AFG's response to the European Commission consultation document on CMU action on cross-border distribution of funds (UCITS, AIF, ELTIF, EUVECA and EUSEF)

Executive summary

The Association Française de la Gestion financière (AFG)[1] is grateful for the opportunity given to answer to EC's consultation document on CMU action on cross-border distribution of funds (UCITS, AIF, ELTIF, EUVECA AND EUSEF) across the EU.

As mentioned in this consultation, "cross-border investment funds have an important role to play […] in mobilising capital in Europe and channel it to companies, including SMEs, and infrastructure projects that need it to expand and create jobs". Overall, the passporting regime enabled by the EU legal framework fostered the French asset management industry growth. However, there are still remaining obstacles linked to the lack of information as to the diverse and sometimes restrictive national standards on marketing rules, to notification procedures, to the absence of common definitions on key provisions creating legal uncertainty, to additional administrative requirements in host Member States (MS), to tax obstacles, and to market structure and distribution networks in the host MS. An AFG's response is provided for those obstacles in the relevant sections of this consultation paper.

Due to these obstacles linked to a large range of factors, AFG strove to explore divergent approaches observed by AFG members through non-harmonized implementations of the EU legal framework by Member States. A recent initiative launched by the AFG's competitiveness committee consists in

[1] The Association Française de la Gestion financière (AFG) represents the French asset management industry, both for investment funds (UCITS, AIF, ELTIF, EUVECA and EUSEF) and discretionary mandates. More than 600 management companies are based in France. At end-2015, EUR 3,600 billion of assets are managed by France-based asset management companies, ranking the French asset management industry first in continental Europe with a 20% market share. It includes EUR 1,700 billion for investments funds composed of around 8,000 AIFs (EUR 920 billion; ranked second in Europe with a 21% market share) and 3,000 UCITS (EUR 763 billion, ranked fourth in Europe). French investment funds are marketed in at least 14 EU Member States. These figures not include non-French investment funds managed by France-based asset management companies. AFG is an active member of the European Fund and Asset Management Association (EFAMA) and of PensionsEurope. AFG is also a member of the International Investment Funds Association (IIFA).

organizing a series of regular "country meetings" aiming at presenting to its members best practices to market UCIs in key EU (and non EU) countries[2] where they do or plan to do business. This initiative which covers fifteen jurisductions illustrates the need for improving access to information linked to cross-border distribution of funds in Europe.

Following this consultation, the EU Commission should primarily lok for non-legislative solutions (instead of a revision of the Level 1 texts), by improving the following practical issues:

1. **to facilitate access to information on national marketing and pre-marketing regimes by making NCAs publish them in a comprehensive document available in a language customary in the sphere of international finance.** Regarding UCITS, the Article 30 of Directive 2010/42/EU finely precises the scope of the information to be made accessible by Member States in accordance with Article 91(3) of Directive 2009/65/EC[3]. In that prospect, for instance, in France, the AMF publishes a *catalogue of French statutory and regulatory measures applicable to the marketing of shares or units in foreign UCITS in France*[4] updated on a regular basis. It also recently publishe a guide on pre-marketing and marketing rules[5]. Similar guides should be available in all jurisdictions.

2. **to facilitate the access to key cross-border information through a specific internet portal produced hosted by ESMA and fully available in a language customary in the sphere of international finance including :**

    - **a repository of all national marketing and pre-marketing regimes.**

    - **a European register of ".eu" Isin[6] codes' funds notified by NCAs**: it should be envisaged that funds compliant with the UCITS, AIF, ELTIF, EUVECA and EUSEF Directives 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 then in the future maintain a repository of the list of these funds published on an internet portal. This initiative would enhance transparency and safety to the benefit of the end investor.

[2] Such meetings cover Belgium, Switzerland, Italy, Germany, the United Kingdom, the Netherlands, Spain, Denmark, Austria, the USA, Canada, Singapore and Hong Kong.

