EFAMA response to the Commission Consultation Document On CMU action on cross-border distribution of funds (UCITS, AIF, ELTIF, EUVECA and EUSEF)

A. Executive Summary

EFAMA welcomes the consultation that the European Commission launched on the cross-border distribution of different types of investment funds (AIFs, UCITS, EuVECA/EuSEF, and ELTIF) and the opportunity to respond as to the remaining barriers to marketing funds across the EU single market, as well as the ways to eliminate them. We, also, fully share the goal of the European Commission in seeking further ways to deepen the Single Market for investment funds. This is essential for widening the opportunities for European citizens to save and invest and facilitates better outcomes both for savers and the wider European economy.

As recently stated in our response to the Commission's Green Paper on Retail Financial Services[1], investment funds are probably one of the best examples to date of a generally well-functioning EU single market in the area of financial services. Based on the latest data of the EFAMA's Fact Book 2016[2], the share of "true" cross-border funds in Europe, i.e. funds sold by fund promoters outside their home market, either elsewhere in Europe or in other parts of the world, was 30% of total European investment fund assets, which is a considerable increase from 18% recorded at end 2005. This trend shows the important rise in the share of cross-border funds over the last decade and the significant potential this has for the EU single market.

This being said, there is certainly significant room for improvement and further integration of the EU Single Market for investment funds. Measures to facilitate the cross-border distribution of funds in the European Union can play an important role in that respect and lead to further economies of scale, to the benefit of the end investors and of the competitiveness of our industry.

Enabling a wider distribution of funds outside their domicile member state means a larger and more diversified choice of investment opportunities for both retail and professional investors, as well as more efficient allocation of resources across the EU. It also means further competition at the EU level and at the level of domestic markets that can increase the overall quality of the products offered, allow for further innovation and reduce the costs and fees. Thus, identifying the reasons that hinder cross-border market for investment funds and the areas where further improvement is necessary, does not

[1] See EFAMA's response to the EC Green Paper on Retail Financial Services (Introduction) http://www.efama.org/Publications/Public/16-4010_EFAMAresponseGPRetailFinancial%20Services.pdf

[2] For further data as to the EU investment funds, see our responses in Section 1.

rue Montoyer 47, B-1000 Bruxelles

☎ +32 2 513 39 69 • Fax +32 2 513 26 43 • e-mail : info@efama.org • www.efama.org • VAT Nr BE 0446.651.445

just respond to the needs of particular market players, but also helps deepening the single market and strengthening the European economy.

EFAMA members are faced with a wide range of barriers when deciding to distribute their funds outside their domicile jurisdiction, i.e. from regulatory to other operational barriers, which vary across different EU jurisdictions and can have different impact and significance. Before assessing each one of those barriers and the priority in which they have to be tackled, it needs to be clear that in the majority of the cases the decision to proceed or not with the cross-border marketing of a fund depends on how a number of those barriers interact and the end result they bring to the asset manager. Therefore, to further enhance and strengthen cross-border marketing of funds, a thorough analysis not only of how different barriers act in isolation, but also of their interaction should be undertaken, complemented by parallel actions in a number of key areas.

With this in mind, in this response to the European Commission's consultation, EFAMA seeks to identify and prioritise the key barriers for the asset management industry and to provide concrete suggestions on how to eliminate them or minimize their impact on the cross-border distribution of funds.

A. **A key element for the efficient distribution of funds across the single market is the legal certainty as to related requirements.** Legal certainty usually comes from a consolidated rule book across the single market, common interpretations of key regulatory provisions and consistency as to how these provisions are implemented in all EU jurisdictions. In spite of the EU legal framework that has been in place for some time now in Europe (UCITS and AIFM Directives), this type of legal certainty is still lacking in a number of the steps related to the funds distribution, e.g. absence of a common definition of marketing and pre-marketing activities, multiple standards and rules related to the notification process, lack of common definition of certain investor categories, different processes related to the fees.

B. A related issue, is **the abuse of the flexibility provided by EU regulatory framework by introducing at the national level additional requirements that do not appear to address specific investors' needs, but, instead, amount to the creation of additional barriers for non-domestic firms.** For instance, many member states require asset managers to appoint a local agent prior to undertaking distribution in their jurisdiction; however, it is often the case that another agent or the manager located outside their jurisdiction could take on this responsibility in an equally efficient way. Other examples of gold-plating include, for instance, rules related to offering documentation, marketing activities and discretion as to the implementation of specific rules etc.

C. Another key element is the **transparency and clear understanding of all rules with which market players have to comply.** Once more, this is not the case in a number of areas in cross-border distribution. Absence of clear and accessible information or problematic access to it regarding notification rules and rules triggering fees, standard interpretations related to marketing etc. generate significant additional efforts executed in-house or outsourced to a third party, therefore, rendering the cross-border distribution more expensive and time-consuming for UCITS managements companies and AIFMs.

D. In terms of **tax treatment**, the issues the investment management industry faces **include (i) the discriminatory withholding tax (WHT) treatment between residents and non-residents, which persists in a number of member states, (ii) differences between member states in terms of tax reporting scope and format and, foremost, (iii) inconsistent double tax treaty (DTT) access for investment funds** (including cumbersome processes when double tax treaty access is granted). On point (i), although significant progress has been made through the European Court of Justice (ECJ) case law, the EU should continue to discourage the imposition of discriminatory WHT on non-domestic investment funds by member states. On point (ii), streamlining the reporting formats in those countries which require tax reporting into a pan-European tax-reporting format for EU funds could be considered and could substantially reduce certain costs (e.g. operational overheads, legal and tax audit and advisory costs). Finally, on point (iii), we recommend that the Commission encourages member states to treat all widely-held CIUs as residents of their State of domicile where established for tax treaty purposes. It is important that this status is guaranteed, independent of the country of residence of the fund's investors or whether their shares are listed / regularly traded on a stock exchange.

E. Last, but not least, a significant part of the cross-border distribution activities of EU asset managers are located outside the internal market. It is, therefore, **crucial that the EU regulatory framework remains cost-effective and proportionate in order to ensure their competitiveness when engaging with non-EU counterparties.** It is also of utmost importance that any action to **bring-down barriers to cross-border distribution should also include tackling the barriers posed by non-EU countries related to the distribution of EU funds outside EU.**

In tackling those barriers, EFAMA strongly supports **further consolidation and clarification of rules and processes on cross-border distribution as the optimal way to enable full use of the EU single market for investment funds.** At the same time, avoiding any unnecessary regulatory burden and maintaining legal certainty and stability for market participants should remain the key principle driving any decision for further regulatory action at the EU level. For that reason, any proposal for legislative changes at level 1, in particular to the AIFM and the UCITS directives, should be a last-resort means for the Commission, to the extent that no alternative non-legislative solutions would have been effective. Instead, whenever appropriate, **practical solutions that don't impose additional requirements should be preferred, such as Guidelines or Q&As**, **which can be developed and implemented within a much shorter period of time and therefore, bring about required improvements in a more timely way**.

B. RESPONSES TO THE QUESTIONS OF THE CONSULTATION DOCUMENT

Section 1 – Information about you

The EFAMA response to Section 1 of the consultation is based on the data of the 14th edition of EFAMA's Fact Book 2016[3]. The Fact Book is an annual review on the state of the European investment fund industry, which puts together a vast amount of accurate and reliable information about the industry and in that way helps policymakers in their efforts to improve the regulatory environment for investment funds.

Question 1.1 – What types of funds do you market and to which types of investors do you market directly? [for each type of fund and investor]

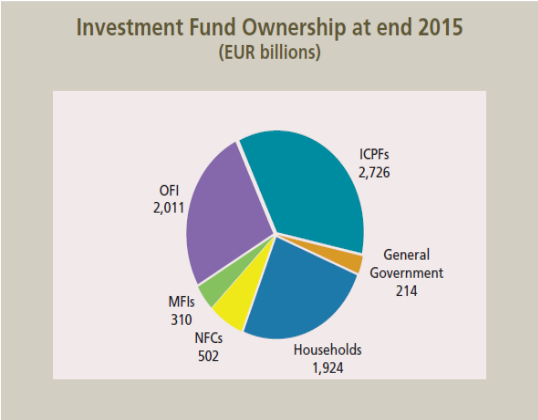
EFAMA is the representative association for the European investment management industry. EFAMA represents through its 28 member associations and 62 corporate members EUR 21 trillion in assets under management of which EUR 12.6 trillion managed by 56,000 investment funds at end 2015.

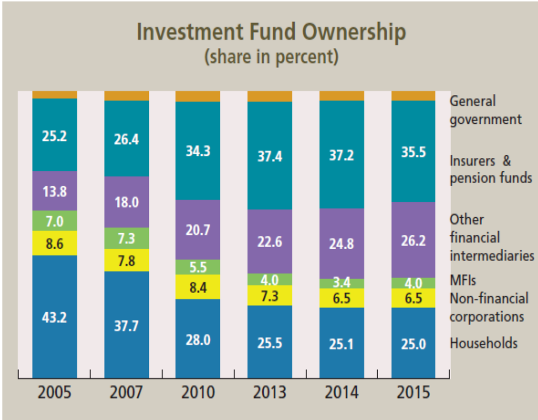
EFAMA members market all type of funds to all different categories of investors. At end 2015, UCITS accounted for 62% of investment fund assets with the remaining 38% composed of AIFs. This represents a total of EUR 8,205 billion of net UCITS assets and of EUR 5,124 billion of AIFs assets at end 2015. (See also our response to question 1.3 on the total net assets in Europe and the additional break down into the main categories (equity, bond, multi-asset, money market, real estate, institutional and other UCITS/AIFs funds.)

Although there is no detailed data available as to the different categories of investors, according to EFAMA's estimation, 47% of AIF and 18% of total funds are reserved for institutional investors, whereas all other funds can be purchased by both retail and institutional investors. In the euro area the three major categories of investors – Insurance Corporations and Investment Funds (ICPFs), Other Financial Intermediaries (OFIs) and households– were holding investment funds worth EUR 6,661 billion at end 2015.

ICPFs remained the major holders of investment funds in 2015, with a share of 35.5% compared to 25.2% in 2005. OFIs became the second largest holders of investment funds in 2015 with a share of 26.2% and households became the third with a share of 25%.[4]

[3] www.efama.org
[4] Data from the EFAMA's Fact Book 2016, Part 1.3 "Ownership of investment funds in the euro area".





Question 1.1a – If you have a general policy of differentiating between high net worth individuals and other retail investors then please also provide information on this.

EFAMA is aware of certain national regulatory provisions foreseeing a separate category within the general category of the retail investors as defined in MiFID II (for instance "semi-professional investors in Germany, "well-informed investors" in Luxembourg) and further on a differentiated treatment. This differentiated treatment consists regularly in allowing this type of investors to invest in products reserved for institutional investors. High net worth individuals together with other type of investors such as pension providers, foundations and municipalities are usually amongst the investors included in this category. Still, to EFAMA's understanding, this is not the case in all EU jurisdictions, which means that a differentiated treatment and further opening of certain markets to high net worth individuals or other type of retail investors is not always an option.

Moreover, in the EuVECA and EuSEF Regulations[5], there is a distinction and separate definition of those investors that commit to invest a minimum of EUR 100 000. The rationale of this provision is to allow the access of those investors into the EuVECA/EuSEF market as long as they consent in written that they are aware of the risks associated with investing in those funds.

EFAMA has been favorable of including similar type of differentiated treatment into the text of the European Long Term Investment Funds (ELTIFs) Regulation in order to give the possibility to those investors possessing significant larger resources and more enhanced expertise and understanding of the complexity and risks of an investment (compared to the retail investors) to have access into ELTIFs that will be open only to professional investors. Investors that can be included in this separate category could be high net worth individuals, mid-tier pension schemes, insurance companies, municipalities, churches, charities and foundations that may have sufficient capital and certain expertise, to invest in

[5] See Regulation 346/2013 of the European Parliament and the Council, Article 6 para (1) on European social entrepreneurship funds and Regulation 345/2013 of the European Parliament and the Council, Article 6 para (1) on European venture capital funds, deeming as semi-professional investors any "other investors that: (a) commit to invest a minimum of EUR 100 000; and (b) state in writing, in a separate document from the contract that is concluded for the commitment to invest, that they are aware of the risks associated with the envisaged commitment.

ELTIFs. This was at the time included in the position of the European Parliament, which, however, was not adopted in the final text of the Regulation.
EFAMA considers that defining a separate investor's category within the general retail investors' category of MiFID II can enhance the market possibilities of certain investment funds, such as ELTIFs and other types of AIFs and allow for a more efficient involvement of this particular group of investors.

Question 1.1b – Which channels do you use to distribute funds cross-border? Does your cross-border distribution policy differ depending on the type of investor you wish to address and the Member State?

Question 1.1c – Please expand upon your reply.

EFAMA members use a number of different distribution channels in the case of cross border distribution. Their choice depends on a number of factors such as the specific distribution landscape, the profile of the targeted investors, the investment strategy and the structure and profile of each asset management company. Furthermore, in many markets the fund distribution is dominated by banks. Asset managers that are members of a banking or an insurance group often use the local distribution networks of their banking/insurance group, although not necessarily in an exclusive way, while in other cases third party distribution channels are used.

Question 1.2 – Please provide your definition of high net worth retail individuals. Does this definition vary from one national market to another one?

See our response to question 1.1a.

Question 1.3 – What is the sum of Assets under Management (€) of these funds? [for each type of fund and investor]

Please see below an abstract of the EFAMA's Fact book 2016 on the sum of assets managed by different type of funds[6]. As mentioned in our previous response to question 1.1, EFAMA does not have aggregate data for assets under management for each type of investor (for further details see also our response to that point).

[6] EFAMA Fact book 2016, Part 1.4 Investment funds across Europe, page 346.

TABLE 1: TOTAL NET ASSETS (EUR MILLION) FOR EUROPE [2]	2014	2015
EQUITY FUNDS	2,712,407	3,096,488
BOND FUNDS	2,031,500	2,155,526
MULTI-ASSET FUNDS	1,124,557	1,414,371
MONEY MARKET FUNDS	949,484	1,109,836
OTHER UCITS FUNDS	369,971	429,587
TOTAL UCITS	**7,187,918**	**8,205,808**
EQUITY FUNDS	361,494	612,681
BOND FUNDS	728,194	968,706
MULTI-ASSET FUNDS	1,191,912	1,300,939
MONEY MARKET FUNDS	92,166	88,607
REAL ESTATE FUNDS	390,744	518,514
OTHER AIF FUNDS	1,361,692	1,634,255
TOTAL AIF	**4,126,202**	**5,124,178**
Of which: institutional funds	1,868,277	2,408,681
TOTAL UCITS & AIF [2]	**12,030,203**	**13,329,986**

[1] UCITS and AIF are classified according to the regulatory definition.

[2] For 2014, total funds does not equal the sum of UCITS and AIF due to the fact that the Netherlands was unable to provide a breakdown into UCITS and AIF.

Question 1.4 – Where are your funds mainly domiciled (In % of the number of your UCITS and AIFs)? [for each Member State where your funds are domiciled]

Please see below the data on investment fund domiciliation based on the data of the EFAMA's Fact book 2016[7].

[7] EFAMA Fact book 2016, Part 1.4 Investment funds across Europe, page 36

Net Assets of Nationally Domiciled Investment Funds[1] (EUR billions)									
Members	Total Assets 2015	Market Share	Total Assets 2005	Market Share	Members	Total Assets 2015	Market Share	Total Assets 2005	Market Share
Europe	13,330.0	100%	6,518.9	100%	Norway	94.2	0.71%	34.0	1%
Luxembourg	3,506.2	26.3%	1,525.2	23.4%	Poland	59.1	0.44%	15.9	0.2%
Ireland	1,898.8	14.2%	584.5	9.0%	Liechtenstein	42.3	0.32%	13.2	0.2%
Germany	1,729.2	13.0%	967.2	14.8%	Turkey	28.1	0.21%	20.2	0.3%
France	1,682.8	12.6%	1,276.4	19.6%	Portugal	23.1	0.17%	36.5	0.6%
United Kingdom	1,484.5	11.1%	644.5	9.9%	Hungary	18.1	0.14%	7.4	0.1%
Netherlands	734.7	5.5%	n.a.	n.a.	Malta	10.1	0.08%	n.a.	n.a.
Switzerland	501.5	3.8%	120.7	1.9%	Romania	9.0	0.07%	0.1	0.001%
Italy	291.1	2.2%	422.4	6.5%	Czech Republic	7.8	0.06%	4.7	0.1%
Sweden	285.6	2.1%	113.2	1.7%	Greece	7.0	0.05%	28.3	0.4%
Denmark	258.5	1.9%	106.4	1.6%	Slovakia	5.7	0.04%	3.3	0.1%
Spain	254.4	1.9%	275.1	4.2%	Slovenia	2.3	0.02%	2.2	0.03%
Austria	168.2	1.3%	156.7	2.4%	Croatia	2.3	0.02%	n.a.	n.a.
Belgium	127.3	1.0%	116.2	1.8%	Bulgaria	0.4	0.003%	n.a.	n.a.
Finland	97.4	0.7%	44.7	0.7%					

[1] UCITS and AIF combined for 2015. UCITS and Non-UCITS combined for 2005.

<u>Question 1.5 – Do you use the UCITS passport in order to market your UCITS funds in other EU Member States?</u>

Yes, EFAMA members generally use the UCITS passport.

<u>Question 1.5a – If you do not use the UCITS passport, please explain why this is.</u>

<u>Question 1.6 – Do you use the AIFMD passport in order to market your EU AIFs in other EU Member States?</u>

Yes, EFAMA members generally use the AIFMD passport.

<u>Question 1.6a – If you do not use the AIFMD passport, please explain why this is.</u>

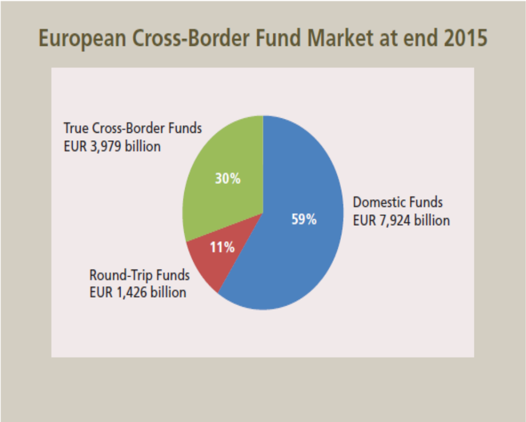
In the case of retail AIFs marketed under specific national framework, cross-border distribution is considered burdensome, as those funds do not benefit from the EU passport and there is no general alignment on how to treat notification for distribution of retail AIFs in another member state.

