. *According to the proposal, acceptable ultimate beneficial owners would include persons who would "include their proportionate share of the fund's income on a current basis". How would a State of source be able to determine when this requirement is met? Also, what would be considered an acceptable anti-deferral regime? In particular, would a regime under which a taxpayer is taxed on a deemed amount of income or deemed return on investment be considered as an anti-deferral regime even if the amount that is taxed is significantly lower than the actual return? Would the United States PFIC regime be an example of an acceptable anti-deferral regime?*

Broadly, private equity and venture capital funds are typically established as tax transparent vehicles to ensure that the ultimate beneficial owners are taxed on their share of the underlying returns as if they had invested directly, rather than on a set distribution (i.e. dividend) from the fund vehicle. Therefore the issue of tax deferral is unlikely to be an issue that affects a large section of the proposed funds.

It is also worth considering that from a commercial perspective the performance of a fund is usually judged on the internal rate of return of the fund. This will have a significant influence in how successful a fund manager is in raising capital for future funds as well as determining the amounts payable to fund managers under co-investment or carried interest regimes. Unpaid cash balances will adversely affect the internal rate of return so there is significant incentive for fund managers to distribute returns as and when they are made.

In terms of transparency on this matter, cash balances and details of returns will generally be included in the fund's statutory accounts. In any event these distributions will be reportable under FATCA and the Common Reporting Standard, so contracting states will have access to this information. Similarly as part of the proposed definition of a qualifying fund, it is suggested that a reporting regime be included so that contracting states can identify investors and investments.

Anti-deferral regimes vary from country to country with the US PFIC regime and the UK offshore funds rules being examples of the different approaches that have been adopted. Broadly, the US PFIC regime would not be a suitable anti-deferral regime due to its reliance on the 'check-the-box' regime which is not common to most tax regimes. Without the ability to elect for opaque entities to be treated as transparent, the US PFIC regime would likely cause significant difficulty if implemented outside the US.

Given that it is likely many private equity funds and venture capital funds are likely to be transparent for tax purposes, that there is a significant incentive for fund managers to distribute cash and that, in any event, most developed countries already employ some form of anti-deferral rules, it is suggested that a separate anti-deferral regime is not required.

21. As regards the application of the proposal in the case of indirect ownership, who will be tested in relation to the condition that an ultimate owner is either tax exempt or taxed on a current basis?

Although it is possible to offer broad comments about how the investors in a fund will be taxed on allocations/distribution from a fund, without detailed consideration of their legal status, country of origin and any other arrangements that they may be party to, it would be extremely challenging for a fund manager to identify the tax arrangements of each of their investors.

The comparison here would be a publicly listed company identifying the tax status of each of its shareholders based on the records it currently keeps. Although this is possible for a large listed organisation this would be a huge exercise for smaller fund managers and likely require significant input from third party overseas tax specialists.

It is therefore suggested that, as above, given that many funds will be tax transparent and that there is a significant incentive for fund managers to distribute cash as it is received, that the issue of tax deferral is unlikely to be a significant issue.

Questions related to the new derivative benefits provision of the United States Model

22. The proposal above was presented as a possible additional derivative benefits rule that would apply specifically to non-CIV funds but that would not replace the more general derivative benefits provision that appeared in the detailed version of the LOB rule included in the Report on Action 6. The Working Party is now looking at possible changes to that derivative benefits provision in the light of the new derivative benefits provision included in the United States Model Treaty released on 12 February 2016 (see https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-US%20Model-206.pdf, paragraph 4 of Article 22 "Limitation on Benefits"). Based on previous comments, it is acknowledged that many non-CIV funds could not satisfy the "seven or fewer" condition of that derivative benefits provision. What other aspects of the new derivative benefits provision included in the United States Model Treaty would be problematic for non-CIV funds?

The new derivative benefits provision would likely be significantly problematic for many non-CIV funds. This is primarily because non-CIV funds are unlikely to be formed as companies, and therefore would not be entitled to benefit under this article as it is currently worded. This provision would have to be significantly reworded to accommodate non-corporate vehicles. For example, many private equity funds are structured as limited partnerships with third party investors investing as limited partners and the fund manager acting as a general partner. The references to voting rights and share classes clearly would not work in this context.