[3] Please see page 13 of the English version of the Directive 2010/42/EU : http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0044&qid=1475056626956&from=EN

[4] http://www.amf-france.org/en_US/Publications/Guides/Professionnels.html?isSearch=true&lastSearchPage=http%3A%2F%2Fwww.amf-france.org%2FmagnoliaPublic%2Famf%2Fen_US%2FResultat-de-recherche.html%3FLANGUAGE%3Dfr%26valid_form%3DLancer%26%2343%3Bla%26%2343%3Brecherche%26DATE_OBSOLESCENCE%3D08%26%2337%3B2F07%26%2337%3B2F2014%26DATE_PUBLICATION%3D08%26%2337%3B2F07%26%2337%3B2F2014%26isSearch%3Dtrue%26formId%3DALL%26langSwitch%3Dtrue&docVersion=3.0&docId=workspace%3A%2F%2FSpacesStore%2Fe81bb29c-9774-4e90-9ad7-c92b5ebcba15&xtcr=4

[5] http://www.amf-france.org/Reglementation/Doctrine/Doctrine-list/Doctrine.html?category=IV+-+Commercialisation+-+Relation+client&docId=workspace%3A%2F%2FSpacesStore%2Fe06aba86-fb44-4083-b597-4c729b6464d8

[6] International Securities Identification Number.

- **a table updated by NCAs presenting national regulatory fees**.

- **a table presenting main national tax regimes**.

3. **to assess the feasibility to harmonize marketing and pre-marketing regimes by examing best national practices.** As mentioned in AMF's position paper published on 19 September 2016 on *Cross-border distribution of funds in Europe: identify the real barriers*[7], this assessment may include an examination of the opportunities to harmonize marketing and pre-marketing rules while " *maintaining a form of supervision by the host country*" which is necessary to prevent missellings for instance based on frauds that would, by tarnishing the confidence of investors, undermine the cross-border market. Such work should first collect best national best practices. For instance, the recent *French Routes & Opportunities Garden* initiative (FROG) involving professionals, trade associations and authorities lead to an updated AMF's position paper on UCITS and AIF marketing regime in France[8].

Last but not least, AFG wishes to stress that the priority is to ensure consistency between regulatory requirements and the objectives announced by the EC in the context of the Capital Market Union. Indeed, **the efforts to bring down obstacles to cross-border distribution should focus also on efficiently tackling obstacles posed by non-EU countries**. This should be done either via actions and regulatory frameworks directly linked to investment funds, for instance whenever the EC will issues a delegated act on the extension of the AIFMD passport, or via more general regulatory frameworks and action plans, such as TTIP and TiSA agreements. In both cases the main aim should be a really reciprocal market access. In particular in relation to the Commission's contemplated delegated acts on the extension - on which we do not approve - of the AIFMD passport, **the reciprocal opening of the markets of the jurisdictions that would be provided with the passport would not be a consequence – to be further assessed – but an absolute prerequisite based on which the extension would be decided**.

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[7] http://www.amf-france.org/en_US/Publications/Rapports-etudes-et-analyses/Epargne-et-prestataires.html?docId=workspace%3A%2F%2FSpacesStore%2Fc4c760cd-5eed-49ee-aba9-a8f499146b47&langSwitch=true

[8] http://www.amf-france.org/Reglementation/Doctrine/Doctrine-list/Doctrine.html?category=IV+-+Commercialisation+-+Relation+client&docId=workspace%3A%2F%2FSpacesStore%2Fe06aba86-fb44-4083-b597-4c729b6464d8

Section 1 – Information about you

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]

In the field of collective investment, AFG members market all types of funds to all types of investors.

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.

In France, investors are classified in a category of client according to the European Directive 2004/39/EC of the European Parliament and of the council of 21 April 2004[9].

- "Professional investors" include licenced establishments (i.e. banks, insurance companies…), entities having a significant equity amount or other big entities declaring themselves as professional investors.

- A "retail investor" means any investor who could not be qualified as a professional client, according to the definition here above. A retail client is an individual who purchases securities under his/her own personal account.

Retail client and professional clients are categorized according to the classification defined by the Directive 2004/39/EC of the European Parliament and of the council of 21 April 2004.

According to the client's level of knowledge in an investment operation, his/her financial intermediary has the obligation to provide the required information based on his/her profile.

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?

A internal AFG's study focused on *How asset management companies/groups market their funds* was presented by AFG's Economic & Research Department last April 2016. On the basis of a sample of 119 France-based asset management companies, it shows that distribution channels used by AFG members to distribute funds cross-border depend on the profiles of the asset management company and its targeted clients.

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

As mentioned in our answer to question 1.1a, in France, investors are classified in a category of client according to the European Directive 2004/39/EC of the European Parliament and of the council of 21 April 2004.

[9] http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32004L0039&from=FR

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

Such data is not available.