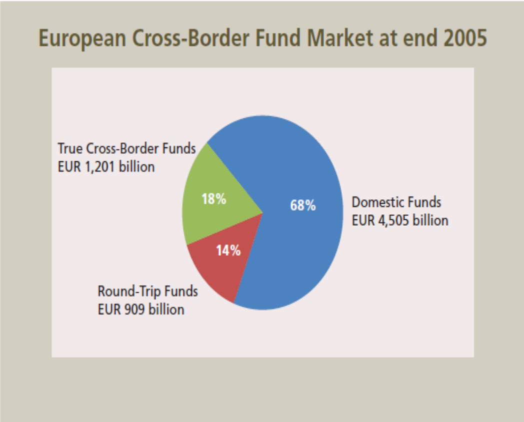
Question 1.7 – Do you use a marketing passport for all your UCITS, AIF, ELTIF, EuVECA and EuSEF?
Question 1.7a – What percentage of your funds have you received permission to be marketed in (a) at least one other Member State and (b) at least two other Member States with the passport? What value of Assets under Management do these represent?

EFAMA does not have such detailed analysis and data presenting the breakdown of funds having received marketing passport for one or several member states and the value of assets under management they represent. Such data may be available for the AIFs via the information received by the NCAs based on the AIFMD reporting requirements.

Question 1.8 – In how many Member States, if any, do you market your funds (including sub-funds) on a cross border basis? (Please provide an aggregate figures or an estimate)

Based on the latest data of the EFAMA's Fact Book 2016, at end 2015 the share of "true" cross-border funds in Europe, i.e. funds sold by fund promoters outside their home market, either elsewhere in Europe or in other parts of the world, was 30% of total European investment fund assets, which is a considerable increase from 18% recorded at end 2005[8]. Moreover, the cross-border fund business in Europe seems to be mainly centered in Luxembourg and Dublin. The experience and services offered in the area of cross-border fund administration and distribution seem to be the key factors explaining the choice of these two countries for the domiciliation of global fund houses.





Moreover, EFAMA's Fact Book 2016 presents more detailed data on the fund demand by country, taking also into consideration the "round-trip" funds, i.e. funds domiciled abroad and promoted by national providers in their own country, the foreign-domiciled funds promoted by foreign providers in each country and the home-domiciled funds sold abroad by national promoters[9].

[8] EFAMA Factbook 2016, Part 1.4.6 Cross-border fund business, page 48.
[9] EFAMA Factbook 2016, Part 1.4.5 Fund Demand by country, page 46.

Recent Trends in Investor Demand for Investment Funds					
Members	**Assets end 2015 (EUR billions)**	**Asset Growth Rate in 2015**	**Members**	**Assets end 2015 (EUR billions)**	**Asset Growth Rate in 2015**
Belgium			**Slovakia**		
Home-Domiciled Funds	119	10.7%	Home-Domiciled Funds	6	6.2%
Round-Trip Funds [1]	64	12.5%	Round-Trip Funds [1]	1	38.7%
Total	182	11.5%	Total	7	10.8%
Czech Republic			**Spain**		
Home-Domiciled Funds	8	27.3%	Home-Domiciled Funds	254	11.0%
Round-Trip Funds [2]	7	15.2%	Foreign Domiciled Funds [4]	122	31.2%
Total	15	21.4%	Total	376	16.8%
France			**Sweden**		
Home-Domiciled Funds	1,683	5.2%	Home-Domiciled Funds	286	12.0%
Round-Trip Funds [1]	272	18.8%	Round-Trip Funds [1]	61	3.4%
Total	1,955	6.9%	Total	346	10.4%
Germany			**Switzerland**		
Home-Domiciled Funds	1,729	9.3%	Home-Domiciled Funds	502	19.3%
Round-Trip Funds [1]	384	14.8%	Round-Trip Funds [1]	206	7.4%
Total	2,114	10.3%	Total	708	15.6%
Greece			**Turkey**		
Home-Domiciled Funds	7	-5.2%	Home-Domiciled Funds	28	1.5%
Round-Trip Funds [1]	3	122.0%	Round-Trip Funds [1]	0	-96.9%
Total	10	13.3%	Total	28	0.9%
Italy			**United Kingdom**		
Home-Domiciled Funds	291	11.1%	Home-Domiciled Funds	1,187	11.1%
Foreign Domiciled Funds [3]	569	28.0%	Round-Trip Funds [1 5]	120	21.0%
Total	861	21.7%	Total	1,307	11.9%
Norway			**Total**		
Home-Domiciled Funds	94	1.9%	Home-Domiciled Funds	6,194	9.4%
Round-Trip Funds [1]	15	0.0%	Round-Trip Funds [1]	1,823	19.1%
Total	109	1.6%	Total	8,018	11.5%

[1] In the sense of funds domiciled abroad and promoted by national providers. In general, many of thes funds are sold in the home country of the provider.
[2] This figure represents total foreign funds in the Czech Republic regardless of whether the manager is foreign or Czech-domiciled.
[3] These funds include round-trip funds as defined above and foreign-domiciled funds promoted by foreign providers in Italy (in 2015: EUR 289.7 billion and EUR 279.7 billion, respectively).
[4] These funds include round-trip funds as defined above and foreign-domiciled funds promoted by foreign providers in Spain (in 2015: EUR 4 billion and EUR 118 billion, respectively).
[5] Data for the UK excludes funds-of-funds.

<u>Question 1.9 – In which Member States do you actively market your UCITS and AIFs?</u>

<u>Question 1.9a – Please provide the UCITS allocation between Member States [number of UCITS funds / sub-funds & AuM]. If this is not straightforward to obtain, please provide an estimate.</u>

The table below from EFAMA's database (yearly data) shows the UCITS allocations between member states at end 2015.

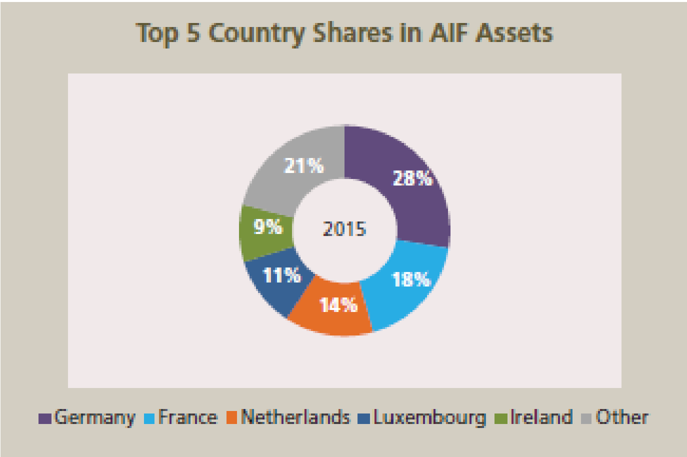
	Topic: Net assets (M)				
	Currency: EUR Millions				
		UCITS Total UCITS	% of total UCITS assets		
2015	Austria	79,205.6	1.0%		
	Belgium	77,558.9	0.9%		
	Bulgaria	406.8	0.005%		
	Croatia	1,814.3	0.02%		
	Czech Republic	7,496.6	0.1%		
	Denmark	107,871.3	1.3%		
	Finland	78,619.0	1.0%		
	France	762,929.0	9.3%		
	Germany	309,851.8	3.8%		
	Greece	4,422.0	0.1%		
	Hungary	471.5	0.01%		
	Ireland	1,446,873.0	17.6%		
	Italy	226,127.3	2.8%		
	Liechtenstein	25,752.5	0.3%		
	Luxembourg	2,946,860.0	35.9%		
	Malta	2,737.4	0.03%		
	Netherlands	34,186.0	0.4%		
	Norway	94,173.5	1.1%		
	Poland	21,777.2	0.3%		
	Portugal	7,577.4	0.1%		
	Romania	4,636.2	0.1%		
	Slovakia	3,973.8	0.05%		
	Slovenia	2,308.6	0.03%		
	Spain	185,420.0	2.3%		
	Sweden	262,445.3	3.2%		
	Switzerland	410,199.5	5.0%		
	Turkey	11,836.6	0.1%		
	United Kingdom	1,088,276.9	13.3%		
	TOTAL	8,205,807.9	100.0%		

Note: Figures provided in the above table for non-EU countries are those related to UCITS equivalent funds, i.e. funds that are subject in their own jurisdictions to rules that are deemed broadly equivalent to the UCITS Framework.

Question 1.9aa – Please provide any further details (e.g. assumptions your estimate is based upon)

Question 1.9b-e – [Please provide the details requested in 1.9a & 1.9aa for AIFs, EuVECAs, EuSEFs and ELTIFs]

The AIF market in Europe is concentrated in a relatively small number of countries. Germany is by far the dominant player in the market with a 28% market share at end 2015, in particular due to a specific type of fund for institutional investors called Spezialfonds. France, the Netherlands, Luxembourg and Ireland held market shares of 18%, 14%, 11% and 9% respectively[10].



A further analysis based on the annual data received by EFAMA members shows the following AIFs allocation between member states.

[10] See EFAMA Fact Book 2016, part 1.4.4, Country shares in assets and net sales of AIFs, page 43.

Topic: Net assets (M)				
Currency: EUR millions				
	2015	% of total AIF assets		
Austria	89,033.0	1.7%		
Belgium	49,747.6	1.0%		
Bulgaria	2.6	0.0001%		
Croatia	475.2	0.01%		
Czech Republic	321.4	0.01%		
Denmark	150,668.6	2.9%		
Finland	18,797.0	0.4%		
France	919,879.0	18.0%		
Germany	1,419,382.7	27.7%		
Greece	2,624.6	0.1%		
Hungary	17,633.7	0.3%		
Ireland	451,951.0	8.8%		
Italy	64,985.0	1.3%		
Liechtenstein	16,578.3	0.3%		
Luxembourg	559,341.0	10.9%		
Malta	7,411.7	0.1%		
Netherlands	700,500.0	13.7%		
Norway				
Poland	37,362.9	0.7%		
Portugal	15,571.8	0.3%		
Romania	4,357.5	0.1%		
Slovakia	1,723.5	0.0%		
Slovenia				
Spain	68,948.0	1.3%		
Sweden	23,115.8	0.5%		
Switzerland	91,328.4	1.8%		
Turkey	16,223.7	0.3%		
United Kingdom	396,214.3	7.7%		
TOTAL	5,124,178.2	100.0%		

Section 2 - General Overview

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members) and where appropriate, distributors who market or advise funds to investors

Other respondents are welcome to respond to some or all of the questions below.

Question 2.1 – What are the reasons for any limitation on the cross-border distribution of your funds? [for each host Member State - Regulatory costs and/or marketing requirements costs are too high, Lack of demand outside your home market, Host Market size is too small, Openness of the distribution network to third parties, Tax issues, Other]

Question 2.1a – Please expand upon and provide more detail on your response – please explain, what the issues are and how they limit the cross-border distribution of funds. Please cite the relevant provisions of the legislation concerned if possible.

As the potential for cross-border distribution is based upon a number of factors, the interaction of which is significant, there is no single factor or barrier that by itself can be considered as the main limitation to cross-border distribution. That means that for further enhancing and strengthening cross-border marketing of funds, a thorough analysis not only on how different barriers act per se, but also together, should be made and parallel actions on a number of key areas are to be taken.

Having that in mind, EFAMA would like to present a number of key factors that asset managers have to deal with when it comes to marketing their funds outside their domicile, which are not to be taken as single cases, but to be considered in an integrated way as parts of the same chain in the cross border distribution.

1. Lack of transparency and appropriate level of information

A key barrier for the majority of asset managers when trying to assess and decide the distribution to a certain jurisdiction is the lack of information as to the national standards on marketing, notification, national requirements that lead to fees, as well as the interpretation by the NCAs on specific provisions of the EU legislation. This lack of or limited transparency as to the national regulatory framework plays an important role in the decision making in favour or against marketing in a given jurisdiction. It should also be noted that prior to marketing any units of collective investment schemes, asset managers need to ensure compliance of the national regime with the EU regulation on investor protection, which requires a thorough assessment and understanding by them of the local market and its regulatory framework and whether it can guarantee this compliance.

Moreover, even if this information is to be acquired via further research by the asset manager (in-house) or outsourced to a third-party service provider (usually located in the jurisdiction that the products are to be marketed), the additional time, costs and administrative burden related to that research can become an important factor as well. In particular, for asset managers of smaller and medium size, the need for a local advisor to gather complex and important information as to the legal interpretation, the local tax regime, the civil liability risks etc. leads to substantial costs that are disproportionate with the revenues that the opening into a new market will bring.

2. Absence of common definitions on key provisions and legal uncertainty/inconsistencies

When marketing across the EU jurisdictions, legal certainty as to how the provisions of the EU regulation are to apply and therefore, as to the criteria that allow compliance with them is of the highest importance for the asset management companies. It seems, however, that several definitions and provisions on key areas such as marketing, notification, and processes related to the distribution vary – and sometimes there are significant differences – amongst the member states.

- Need for common definition on marketing: In the case of marketing a common approach as to the definition of what constitutes marketing (positive and negative common criteria), as well as the premarketing process and which rules apply is a significant factor. In addition, the rules on the content and the standard presentation seem to also differ significantly.
- Further consolidation of the rules related to the distribution of funds: The absence of common understanding on processes related to the triggering of the fees and the competent NCA, the notification process and the information requested in case of updates and modifications etc. means that the same fund is requested to comply with multiple processes and to prepare multiple documentation for the same units, which is a repetitive exercise often with no added value for the end investor.
- Several legal inconsistencies and differentiations as to the definition of different investor categories is also a source of a barrier for distributing cross-border, in particular as each one of them is attached to different regulatory requirements.

Apart from those examples there are additional areas where further consolidation of the rules applying to funds distributed cross-border needs to be in place. This is to be achieved via mapping all the national best practices and allowing for a common set of rules via Guidelines, Q&As etc. ESMA has a key role to play in ensuring more consistency as to the implementation of the UCITS and AIFM directives requirements and in enhancing common rules as to the definitions and interpretations of concrete provisions of the EU regulation, without imposing more requirements and rules.

3. Additional administrative requirements in the host member state

Along with the lack of transparency and information as to the national standards, mentioned before, the requirement to have a local agent in different forms and for different reasons – requirement for a local distributor or a transfer agent etc. – is also a significant barrier. This makes the previous factor, i.e. lack of information and transparency as to the national standards, even more relevant as lack of transparency can lead de facto to the need for a national agent or local service provider, even if this is not a regulatory requirement.

4. Tax barriers

Concerning taxation constraints, one of the most important issues is the challenges experienced by investment funds attempting to access double tax treaties – if possible at all – and thus, to benefit from the appropriate WHT treatment (either ex ante through relief at source, or ex post through WHT reclaim processes). This may lead to a disadvantage for investors compared to their direct investments. As a result, end investors often are effectively forced to forego the tax relief due to them, which has adverse effects.

In addition, the process for claiming WHT relief has deteriorated over time in many countries, resulting in increased costs and protracted delays for cross-border portfolio investors to collect the tax relief owed to them. The time and costs of WHT recovery still act as deterrent for investment funds to invest in other than their residency states.

In this respect, we recognize that this area already has been intensively discussed for many years, unfortunately, with only minor or no improvements so far. The Commission already consulted in 2011 on taxation problems that arise when dividends are distributed cross border to portfolios and individual investors and asked for possible solutions. The OECD and EU also reviewed the situation for Collective Investment Vehicles publishing its recommendations in 2010 11 (the work of the Commission's Tax Barriers Business Advisory Group complements this). We welcome the fact that the Commission as well as the OECD have widely acknowledged in their work on cross border tax relief procedures that, in practice, claiming WHT relief under Double Taxation Agreements and/or a country's domestic tax laws is often cumbersome and time- and resource-intensive for governments, financial institutions, and foreign portfolio investors.

Another tax issue is the lack of harmonisation of national tax reportings to be provided to local investors. Compliance requires the establishment of large scale processes, which then must be adapted to local requirements. Therefore, if a fund manager is uncertain of developing a large scale base in a member state, it may abandon the objective of marketing in this member state due to the costs of a specific reporting for the investors of this member state.

Differences in tax treatment at investor level for foreign funds compared to domestic funds may also be a barrier for cross-border distribution. Often, differences in tax treatment, including administrative burdens, deter the investors from buying foreign funds due to e.g. special tax return requirements for foreign funds and differences in the taxation for foreign and domestic funds. Such differences in taxation will often be discriminatory and accordingly an infringement of the right to "free movement of capital" under EU law. The differences in tax treatment often imply that the fund providers must launch several copies of the same products in each of the jurisdictions in order to become tax efficient for investors in the different markets. This prevents the fund providers from economics of scale to the benefit of their investors. In the next step this leads to competition barriers because some institutional investors do not invest in funds whose AUM are below certain levels.

[11] See the OECD Report "The granting of treaty benefits with respect to the income of collective investment vehicles" dated 23 April 2010, available at http://www.oecd.org/tax/treaties/45359261.pdf.

Against the background of the existing broad consensus about these problems, EFAMA welcomes the Commission's intended aim to address them.

5. Market structure and distribution networks in the host member state

The size of the host market seems to play an important role for the decision of an asset manager to distribute his funds. Moreover, the distribution networks of the host member state and its open and fair access is also of key importance. Direct distribution is proving difficult for a number of reasons. When it comes to electronic distribution, these reasons vary from different marketing rules to language barriers, and impede the potential of a single digital platform that works across the EU.

6. Regulatory fees

Although the level of regulatory fees alone doesn't seem to be a decisive barrier, the lack of transparency and clear understanding as to their structure (for instance, which provisions trigger which fees), the timing that they are due and the complications as to the NCA that is in charge, may also cause concerns that can further contribute to a negative analysis as to the decision to distribute to one or several member states.

An extensive response is provided for each of those barriers in the relevant sections of this consultation paper.

<u>Other types of barriers</u>

Apart from those barriers, stated in the Commission's question and the following sections, EFAMA would like to highlight a number of other barriers and concerns that do not necessarily fall into one of the abovementioned categories, but which can still impose concrete and important impediments to the cross-border distribution of funds.