As identified, non-CIV funds are generally widely held and therefore it is highly unlikely that 95% of the vote or value would be concentrated in the hand of 7 or fewer individuals. As a general comment, it appears that this exception is aimed at smaller closely held companies, rather than investment vehicles generally and we do not consider that it would be a reasonable template to use for designing a regime for non-CIV investment funds.

Suggestion that a "substantial connection" approach be adopted

23. *Are there practicable ways to design a "substantial connection" approach that would not raise the treaty-shopping and tax deferral concerns described in paragraph 21 above?*

The concern of the working party appears to be that by managing a fund in a specific jurisdiction that a fund would be able to engage in treaty shopping by basing funds in regions that offer treaty benefits to their prospective investors. So long as such substance requirements are weighted towards looking at board level decision makers (in line with the value chain analysis approach adopted by Action Point 10) then in reality this is unlikely to be an issue for non-CIV funds.

Firstly the state of residence of the fund will have to be decided prior to on boarding any investors as the fund manager will need to be regulated in the relevant state and this will need to be disclosed in the PPM as previously described. At this stage whilst a fund manager may have a list of target investors, it is unlikely to know who will ultimately invest in their fund. Indeed, considering the costs of legal fees and regulation alone, it is unlikely that there would be sufficient incentive for a fund manager to set up the fund in a specific state with a view to using this as a selling point to a potential investor.

Secondly, whilst in theory a fund manager could set up a fund in one state, then move to another for a second fund in an attempt to treaty shop, this is unlikely to work in practice. The key personnel will need to be disclosed to potential investors on the PPM and these individuals will often meet with investors as part of the investment raising process, so these individuals are key in determining how successful this process is. Recruitment and retention are already key business issues in the private equity and venture capital industry. Considering the average length of a fund is up to 10 years, while it may be possible to relocate a fund and the majority of its staff between metropolitan hubs such as London to New York, in practice it is highly unlikely that a fund manager will be able to transfer/recruit senior executives into tax havens or other overseas jurisdictions as part of an attempt to facilitate treaty shopping.

Provided that substance requirements are based on the BEPS Action Point 10 principle of value chain analysis, in practice we do not think that treaty shopping by way of moving the business operations of the fund is a significant risk.

Suggestion of a "Global Streamed Fund" Regime

24. *Although the above proposal for a "Global Streamed Fund" regime is very recent and has not yet been examined by Working Party 1, the Working Party wishes to invite commentators to offer their views on its different features. In particular, the Working Party invites comments on:*
- *Whether the approach would create difficulties for non-CIV funds that do not currently distribute all their income on a current basis?*
- *Whether the approach would create difficulties for non-CIV funds that cannot, for various reasons, determine who their investors are?*

- *Whether the suggestion that tax on distributions be collected by the State of residence and remitted to the State of source would create legal and practical difficulties?*
- *What should be the consequences if, after a payment is made to a GSF, it is subsequently discovered that the fund did not meet the requirements for qualifying as a GSF or did not distribute 100% of its income on a current basis?*

We have considered the proposal and agree that it does have merit. Our initial thoughts are as follows:

- Broadly, so long as there are sensible requirements relating to the time of distributions (e.g. quarterly) and that cash can be retained to be held against specific liabilities (e.g. tax) we do not envisage that a distribution requirement should cause any significant issues. A relaxation to say 85% rather than 100% may mitigate the risk that a fund inadvertently falls out of the regime.
- This could potentially cause issues for non-CIV funds that cannot for various reasons determine the ultimate beneficiaries of their investors. The new GSF framework, alongside the new FATCA and Common Reporting Standard rules could provide a greater incentive for investors who invest to intermediaries to disclose their ultimate investment status.
- The suggestion that tax on distribution be collected by the state of residence and remitted to the state of source is likely to require a new legal framework and new processes. It is unclear how much appetite there is for this level of cooperation. However, given the momentum towards greater intergovernmental action this is something that could be addressed.
- The consequences of failing to meet the GSF conditions would need to be carefully considered, as if they were too punitive then it may make the proposition less compelling. Reducing the distribution threshold to 85% and testing the GSF criteria over time (rather than period by period) would do something to mitigate the uncertainty.

We consider these proposals to be an interesting development and something that we would be pleased to discuss in greater detail in due course.