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]

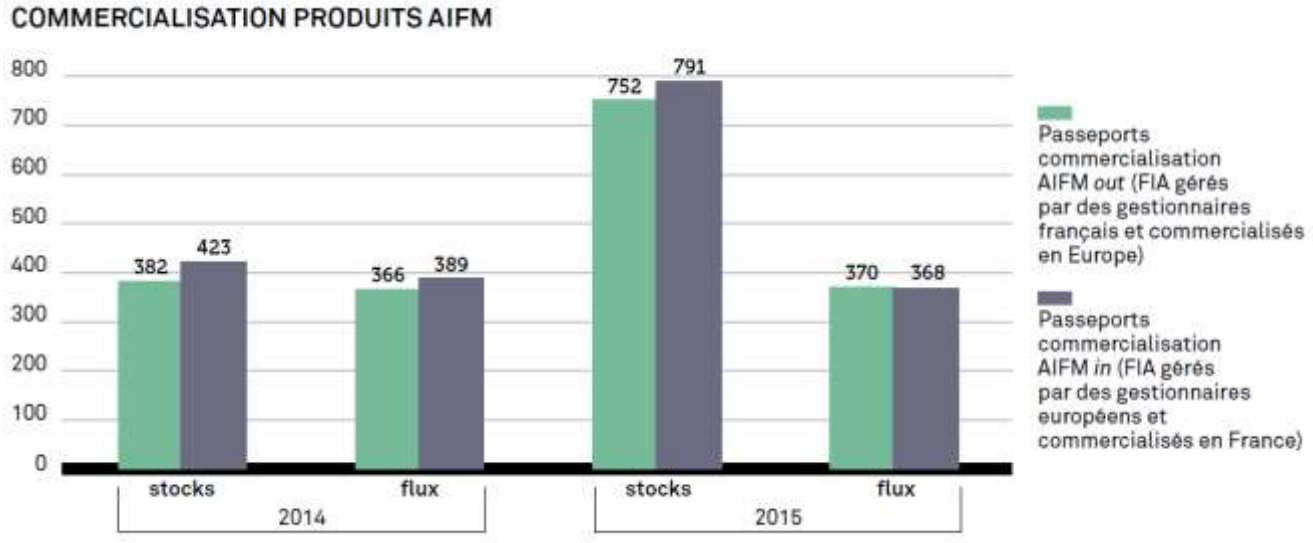
Such data is not available.

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

Yes. According to Lipper data published by PwC last April 2016[10], in terms of stocks, 3,039 French cross-border UCITS funds were registered in other EU Member States through the UCITS passport regime.

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

Yes. According to AMF's annual report relased on May 2016[11], in 2015, 370 French AIFs were marketed out of France in other EU Member States through the AIFMD passport regime. Once again, as mentionned in our answer to question 1.4, these figures do not include non-French AIFs passported by French asset management companies in other Member States.



Source: AMF's Annual Report, 17 May 2016

[10] https://www.pwc.lu/en/fund-distribution/docs/pwc-publ-gfd-march-2016-printer-friendly.pdf.
[11] http://www.amf-france.org/Publications/Rapports-annuels/Rapports-annuels-de-l-AMF/annee-2015-2019.html?docId=workspace%3A%2F%2FSpacesStore%2Ffc4b00fa-fb81-4a7d-ace5-88e5e5aa34de .

Question 1.6a – If no, please explain why you do not use the passport

In the case of retail AIFs, even when they are following specific rules tailored for retail distribution, cross-border distribution is considered burdensome as those funds do not benefit from the EU passport.

Question 1.7 – Do you use a marketing passport for all your UCITS, AIF, ELTIF, EuVECA and EuSEF?

Yes

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?

AFG 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 amount of assets under management they represent. Such data may be available for the AIFs via the NCAs' received information 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)

Regarding UCITS, according to Lipper data published by PwC in March 2016[12], French UCITS are registered in 14 EU Members States (by alphabetical order): Austria, Belgium, Denmark, Finland, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, United Kingdom.