Gold-plating and risks of abusing the flexibility provided by the EU Directives to the detriment of the investors' rights and of the single market

UCITS and AIFM Directives, which are the two key legislative frameworks for investment funds in Europe, allow for legislative discretion to the national regulators on a number of key areas that are also mentioned above and will be also analysed in the separate sections of this consultation: marketing, regulatory fees, notification processes etc.

In spite of the welcome flexibility this regulatory framework allows in terms of different local distribution networks and market structures, it entails at the same time risks of abusing of this discretion at national level by introducing additional regulatory requirements and provisions that do not necessarily meet concrete needs of the investors and may result in impeding and discouraging the access of non-domestic players in the local market. In that sense, further national requirements consist in gold-plating, which poses an important danger for the single market.

Some examples that highlight this danger consist in additional requirements related to, for instance, the offering documentation, the processes for the pre-approval of marketing material, the payments to unit-holders, the repurchase or redemption of units and dissemination of information or the definition of an activity as marketing, as well as the discretion to not implement certain regulatory provisions, such as the ones related to the National Private Placement Regime (NPPR)**.**

The single market should ensure that investors are equally protected regardless of their domicile and are offered equal opportunities for access to investment products. In that respect, one of the main priorities when trying to enhance cross border marketing and distribution of funds is to allow for a comprehensive assessment of those national regulatory requirements that go above what is foreseen in the EU regulation and provide no added value from the investor's perspective. A key component for such exercise to be undertaken at the ESMA level is the trust and closer collaboration amongst NCAs.

Barriers to cross-distribution of funds outside the EU

An important part of cross-border activities of EU asset managers do not take place within the internal market, but with non-EU counterparties. It is, therefore, of utmost importance that the efforts to bring down barriers to cross-border distribution focus also on efficiently tackling barriers posed by non-EU countries (as well as the ones posed against non-EU countries). This should be done either via actions and regulatory frameworks directly linked to investment funds, for instance, each time the EC issues a delegated act on the extension of the AIFMD passport, or via more general regulatory frameworks and action plans, such as the TTIP and TiSA agreements. In both cases, the main aim should be negotiating reciprocal market access.

In particular in relation to the Commission's delegated acts on the extension of the AIFMD passport, the reciprocal opening of the markets of the jurisdictions that would be provided with the passport should not be only a consequence – to be further assessed – but also a prerequisite based on which the extension would be decided. At the same time, the EU regulatory framework needs to stay competitive in terms of constraints and of regulatory costs in order to ensure cost-effective and proportionate legislative provisions, thus, safeguarding the competitiveness of the EU-based players and products. This applies in particular when EU-based players and products want to develop their activities outside of the EU and are facing competition from non-EU based players and products.

Timely implementation of the EU Directives in all member states

EFAMA would also like to stress that requiring and enforcing the timely transposition of the relevant EU regulation by member states holds a significant role. The fact that there are MSs that still haven't fully transposed the AIFMD several years after its entry into force, is an example of how the cross-border marketing of AIFs is being held back within the single market, as the applicable rules remain unclear even after such a long period of time.

Consistency with the goals of the CMU Action Plan

When it comes to cross-border distribution, we wish to stress that one of the first priorities should be to ensure consistency between regulatory requirements in different texts of the EU legislation, but also between these regulatory requirements and the objectives announced in the Action Plan on Building a Capital Markets Union. Concretely, avoiding any unnecessary regulatory burden and maintaining legal certainty and stability for market participants should remain a key principle driving any decision for further regulatory action at the EU level. In that context, EFAMA would like to stress that any proposal for legislative changes at level 1, in particular related with the text of the UCITS and the AIFM Directives, should be a means of last resort for the Commission to the extent that no alternative non-legislative solutions would have been effective.

Reviewing the level 1 text of the core regulatory framework for investment funds in Europe, not only is a lengthy and burdensome process, but can also pose risks for the regulatory stability for asset managers and for investors inside and outside Europe. Instead, any practical solutions should be preferred with the aim of clarifying and understanding regulatory requirements, such as Guidelines or Q&As published by ESMA – in particular Guidelines as they trigger a public consultation - that could provide with the right responses.

Language barriers

The provision of information only in the language of the local NCA can become an important barrier, in particular in the case of NCAs that do not communicate in an open and transparent way the local guidelines, standards, processes and provisions. There are several official NCAs' websites that offer limited proportion of the available information in English or another language apart from the local one.

Question 2.2 – In your experience, which of the following issues are the major regulatory and tax barriers to the cross-border distribution of funds in the EU? For the issues you consider to be major barriers, please rank them in order of importance [Different definitions across the EU of what marketing is, Marketing requirements imposed by host Member States, Regulatory fees imposed by host Member States, Administrative arrangements7 imposed by host Member States, Lack of efficiency of notification process, Difficult/cumbersome refund procedures for claiming relief from withholding taxes on distributions by the UCITS, AIFs, ELTIF, EuVECA or EuSEF, Higher taxation of investment funds located elsewhere in the EU/EEA than of domestic funds, Differences between the tax treatment of domestic and foreign fund managers as regards withholding tax/income reporting responsibilities and opportunities on income distributed by UCITS, AIF, ELTIF, EuVECA or EuSEF, Differences between Member States in tax reporting, Other: Please specify]

As mentioned in our previous response, the ranking and identification of barriers that is presented by EFAMA is an effort to reflect the current situation in the market. Still, we need to underline that no barrier should be seen only as a stand-alone factor, but in close relation to the other ones. In that sense, EFAMA members consider that a general ranking of different barriers as to the cross border distribution of funds is the following:

1. **<u>Lack of transparency and appropriate level of information</u>**
2. **<u>Marketing Requirements and different definitions/interpretations</u>**
3. **<u>Administrative arrangements and gold-plating</u>**
4. **<u>Higher taxation, and burdensome – if possible at all – WHT refund procedures for foreign funds (and their investors)</u>**
5. **<u>Differences in tax reporting</u>**
6. **<u>Costs related to cross-border distribution and regulatory fees</u>**
7. **<u>Lack of efficiency of the notification process</u>**

<u>Section 3 – Marketing requirements</u>

Questions addressed to all respondents

Question 3.1a – Are you aware of member state interpretations of marketing that you consider to go unreasonably beyond of what should be considered as marketing under the UCITS Directive?
Question 3.1aa – Please explain your answer

A. Marketing Definition

EFAMA is aware of different interpretations of marketing and considers their existence to be a significant market entry barrier.

- **For that reason, EFAMA would strongly suggest that further work and clarification is to be done at the EU level in order to ensure a common approach as to the definition of what is marketing, as well as to set common guidelines and standards as to the scope of marketing activities on which the AIFMD rules apply. ESMA should be assigned this task with the aim of clarifying existing rules without imposing new requirements in order to ensure regulatory stability.**

B. Definition of pre-marketing

What is also crucial to define is the point at which the marketing starts, on which there are different national interpretations. In that respect, the scope of permissible pre-marketing communications and timing after which an activity is considered as marketing remain unclear and inconsistent within the single market.

There have been some efforts in several EU jurisdictions to single out and define activities in the stage prior to marketing (such as preliminary meetings with potential investors in order to understand investors' interests etc.) in which there is no requirement to comply with the AIFMD marketing rules (for instance, provided that no subscription in the AIF in question is yet possible). However, as those initiatives remain sporadic and the conditions set are not common within the internal market, the significant divergence as to the approach concerning marketing and premarketing activities remain.

Hence, it is still not clear to what extent a given activity is to be considered as marketing or premarketing and whether it triggers compliance with the AIFMD notification requirements or not.

- **EFAMA would, therefore, support any initiatives by ESMA on a common approach as to the definition of marketing, taking as a starting point not only what is marketing, but also what is pre-marketing and therefore, activities in which the AIFMD notification rules don't apply. To that direction, the work on common Guidelines and standards on the definition of pre-**

marketing would be extremely useful. A set of best practices applied in different jurisdictions could help as a basis for this type of work[12].

C. Legal clarity as to the marketing requirements and national process

Further on, it should be stressed that even when the definition for an action as marketing in a member state doesn't trigger the need for a prior notification (for instance, in some member states marketing to a limited number of customers doesn't trigger notification requirements), the need for legal clarity and consistency as to the notion of marketing, its triggering point and the requirements that apply remains important. Access to that type of information is often problematic or if access is granted it can be that the information is not easily understandable (for instance, in the case mentioned above, it is not always clear whether the restricted number of customers refers to a specific point in time or should be assessed continuously in case this number increases). Therefore, it should be stressed that different definitions/interpretations can also lead to non-transparent processes and therefore, increase lack of transparency and understanding of the national regulatory framework.

D. Legal inconsistencies

There is a number of inconsistencies across the EU single market that can become an additional disincentive for cross-border distribution as this aggravates legal confusion, burden and duplicative work, in particular for smaller asset managers that are lacking the necessary resources to further analyse the difficulties and complexities of a certain jurisdiction. Engaging local advisors in order to clarify these national requirements is part of the cost-benefit analysis they need to do.

These inconsistencies relate to a number of marketing requirements and the different interpretations and understanding as to their implementation, such as:

- The marketing material itself has different purposes and uses according to the jurisdiction it is provided (e.g. in some member states marketing material needs to not only be filled, but also be approved by the NCA prior to its use);
- In some jurisdictions marketing activities are not the only ones triggering filing requirements, but this also depends on whether there is an initial registration of a fund or, in the case of additional share classes, whether these have to be filed separately.

Once again, in order to overcome the inconsistencies and the confusion caused by different interpretations on marketing rules, EFAMA would support an EU approach targeting at a set of common guidelines and standards on the scope of marketing activities on which the AIFMD rules apply.

[12] For instance, the UCITS and AIF marketing regime in France that was updated by the AMF on 4 July 2016, could serve as one of the starting points for further discussions to be undertaken at the level of ESMA.

Question 3.1b – Are you aware of member state interpretations of marketing that you consider to go unreasonably beyond the definition of marketing in AIFMD?

Question 3.1bb – Please explain your answer

Please see our response to question 3.1a

Question 3.1c – Are you aware of any of the practices described above having had a material impact upon the cross-border distribution of investment funds?
Question 3.1cc – Please explain your answer.

As mentioned in our response to question 3.1a, different interpretations constitute a de facto market entry barrier. Differences due to country specific marketing requirements make it difficult to produce harmonised marketing materials for use on a pan-EU basis. They cause significant delays and bring legal uncertainty and additional costs, as customized legal advice per member state is usually necessary. Moreover, different or intransparent rules that apply in each jurisdiction on the printed material and the material offered in websites, especially when they foresee more detailed content than what is required by the EU regulation, result in important burden as to the reviewing of the requirements and the use of disclaimers.

A practical aspect of the lack of consistency on rules for marketing are the pre-approval arrangements foreseen in some member states (such as Finland, Croatia, Belgium and France) according to which marketing material has to be provided and approved by the local NCAs prior to their use. This is a lengthy and cumbersome process that can take up to 4 months and in some cases, for instance for material in the form of alerts to clients on evolving market conditions, they render the material outdated. In general, such pre-approval requirements lead to a rather bureaucratic and slowing-down of the process with no true added value. The supervisory control in that case should rather be established on an ex post basis.

Moreover, the legal uncertainty as to what is triggering marketing, as well as the pre-marketing definition and the relevant rules, causes additional internal and external costs. Market participants have to identify the problems, seek and engage advisors, negotiate the terms, pay for their services and implement the advice received.

In that respect, EFAMA would like to stress that any information document produced under a mandatory requirement cannot be automatically seen as a marketing action. For instance, in the case of PRIIPS that include also funds sold upon request by the investor, the mere draft of the Key Information Document (KID) and its publication should not be automatically deemed as a marketing action within a member state, since the PRIIPs Regulation requires manufacturer to draw up a PRIIPs KID before a PRIIP is made available to investors.

Moreover, distributing funds through MiFID firms has an important impact in particular on the marketing communication. MiFID entails specific rules regarding marketing communication which are currently interpreted differently within the member states, e.g. regarding what is allowed to show as past performance, which costs should be taken into account etc.

We believe that MiFID II will enhance harmonisation in this regard. However, it only affects distribution through MiFID firms or exempt IFAs for which national legislators have to provide the same rules. It would, therefore, be important to clarify that all marketing communication compliant with the detailed MiFID requirements are sufficient also for direct distribution purposes. This would ensure legal consistency and allow market participants to use the same marketing material throughout Europe.

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members) and where appropriate, distributors who market or advise funds to investors and National Competent Authorities

Other respondents are welcome to respond to some or all of the questions below.

Question 3.2 – Which of the following, if any, is a particular burden which impedes the use of the marketing passport? [Different interpretations across Member States of what constitutes marketing, Different methods across Member States for complying with marketing requirements (e.g. different procedures) Different interpretations across Member States of what constitutes a retail or professional investor, Additional requirements on marketing communications imposed by host Member States, Translation requirements imposed by host Member States, Other domestic requirements]

Question 3.2a –Please can you expand on this below.

As already mentioned in our responses to the previous questions of that section, different interpretation across member states on the definition of marketing is one of the most important barriers regarding the use of marketing passport. Moreover, different methods of complying with the marketing requirements at national level is also an important factor. (See our response to question 3.1a.)

Moreover, some EU member states require different registration procedures for marketing to retail and for marketing to institutional investors.

For professional investors what should be taken into account is their need for information that is tailored to their business model (e.g. insurance companies need information in order to submit their reporting), whereas they require less or no general information that is usually appropriate for retail investors and their understanding of the products. Furthermore, they are often involved in the set up and negotiation of specific aspects in the case of funds open only to professional investors. <u>Consequently, with respect to professional investors, investment law should provide for flexibility as to the information they receive, which needs to be appropriate to their needs.</u>

Moreover, AIFMD allows member states to impose additional requirements for the distribution of AIFs to retail investors. In that context, when targeting local retail investors, a number of additional requirements can be found in several jurisdictions, such as the creation of a dedicated form to be approved by the NCA, reporting to a number of local authorities, payment of additional regulatory fees etc. <u>All these requirements and the operational workload they come with are creating important delays and costs. Therefore, it needs to be ensured that these requirements have the added value for the end-investor that justifies all the additional costs and delays.</u>

Question 3.3 – Have you seen any examples of Member States applying stricter marketing requirements for funds marketed cross-border into their domestic market than funds marketed by managers based in that Member State?

Question 3.3a – Please explain your reply and provide evidence.

EFAMA is not aware of such examples. However, the variety as such of national requirements across the EU hampers the development of pan-European marketing of funds.

Question 3.4 – Are domestic rules in each Member State on marketing requirements (including marketing communications) easily available and understandable?

Question 3.4a – If your answer is no, please provide details and specify in which Member State(s) the rules are not easily available and understandable and why.

In several member states, domestic rules on marketing requirements (including those on marketing communications) are not easily available nor easily understandable. Generally, multiple texts apply, and, in many cases, they form part of laws and regulations which are lengthy and not translated into a language customary in the sphere of international finance. Thus, the risk for managers marketing their funds on a cross-border basis is that they are unable to easily identify local requirements and, when they have identified them, to understand them. The costs of research and compliance with local requirements are significant, and even when these costs are assumed, still managers often risk failing to comply with local requirements.

<u>Therefore, EFAMA would strongly recommend further coordination at EU level.</u>

A. The action to be taken in the short term should be the publication of all marketing rules applying in each jurisdiction in an internet portal which will be publicly and freely accessible.

Concretely, ESMA, in association with NCAs, should publish on a specific internet portal in a language customary in the sphere of international finance, legal, tax and practical information on the marketing regimes, including:

- A single table on the regulatory fees regularly updated by the NCAs;
- A harmonized and easily accessible Guide to national UCITS, AIF, EUVECA, EUSEF and ELTIF marketing regimes, regularly updated by the NCAs (updates should be visible by investors in real time);

- A table with the main national tax costs;
- A single European register of .eu funds notified by the NCAs[13].

B. Over the longer term, EFAMA would support an EU approach targeting at a set of common guidelines and standards as to the scope of marketing activities on which the AIFMD rules apply.

See also our response to question 3.1a.

Question 3.5 – When you actively market your funds on a cross-border basis to retail investors/High Net worth retail individuals/ Professional investors do you use marketing communications (Leaflet, flyers, newspaper or online advertisement, etc.)? Please provide the percentage of your funds marketed on a cross-border basis using marketing communications in the host country

EFAMA members use a broad range of marketing materials from leaflets to TV spots. For retail investors and distributors the scope of communication activities is broader. For institutional investors, individual reporting and market data, acquired via a registration in a closed data area or via printed material, are amongst the common marketing tools.

Question 3.5a – To what extent are marketing communications important in marketing your funds to retail investors, high net worth individuals and professional investors? Please explain your answer

Marketing communication is very useful and important to asset managers for each of the investor groups mentioned.

Question 3.6 – What types of marketing communication do you use for retail investors [leaflet / flyer, short booklet, newspaper advertisement, TV advertisement, radio advertisement, online advertisement, other (please specify)]

EFAMA members make use of a wide range of marketing communication material for retail investors: image brochure, leaflets/flyers, newspaper advertisements, TV-radio-online advertisements, pages in social networks etc.

[13] For further details, see our response to question 5.5.

Questions addressed to all respondents

Question 3.15 – Do you consider that rules on marketing communications should be more closely aligned in the EU?

Questions 3.15a – Please explain your answer – and if appropriate, to what extent do you think they should be harmonised?

EFAMA considers it of key importance to ensure a closer alignment on the definition of what constitutes marketing, private placement and reverse solicitation in both the primary and the secondary market, as well as on the different national requirements applying to marketing and pre-marketing communications for UCITS and AIFs in the EU. The same stands for the need to maintain a NPPR and to harmonise the rules that apply to it. It should be clear, however, that there is no need to provide all details, but rather general statements which clarify that the standard suffices.

As mentioned in our answer to the question 3.4a, this can be done via short and long term actions. In particular over the shorter term, ESMA in association with NCAs should publish on a specific internet portal in a language customary in the sphere of international finance, legal, tax and practical information on the marketing regimes, including:

- A single table on the regulatory fees updated by the NCAs;
- A harmonized and easily accessible Guide to national UCITS, AIF, EUVECA, EUSEF and ELTIF marketing regimes, regularly updated by the NCAs (updates should be visible by investors in real time);
- A table with the main national tax costs;
- A single European register of .eu funds notified by the NCAs[14].

Question 3.16– Is there a case for harmonising marketing communications for other types of investment products (other than investment funds)?
Question 3.16a – Please explain your reply and what should be the other products be?