Additional examples for the commentary on the PPT rule

25. *Commentators wishing to suggest new examples related to the application of the PPT rule to common types of legitimate arrangements that are commonly entered into by non-CIV funds that are invited to do so. These example should be brief and should focus on common transactions that do not raise concerns related to treaty shopping or inappropriate granting of treaty benefits.*

We offer the following example for inclusion in the commentary, and emphasise that we would be pleased to work with you in refining any proposals for the commentary in order to ensure that they represent a realistic view of the industry.

Private Equity

A non-CIV fund, structured as a fiscally transparent partnership, is established to invest in a portfolio of existing and unrelated trading businesses. The fund manager is regulated and the fund is marketed to a range of potential investors including pension schemes, sovereign wealth funds, other institutional investors and high net worth individuals, on the basis of a prospectus that describes the investment mandate of the fund. A range of investors resident in different jurisdictions commit funds to the partnership.

Investments in target businesses are made through one or more holding companies established in State R. In deciding on the location of the holding company, the fund manager considers a range of factors, with particular emphasis on:

- Clarity that the applicable corporate law permits timely and efficient cash extraction (for example in respect of a disposal of part of an investment). Given that the main purpose of a private equity fund is to make and realise investments, this is of paramount importance.
- Stability of the political, regulatory and legal system, bearing in mind that investments may be held for a number of years.
- Clarity that the applicable corporate law facilitates co-investment arrangements without excessive complexity.
- Mitigation of foreign exchange fluctuation exposure, or of currency control risks.
- Certainty around the taxation position of the company on disposal of the investment, again bearing in mind that investments may be held for a number of years.
- Clarity of the ownership chain, say in circumstances where fund partnerships are not clearly characterised by a source state fiscal authority.
- Availability of suitable premises, staff, and administrative support at a reasonable cost.
- Flexibility that these benefits will be available across a range of investments.

In making the decision to locate the holding companies in State R, the fund manager did consider the existence of benefits under the tax conventions between State R and the states in which the target investments are resident, but this alone would not be sufficient to trigger the application of paragraph 7. The intent of tax treaties is to provide benefits to encourage cross-border investment and, therefore, to determine whether or not paragraph 7 applies to an investment, it is necessary to consider the context in which the investment was made. In this example, the companies formed in State R are established for a range of commercial purposes including those set out above, and accordingly should receive treaty benefits; it would not be reasonable to deny the benefit of the tax treaties between State R and the states in which the target investments are resident.

Consequences of failing the PPT

As well as including suitable examples in the commentary we are concerned that the text of the October draft does not make clear the consequences of failing the PPT. There are two main reasons for this:

- firstly, the text only affords the "possibility" of granting alternative relief. This leads to a likelihood of subjectivity and inconsistency, which is undesirable; and
- secondly, if the arrangement in question is the insertion of a holding company then the text as written presents a logical problem. This is because paragraph 16 operates by providing

the person originally seeking treaty relief with the possibility of seeking alternative relief which may have been available in the absence of the arrangement which gave rise to the PPT failure. If the person and the arrangement are one and the same, then arguably no alternative relief can be available.

It is essential that should the PPT be failed then the arrangement in question is, in effect, disregarded in establishing what other treaty benefits might alternatively be afforded. This is crucial to our industry, where investors will not accept being in a worse position than they would have been had they made a particular investment directly. We recommend the following amendments to the October report:

16. ~~Also, some States consider that w~~Where a person is denied a treaty benefit in accordance with paragraph 7, the competent authority of the Contracting State that would otherwise have granted this benefit should ~~have the possibility of~~ treat~~ing~~ that person as being entitled to this benefit, or to different benefits with respect to the relevant item of income or capital, if and to the extent that such benefits would have been granted to that person, or to the persons who own, directly or indirectly, the beneficial interests in such person, in the absence of the transaction or arrangement that triggered the application of paragraph 7. In order to ~~allow that possibility~~achieve this, such States ~~are free~~should ~~to~~ include the following additional paragraph in their bilateral treaties:

> *8. Where a benefit under this Convention is denied to a person under paragraph 7, the competent authority of the Contracting State that would otherwise have granted this benefit shall nevertheless treat that person as being entitled to this benefit, or to different benefits with respect to a specific item of income or capital, if ~~such competent authority, upon request from that person and after consideration of~~having regard to the relevant facts and circumstances, ~~determines that~~ such benefits would have been granted to that person, or to persons who own, directly or indirectly, the beneficial interests in such person, in the absence of the transaction or arrangement referred to in paragraph 7. Such person may be required to provide information about itself or the persons who own the beneficial interests in such person to such~~The~~ competent authority ~~of the Contracting State to which the request has been made will consult with the competent authority of the other State before rejecting a request made under this paragraph by a resident of that other State~~to support its entitlement to benefits under this paragraph 8.*

~~17. For the purpose of this alternative provision, the determination that benefits would have been granted in the absence of the transaction or arrangement referred to in paragraph 7 and the determination of the benefits that should be granted are left to the discretion of the competent authority to which the request is made. The alternative provision grants broad discretion to the competent authority for the purposes of these determinations. The provision does require, however, that the competent authority must consider the relevant facts and circumstances before reaching a decision and must consult the competent authority of the other Contracting State before rejecting a request to grant benefits if that request was made by a resident of that other State. The first requirement~~

~~seeks to ensure that the competent authority will consider each request on its own merits whilst the requirement that the competent authority of the other Contracting State be consulted if the request is made by a resident of that other State should ensure that Contracting States treat similar cases in a consistent manner and can justify their decision on the basis of the facts and circumstances of the particular case. This consultation process does not, however, require that the competent authority to which the request was presented obtain the agreement of the competent authority that is consulted.~~

1~~8~~7. The following example illustrates the application of this alternative provision. Assume that an individual who is a resident of State R and who owns shares in a company resident of State S assigns the right to receive dividends declared by that company to another company resident of State R which owns more than 10 per cent of the capital of the paying company for the principal purpose of obtaining the reduced rate of source taxation provided for in subparagraph a) of paragraph 2 of Article 10. In such a case, if it is determined that the benefit of that subparagraph should be denied pursuant to paragraph 7, the alternative provision would ~~allow~~ require the competent authority of State S to grant the benefit of the reduced rate provided for in subparagraph b) of paragraph 2 of Article 10 if that competent authority determined that such benefit would have been granted in the absence of the assignment to another company of the right to receive dividends.

Concerns related to the "special tax regimes" proposal

26. *Commentators who shared the concern described above in relation to the proposal for "special tax regime" rules are invited to indicate whether they have similar or different concerns with respect to the new version of the proposal that was included in the new United States Model Tax Treaty released in February 2016 (see question 22 above). If yes, what is the type of "statute, regulation or administrative practice" related to non-CIV funds that could constitute a special tax regime and that would give rise to these concerns?*

We do not have any comments regarding the special regimes proposal.

Other Suggestions

27. *Please describe briefly any approach not already mentioned in this consultation document or in previous comments that could address concerns related to the way in which the new treaty provisions included in the Report on Action 6 may affect the treaty entitlement of non-CIV funds without creating opportunities for treaty-shopping or tax deferral.*

Many of the concerns identified in the consultation document relate to the concept of treaty shopping. Our view is that due to the diverse investor base, the typical tax profile of institutional investors and the separation of ownership and manager, that private equity funds are not vehicles for tax avoidance.

Although we agree with the principal objectives of combatting treaty abuse, we are concerned that as drafted neither the LOB nor the PPT would give sufficient assurance to the 'good investors' in private equity funds that their rights to treaty benefit would not be adversely effected.

As such the concern is that the majority of good investors would be put in a position where they would be worse off investing through a private equity fund, than if they invest directly. Various proposals have been discussed concerning how non-CIV funds could be carved out of the current provisions. One of the key areas of concern for states is that although the majority of investors are 'good investors' they do not necessarily have the documentary evidence necessary to identify the treaty residence for investors that hold their interest through intermediaries, such as fund of funds.

In order to balance the legitimate aim of combatting treaty abuse with the need to minimise administration we propose the following process:

- A simple form for certifying an investor's tax status (similar to the US W8-BEN) is agreed amongst the contracting states.
- The forms are collected by the fund manager and made available to the fund managers' resident tax authority for audit purposes.
- These forms are available for exchange of information between the fund managers' resident tax authority and any subsidiary or intermediary.
- The fund manager advises the portfolio company about the correct amount of tax to withhold locally based upon the tax treaty status of its investors.

This approach would give assurance to all the relevant authorities that the correct amount of tax was being withheld.