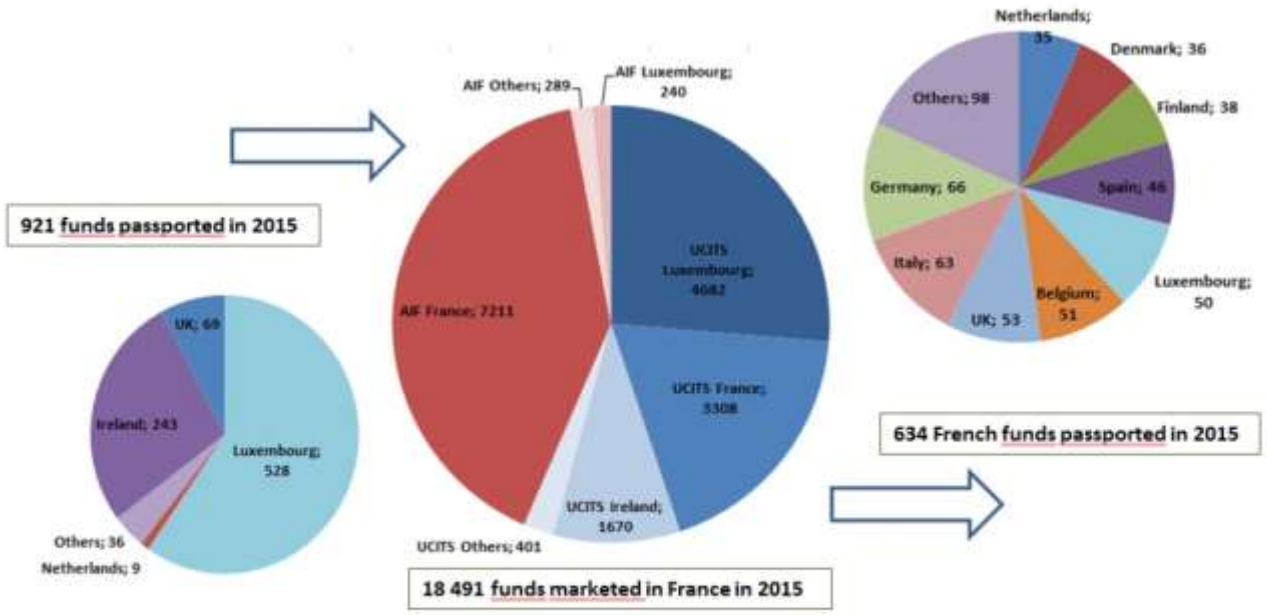
Regarding AIFs and UCITS, according to an extract of AMF's position paper published on 19 September 2016 on *Cross-border distribution of funds in Europe: identify the real obstacles*[13], in terms of flows, at end-2015, the 634 French UCIs (including 270 UCITS funds and 370 AIFs) that were passported obtained a notification's approval mainly in Germany (66 passport's notifications), in Italy (63), in the UK (53), in Belgium (51), in Luxemburg (50), in Spain (46), in Finland (38), in Denmark (36) and in the Netherlands (35).

These figures do not include non-French UCIs passported by France-based asset management companies from France in other Member States.

[12] Please see the footnote #10.

[13] AMF's position paper is available online at: http://www.amf-france.org/en_US/Publications/Rapports-etudes-et-analyses/Epargne-et-prestataires.html?docId=workspace%3A%2F%2FSpacesStore%2Fc4c760cd-5eed-49ee-aba9-a8f499146b47&langSwitch=true .

Figure 4: Investment funds sold in France by country of origin, total number, and inward and outward flows (by number of passports)



Note: the middle pie chart shows the total number of funds marketed in France by country of origin. The two pie charts on the sides show, respectively, the change in the number of funds passported in France by country of origin (L), and French funds that obtained passports, by destination country (R); these two sets of flows cover UCITS and AIFs, owing to the small differences between the two types of funds.
Source: AMF data.

Source : AMF's position paper on *Cross-border distribution of funds in Europe: identify the real barriers*, 19 September 2016

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

Please refer to our anwer to question 1.8.

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.

According to Lipper data published by PwC, French cross-border UCITS are marketed out of France in Austria: 242; Belgium: 137; Denmark: 27; Finland: 64; Germany: 550; Greece: 2; Ireland: 32; Italy: 389; Luxembourg: 173; the Netherlands: 309; Portugal: 6; Spain: 286; Sweden: 76; United Kingdom: 338.

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

These figures do not include non-French UCITS marketed by France-based asset management companies.

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

According to EFAMA[14], the AIF market in Europe is concentrated in a relatively small number of countries. France is the second player in the market with a 18% market share at end 2015 behind Germany and ahead of the Netherlands, Luxembourg and Ireland.