The recently adopted PRIIPs Regulation sets already a first round of key information that is to be included in the Key Information Document (KID) of insurance products covered by the scope of the Regulation. This effort to provide the appropriate level of information to retail investors should also cover all types of equivalent investment products so that a level playing field for all providers is ensured. This should be further enhanced by moving towards a set of rules as to the marketing of other types of investment products such as insurance products.

[14] For further details see our response to question 5.5

Question 3.17 – What role do you consider that ESMA – vis-a-vis national competent authorities - should play in relation to the supervision and the monitoring of marketing communications and in the harmonisation of marketing requirements? If you consider both should have responsibilities, please set out what these should be.

We believe that ESMA should only supervise financial market participants where EU law provides for such direct supervision. In all other areas, ESMA should contribute to the single rulebook in the EU financial legislation within its powers, i.e. providing guidelines on the implementation of the EU law followed by national best practices.

Concretely, ESMA should work together with the national competent authorities and market participants on common standards for defining the pre-marketing and the rules that apply, based on existing best practices at national level. Moreover, ESMA should work on the launch of a public website that will allow access to a mapping of all current national regulatory frameworks on marketing (see also our response to question 3.4a). ESMA could also become a common repository of both marketing passport notifications and AIFMD regulatory reporting, which can eventually eliminate the barriers deriving from national notification processes and allow for a single notification required for EU cross-border distribution.

Moreover, by acknowledging that marketing material that is in line with MiFID II complies with regulatory requirements in all jurisdictions, market participants will not be forced to issue marketing material for each jurisdiction separately. Common standards can facilitate consistent requirements for marketing material, e.g. how to display performance figures (net/gross figures, 1-3-5 year performance, model calculation), as well as standardisation of local addendum for legal prospectus).

However, ESMA should act in close collaboration with the NCAs, which should be able to deal with any shortcomings or potential concerns in their national financial markets, based on the allocation of competences foreseen by the EU regulations.

IF YES TO QUESTION 3.15

Question 3.18 – Do you consider that detailed requirements– or only general principles on marketing communications should be imposed at the EU level when funds are marketed to retail investors?

Question 3.18a – Please explain your reply.

EFAMA considers that ESMA should take the lead and propose a set of common standards as to the marketing/pre-marketing definition and the rules on marketing communications via Guidelines that will be based upon best practices at national level. However, in our view, including those rules in the level 1 text of the EU regulation would be too burdensome and long as a process and would have no necessary additional value. Therefore, the set of common rules should not be too detailed, but only provide guidance in the form of clarifications and enable a common approach, which is currently missing within the internal market.

Moreover, ESMA should hold a common repository of both marketing passport notifications and AIFMD regulatory reporting and make available all existing local marketing and pre-marketing rules in a website so as to be publicly available to all market participants. This would not only help market participants, but also NCAs insofar as they can rely on the information submitted to ESMA and can reduce their need for gathering or analysing information on other jurisdictions.

EFAMA would also like to come back to its comment in section 1 question 2 on the high-net worth individuals and the other type of investors that don't meet the criteria to be classified as professional investors, but possess significantly more resources and expertise compared to retail investors. They are currently recognised as a separate category in certain jurisdictions and benefit from a different treatment. EFAMA considers that there are merits in assessing further the differentiated treatment for this category of investors at the EU level, for the marketing rules as well, given that they represent a more sophisticated and expert type of investors.

Question 3.19 – Do you consider that the requirements on marketing communications should depend on the type of funds or the specific characteristics of some funds (such as structured funds or high leverage funds) when those funds are marketed to retail investors?

Marketing communication rules should be applicable to all types of funds, but further flexibility can be envisaged based on the type of the investor and the complexity and structure of the product.

Section 4 - COSTS

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members) and where appropriate, distributors who market or advise funds to investors

Other respondents are welcome to respond to some or all of the questions below.

Question 4.1 – What proportion of your overall fund costs relate to regulation and distribution depending on the Member State where the fund is marketing regardless where it is domiciled? If this is not straightforward to obtain, please provide an estimate. Alternatively, please provide man hours spent on each. [Please answer for each relevant host Member State:

- **Regulatory costs – Legal costs (Third party, Internal legal analysis) / Regulatory fees / Administrative arrangements / Marketing requirements / Others**
- **Distribution costs – Traditional Network distribution / Online distribution**
- **Costs links to taxation system – Costs in order to get the information / Costs to fulfil the obligation]**

EFAMA wishes to underline that apart from the regulatory fees, analysing the part of the costs that are directly and solely linked to the cross-border distribution is an extremely complicated exercise for any asset management company. Based on that, we consider that there is for the time being no feasible way to aggregate these types of data at the EU level.

However, we can provide the following list of factors that can trigger costs or influence their level:

- individual price schedules of service providers;
- frequency of documentation updates;
- fund volume;
- different national requirements of host markets (e.g. appointment of paying agents, specific marketing material).

Section 5 – REGULATORY FEES

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members)

Other respondents are welcome to respond to some or all of the questions below.

Question 5.1 – Does the existence and level of regulatory fees imposed by host Member States materially affect your distribution strategy?

Typically, the existence or the level of regulatory fees imposed by NCAs does not impact the decision of distributing funds cross border. However, they may have an impact given that they can vary significantly in both scale and how they are calculated in different member states and consequently trigger a burdensome process. That leads to a situation where the costs and time spent to research those regulatory fees and to organise payments constitute a material barrier.

What we would certainly stress is that diverging regulatory fees and processes related to them are plainly at odds with the spirit of a Capital Markets Union.

One concrete example, are inconsistencies regarding the payment of fees when asset management companies attempt to register in host jurisdictions and the receipt of confirmation as to that payment. Although these charges need to be paid to the host NCA prior to the fund being registered and open to receive local subscriptions, not all NCAs provide the asset management companies immediately with the confirmation of the payment, which creates challenges for the accounting and back office functions, but also for the possibility to conclude the registration process. More specifically, in order to register a UCITS or an AIF in some EU jurisdictions (i.e. Germany, France, Austria, UK and Greece), it is mandatory to include a proof of payment of the initial registration fees in the notification file submitted to the home and host regulators. On the contrary, some regulators (e.g. the FSMA in Belgium) send their invoice to the fund only once the fund is registered.

For that reason, EFAMA would suggest that ESMA publishes on a specific internet portal, regularly updated by the NCAs, a single table on the regulatory fees requested in each jurisdiction and the notification processes related to them (see also our response to questions 3.4a and 3.15). This could help further rationalise and, subsequently, standardise the processes on the payment of the regulatory fees. Moreover, NCAs should be required to provide a confirmation of the fees payment immediately upon receipt of the payment, so that the notification process can be completed in every jurisdiction.

On the process related to the regulatory fees and the notification, it should also be stressed that in several NCAs the use of outdated technologies or of a specific encoding while filing the notification request is required. Both requirements are burdensome and time consuming and should be updated based on the most recent technological developments.

Question 5.2 – In your experience, do any Member States charge higher regulatory fees to the funds domiciled in other EU Members States marketed in their Member State compare to domestic funds?
Question 5.2*a* – Please explain your reply and provide evidence.

EFAMA is aware of a number of member states that requires the payment of additional regulatory fees by foreign UCITS and AIFs.

Without necessarily being exhaustive, Belgium, Cyprus, Croatia, Finland, France, Germany, Greece, Italy, Luxembourg and Spain are some member states that charge higher regulatory fees. At the same time, it has to be noted that the difference is usually of a relatively low amount, i.e. only a few hundred Euros, which is not enough to be a deterrent. Furthermore, it is important to highlight that the legal basis for a cross-border distribution of an AIF or a UCITS is different to the legal basis for distribution of a domestic AIF or UCITS[15].

Question 5.3 – Across the EU, do the relative levels of fee charged reflect the potential returns from marketing in each host Member State?
Question 5.3*a* – Please explain your reply and provide examples.

Fees applicable to funds marketed cross-border are generally fixed and depend on:

- The type of fund: UCITS, EU AIF managed by EU AIFM, EU and non-EU AIF managed by non-EU AIFM;
- The number of funds and/or the number of sub-funds;
- The type of investor (retail or professional);
- The distribution model (private placement/public distribution).

EFAMA would like to stress that the fees charged need to reflect, at the best, the NCA’s necessities as a supervisor and regulatory authority. However, it is legally inconsistent and non-proportionate to directly correlate the fees with the potential returns of the marketing of the fund in the jurisdiction of the NCA.

Please see below detailed data as to the one-off notification and ongoing fees per member state as reported by EFAMA members. Please note, also, that EFAMA members have reported instances where NCAs have difficulties in ascertaining the fees applicable and had to correct invoices already sent.

[15] See article 32 (cross-border distribution of AIFs) and 31 (domestic distribution of AIFs) of the Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers, as well as article 91 et seq. (cross border distribution of UCITS) and Art. 5 para. 1 (domestic distribution of UCITS) of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

EU/EEA MS	One-off registration fees UCITS	Annual registration maintenance fees UCITS
Austria	EUR 1'100 for the first sub-fund; EUR 220 for each additional sub-fund	EUR 600 for the first sub-fund EUR 200 for each additional sub-fund
Belgium	EUR 377 per sub-fund	EUR 2,'580 per sub-fund
Bulgaria	None	None
Croatia	Unknown	Unknown
Cyprus	EUR 800 for the first sub-fund and EUR 400 for each additional sub-fund (up to the 15th) and EUR 250 per sub-fund as from the 16th sub-fund	EUR 2'000 per umbrella UCITS
Czech Republic	None	None
Denmark	DKK 5'445 per application (irrespective of the number of funds)	DKK 17'424 per umbrella UCITS
Estonia	Unknown	Unknown
Finland	EUR 1'600 per umbrella UCITS	None
France	EUR 2'000 per sub-fund	EUR 2'000 per sub-fund
Germany	EUR 115 per sub-fund	EUR 494 per sub-fund
Greece	EUR 1'024 per sub-fund	EUR 1,024 per sub-fund
Hungary	None	None
Ireland	None	None
Italy	None	EUR 4000+ EUR 1700 for each fund offering + EUR 1200 in case of public offer is closed but the fund has got Italian resident as subscribers (Two first funds are exempted from the variable part). EUR 4000 in case of EU UCITS marked only to professional
Latvia	Unknown	Unknown
Lithuania	Unknown	Unknown
Liechtenstein	CHF 750 for the first sub-fund; CHF 500 for each additional sub-fund	CHF 1'250 per sub-fund
Luxembourg	EUR 2,650 for a UCITS with no compartments. EUR 5'000 per umbrella UCITS	EUR 2,650 for a UCITS with no compartments. EUR 5'000 per umbrella UCITS

Malta	EUR 2,000 per umbrella and EUR 450 per sub-fund (up to the 15th) and EUR 250 as from the 16th	EUR 2,500 for umbrella UCITS and EUR 450 per sub-fund (up to the 15th) and EUR 250 as from the 16th
Netherlands	EUR 1'500 per UCITS umbrella	None
Norway	None	None
Poland	EUR 4'500 per umbrella UCITS	None
Portugal	None[16]	EUR 1200 per umbrella UCITS[17]
Romania	Unknown	Unknown
Slovakia	Unknown	Unknown
Slovenia	Unknown	Unknown
Spain	EUR 1'000 per UCITS umbrella	EUR 2'500 per UCITS umbrella
Sweden	None	None
UK	GBP 1'200 per UCITS umbrella	GBP 455 per sub-fund (basic fee) 0-2 sub-funds --> 455 GBP 3-6 sub-funds --> 1,138 GBP 7-15 sub-funds --> 2,275 GBP 16-50 sub-funds--> 5,005 GBP >50 sub-funds --> 10,010 GBP

Question 5.4 – How much would it cost you, in term of regulatory fees [one-off fees and ongoing], to market a typical UCITS with 5 sub-funds to retail investors in each of the following Member States (this excludes any commission paid to distributors)? Please respond for each Member State where you market your UCITS funds.

Please see below detailed data as to the one-off notification and ongoing fees per member state as reported by EFAMA members

[16] According the Portuguese legislation, a one-off registration/notification fee of EUR 3000 is charged per Umbrella UCITS. However, this provision is under revision and since Regulation (EU) N.º 584/2010 entered into force, the mentioned fee is no longer being charged.
[17] This fee is due by the distributor.

Country / Costs (in EUR) for 1 UCITS umbrella with 5 sub-funds	One-off Regulatory fees	Ongoing Regulatory fees
AT	1'980	1'400
BE	1'885	12'900
BG	0	0
CY	2'400	2'000
CZ	0	0
DE	575	2'470
DK	730	2'340
IE	0	0
ES	1'000	2'500
FI	1'600	0
FR	10'000	10'000
GR	5'120	5'120
HU	0	0
IT (retail)	4000	9'100
LI	2'530	5'750
LU	5'000	5'000
MT	4'250	4'750
NL	1'500	0
NO	0	0
PL	4'500	0
PT	0	1200
SE	0	0
UK	1'400	1'330
TOTAL	**44'470**	**68'660**

Apart from the amount of the fees, we note that there are important differences in the treatment, e.g. related to different schedules or points in time when the regulatory fees need to be paid (i.e. ex ante or ex post the notification), or to the entity to which the payment needs to be made (i.e. to a national agent in Spain, or directly in Austria). It is these factors that contribute to cumbersome notification procedures and add to the difficulties for companies to quantify costs.

Question 5.5 – How much would it cost you in terms of regulatory fees [one-off fees and ongoing], to market a typical AIF with 5 sub-funds to professional investors in each of the following Member States (this excludes any commission paid to distributors)? Please respond for each Member State where you market your AIFs.

Please see below detailed data as to the one-off notification and ongoing fees per member state as reported by EFAMA members

Country / Costs (in EUR) for 1 AIF umbrella with 5 sub-funds	One-off Regulatory fees	Ongoing Regulatory fees
AT	1'980	1'400
BE	0	0
CY	0	0
DE	3'860 (772 per sub-fund)	1'080 (216 per sub-fund)
DK	0	1'620
IE	0	0
ES	2'500	3'000
FI	4'000	0
FR	10'000	10'000
GR	5'120	5'120
HU	0	0
IT	0	4'000
LI	4'840	5'750
LU	5000	5000
MT	4'750	5'500
NL	0	0
NO	0	0
PT	5000 per umbrella	1200 per umbrella[18]
SE	0	0
UK	0	0
TOTAL	**37'050**	**37'470**

EFAMA would like to stress that the differences of regulatory fees by member state can cause constraints regardless of the level of the fees. It would be optimal to achieve a single EU notification process which would certainly rationalise costs and efforts by the asset managers. In that context, the

[18] Both fees are due by the distributor.

EFAMA proposal for an ESMA portal to be built and updated in association with the NCAs, which will include amongst others a single table with all the regulatory fees in each jurisdiction, can be the first step towards addressing those issues and further rationalising the regulatory costs.

A step towards rationalising and bringing further consistency and transparency concerning regulatory fees can be found also in the recent proposal for amending the EUVECA Regulation (COM (2016)421), where the Commission explicitly requests that fees and other charges in relation to cross-border marketing of EuVECA and EuSEF funds are not to be imposed by competent authorities of host member states. The same Proposal also requests that the NCA of the home member state notifies the NCAs of the host member states and ESMA immediately of any registration of a EUVECA manager and asks ESMA to maintain a central database publicly accessible on the internet, listing all managers of funds using the designation "EuVECA" and the funds for which they use it, as well as all the member states in which those funds are marketed.

EFAMA fully supports these proposals. This is a good practice at EU level that could be followed in the case of UCITS and AIFs. In addition, it could be envisaged that NCAs grant to funds compliant with the UCITS, AIF, ELTIF, EUVECA and EUSEF regulatory framework and at the asset management company's request a ".eu" ISIN code instead of the usual ".fr", ".it", ".sp"., ".lu" (etc.) ISIN code. ESMA could also maintain a repository of the list of these funds published on an internet portal. The merits of that proposal is that a European label would enhance transparency to the benefit of the end investor.

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members) and National Competent Authorities

Other respondents are welcome to respond to some or all of the questions below.

Question 5.8 – Where ongoing fees are charged, are they related to use of the passport?

Yes.

Question 5.9 – Do differing national levels of, and bases for, regulatory fees hinder the development of the cross-border distribution of funds?

Question 5.9a – Please explain your answer.

Yes, in particular as regards the different bases for regulatory fees and the payment process. We also understand that regulatory fees for the passporting of AIFs required by national regulators across the EU still differ widely, which doesn't enhance the cross-border marketing within the single market[19].

Question 5.10 – On who are regulatory fees are charged: managers or funds? Please describe if there are different practices across the EU.

The fees are levied on the funds notified for marketing. It is up to the manager's discretion whether they are ultimately charged to the funds or to the asset management company. This depends mainly on whether it is allowed to charge these costs to the funds pursuant to the disclosures in the prospectuses of the respective funds, but also on the supervisory requirements and civil law in each EU member state.

[19] See the CMS study "A Guide to Passporting –Rules on Marketing Alternative Investment Funds in Europe" (March 2015) available at: https://cms.law/en/content/download/77491/2984893/version/2/file/CMS-Passporting-Guide-March-2015.pdf

Section 6 – Administrative Arrangements

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members)

Other respondents are welcome to respond to some or all of the questions below.

Question 6.1 – What are the main barriers to cross-border marketing in relation to administrative arrangements and obligations in Member States? Please provide tangible examples of where you consider these to be excessive.

A. The current situation within the EU internal market

Member states have a wide range of requirements on local agents that must be appointed before an investment fund can be distributed on a cross-border basis into the territory of the State. The roles of local agents in relation to the cross-border distribution of investment funds include, for example:

- Local paying agent:
  - Making redemption payments to unitholders (e.g. Sweden)
  - Receiving subscription payments from client

- Local information agent (e.g. France, Sweden):
  - Provision of information to unitholders, including prices
  - Provision of documentation to unitholders
  - Publication of documents and information

- Local representative agent:
  - Legal representative (e.g. France)
  - Provision of information to competent authorities (e.g. France)
  - Provision of information to tax authorities
  - General Partner of the AIF (Luxembourg)

- Local transfer agent:
  - Reception of investors orders and communication to central administration / Global transfer agent (e.g. France)

- Complaints handling

Concerning the requirement for local facilities/ paying agents, EFAMA has raised its important concerns in the recent consultation papers on the CMU, but also in relation to the ELTIF Regulation and the relevant RTS. In its recent response to the ESMA Consultation on the draft RTS under the ELTIF

Regulation[20], it was stressed that the requirements initially foreseen in the UCITS Directive for local facilities and paying agents were appropriate at the time of their adoption, when these were the main means to obtain the necessary information. However, they do not reflect anymore the current technological developments, which render them outdated and for that reason, they can increase the administrative costs for the ELTIF. Today the access to information, payments and issue handling services can be provided by other means and without having a physical facility in each member state in which the ELTIF is to be marketed. It would, therefore, be appropriate to give the possibility to the manager to put in place either physical facilities or on-line and telephone ones, bringing the requirements in line with the existing market conditions.

EFAMA welcomes the fact that ESMA has included this suggestion in its final report on the draft RTS under the ELTIF Regulation as published in June 2016[21], stating that similar services can also be provided by telephone or electronically. Moreover, in the same report, ESMA is providing a mapping of the national requirements for facilities available to the retail investors under Article 92 of the UCITS Directive, which highlights the important divergence of such requirements per jurisdiction and hence, the burdensome activity they pose to asset managers.

More generally, when it comes to the term of “local agent”, this is associated to any agent appointed locally and required from a regulatory perspective by the host NCA and should not be confused with the local distribution networks. In a big number of EU member states, before a foreign UCITS or retail AIF can be distributed, a local agent must be appointed. Local agents are qualified as “information and paying agent”, “facilities agent”, “centralising correspondent agent” (or *agent centralisateur*), “local financial service provider”, etc. It is mandatory to indicate all details of the local agent in the notification letter sent out to the home and host NCAs. In this regard, the following features can be highlighted, in terms of additional costs and impact on the UCITS time-to-market:

- The amount of time spent on finding such a service provider, negotiation and review of the relevant local agent agreements;
- Local agent costs themselves;
- Legal review of the agreements: these agreements are very often governed by foreign laws and regulations. As a result, appointment of external local law firm to ensure proper review of the agreements is necessary;
- Maintenance aspects of these agreements.

In general, the roles of such intermediaries – which depending on the jurisdiction may be designated under a different name, e.g. local representative, information agent, facilities agent, paying agent, etc. – also differ according to the jurisdiction. For instance, in Ireland and Denmark, they function purely as *information agents*, making a fund’s constitutive documents available to local investors. In Austria and France, their role is also to collect investors’ subscriptions and process dividend payments, acting as a representative for the local NCA. In Germany, such a paying agent is a necessary requirement for

[20] See EFAMA’s response to Q16-17 of the ESMA draft RTS under the ELTIF Regulation http://www.efama.org/Publications/Public/EFAMA%20reply%20ESMA%20ELTIF%20RTS.pdf

[21] https://www.esma.europa.eu/sites/default/files/library/2016-935_final_report_on_eltif_rts.pdf , article 5 on Specifications on the facilities available to retail investors, paragraph 2: “they provide their services physically, by telephone or electronically”.

any AIF to be registered and marketed to retail investors. In Italy, intermediation duties are performed by any intermediary based in the EU (not necessarily in Italy), but for relations between investors established in Italy and the AIFM or the UCITS management company based abroad an intermediary established in Italy is a requirement (there is a flexibility as to the type of such an intermediary, i.e. branch of the asset manager or the offeror, bank and other intermediaries in charge of the placement or marketing of units or shares of the UCITS[22]). In certain member states (such as Luxembourg, where the home NCA (CSSF) requires a General Partner to be located in Luxembourg for locally-domiciled specialized investment funds (SIFs) in the form of a société en commandite par actions) the full fruition of the AIF management company passport is dependent on a series of restrictive administrative arrangements that seem to be at odds with the general aims and specific provisions of the UCITS and AIFM Directives.

The fees charged by those local facilities also differ considerably across the EU jurisdictions. Firstly, the fees depend on the multiple roles of the local intermediary and secondly, due to the absence of competition in general in that area, providers are able to significantly influence the price for their services. Hence, fees may vary between 5,000 EUR to 35,000 EUR per annum, also depending on how they are levied, i.e. only once for an entire umbrella structure or depending on the number of sub-funds and even individually for each sub-fund.

What is also significantly diverging are the modalities of marketing and dealing with redemption requests/other payments to investors. In this regard, some member states require the identification of a local financial institution as a paying agent who satisfies redemption requests and makes other payments to investors or as an information agent whose role is to provide information on the funds to local investors. These requirements, not foreseen by the UCITS Directive, increase as well the costs of marketing UCITS in the relevant jurisdictions.

[22] According to the CONSOB Regulation:

(i) The offeror and depositary define the methods by which intermediation duties are performed in payments connected with investment in the UCITS, such as subscriptions, redemptions and the payment of dividends, using specifically qualified intermediaries based in the European Union.

(ii) Relations between investors established in Italy and the statutory and administrative headquarters of the UCITS abroad, are entertained:
a) by a branch of the offeror based in Italy;
b) by the asset management company, established in Italy, managing the UCITS;
c) by banks, established in Italy, qualified to act as payment intermediaries;
d) by intermediaries, established in Italy, in charge of the placement or marketing of units or shares of the UCITS.
The activities pursuant to point (ii), where not carried out by a branch of the offeror in Italy, are regulated by specific conventions stipulated with the intermediaries appointed.

(iii) If the units or shares of a UCITS are marketed exclusively using remote communication techniques, relations with investors may be entertained using such techniques, as long as they can enable investors established in Italy the same services provided by the intermediaries pursuant to point (iii).

(iv) The provisions of point 2, 3 and 4, do not apply to UCITS if the offer in Italy is addressed exclusively to qualified investors.

B. The barriers to the cross-border distribution

Altogether, the requirement for a local agent means that each fund distributor has to negotiate separate agreements with these institutions, involving a management company's legal and business management teams, as well as the fund's depositary and operational oversight teams. Together with the monitoring of additional service providers, the whole process typically requires between three to four months to complete.

Moreover, this can frequently lead to confusion regarding the contracting party, as typically the fund depositary is required to be a party to the agreement with the transfer agent as a result of the enhanced depositary liability standards (applicable under AIFMD and more recently under "UCITS V" Directive).

EFAMA would like to stress that the services these agents provide could in many cases be provided just as well by any authorised entity. In terms of paying agent for instance, the use of a local bank to direct payments to a local CSD which then transmits orders to the transfer agent of the fund represents an unnecessarily complex process. In an open architecture model there is little flexibility and limited scope to monitor and facilitate payment of retrocessions to multiple third parties, as deals arrive in bulk at the fund's transfer agent. This requires multiple reconciliation processes to ensure retrocessions are paid to the correct distributor.

Finally, with regard to our comments on the application of withholding taxes (see infra), the requirement for a local agent is at odds with a more standardised taxation system to the extent they act as local tax agents.

<u>Therefore, the continued reliance on such intermediaries implies inevitable delays and burden in the registration process, resulting from the time to source local partner institutions, from carrying out an extensive due diligence and negotiating the underlying service agreements. The accompanying costs are at the expense of the fund and their investors while, often, they bring no added value to the investor.</u>

Question 6.2 – Do you consider that requirements imposed by host Member States, in relation to administrative arrangements, to be stricter for foreign EU funds than for to domestic funds?
Question 6.2a – Please explain your reply.

Even though there are no differences reported in the administrative arrangement imposed to foreign EU funds, the arrangements as such represent a significant burden when applied on a cross-border basis. The requirement to appoint local facilities in the territory of the host member state are disproportionate for the cross-border distribution of investment funds; they represent a burden for all asset managers with limited tangible added value for investors.

Question 6.3 – What would be the estimated savings (in term of percentage of your overall costs) if you were no longer required to apply these administrative arrangements in the Member States where you market your units?

The requirements to appoint local facilities in the territory of the host member state are a burden to management companies and AIFMs in the following ways:

- Time to market: the negotiation of contracts with local service providers takes often months and therefore, slows down the time to market in the host member state, with potential loss of opportunities identified.

- Time investment: the management company or AIFM and its service providers are required to invest time to:
  - Understand the local facilities requirements;
  - Select a local facilities agent;
  - Negotiate and sign contracts and service level agreements;
  - Perform initial due diligence prior to accepting the agreement;
  - Perform ongoing due diligence on at least an annual basis;
  - Monitor the service provider on an ongoing basis;

- Costs: the cost of local service providers relates to:
  - Set up: as a rough estimate, this may take a month of the time of qualified professionals including product development, compliance, legal, conducting persons at the levels of the Management Company or AIFM, depositary administrator/transfer agent.
  - Ongoing: as a rough estimate, the ongoing maintenance may take one to two days per fund - per year - per distribution market of qualified professionals at the management company and the relevant service provider.
  - Cost of the service itself: the costs models of service providers vary. Some, for example, implement a minimum fee of several thousand Euros, plus a variable fee beyond a certain volume of transactions.

Thus, reducing the member states' local agent requirements would offer significant cost savings to management companies, whose funds are marketed on a cross-border basis.

Question 6.4 – In the absence of the administrative arrangements described in your response to Question 6.1, what arrangements would be necessary to support and protect retail investors?

As mentioned in our response to question 6.1, EFAMA has already raised its important concerns (most recently in relation to the ESMA consultation on the draft RTS under ELTIF Regulation) as to the specific requirements foreseen in the UCITS Directive for local facilities and paying agents, stressing that even though they were appropriate at the time of the initial adoption of this legislation, they have stopped reflecting the reality of the market and the needs of retail investors nowadays. The current technological developments have rendered those facilities outdated and their only direct consequence is the increased administrative costs that funds have to assume. Today the access to information, payments and issue handling services can be provided by other means and without having a physical facility in each member state in which a fund is marketed.

Instead of the existing arrangements, a requirement should be in place that the accessibility to the selling intermediary and the asset manager should be ensured via a number of means[23]:

- Having on-line access to information related to the investment (via an on-line account or the website of the asset manager);
- Possibility to introduce complaints via electronic means and in in a language customary in the sphere of international finance (also valid for the responses to be received);
- Having access to information provided by NCAs on the funds that are notified for marketing in their country of residence.

Moreover, it should be stressed that the investor's access to the appropriate amount of information is not restricted only to the information provided by the asset manager, but should also includes the one that can be provided by the NCA. For that reason, improving the NCAs' websites and the access they provide to information on the funds that have been authorised for marketing in their jurisdiction, will also significantly enhance the quality and level of information investors receive[24].

Question 6.5 – Do you consider that the administrative arrangements should differ if the fund is marketed to retail investors or professional investors?

An online provision of fund documentation and NAVs as well as provision of a telephone number (rather than provision of a physical facility) can be sufficient for both investor groups.

Question 6.6 – What is the impact in term of costs of making these facilities available in each Member State? Please quantify them in relation to each measure and for each Member States where you distribute your funds.

Regarding the means proposed in our response to question 6.4 and 6.5, the additional burden would be little to no extra cost.

[23] Taking the Belgian asset managers association's (Beama) website - www.beama.be - as a good example here, we find that it proves to be very helpful for local retail investors in foreign funds to have a local central online repository of information on funds authorised for sale in the given country that allows retail investors to:

- Consult the latest documentation and prices of all funds notified for sale in their country of residence without having to individually search the websites of the fund houses they are invested / they are interested in investing in;
- Allow for easy comparability of funds available for distribution in the given MS.

[24] Some NCAs maintain lists of funds or data bases notified for cross border distribution, see e.g. https://portal.mvp.bafin.de/database/FondsInfo/. If these lists provide also the link to the asset management company's website, they can indeed be a comprehensive set of information for the retail investor.

Question 6.7 – Which alternative/additional administrative arrangements would you suggest in order to ensure greater efficiency in cross-border marketing and appropriate levels of investor protection?

See our response to question 6.4.

Question 6.8 – Are there any measures you would suggest to improve the efficiency and effectiveness of administrative arrangements within and across Member States?

Limitations with regard to processing transactions of fund units through a local distributor (directly), or via the management company, or the custodian bank, or transfer agent of the fund (indirectly), should be removed to improve the current cross-border fund unit settlement cycle. These arrangements, differing between UCITS and AIF (e.g. update of the notification via the host country for UCITS and via the home country for AIF), should be streamlined.

Section 7 – DIRECT AND ON LINE DISTRIBUTION OF FUNDS

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members) and where appropriate, distributors

Other respondents are welcome to respond to some or all of the questions below.

Question 7.1 – What are the main issues that specifically hinder the direct distribution of funds by asset managers? [Regulatory requirements – Marketing requirements, Administrative arrangements, Others: please specify / Regulatory fees imposed by host Member States / Tax rules (e.g. withholding taxes) / Income reporting requirements / Lack of resources / Others: Please specify]
Question 7.1a – Please expand on your reply.

Although there is a high interest from the asset management industry to further explore the potential of distribution via a single on-line platform across the EU, there is a number of barriers that for the time being does not allow that: different marketing rules, different definition and rules on advice, diversified fund pricing structures, additional registration requirements imposed by national frameworks etc. Moreover, electronic distribution often requires a local country website, which means further efforts that may not always be related to financial regulatory requirements (for instance, rules related to national privacy rules and data retention) and further resources to support that.

Question 7.2 – What are the main barriers that hinder the online distribution of funds or the setting up new distribution platforms or other digital distribution ways?

In most members states online distribution is de facto impeded by the intermediation of the investment chain across multiple service providers, as already illustrated in our response to question 7.1a. Additional factors hindering both online (as well as traditional) distribution would be non-harmonised anti-money laundering requirements, prohibitions on the use of omnibus accounts in certain jurisdictions (e.g. Poland) etc. Furthermore, the general problem for investment companies is how to get investors' interest in directly distributed funds, for which enhanced investors' education policies and strategies are important. Overall, there is a variety of technical aspects making the identification and treatment of clients (especially retail) on online platforms difficult under the applicable legislation/regulation.

In addition, in the case of on-line distribution, the relevance of the automated advice-solutions becomes very high. As it is important to ensure the right level of investor protection, in the case of automated financial advice tools this requires developing a technologically advanced, robust and secure along with compelling tools/services for customers. Hence, technological barriers in developing such tools can become an additional important factor delaying the implementation of on-line distribution.

It should also be mentioned that in some member states (e.g. Poland and Croatia) the NCAs require the provision of on-line information in local languages, which is a language barrier that impedes a direct distribution via a global EU platform.

Question 7.3 – Are there aspects of the current European rules on marketing, administrative arrangements, notifications, regulatory fees and other aspects (such as know your customer requirements) that hinder the development of cross-border digital distribution of funds beyond those described in earlier sections?

Question 7.3a – What are these aspects?

As highlighted in our response to question 7.1/7.1a, there is a wide scope of regulatory requirements (apart from the ones coming from the financial services legislation and sector rules for asset managers and investment funds) that asset managers need to comply with when setting up online distribution services through websites. For that reason, a more holistic/coordinated approach is necessary to come up with the right solutions. EFAMA, therefore, considers, that this is an issue to be tackled within the EU digital single market agenda.

In that respect and as we already stated in our response to the Green Paper on retail financial services[25], "over the long term, we would invite the Commission to consider the idea of a "digital passport", i.e. a single saving solution that once completed and validated by a single provider would allow a consumer to open securities accounts or purchase other investment services – including UCITS – with more providers (even in different member states) and individually manage his/her digital account in a consolidated manner. This digitalisation of savings solutions will necessarily be adapted to fit both execution-only products, as well as those requiring investment advice."

Question 7.3b – Are there aspects of the current national rules on marketing, administrative arrangements, notifications, regulatory fees and other aspects (such as know your customer requirements) that hinder the development of cross-border digital distribution of funds beyond those described in earlier sections?

Question 7.3c – What are they?

Regulatory differences between member states hinder the cross-border distribution of funds. For instance, differences in "Know your Customer" - "KYC" requirements play an important role. Moreover, the on-line distribution of funds requires a further adaptation of the overall legislation related to the distribution of funds to the new Fintech developments. (See also EFAMA's response to question 7.5.)

[25] EFAMA response to the Green Paper on retail financial services, page 7
http://www.efama.org/Publications/Public/16-4010_EFAMAresponseGPRetailFinancial%20Services.pdf

Question 7.4 – What do you consider to be the main reasons why EU citizens are unable to invest in platforms domiciled in another Member State?

A number of factors have an impact as to the investors' reluctance to invest on-line and cross-border. We would mainly stress the lack of certainty and understanding of the impact of such a decision, due to lack of transparency about critical aspects, such as investor protection. Again, an appropriate example could be the different "KYC" checks criteria, as well as different requirements as to the set-up of an account in a foreign platform, for which some member states require a bank account in the jurisdiction of the fund's domicile.

Question 7.5 – What would you consider to be appropriate components of a framework to support cross-border platform distribution of funds? What should be the specifications for the technical infrastructure of the facilities? Please clarify among others how you would address the differences in languages.

EFAMA considers that the on-line distribution will be an increasingly important part of many consumers' overall experience. Responding to the ESAs' Joint Discussion Paper on automation in financial advice[26], we generally agreed with the assessment on the potential evolution of automated advice, as we believe firms will seek to develop their digital capabilities with automated advice considered as part of their wider distribution strategy.

However, EFAMA raised concerns that the development of automated advice and of the on-line marketing of funds, might take place in different forms and speeds in each market throughout Europe. This relates to broader economic and social trends and differences in the delivery of financial advice and effectively reflects the diverging national distribution landscape for financial products.

In order to ensure that the development of a coherent single market will ensure the same safeguards and protection that investors enjoy currently, EFAMA invited in its response ESAs to ensure that new entrants into the automated advice space are properly qualified and authorised, so as to avoid a decrease in the overall quality of advice and thus avoid running reputational risks for these tools and for the wider advice model in general.

In addition, it will be essential to distinguish clearly between financial digital advice and tools that merely guide investors to make their own investment decisions on a well-informed basis. MiFID, for example, distinguishes between products placed with financial advice and execution-only services. This distinction should be taken into account when considering potential rules.

Moreover, prior to proposing or taking any further action, ESAs should review all existing legislation and examine whether and to what extent it is applicable to the services offered by means of specific automated tools.

[26] See EFAMA's response here: http://www.efama.org/Publications/Public/MiFID-MiFIR/16-4017_EFAMA_Robo%20Advice.pdf

Section 8 – NOTIFICATION PROCESS

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members) and where appropriate, to national competent authorities

Other respondents are welcome to respond to some or all of the questions below.

Question 8.1 – Do you have difficulties with the UCITS notification process?

Yes. The problems are not only related to the absence of common rules as to what is necessary for the initial notification process, but also arise in cases of maintenance of the notification (when updates and modifications are necessary) and in cases of deregistration, where there is no common process across the single market.