Source : EFAMA Factbook 2016

Section 2 - General Overview

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 obstacle 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 on how different obstacles act not only 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, AFG stands for EFAMA's position which presents 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 obstacle for AFG members when trying to assess and decide the distribution to a certain jurisdiction is the lack of information as to the national standards on marketing rules, notification

[14] EFAMA Factbook 2016, part 1.4.4, Country shares in assets and net sales of AIFs, page 43.

procedures, national requirements, as well as interpretations by the NCAs on specific provisions of the EU legislation. The level of transparency as to the national regulatory framework plays an important role in the decision making in favor 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 to be done by the asset manager (in-house) or to be outsourced to a third-party service provider (usually located in the jurisdiction that the products are to be marketed) the additional costs and administrative burden related to that research is an important factor. In particular, for asset managers of smaller and medium size, the need for a local agent to gather important information as to the legal interpretation, the local tax regime, the civil liability risks entails costs that are disproportionate with the revenues that the opening into a new market would 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. There are different definitions and provisions on key areas such as marketing, notification, and process 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 key factor. In addition, the rules on the content and the standard presentation often 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. implies 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 with no added value for the end investor.

- **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 AIFMD and UCITS requirements and in enhancing common rules as to the definitions and interpretations of concrete provisions of the EU regulation. For instance, AMF's position paper on UCITS and AIF marketing regime in

France updated in July 2016 provides with accurate criteria defining the rules applying to funds distributed cross-border.

3. Additional administrative requirements in the host Member State

Along with the lack of transparency and information as to the national standards, the requirement to have a local agent in different forms and for different reasons – requirement for a local distributor or a transfer agent, even recoginzing it can be of help, can also be a significant source of cost and complexity. 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 fact to the need for a national agent or local service provider even when this is not a regulatory requirement.

4. **Tax obstacles**

Concerning the constraints related to taxation, one of the most important issues is the **high burden for investment funds to achieve double tax treaty access** – if possible at all – and 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 are often unfortunately forced to forego the tax relief due to them. 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.

Another and important tax issue is the **lack of harmonisation of national tax reportings to be provided to local investors**. Setting such formats requires the setting up of industrial processes, which have to be each time adapted to the local requirements. Therefore, if a fund manager cannot be sure in advance if it will reach a minimum number of investors in a Member State, it may abandon the objective of marketing in this Member State due to the hurdle to set up a specific reporting for the investors of this Member State. Therefore, it benefits the local asset managers of this Member State as these local tax reportings create a dis-incentive for non-local players to start entering the local market. Please see AFG's answer to question 9 for further details.

5. Market structure and distribution networks in the host MS

The size of the host market plays an important role for the decision of an asset manager to distribute its 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 obstacles, and impede the potential of a single digital platform that would work across the EU.

6. Regulatory fees

More than the level/amount of the regulatory fees alone that is not generaly perceived as being a decisive factor/obstacle: the lack of transparency and easy 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 causes 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 obstacles in the relevant sections of this consultation paper.

7. Other types of obstacles

Apart from those obstacles, stated in the Commission's question and the following sections, AFG strongly supports EFAMA highlighting of number of other obstacles 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-platting 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-platting, which poses an important danger for the single market.

Additional requirements imposed at national level related to the offering documentation or the definition of an activity as marketing, as well as the discretion not to implement certain regulatory provisions, for instance the ones related to the National Private Placement Regime (NPPR) are among examples that highlight this danger.

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 foreseen in the EU regulation and provide no added value from the investor's perspective. A key component for such an exercise to be undertaken at the ESMA level is the trust and closer collaboration amongst NCAs.

Obstacles 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 rather with non-EU markets. It is, therefore, of utmost importance that the efforts to bring down obstacles to cross-border distribution focus also on efficiently tackling obstacles posed by 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 a really reciprocal market access. **In**

particular in relation to the Commission's delegated acts on the extension of the AIFMD passport - which we do not approve -, 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 an absolute prerequisite based on which the extension would be decided. At the same time, the EU regulatory framework needs to foster its competitiveness in terms of constraints and of regulatory costs in order to ensure cost-effective and proportionate legislative provisions, thus enhancing the competitiveness of the EU-based players and products. This applies in particular when EU-based players and products want to develop their activities out of the EU and are facing competition from non-EU based players and products.

Timely implementation of the EU Directives in all Member States

Fully aligned with EFAMA's position, AFG would also like to stress that requiring and enforcing the timely transposition of the relevant EU regulatory framework by Members States holds a significant role. The fact that there are MS that still haven't fully transposed the AIFMD several years after its entry into force, is an example as to 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 text 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, AFG would like to stress that any proposal for legislative changes at level 1, in particular related with the text of the AIFMD and the UCITS Directive, should be a last resort means for the Commission to the extent that no alternative non-legislative solutions would have been effective. Reviewing the level 1 text of the main regulatory frameworks 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, such as Guidelines or Q&As – in particular Guidelines as they trigger a public consultation - published by ESMA that could provide with the right responses, should be preferred.