Question 8.2 – If yes, please describe those difficulties.

A. Initial Notification

The notification procedure as defined in the UCITS Directive is sufficient to allow a UCITS to be distributed to retail investors in almost all EU member states.

One notable exception appears to be in Italy, where several additional requirements would be imposed on a foreign asset management company wanting to offer UCITS to local retail investors. Such additional requirements would essentially consist in:

- The creation of a dedicated subscription form (modulo di sottoscrizione);
- A parallel submission of the registration file to the CONSOB (i.e. via DEPROF system) and ongoing reporting (including a separate reporting of fees and additional information via the automated teleraccolta system); and
- The payment of additional regulatory fees to the CONSOB (see our response to Question 5.4).

Further on, a practical example of lack of efficiency in the initial UCITS notification process, is related to the material and the standard notification form that is used to inform the NCAs (Annex 1 to Commission Regulation (EU) 584/2010 of 1 July 2010). This foresees only three options of legal forms that the management company may have (see Part A of the format: common fund, unit trust, investment company), which means that any other legal forms are not covered (for instance in Norway a UCITS company may be set up also in the form of common funds with investment company elements). This creates confusion to the host NCA, but also to investors, in particular in cases where the selection of one legal form has direct implications for the tax treatment of the fund. Therefore, it is suggested that in the notification process of a UCITS, an indication on “any other legal forms” should be added in the list of legal forms.

B. Maintenance of the notification

Once the notification has been obtained, the process to update the legal documents with the host NCA (e.g. the prospectus, the KIIDs, annual and semi-annual reports etc.) is also not standardised. For example, the filing of updated KIIDs is not requested in some host jurisdictions, but is a requirement in others. In addition to these updates, some host NCAs require on a global basis, lists of appointed distributors, funds being authorised at a certain point in time, notices to clients, and risk classifications of funds etc.[27] EFAMA would propose that this information shall be reduced to an efficient level (e.g. KIIDs, notifications to customers).

C. De-registration

With regard to a fund's de-registration from a host country, the relative process is also not yet standardised and even more not harmonised. There are different approaches to filing requirements when companies need to exit a market via a de-registration. At this point in time, some countries (e.g. Belgium, Greece and Poland) permit de-registration of a fund only once the number of clients drops below a minimum specified amount (in Greece[28] and Belgium the threshold is 100 and 150 investors respectively) or after certain publication requirements are fulfilled. Prompting redemptions by the asset management company may be envisaged, provided the decision is left to the client.

<u>We therefore recommend focusing primarily on further standardizing requirements such as:</u>

- The requirement to submit written notice process to each host member state;
- Requirements to appoint local agents;
- Specific local marketing material rules in each member state.

In that respect, the proposal for a dedicated internet portal prepared and updated by ESMA with the contribution of all NCAs, as described in our previous responses, can significantly help in that part of the notification process as well[29].

[27] In this regard, please refer to the Italian CONSOB Resolution no. 17297 of April 2010 (Delibera n. 17297 - Disposizioni concernenti gli obblighi di comunicazione di dati e notizie e la trasmissione di atti e documenti da parte dei soggetti vigilati); available at: http://www.consob.it/documents/46180/46181/del_consob_2010_17297.pdf/665e28d4-2f82-4e9c-9b17-f60624564f7d

[28] It should be noted that the requirements for the deregistration process in Greece are based on a recent circular from the NCA (HCMC Circular 55 « UCITS authorized in another member state intending to market units/shares in Greece ») and is a result of the capital controls that apply to local investors as well as of the economic crisis in the local market, hence, trying to deal with risks of massive outflows.

[29] For further details see our response to question 5.5.

Question 8.3 – Have you experienced unjustified delay in the notification process before being able to market your UCITS in another Member State?
Question 8.3a – Please describe your experiences?

No unjustified delay is reported by EFAMA members, still there are significant differences as to the time necessary for the reaction of the NCAs concerning the treatment of the notification files. For instance, in Luxembourg it seems that there is a quick treatment of the notification files, i.e. within two business days, in order to allow for a sufficient time to market, whereas, other NCAs, (there are reports, for instance, for the Irish NCA) seem to be regularly using all the time prior the expiration of the deadline for the treatment of the notification files.

Question 8.4 – Do you have difficulties with the AIFMD notification process?
Question 8.4a – If yes, please describe these difficulties.

The registration process and the requirements regarding transparency, disclosures and reporting vary among the EU jurisdictions. These different requirements hinder in particular the cross-border marketing of AIFs in the single market.

Furthermore, in practice, a big number of NCAs regularly ask for amendments to a notification, regardless of whether the amendment is material or not, with the consequence that a notification period starts again. Particularly with respect to notification of AIFs, it has been observed that NCAs differentiate between considering a notification file incomplete and having comments on the contents of a document (prospectus etc.) submitted. In the case of the NCAs for which every comment renders the notification file "incomplete", the result is that the notification period starts to run again as from the day the new document has been received by the NCA, which makes the notification process in that jurisdiction much more complicated.

<u>We, therefore, recommend focusing primarily on further standardising a number of requirements such as</u>:
- The specific requirements applicable to the marketing of AIFs to retail investors;
- Requirements to appoint local agents, in particular, in relation to AIFs marketed to retail investors;
- Specific local marketing material rules in each member state;
- Specific criteria for which the notification period will start again, including a distinction between an incomplete file and comments on the documents.

See also our response to question 8.2 regarding our proposal for an ESMA specific internet portal that can provide an important basis for further standardisation also in the area of the notification process.

Question 8.5 – Have you experienced unjustified delay in the notification process before being able to market your AIFs in another Member State?
Question 8.5a – Please describe your experiences?

In the case of AIFs, the notification letter forwarded by the home NCA to the host NCA is very detailed not only in the case of initial registration, but also in the case of modifications. Any amendment of the offering documentation, material or not, has to be fully reviewed and this leads to a review of the notification letter, which also has to be sent to the host NCA one month prior to the entry into effect of the changes. This process is costly and extremely time consuming and is not proportionate as it isn't related to the initial registration, but to narrower modifications to the marketing documentation.

Question 8.6 – What should be improved in order to boost the development of cross-border distribution of funds across the EU?

EFAMA would propose to maintain the obligation to send a notification to the home NCAs only, while at the same time for the NCAs to send it to a centralized record of notifications hosted by ESMA and to which all NCAs and fund managers can connect to. This will allow for a single notification required for EU cross-border distribution. The provisions foreseen in the recently published Proposal for amending the EuVECA Regulation (on a central database publicly accessible on the internet listing all managers of funds using the designation "EUVECA" and the funds for which they use it[30]) sets a good way forward in that respect.

Such a central record managed at EU level could cover all initial registrations and modifications and update of the marketing material, as well as any de-registration of the fund from a member state. Concerning the AIFMD reporting requirements this type of platform would have the basic benefit of reporting under same publicly available and stable conditions/requirements with no additional costs for local services for research/compliance/translation etc. In particular for smaller asset managers registered in a few member States, this would significantly reduce the burden and costs related to the reporting requirements they are faced with currently in several jurisdictions. For UCITS, it could also include any subsequent update of constitutional documents, such as the articles of incorporation, the prospectus, the annual and semi-annual report and accounts, the UCITS KIID and PRIIPs KID, as well as the activation of additional share classes.

Moreover, such an initiative could also be combined with the opportunity for funds compliant with the UCITS, AIF, ELTIF, EUVECA and EUSEF regulatory framework to be granted at the fund management company request a ".eu" ISIN code by their national regulators (NCAs) instead of the usual ".fr", ".it", ".sp"., ".lu" (etc.) ISIN code. ESMA could maintain a repository of the list of these funds published on an internet portal. The merits of that proposal is that a European label would enhance transparency and safety to the benefit of the end investor[31].

[30] See also our response to question 5.5.
[31] As mentioned above.

We would also like to remind of the additional tools available to national supervisors resulting from the introduction of MIFID II. Product governance requirements on MIFID distributors include, inter alia, target market requirements and this adds a further investor protection layer of regulation. The process of notification should be, therefore, considered in the light of these new requirements.

Finally, concerning the lack of standardised information or common approach on the de-registration process, a more integrated approach, possibly via ESMA Guidelines, could help lifting this barrier for the cross-border players.

Section 9 - TAXATION

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members)

Other respondents are welcome to respond to some or all of the questions below.

Question 9.1 – Have you experienced any difficulties whereby tax rules across Member States impair the cross-border distribution and take-up of your UCITS or AIF or ELTIF or EuVECA or EuSEF?

Yes

Question 9.1a – Please describe the difficulties, including whether they relate to discrimination against UCITS or AIF (including ELTIF, EuVECA or EuSEF) sold on a cross-border, and provide examples. Please cite the relevant provisions of the legislation concerned.

The tax treatment on investment in European transferable securities, tax rates, and tax relief process for European Collective Investment Undertakings ("CIUs") is far from harmonized. Conversely, it is a very different, complex and sometimes uncertain environment which is clearly, from the tax perspective, not encouraging cross border investments within European member states.

The issues are multiple and not only range from the lack/difficulties of access to tax treaties for investment funds (incl. difficulties in obtaining refunds of withholding taxes (WHT) or relief at source when tax treaties' access is granted), but also to the need of investor tax reporting in other member states or tax discrimination between resident and non-resident investment funds.

For instance, the European Commission should be aware that national tax reporting that need to be prepared by investment funds for their investors (e.g. Austria, Belgium, Denmark, Finland, Germany (until 2017 included), Italy, Sweden and UK) are based on national legislative requirements, although they normally share the common aim of facilitating investor compliance with local tax law. Such tax reporting obligations are not harmonised across Europe and therefore represent additional complexity and costs for investment funds that distribute their shares cross-border.

This triggers additional costs and efforts of coordination. In case of target funds in the fund to be reported the challenge, effort and cost situation is a multiple one.

Local rules demand asset managers to provide specific data that are absolutely necessary to get the appropriate tax treatment. In some countries, foreign domiciled funds are even required to appoint for that purpose a tax representative while being marketed to the public which creates additional complexity and incurs extra costs for non-domestic funds (i.e. tax representative fees + newspaper publication fee of this tax data). The multiplication of these local specificities is an impediment to develop cross border distribution of funds. The same point is valid when addressing third country markets.

The table below reflects that there are a number of countries (non-exhaustive list) which currently requires some level of investor tax reporting for offshore funds.

Also on the table you will see the volumes of tax calculations required in a year per country.

So, for an offshore fund (with a single share class/ISIN) distributing into all these markets, a Fund Administrator will calculate in a year 260 Net Asset Values (NAV) for a daily NAV fund but will also need to calculate a total of 2,534 tax figures. This represents a burdensome and costly exercise for the fund.

Example of volumes for one share class and investor tax reporting with 260 NAV points

No:	Country	Daily	Daily (260 days)	Y/E	Interim/periodic	Total
1.	Germany	4	1,040	1	120	1,161
2.	Austria	1	260	60	4	844
3.	Switzerland	n/a	n/a	1	n/a	1
4.	UK	n/a	n/a	5	n/a	5
5.	Belgium	1	260	n/a	n/a	260
6.	Italian	n/a	n/a		2	2
7.	EU SD	1	260	n/a	1	261
Total 260 NAV points						2,534

Other Tax barriers for inbound distribution (local tax rules in host countries)

There are also other examples where local tax rules makes it much easier for the investors to buy domestic funds compared to foreign funds and which is not related to specific tax reporting requirements. Different tax treatment of the investors depending on whether the fund is domestic or foreign is discriminatory and will generally be an infringement of the freedom of free movement of capital a, cf. TFEU art. 63 and 66.

In some countries, e.g. in Ireland, local income tax on distributions/redemptions is to be collected at source by imposing a final withholding tax on any distributions, reportable income or capital gains. However, such rules do in many cases only apply for local funds and not foreign funds, because the latter are outside the jurisdiction of the relevant country. If the investors in such cases buy units in foreign funds the result might be that the investors must annually file a special tax return for investments in foreign funds etc.

Accordingly, the investors prefer to buy local funds where such administrative burdens do not exist. High net worth individuals and institutional investors may be able to overcome this hurdle, but if the relevant fund is to be marketed to all types of investors this might in practice create a barrier for cross-border distribution. A way to solve this problem in practice could be to grant foreign funds the same possibility to withhold local income taxes on dividends/redemptions on behalf of the local investors.

Also different tax treatment in the country of registration and the host country may exclude investment funds from being distributed cross- border. In some countries for examples, UCITS and AIFs only exist in the form of the contractual fund type (FCP). In other countries, e.g. UK and Ireland, such funds are deemed to be transparent for tax purposes, i.e. that the investors are taxed on interest, dividends and capital gains on the underlying investments as if they had invested directly. In practice such tax treatment in the host country often prevents cross-border distribution, since it´s not possible for the fund providers to provide the necessary information that makes investors able to file their tax returns.

Examples like those listed above often imply that the fund providers must launch several copies of the same products in each of the jurisdictions in order to become tax efficient for investors in the different markets. This prevents the fund providers from economics of scale to the benefit of their investors. In the next step this leads to competition barriers because some institutional investors do not invest in funds whose AUM are below certain levels.

Besides, WHT currently applied at national level and the fact that in many cases investment funds do not have directly access to reduced WHT rates available under tax treaties act as a barrier (see in more detail below).

Question 9.2 – Have you experienced any specific difficulties due either to the absence of double taxation treaties or to the non-application of treaties or to terms within those treaties which impede your ability to market across borders? For example: difficulties in determining the nationality of your investors or difficulties in claiming, or inability to claim, double tax relief on behalf of your investors.

Yes

Question 9.2a – Please, describe those difficulties, and if applicable, how these can best be resolved – for example through amendments to double taxation treaties. Please share any examples of best practice that could help to address these issues.

Overall, tax treaties sometimes operate well in the context of investment by a resident of one country into the other, but much less well for cross-border funds which pool investors from multiple jurisdictions. Investment funds are generally (and necessarily) exempt from tax in the territory where they are located – whereas tax treaties often make eligibility dependent upon being a 'tax resident' and investment funds often struggle to meet these criteria because of their status. This was as aforementioned recognized by the OECD in its 2010 report on collective investment vehicle (CIV) tax treaty access, but little practical progress has been made since in improving the tax treaty access for investment funds.

The main difficulty is that many CIUs (UCITS as well as AIFs) are widely distributed and held by or through distributors or through CSDs (Central Securities Depositors). All the information with respect to the end investors lies with the distributors (e.g. account holder banks, brokers or transfer agents) which – mostly for commercial and legal reasons – often are not willing or able to share the information with the issuer (CIU). Therefore, the CIUs would only have information about those distributors, if any, but not of their "end" investors. Tax treaties, however, often foresee LoB-rules (limitation on benefits) in order for the funds to achieve treaty entitlement. LoB-rules require the funds to proof their "end" investor base (nationality/residence). Due to the before mentioned, for CIUs this is often very difficult or even impossible to achieve.

Cross-border European investment funds have also long suffered differing withholding treatment when compared to domestic funds, and have been forced to challenge this at the European Court of Justice (ECJ) and national courts. Significant progress has been made, but not all discriminatory treatment has yet been eliminated. For instance, in Finland, funds which are not listed on a stock exchange cannot access withholding tax exemption. We would encourage a renewed effort be made by the EU to discourage discriminatory WHT on non-domestic investment funds by member states.

Some considerations in this respect from a Luxembourg perspective:

- A Luxembourg FCP in general does not benefit from double taxation treaties (DTT) as it is not a legal person and is therefore deemed as "transparent" from a tax point of view.

- In some countries, an FCP could however theoretically benefit from a DTT. DTT concluded with Germany specifically refers to the notion of FCP and the FCP can benefit from the regulations of a DTT in so far as the fund shares are owned by German residents.

- As a SICAV is an own legal person, it is considered as Luxembourg resident and therefore benefits in some countries from double taxation agreements.

- When the FCP or SICAV does not benefit from DTT, the investors are considered as taxable persons based on the DTT and a claim on tax relief on their behalf can be made.

To illustrate this, let us take as example a Luxembourg Fund for example investing in a German stock. Based on German tax regulations a WHT amounting to 26,375% of the gross dividend is withheld in Germany (Art. 50d GITA). There are two alternatives:

- Alternative 1: Fund is a FCP. If the FCP is not able to benefit from the double tax treaty concluded between Germany and Luxembourg it is the investor who mayclaim for a tax relief of 11,375% (DTT rate for dividend income amounts to 15%). In practice it is on the one side a complex process to claim back WHT and on the other side due to costs (tax advisor etc.) in most cases in general not advantageous to claim back WHT from an economical point of view (dependent on the kind of investor).

- Alternative 2: Fund is a SICAV. As the SICAV may apply the regulations of the double tax treaty concluded between Germany and Luxembourg (Germany considers the SICAV as taxable person) the SICAV as such can claim back WHT amounting to 11,375%. For countries not considering the SICAV as taxable person according to the double tax treaty, we refer to the aforesaid in alternative 1.

In France, even if French CIUs (FCP or SICAV) are supposed to qualify for the France-Germany DTT, they have difficulties to do so in practice due to the German tax authorities requesting specific information, such as the number of investors and the number of shares or units issued by the FCP/SICAV, which are often not available.

Importantly, EFAMA wants to point out that this is a good example of a potential barrier that Germany has already successfully addressed, since Germany will as from 2018 apply a new and simpler tax regime and the WHT on German dividends paid to foreign investment funds, including Lux FCP, will only be 15%. Therefore there will be no need for foreign funds to apply DTTs anymore.

We can also mention that Luxembourg issued Circular L.G.-A n°61 (***Appendix 1***) in February 2015 which sets out Luxembourg Tax Authority's position on issuing Certificates of Residency (CoR) for Luxembourg resident SICAV, SICAF and FCP. This year we have found that the Luxembourg Tax Authority will not issue CoRs or certification for SICAVs investing in countries where the double tax treaty does not explicitly recognise these entities or there is a separate agreement in that respect. Currently we are seeing that although in the past the Luxembourg Tax Authority used to issue CoR for SICAVs investing in Italy, this is no longer the case and as such these entity types are no longer able to benefit from the reduced domestic or treaty withholding rates, when in the past they were.

In Slovakia, the capital gain of domestic funds are taxed at a current rate of 19 % which is executed by the local asset management companies. The capital gain of international fund needs to be included in the personal income statement of the Slovak investors which results in a tax rate of 19 % (or 25 % depending on the overall income situation) plus a rate of 14% health insurance meaning a total rate of 33 % (or 39 %) to be applied.