Language obstacles

The provision of information only in the language of the local NCA can be an important obstacle, 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 a very limited proportion of the available information in a language customary in the sphere of international finance.

Question 2.2 – In your experience, which of the following issues are the major regulatory and tax obstacles to the cross-border distribution of funds in the EU? For the issues you consider to be major obstacles, 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 arrangements 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]

No obstacle should be seen only as a stand-alone factor, but also in close relation to the other ones. In that sense, AFG members consider that a general ranking of the importance of different obstacles as to the cross border distribution of funds is the following

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

Section 3 – Marketing requirements

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

- **Marketing Definition**

AFG is aware of different interpretations of marketing, and it considers their existence to be a significant market entry obstacle. For that reason, AFG would strongly suggest that further work 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. This work should be undertaken through ESMA by the NCAs.

- **Definition of pre-marketing**

What is also crucial to define is the point at which the marketing starts, point 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 progress 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 too 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. **AFG would, therefore, support any initiatives by ESMA on a common approach taking as a starting point not only what is marketing, but also by defining what is pre-marketing and therefore activities to which the AIFMD notification rules don't apply**. Indeed, the work on common Guidelines and standards as to 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. **Such case of national best practice is the *Guide on UCITS and AIF marketing regimes in France* that was updated by the AMF on 4 July 2016**[15].

- **Legal clarity as to the marketing requirements and national process**

Further on, it should be stressed that even when the definition of an action as marketing in a Member State doesn't trigger the need for a prior notification (for instance in some Member States for marketing to a limited number of customers no notification requirements is triggered), the need for legal clarity and consistency as to the notion of marketing, its triggering point and the requirements that apply remain important. Access to that type of information is often problematic or, when 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 refers to a specific period of time or should be assessed continuously in case the number increases). Therefore, it should be stressed that different definitions can also lead to non-transparent processes of interpretation and therefore increase lack of transparency and understanding of the national regulatory framework.

- **Legal inconsistencies**

In addition, there are a number of inconsistencies across the EU single market that can become an additional disincentive for cross-border distribution as they aggravate the legal confusion, burden and duplicative work, in particular for smaller asset managers lacking the necessary resources to further analyse the difficulties and complexities of a certain jurisdiction. These inconsistencies relate to a number of marketing requirements and the different interpretations and understanding as to their implementation. Such inconsistencies are:

- **The marketing material itself** has different purposes and uses according to the jurisdiction it is provided (in a number of Member States marketing material has to be approved by the NCA prior to its use);
- **In some jurisdictions the filling requirements are not just triggered when an activity is defined as marketing**, 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 filled separately.

Once again, in order to overcome the inconsistencies and the confusion caused by different interpretations on marketing rules, AFG 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.

[15] AMF Guide on *UCITS and AIFs' Marketing regimes in France*, DOC 2014-04, July 4, 2016.

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

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 AFG's response to question 3.1a, different interpretations constitute a de facto market entry obstacle. Differences due to country specific marketing requirements make it difficult to produce harmonised marketing materials for use on a pan-EU basis, cause significant delays and create legal uncertainties and additional costs, making customized legal advice per Member State often necessary. Moreover, different or intransparent rules that apply in each jurisdiction on the printed material and the material offered in websites, which can foresee more detailed content further to what is required in the regulation, result in important burden as to the reviewing of the requirements and the use of disclaimers.

The legal uncertainty as to what is triggering marketing, as well as the pre-marketing definition and the rules that apply, 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, AFG would also like to highlight 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 KIID and its publication should not be automatically deemed as a marketing action within a Member State.

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 obstacles regarding the use of marketing passport. Moreover, different methods of complying with the marketing requirements at national level is also an important factor for the use of the passport.
Here are two concrete examples:

- **Hurdles to the cross-border offering of Employee sharing / shareholding funds (Fonds Communs de Placement d'Entreprise)**: more than 120 billion euros are managed within the framework of employee savings plans in France, of which 47 billion invested in shares of employing firms (employee shareholding funds / fonds d'actionnariat salarié), the remaining being in diversified funds. Employee savings schemes rely on an agreement whereby the employer and the employees agree to offer funds to collect money with an obligation of lock up. Lock up is either 5 years or till retirement age depending on the schemes. There are exceptions allowing for early redemptions. Employees subscribe units of funds specifically dedicated to these schemes. Only employees and former employees can access the funds. Personal securities accounts are opened for each employee on the basis of information provided by the employer.Firms which developed at pan-European level would like to offer all of their EU employees access to their shares when they launch a capital increase with a tranche dedicated to their employees, with a usual discount of 20% compared to the public offer. The introduction of the AIFMD unfortunately made this often impossible, because some regulators consider that in the absence of a retail passport for AIFs, there is no possibility to offer through collectively managed funds shares of the company to employees who are considered, wrongly in our view, as ordinary retail investors. It is resented as creating social inequity and unfair discriminative practices by employees that are denied the possibility to subscribe. For the specific issue of employee shareholding funds, a workable solution is urgently needed throughout the EU. A common view should be confirmed that there is neither marketing nor offer but a strictly limited distribution of shares of units of dedicated funds to qualified persons, namely employees who have the choice to accept or refuse to participate. Consequently, employee shareholding funds should be open for subscription by any EU employee of the firm. More generally, employee savings schemes should be considered as a specific segment and in many regulations benefit from a carve out on the basis of the absence of commercialization.

- **Another example lies in the divergent interpretations of the definition given by EU Member States to real estate assets eligible to an ELTIF vehicle**. This lack of harmonization can impede cross-border marketing of French real estate funds including the so-called Organismes de Placement Collectif Immobilier (OPCI) as well as the Sociétés civiles de Placement Immobilier (SCPI).

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?

No.

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

AFG 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?

No.

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 are not easily available nor easily understandable. Often, multiple texts apply, and, in many cases, they are included in laws and regulations which are lengthy and not available in 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. Thus, the costs of research and compliance with local requirements are significant, and even when they are borne, still managers often risk failing to comply with local requirements.

Therefore, AFG strongly supports EFAMA's proposal to launch a further coordination to be taken at the EU level.

- **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 repository of all national marketing and pre-marketing regimes** including a harmonized and easily accessible guide to national UCITS, AIF, EUVECA, EUSEF and ELTIF marketing regimes, regularly updated by the NCAs (updates should be accessible by investors in real time);
    - **a table on the national regulatory fees** regularly updated by the NCAs;
    - **a European register of ".eu" Isin codes' funds notified by NCAs**
    - **a table presenting the main national tax regimes**.

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

Please see also our response in 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

AFG members use a broad range of marketing materials from client presentation, marketing launch document and emailing to transparency charters, flyers, brochures, factsheets, prospectus, KIIDs. The marketing focus lies mostly with the investment strategy of the product and not the fund itself and is customized per the targeted investment group.

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 the most 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)]

AFG 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.

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

Yes. A first and important step would be for each NCA to make them available in a single document which would be available through a portal maintained by ESMA.

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

AFG considers it of key importance to ensure a closer alignment on the definition of what constitutes marketing and reverse solicitation in both the primary and the secondary market, as well as on the different national requirements applying in 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 immediately all details, but general statements.

As mentioned in AFG's answer to the question 3.4a, this would be done via short and longer term actions.

In particular over the shorter term, the access to key cross-border information could be facilitated through a specific internet portal hosted by ESMA and fully available in a language customary in the sphere of international finance including:

- **a repository of all national marketing and pre-marketing regimes** including 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 on the national regulatory fees** regularly updated by the NCAs;
- **a European register of ".eu" Isin codes' funds notified by NCAs**
- **a table presenting the main national tax regimes**.

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 effort to provide the appropriate level of information for investors and to ensure a level playing field for providers of all types of equivalent investment products, as set by the PRIIPS level 1 text, could be further enhanced by moving towards a set of rules as to the marketing of all types of investment proposals.

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 would 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. ESMA could also become a common repository of both marketing passport notifications and AIFMD regulatory reporting.

However, ESMA should act in close collaboration with the NCAs who are also to remain competent to deal with any shortcomings or potential concerns in their national markets, based on the allocation of competences foreseen by the EU regulations.

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 and on the launch of a public website that will allow access to a mapping of all current national regulatory frameworks on marketing (please see also pour response in question 3.4a).

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.

AFG supports EFAMA that considers that ESMA could 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 based upon best practices at national level. However, including those rules in the level 1 text of Regulation would be too burdensome and have no evident additional value.

Therefore, the set of common rules should not be too detailed, but provide guidance and enable a common approach which is currently missing within the internal market. Moreover, ESMA could consider holding in the future a common repository of both marketing passport notifications and AIFMD regulatory reporting and should as soon as possible make available all existing local marketing and pre-marketing rules in a website accessible to all market participants. This would not only help market participants, but also NCAs insofar as they will be able to rely on the information submitted to ESMA, reducing their need for gathering or analysing information on other jurisdictions.