In Sweden, since Swedish UCITS and "specialfond" are exempt from tax, foreign UCITS are also exempt from tax and can receive exemption from tax at source but needs to provide a UCITS certificate to the custodian. According to the Swedish Tax authority a foreign fund that is not a UCITS and is a legal person e.g. a Luxemburg AIF that is a SICAV can never be exempt from Swedish tax even if it is from an investor's perspective similar/(equal) to the Swedish fund named "specialfond". The Swedish Tax Authority´s argument for this is that a foreign fund is a legal person and the Swedish Fund "Specialfond" is a contractual fund and consequently not equal. On the other hand, a foreign fund that is contractual fund and is similar to a Swedish UCITS or "specialfond" can be out of scope from Swedish withholding tax. The rules are very complicated and difficult for both foreign funds and the Swedish custodian to understand and handle.

Therefore, in our view, WHT currently applied at national level and the fact that in many cases investment funds do not have direct access to reduced WHT rates available under tax treaties act as a barrier. The time and costs of recovery of WHT – if possible at all - in many cases act as deterrent for investment funds and pension funds to invest in states other than that of their residence where they are normally taxed at a low rate or exempt from taxes from corporate income tax.

Two solutions can be considered:

- The fund is always considered as the beneficial owner (or a qualified person) and qualifies for the double tax treaty without further requirements (no LoB-requirement). This solution, which is in part supported by the 2010 OECD CIV report, should be applied at least to all widely held open ended funds. The EU should encourage in this respect member states to take a harmonised position in negotiating revisions to double tax treaties. That position should aim to protect pooled fund investing, UCITS in particular, and do so on a more standardised basis.

Alternatively, in a European context, the current application of LoB clauses provided by certain DTTs concluded between member states should at least be reconsidered for funds, as it may be viewed as a barrier since a fund must in some instances only be held by resident investors of the country where it has been established in order to qualify for said DTT benefits (look-through approach): in our view, investors from all European countries should be accepted. A potential further step could even be in this respect to consider that a fund set up in a European country, authorized and controlled by a European regulator and marketed only in European countries is deemed to be a European resident for tax treaty purposes and benefit, as a beneficial owner, from the various tax treaties signed between European countries.

- The TRACE (Treaty Relief and Compliance Enhancement) project.

Given that both Directive 2014/107/UE and Common Reporting Standards of the OECD provide for an exchange of tax information between countries, building on the experience on exchange of information of these initiatives, the implementation of the TRACE initiative in EU countries should be fostered in order to ease the problem of recovery of WHT and reduce tax barriers on cross-border investments for funds that cannot be considered as beneficial owners.

1.) Complementary comments on the implementation of TRACE for the purpose of simplifying withholding tax procedures

TRACE has been designed to improve efficiency for claiming treaty benefits for investors and EFAMA understands that TRACE could be a way to overcome WHT issues. EFAMA is therefore supportive of a TRACE implementation or any other alternative that provides additional information to investors.

As mentioned above, at the moment the time and costs of recovery of WHT in many cases act as deterrent for investment funds to invest in states other than those of their residence. An implementation of TRACE could definitely ease the problem of recovery of WHT and reduce tax barriers on cross-border investments for funds.

However, EFAMA is concerned that in practice implementation may be quite protracted and will not in all cases ensure treaty entitlement of widely-held CIUs. Thus, EFAMA is of the opinion that it would be helpful to have better and easier European WHT rules in advance of the implementation of TRACE. It is necessary that investment funds are generally entitled to double tax treaties so that the fund itself will always be considered as the beneficial owner in all member states and is therefore able to claim benefits in its own right. In this regard it is necessary to set up a unified system.

As already outlined, many funds are widely distributed, especially Luxembourg and Irish funds are routinely distributed beyond Europe. Retail funds are typically held by or through distributors or CSDs and would only have information about those intermediaries, if any. Thus, in case TRACE requires the knowledge of the investor base it is not helpful for a lot of widely-held CIUs. Consequently, better and easier rules including a general treaty entitlement for UCITS and comparable AIFs would be mandatory.

2.) Easiest and justifiable solution: Abolishment of WHT for payments made to UCITS and AIFs within the EU and partner jurisdictions

That being said, from our point of view the easiest solution to solve complex legal and practical WHT problems in Europe would be the abolishment of WHT on transferable securities for payments made to UCITS and AIFs within the EU and partner jurisdictions to the EU. This is a less radical proposal than it may at first appear.

First, generally abolishing WHT on cross border dividend payments was one possible option presented by the Commission in its 2011 consultation.

Second, further to the judgement of the ECJ on the principles of the free movement of capital (especially "Santander", C-338/11 or "Emerging Markets", C-190/12), some member states already abolished under certain circumstances WHT for certain types of foreign CIUs (France; Spain; Poland) or limited the WHT rate to 15% (e.g. Netherlands, Belgium, Germany from 2018). In the case of Netherlands, it limited the WHT rate to 15% already on January 2007 in order to limit administrative burdens. The Netherlands came to the conclusion that due to its extensive treaty network in most cases the shareholder receiving the dividend was entitled to a reclaim of 10% anyway. So it was decided that in order to limit reclaim procedures, the statutory rate should be limited to 15%, which is equal to the standard treaty WHT rate for dividends.

Other member states do not levy WHT on certain type of income paid on the basis of their domestic legislation (e.g. UK on dividends and Luxembourg on interest). The Commission could thus consider a recommendation to member states to abolish the WHT for payments made to UCITS and AIFs in order to ensure a uniform and consistent application of the ECJ judgements.

As an alternative approach it also could be considered to at least impose an EU wide limit on the WHT rate equal to the rate foreseen in double tax treaties which is 15%.

As major source countries in Europe already followed those approaches this would also help to create a level playing field for all countries within the EU and partner jurisdictions and to boost the competitiveness of the Single Market as a whole.

As to a potential 'treaty shopping' argument against this, it is worth reiterating that investors invest in a widely held fund to benefit from professional management of a diversified portfolio. They do not have control over the investment decisions and treaty benefits are not the primary objective of investing in a fund.

Question 9.3 – Feedback to earlier consultations has suggested that the levying of withholding taxes by Member States has impeded the cross-border distribution of UCITS or AIFs (including ELTIF, EuVECA and EuSEF). Withholding taxes are usually reduced or even eliminated under double taxation treaties. But in practice it has been claimed that it is difficult for non-resident investors to collect any such withholding tax reductions or exemptions due under double taxation treaties. Have you experienced such difficulties?

Yes

Question 9.3a – Please provide examples of the difficulties with claiming withholding tax relief suggest possible improvements and provide information on any best practices existing in any Member States. Please cite the relevant provisions of the legislation concerned.

Besides difficulties mentioned in 9.2a, EFAMA's members experience several difficulties due to inconsistent WHT recovery processes which are defined and applied at national level:

- The deadlines as well as the forms are deviating among the member states. The supporting documentation required by the forms also widely varies and may in some instances be heavy and bureaucratic. Often, physical tax reclaim forms have to be signed and stamped by all relevant actors in the chain (investors, local tax authorities, paying/fiscal agents), translation services are required and foreign intermediaries are excluded from offering the WHT relief.

- The possibility for an investment fund to appoint a local representative, such as the depositary bank, to file tax reclaims on its behalf is not always granted.

- Tax reclaim forms quite often list unilaterally additional conditions which are onerous to meet or which simply make impossible to take a systematic system-based approach in the tax reclaim process. It is therefore nearly impossible to standardize the relevant processes and this lack of consistency is expensive and time consuming.

- Tax authorities refuse to sign foreign tax forms.

In instances where costs outweigh the benefits of reclaiming tax, an investment fund may prefer to forego its right to claim treaty benefits.

A summary done by the International Custody Tax Liaison Group from the British Bankers Association in June 2015 (***Appendix 2***) captures all EU countries and the WHT rates on tax events from transferable securities (dividends from equities and interest from fixed income), the domestic tax rate, the treaty tax rate, the possible domestic tax exemption process, and the treaty relief at source and/or tax reclaim process.

This summary also reflects substantial and fundamental discrepancies between member states on the tax treatment of transferable securities:

- Some member states imposes WHT on dividends and/or interest, some of them do not.

- The WHT rates are different for those member states which imposes WHT on dividends and/or interest.

- Some member states provides tax relief (exemption or reduced rate) through the application of a Double Tax Treaty.

- In the application of tax relief, some member states provides tax relief at source based on specific tax documentation provided.

- Other member states provides treaty tax relief through a tax reclamation system. There are very different processes, documentation provided, and refund time frames between member states.

One of the above mentioned discrepancy is the great difference in how CIUs can access double tax treaty reduced rates or exemptions. Across member states, as mentioned, there are some countries that operate a relief at source mechanism while others require reclaims to be filed ex post (e.g. Denmark, Austria). The lack of generalised relief at source automatically increases costs to funds and therefore to investors. Having all member states operating relief at source for funds would be a highly welcome efficiency improvement on its own.

As regards reclaims filed ex post, a key issue for funds is the timing difference and delay in getting the reclaim back as well as the certainty. For an open ended fund, this can lead to incorrect fund pricing e.g. if irrecoverable WHT is accrued in the price. The timing differences can also disadvantage one group of investors but benefit another group. Therefore the timing of processing by tax authorities is an increasing problem. For instance, one of our member file treaty claims across 27 markets and 60% of its claims have not been recovered yet and are outside of the standard timeframe suggested by its custodian. Again, this can lead to pricing difficulties (as already state above).

Member states also have different types of good practices in place:

- Relief at source (only for some instruments? Subject to documental evidence?).

- Simplified documental evidence (e.g. validity of certificate of residence > 1y).

- Refund in a short period of time (from 7-30 days to 10 years).

- Single point of contact for handling refund claims.

- Single form for the refund.

- Claim forms available online/ possibility to complete the whole process online.

- Possibility for intermediaries to claim relief on behalf of their clients.

The above being said, we mention hereinafter some concrete domestic examples.

Austria

Additional documentation is required for Investment funds to access treaty relief and the number of investors will determine at what level the reclaims can be filed at (***Appendix 3***).

Besides, funds with less than 100 shareholders should obtain tax certificate from each shareholder in order to access treaty relief between Luxembourg and Austria.

As an Austrian Investment Fund is not a taxable person and has no legal personality, the fund itself cannot claim any treaty benefits. In Austria the owner of the securities held within the fund are the individual investors. As there are numerous of investors within the fund, they will therefore also have no chance to get any reduction/exemption at source based on DTT, as they cannot prove the kind and proportion of securities held. The result is that the individual investor is often subject to double-taxation (withholding tax in the foreign source country on the movable income (interest, dividend…) and taxation on said movable income in Austria under the personal income tax regime of the Austrian individual investor).

Czech Republic

Local funds in the Czech Republic are not subjected to the so-called tax transparency regime where Unit Holders as the beneficiary owners, rather than the fund itself, are considered as the taxable entity, who are then required to pay tax themselves on their income generated through their tax transparent fund.

Funds established under other jurisdictions such as Germany or Austria fall under the category tax transparent entities.

The amended Czech Income Tax Act introduced as of 1 January 2013 a new withdrawal tax rate (35%) applicable to income generated by EU non-residents (and residents of states outside the EU that have not concluded the relevant tax treaties) in the Czech Republic; this has resulted in some unexpected impacts on revenues from tax transparent funds. Individual beneficiaries of either interest or dividend income received from Czech legal entities shall be required to evidence their tax domicile; otherwise they will be required to pay the 35% withdrawal tax rate in full. As regards to transparent funds, this means that they would be required to evidence the tax domiciles of all of their Unit Holders so that they become eligible for the application of the mere 15% rate as applied to Czech residents. In practice this proves to be administratively not possible.

Denmark

Audit requests being received for reclaims filed by several investment funds. Further, the requirements for filing reclaims in Denmark have changed with additional documentation being required (generally falling in line with what had been requested by the Danish tax authorities (SKAT) for the audits) and no clear guidelines as to exactly what documents will meet their requirements, making it difficult to access treaty relief. Simplified solution is being suggested by various custodians as current uncertain requirements are difficult to comply with/manage. (***Appendices 5 and 6***)

Luxembourg

It is our understanding that nearly all retail investors in a (Luxembourg) FCP or other transparent fund vehicles have not claimed a WHT relief. From an economic point of view they are subject to a double taxation. The Fund (SICAV or the Management Company on behalf of its FCP) will on the other hand claim the WHT in different countries (e.g. Finland, France, Germany, Norway, Poland, Spain, Sweden).

Difficulties are on the one side complex reclaim processes and application forms only available in the national language and in English. On the other side due to the complex national tax regulations a local tax advisor needs to be assigned.

Depending on the investor type, a possible improvement could be to consider tax transparent vehicles such as the FCP for (DTT) "claiming purposes" as non-transparent.

The DTT between source country and fund domiciliation country could be applied for all investors in order to facilitate the claiming process. In case of a diverse investor structure from a tax resident point of view, it could be based on the percentage (average or as per financial year-end) of the different investors per country if the FCP would be able to identify the tax residency of its investors.

The possibility to apply for a relief at source based on the aforesaid would facilitate the process. This is currently the case in France.

Germany

German Tax Authorities in some instances have refused to sign foreign tax forms (cross-border dividend distributions, interest reclaim, etc.). An example is the German Tax Authorities refusing to certify Finnish VEROH 6161e Tax Forms which are required for German Funds to benefit from the Finnish domestic exemption on dividend WHT. The German Tax Authorities view is that the CoR should suffice.

Besides, Germany has a transparent fund tax regime until 2018 which means that as a rule, most foreign investment funds must provide a German Questionnaire document. A specific example would be the Germany-Ireland treaty which provides different processes for UCITS and non-UCITS funds as noted in Article 1(b) of the Protocol to the treaty which covers only UCITS, meaning that for non-UCITS we apply standard treaty provisions and can only claim for resident investors.

1. With reference to this Agreement as a whole: (…)

b) Undertakings for Collective Investment

aa) Notwithstanding the provisions of this Agreement but without prejudice to any benefits to which an undertaking for collective investment in transferable securities ("UCITS") would *otherwise be entitled under this Agreement, a UCITS which is established in a Contracting State and which receives income arising in the other Contracting State shall be treated for purposes of applying the Agreement to such income as an individual who is a resident of the Contracting State in which it is established and as the beneficial owner of the income it receives, but only to the extent that the beneficial interests in the UCITS are owned by equivalent beneficiaries.*

bb) However, if at least 95 percent of the beneficial interests in the UCITS are owned by equivalent beneficiaries, the UCITS shall be treated as an individual who is a resident of the Contracting State in which it is established and as the beneficial owner of all of the income it receives.

cc) For purposes of this paragraph,

i) the term "UCITS" means an undertaking for collective investment in transferable securities within the meaning of European Communities (Undertaking for Collective Investment in Transferable Securities) Regulations 1989, as amended or extended from time to time and any other regulations that may be construed as one with those Regulations, as well as any other investment fund, arrangement or entity established in either Contracting State which the competent authorities of the Contracting States agree to regard as a UCITS for purposes of this paragraph; and

ii) the term "equivalent beneficiary" means a resident of the Contracting State in which the UCITS is established, and a resident of any other State with which the Contracting State in which the income arises has an income tax agreement that provides for effective and comprehensive information exchange who would, if he received the particular item of income for which benefits are being claimed under this Agreement, be entitled under that agreement, or under the domestic law of the Contracting State in which the income arises, to a rate of tax with respect to that item of income that is at least as low as the rate claimed under this Agreement by the UCITS with respect to that item of income.

For UCITS funds this requires them to calculate the percentage of Irish and equivalent beneficiaries in order to recover the withheld tax. Documentation requirements include the provision of a self-assessment document evidencing the percentage of Irish/equivalent beneficiaries, in addition to the UCITS attestation document from the Central Bank of Ireland.

A non UCITS fund must calculate the percentage of Irish investors and provide the German Questionnaire.

As a consequence thereof, a different treatment of UCITS and non-UCITS Funds exists (one file for Irish and equivalent beneficiaries while non-UCITS can only file for Irish investors). Further, in both cases funds will need to go away and do calculations to arrive to the beneficiaries' percentage. This can be burdensome and not straight forward, especially when you may have listed funds.

Portugal

Portugal requires all collective investment vehicles to provide a specially worded CoR to contain wording along the lines of "is fully liable to tax and is not fiscally transparent". If the CoR cannot contain the wording then this can be done on a statement, but either document must be issued by the tax authority of the jurisdiction where the investment fund is resident. To date this has caused problems for Irish investment funds although the Irish Revenue are now looking at this problem with the view of finding a solution.

Sweden

In Sweden, Swedish UCITS funds and an alternative fund named “specialfond” are since 2012 exempt from tax. Due to this the Swedish Tax Authority stopped issuing Certificate of residency for Swedish funds. According to the Swedish Tax Authority the OECD report from 2010 “The granting of treaty benefits with respect to the income of collective investment vehicles” should be interpreted as that funds that are totally exempt from tax cannot be tax resident under the tax treaties. Funds that do pay tax but can be exempt from tax if they distribute the dividend and funds that do pay a low fee like funds in Luxembourg can be resident under the tax treaty if the source country accept that these funds are resident under the tax treaty. The Swedish tax authority´s interpretation of the law was tried in court earlier this year. The Swedish Tax Authority lost but has decided to issue certificate of residency for Swedish funds only if the Swedish preparatory work to the tax treaty does not state that a person must pay tax according to normal corporate tax rates in order to apply the tax treaty. Since most preparatory work to the Swedish tax treaties does include this statement Swedish and foreign funds that are totally exempt from tax should according to the Swedish Tax Authority not be tax resident and cannot apply the tax treaty.

Since the Swedish Tax Authority has not issued resident certificate for Swedish funds countries like Germany and Switzerland no longer accept Swedish funds to apply the tax treaty.

Question 9.4 – What are the compliance costs per Member State (in terms of a percentage of assets under management) of managing its withholding tax regimes (fees for legal and tax advisers, internal costs, etc.)? Do they have a material impact on your UCITS or AIF (including ELTIF, EuVECA and EuSEF) distribution strategy?

The costs for the claims are essentially costs for the tax and legal advisers and they differ a lot depending from the country where the claim is made. For example in Poland, the claiming procedure is very complicated and long. As a consequence, the costs for claiming are logically higher than for instance in the Scandinavian countries where the procedure is more convenient and straightforward.

Alternatively, managing withholding tax regimes is also in some instances a part of an all-inclusive fee agreement with the custodian. Hence, providing any cost estimate for this process is not straightforward.

Question 9.5 – What if any income reporting or tax withholding obligations do you have in the Member States where the UCITS or AIF (including ELTIF, EuVECA and EuSEF) is located and what if any difficulties to you have with reporting formats? What kind of solutions and best practices, if any, would you suggest to overcome these difficulties? If a single income reporting format were to be introduced across the EU, what would be the level of costs saved? Would this have a material impact on your UCITS or AIF (including ELTIF, EuVECA and EuSEF) distribution strategy?

The European Commission should be aware that national tax reporting that need to be prepared by investment funds for their investors (e.g. Austria, Belgium, Denmark, Finland, Germany (until 2017 included), Italy, UK) are based on national legislations' requirements. Such tax reporting obligations are not harmonised across Europe and therefore represent additional complexity and costs for investment funds that distribute their shares cross-border.

Local rules in some countries demand asset managers to provide specific data that are absolutely necessary to get the appropriate tax treatment. Currently each reporting system requires an individual calculation and system which needs to be tracked on a regular basis with respect to legal and technical updates. In some countries, foreign domiciled funds are even required to appoint for that purpose a tax representative while being marketed to the public which creates additional complexity and incurs extra costs for non-domestic funds (i.e. tax representative fees + newspaper publication fee of this tax data). The multiplication of these local specificities is an impediment to develop cross border distribution of funds. The same point is valid when addressing third country markets.

As regards domestic tax reporting, streamlining the reporting formats in those countries which require tax reporting into a pan-European tax-reporting format for EU funds could be considered and could substantially reduce certain costs (e.g. legal and tax advisers). In some instances it could also have a material impact on the funds distribution strategy. Within the EU, the long-term objective is to develop a harmonized framework for taxation of savings and investment products.

Besides inconsistent investor tax reporting requirements, the absence of an EU tax framework for funds also leads to tax inefficiencies on cross-border fund re-domiciliations and mergers. To address this, we believe that investment funds should be included in EC Directive 2005/19/EC (the Merger Directive) to allow tax-neutral reorganisations of cross border investment funds.

Some domestic specificities are detailed hereinafter in terms of income reporting.

Austria

Depending on the filing of tax figures according to the „Fondsmeldeverordnung 2015" foreign funds qualify either as non-reporting or reporting funds. The latter status requires as follows:

- Registration with OeKB (Österreichische Kontrollbank);
- Appointment of Austrian tax representative;
- Delivery of relevant data to OeKB in order to calculate taxable income;
- Publication of results on OeKB website.

If a fund lacks one of the above mentioned requirements, investors face a lump-sum taxation. Although the investor has the possibility to present the tax authorities the corresponding tax figures ("Selbstnachweis"), it is our understanding that this is rarely the case.

The tax compliance costs amount to roundabout EUR 2.000,00 per share class depending on the number of share classes per (sub)fund and the kind of fund. Fund-of-funds are expected to be more expensive.

In Austria it is mandatory to appoint a Tax Representative. It is currently not possible for a fund manager (compared to the United Kingdom) to calculate and publish the figures without a tax representative. This obligation leads to additional external costs.

Belgium

For Belgium no general tax reporting is required. Nevertheless it is considered favourable for Belgian retail investors to calculate and publish the Belgian TIS (taxable income per share) on a daily basis.

With respect to corporate investors a look-through approach for Belgian tax purposes is required to provide for a favourable tax treatment.

Denmark

We are aware of only two or three non-Danish fund groups which at the moment comply with Danish tax requirements. Please note, that Danish tax reporting status is necessary for foreign funds if they want to be tax efficient for private individuals. For companies and institutional investors Danish tax reporting status does not give any advantages.

If the foreign fund does not obtain Danish reporting status, private individuals will be taxed annually on a mark-to-marked principle. Moreover, the investors will always be taxed at the higher rates for capital income and accordingly the investors cannot benefit from the lower rates for equity income even if the foreign funds are based on equities.

Germany

The tax reporting obligations for domestic and foreign funds are regulated in the German Investment Tax Act ("InvStG"). Based on the calculation and publication those funds can be transparent or non-transparent for German tax purposes.

Non-transparent funds which do not publish the corresponding tax figures are in general disadvantageous for German investors. In general a lump-sum taxation is applied. Although the investor has the possibility to provide the tax administration with the corresponding tax figures ("Selbstnachweis"), it is rarely used as the investor himself is in general not in the position to gather all information and to calculate the required tax figures.

The tax compliance costs amount to roundabout EUR 1.500,00 per share class depending on the number of share classes per (sub)fund and the kind of fund.

Please note, however, that these tax reporting requirements will cease to exist as from 1 January 2018.

Italy

According to the Italian tax regulation income deriving from direct investment in public securities (i.e. bonds issued by the Italian government and other countries which allow an adequate exchange of information with Italy) are subject to a 12,5% tax rate (in lieu of the 26% tax rate applied to other financial income, including proceeds deriving from Italian and certain EU and EEA investment funds).
In order to prevent that indirect investment in public securities through investment funds be penalized, it is provided that the 26% tax rate does not apply to the portion of proceeds that is attributable to investment in public securities.

Therefore, in order to benefit from the favourable tax rate, both the Italian fund and EU and EEA investment funds distributed in Italy are required to calculate the portion of their assets (the EAR – eligible asset ratio) that are invested in public securities eligible for lower tax rate. This ratio is calculated twice a year.

For Fund-of-funds the EAR has also to be applied in order to provide the investor with the possibility to participate from the above mentioned favorable tax rate.

In cases where the EAR is not available (i.e. foreign target funds do not calculate it) income from target funds is taxed on investor–level with the higher tax rate.

Spain

Income tax
In Spain, in order for a domestic SICAV to qualify as UCITS, it needs to have at least 100 shareholders and therefore the SICAV (not the investors) will benefit from the special tax regime (income and capital gains are subject to a tax rate of 1 percent on the fund income). However, this requirement does not apply to the EU SICAV since an EU UCITS SICAV can be registered in Spain for distribution even if the number of its shareholders is less than 100 shareholders.

Deferral tax regime
On the other hand, in Spain, UCITS' investors benefit from a tax deferral regime for gains according to which if any natural person disinvest in a UCITs but, at the same time, the same amount is invested in another UCITs, he/she will not pay the relevant capital gain tax generated for the investment in the first UCITs at that moment (known as "traspaso" system). This tax regime applies to UCITs with a contractual form ("Fondos") and UCITs as investment companies (SICAV), whether Spanish domiciled or EU domiciled registered in Spain for distribution. However, in case of SICAV, the tax deferral regime is applicable provided two conditions are met: (i) the number of shareholders of the SICAV is higher than 500 and (ii) the investor shareholding in the SICAV over the 12-month period prior to the date of the transfer did not exceed 5% percent of the share capital of the SICAV. These two conditions apply

for both, Spanish domiciled SICAVs and for EU SICAVs registered with the CNMV (Spanish regulator). For this purpose, EU SICAVs shall inform the CNMV about the number of shareholders so that the Spanish investors in that SICAV could benefit from this tax deferral regime.

United Kingdom

The UK tax system distinguishes between reporting and non-reporting funds. Although there is no legal requirement for non-UK funds being a reporting fund, the investors of reporting funds may obtain significant tax advantages. The main advantage is the application of Capital Gains Tax (20% from April 2016) instead of Income Tax (up to 45%) in case of the disposal of fund units.

In order to obtain reporting fund status the following requirements must be fulfilled:

- Initial application to HMRC.
- Preparation of computation of reportable income.
- Submit information to HMRC and investors within a defined deadline.

Question 9.6 – Are there any requirements in your Member State that the UCITS or AIFs (including ELTIF, EuVECA and EuSEF) need to invest in assets located in that Member State in order to qualify for preferential tax treatment of the proceeds of the UCITS or AIF (including ELTIF, EuVECA and EuSEF) received by the investors in the UCITS or AIFs?

Our members were not aware of any such requirements.

Question 9.7 – Have you encountered double taxation resulting from the qualification of the UCITS or AIF (including ELTIF, EuVECA and EuSEF) as tax transparent in one Member State and as non-tax transparent in another Member State?

As mentioned above some member states do not accept that the foreign fund itself is a taxable person. Accordingly, the foreign funds should demonstrate that the investors are also resident in the country where the fund is registered in order to obtain treaty benefits. That is e.g. the case for Danish funds with investments in Germany, but it may be the case for many other countries. Especially, this is a problem for funds that are marketed cross-border in many different countries, since such funds cannot fulfil the requirements.

Double taxation can happen from a shareholder perspective, each time a fund suffers withholding tax on a dividend / interest income which is then distributed by the fund to the shareholder who in turn suffers income tax on the same dividend. If the income is accumulated, the shareholder is still taxed on the deemed distributed income (in the UK for instance) or at the time of the redemption.

Question 9.8 – Have you encountered difficulties in selling a UCITS or AIF cross-border because your UCITS or AIF (including ELTIF, EuVECA and EuSEF) or the proceeds produced by the UCITS or AIF (including ELTIF, EuVECA and EuSEF) would not receive national (tax) treatment in the Member State where it was sold? Please provide a detailed description, including quotes of the national provisions leading to the not granting of national treatment.

Examples:

- According to our knowledge, in France a French investor can only credit foreign WHT on foreign dividends earned through a fund if he invests through a French fund, but not if he invests through a foreign fund.

- In the Netherlands, only a Dutch fund can pass on a tax credit on Dutch WHT to a Dutch investor, whereas a foreign fund cannot; this is discriminatory for the foreign fund.

Question addressed to investors

Question 9.9 – Have you experienced any difficulties relating to the taxation of investment in UCITS or AIF (including ELTIF, EuVECA and EuSEF)? Please describe those difficulties and provide examples.

Question 9.10 – Are you worse off tax-wise if you invest in a UCITS or AIF (including ELTIF, EuVECA and EuSEF) sold from another Member State than if you invest in a comparable domestic UCITS or AIF? What is the reason for this higher tax burden? Please cite the relevant provisions of the national legislation

Question 9.11 – To what extent are tax rules preventing you from investing across borders in UCITS or AIF (including ELTIF, EuVECA and EuSEF)?

It should be noted that old treaties may refer to the ancient terminology of UCITS which, at that time, included AIF but now, with the distinction between UCITS and AIF, some European countries simply do not accept to apply the treaty to AIF (only to UCITS). Likewise, some countries consider that debt funds and securitization funds are not CIUs and cannot qualify for treaties even if CIUs are clearly mentioned.

Question 9.12 – Do you see any other tax barriers to investment in cross-border UCITS and AIFs (including ELTIF, EuVECA and EuSEF)? Please specify them and cite the relevant provisions of the national legislation.

Yes

Tax barriers for outbound distribution (Tax barriers in the registration country of the fund)

In other cases local tax rules prevent local funds providers for distributing their investment funds in other EU-member states. An example is when local dividend taxes are levied foreign investors on any distributions/reportable income or capital gains. That is *e.g.* the situation in Denmark and many other European countries. The problems arising in relation to investment funds are very similar to the problems arising on portfolio investments in general, cf. the EU Commission public consultation from April 30, 2011, on Withholding taxes on cross-border dividends – Problems and possible solutions.

If the relevant foreign investor is a pension fund exempt from tax in the country of residence such foreign withholding taxes will be an extra expense, since the pension fund do not have a local tax to credit the withholding tax against. However, even if the relevant foreign investor can credit the local withholding taxes on distributions, reportable income and capital gains derived from the fund units against a local tax in the country of residence, such withholding taxes will in many cases prevent that investments funds are distributed cross-border. The reason is that the investors have to ask for a tax recover/relief at source in order to reduce the withholding tax in the source country and secondly they should ask for a tax credit against the local tax in the country of residence in order to avoid any double taxation.

At the end of the day the investors will prefer to buy domestic funds or funds from other EU countries, *e.g.* Luxembourg and Ireland, where such withholding taxes are generally not imposed.

In some countries (e.g. in Italy) the application of a relief at source for distributions and redemptions to non-resident investors is subject to the condition that their shares are deposited with a local intermediary. A withholding tax may therefore be applied if the shares are distributed cross-border.

Local tax rules are deterring fund providers from consolidating their business activities in one or a few EU member states.

In order to cut costs and reach economics of scale international fund providers often want to gather their funds and/or management companies in one or a few countries creating a so called fund hub and/or management hub for international distribution. After UCITS IV and AIFMD the regulatory framework is for such consolidation is in place. However, the fact that the tax is not yet harmonized in the EU means that it is in practice often not possible to gather the funds and management in one or a few countries.

Tax barriers for cross-border managements of funds

Complex tax issues arise when investments funds are managed cross-border. Many EU countries define tax residency where the business is effectively managed. Accordingly, the investment funds that are managed cross-border may become liable to tax in the country where the management company is established. A broad range of taxation issues may arise:

- No taxation rules currently exist for the relocation of an investment fund from one jurisdiction to another. Accordingly, some jurisdiction may consider the transfer to be a liquidation of the fund in their country. This may trigger taxation of unrealized capital gains on the underlying investments etc.

- The jurisdictional separation of the management company and the fund could lead to double taxation or double non-taxation at fund level.

    - If *e.g.* a Luxembourg fund is managed by a Spanish management company, both a subscription tax in Luxembourg and a 1 percent Spanish tax on the fund income would be due.
    - If *e.g.* a Luxembourg FCP is managed by a Danish management company, Danish withholding taxes on any distributions from the fund may be due even though the fund is not a Danish fund. It can in practice prevent foreign funds from being managed from Denmark because dividend taxes in general create tax problems in relation to double taxation of the investors etc., see above. In other cases withholding taxes and tax reporting obligations may be due in both countries creating a taxable mismatch, e.g. if an Irish fund is managed by a Danish management company.
    - The jurisdictional separation of the management company and the fund could also make it difficult to obtain treaty benefits, because it creates uncertainty about the fund's tax domicile, i.e. the source country may not accept that the fund is having its tax domicile in one or either of the countries.

Please note that the issues are most relevant to contractual funds and unit trusts since they do not have their own governing bodies that can maintain the effective management in the fund's country of registration in case the fund is managed cross-border.

Certain member states have introduced rules and guidelines to eliminate the taxation risk with the single management company passport. This is *e.g.* the case for Germany, Ireland, Italy, Luxembourg and the Netherlands, which have introduced rules that exclude foreign investment funds from the rules on effective seat of management. However, the only way to solve the question in general in all EU member states would be to introduce an investment manager exemptions through specific EU regulation.

Tax barriers for cross-border mergers

Under UCITS IV all EU countries are obliged to allow cross-border mergers from a legal and regulatory point of view.

However the tax treatment of fund mergers varies from country to country. While some countries allow tax neutrality for domestic merges, many countries impose tax on foreign and cross-border fund reorganizations at the level of the fund and/or at level of the investors. In practice this prevents the fund providers from gathering and offering their investment products from one or a few EU member states.

Introducing a separate EU directive in order to ensure and promote the further development of the EU fund market can solve these problems. This directive could be an extension of the current EU Merger Directive for commercial companies and should cover taxation issues for domestic, foreign and cross-border fund reorganizations.

Master-feeder structures

UCITS IV allows for the pooling of assets into a master fund. Several feeder funds is allowed to invest in a single master fund, provided each of the feeders invest more than 85 percent of their assets in the master.

Setting master-feeder structures in one EU country will normally not create negative tax consequences. However, when it comes to cross-borders structures negative tax consequences might occur. The main problem is that withholding taxes might be levied on profit distributions from the master to the feeder fund, cf. the section Tax barriers for outbound distribution above. The reason it that the feeder funds are normally exempt from tax in the registration country and accordingly the withholding tax in the country where the master fund is registered is an extra cost. However, the feeder funds may in many cases be able to reclaim the withheld tax on basis of the ECJ decision in the Santander case mentioned above, since such withholding taxes may discriminate foreign feeders compared to domestic feeders, but the administrative burden and cash deferral disadvantage should still remain.

Financial Transaction Tax

We are also very much concerned about the current discussions in relation to the introduction of a financial transaction tax (commonly named FTT) in certain EU member states. This could be very harmful for distributing funds of FTT participating member states cross border in non FTT participating member states and third country states.

Section 10 – OTHER QUESTIONS

Question 10.1 – Are there any other comments or other evidence you wish to provide which you consider would be helpful in informing work to eliminate barriers to the cross-border distribution of UCITS or AIFs (including ELTIF, EuVECA and EuSEF)?

Further to some key comments given in our response to the question 2.1, you can find below some additional comments or other evidence related to existing barriers in the internal market.

- **The interaction of MIFID distribution rules with the provision of fund units at a cross-border level**

When looking at distribution of UCITS and AIFs, one has to consider that the large bulk of these investment products is not distributed directly by the UCITS Management Company or AIFM, but rather through distribution agreements by MiFID investment firms. As these companies, naturally, need to comply with the MiFID II framework, more complexities arise when trying to distribute cross-border. For example, the ways of financing differ from one member state to another. For example, the Netherlands and UK have unilaterally decided to ban the receipt of inducements, thus special "clean" share classes void of any retrocessions are required in order to sell these products as "inducement-free" in those particular member states. Particular attention needs to be paid to the revised inducement rules in MiFID II which are currently being transposed by member states. Taking into consideration that both MiFID II and its relevant implementing measures are directives, it is possible that different views in interpreting the use of inducements may emerge over time, thus, requiring special share classes for a particular member state to reflect these national specificities, and leading to a further increase in the number of share classes within the EU.

Furthermore, another MiFID II rule directly impacting the cross-border distribution of funds is the definition of complex and non-complex financial instruments, as only the latter can be sold execution-only (without suitability and appropriateness test) to investors. While all UCITS (except structured-UCITS) are considered under MiFID II as non-complex, this situation is more difficult for AIFs, in particular AIFs that are "UCITS-like", which were designed by EU member states with retail investors in mind. While MiFID II's Implementing Regulation allows non-complex AIFs to pass the complexity test to be (if passing it successfully) labelled as non-complex, enough flexibility exist for NCAs to unilaterally extend the scope of complex instruments (e.g. the case of Italy). This entails the risk that some member states consider certain types of AIFs as complex whereas other do not. This would result in some AIFs being allowed to be sold without advice in one member state, but not in another, thus creating further uncertainties in cross border distribution.

- There are **differences in accounting standards** that generate problems, such as the ability to launch share classes with the right to distributions from fund's capital account.
- In some jurisdictions **existing capital control regulation prevents or limits investments by foreign players** into products for local investors.

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