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. Investors should be protected against products presenting themselves as "funds" but in fact not following the rules of European directives or even being "frauds".

Question 3.19b – Please describe the types of products which should have additional requirements on their marketing and their specific characteristics.

Products not regulated by a European directive.

Section 4 – COSTS

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]***

Analysing the part of the costs of asset management companies that are directly and solely linked to cross-border distribution is an extremely complicated exercise for any asset management company.

There is unfortunately to our knowledge for the time being no feasible way to aggregate these type of data at the EU level.

Section 5 – REGULATORY FEES

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

AFG members do not consider that the level of regulatory fees imposed by Members State' NCAs is a crucial factor. However, the time spent to research those regulatory fees and to organise payments constitute a frequently stated material obstacle.

AFG notices **divergent up-front and running regulatory fees**:

- In some Member States, the amounts are fixed each year (Germany) while in others the amount varies importantly from one year to another (Italy, the Netherlands);
- Almost all the Member States ask for a running fee execpt some of them (Norway, Sweden);
- Regarding the up-front fee, some Member States ask for a fee (Austria, Germany, Luxemburg, Spain, UK, Finland) while others not (Italy, the Netherlands, Norway, Sweden, Portugal);
- For a single fund, the up-front fees amount can vary from EUR 115 (Germany) to EUR 2,650 (Luxemburg), with large discrepancies from one country to another,
- For a single fund, the running fees amount can vary from EUR 494 (Germany) to EUR 2,500 (Spain), with large discrepancies from one country to another

A maybe even more significant obstacle linked to regulatory fees is the **diversity of payment processes**:

- Payment on the basis of one invoice for the overall registered funds (Italy)
- Payment on the basis of one invoice per registered fund, sent to each fund (Germany)
- No issue of any invoice (Austria, Sweden) and no alert on the payment deadline i.e. accounting payment issue for the management company that really needs an invoice + the asset management company needs to go to the regulator's website to know the amount and the payment deadline
- Some invoices are in the name of the registered fund i.e. accounting payment issue for the management company since it needs an invoice named with its own name and payment reference.

Last but not least, on the process related to the regulatory fees and the notification, there are NCAs that impose either the use of outdated technologies or the necessary encoding in a certain process while filling the notification request. Both processed are further burdensome and time consuming.

Therefore, as mentioned in AFG's answer to question 3.4a, ESMA should publish on a specific portal, regularly updated by the NCAs, a single table on the regulatory fees requested in each jurisdiction and the notification processes related to them (please see also our response in questions 3.4a and 3.15). This could help further rationalise and subsequently work towards a standardized process 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.

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?

No.

Question 5.2a – Please explain your reply and provide evidence.

A number of Member States require the payment of regulatory fees to foreign UCITS and AIFs and foresees a different amount for marketing to institutional and marketing to retail investors. However, it has to be noted that the difference is usually of a relatively low amount, only a few hundred Euros, which is not enough to be a deterrent.

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 5.3a – Please explain your reply and provide examples.

Fees applicable to funds marketed cross-border generally 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) and the distribution model (private placement or public distribution).

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

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 / not registered	Unknown / not registered
Cyprus	EUR 800 for the first sub-	EUR 2,000 per umbrella

	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	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 / not registered	Unknown / not registered
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 4,000 for the first two sub-funds / fund + 1'700 Euro starting from the third sub-fund
Latvia	Unknown / not registered	Unknown / not registered
Lithuania	Unknown / not registered	Unknown / not registered
Liechtenstein	CHF 750 for the first sub-fund; CHF 500 for each additional sub-fund	CHF 1,250 per sub-fund
Luxembourg	5,000 per umbrella UCITS	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	None
Romania	Unknown / not registered	Unknown / not registered

Slovakia	Unknown not registered	Unknown / not registered
Slovenia	Unknown / not registered	Unknown / not registered
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)

In addition, please find below data published in 19 September 2016 by the AMF in their position paper on *Cross-border distribution of funds in Europe: identify the real barriers.*

Table 4: Comparison of costs for AIFs and UCITS to establish themselves in another EU country, by host country

	AIF		AIF AUM in 2015 by country (M€)	UCITS		UCITS AUM in 2015 by country (M€)
Country	Entry	Annual		Entry	Annual	
Germany	2 520 €	204 €	1 419 383	115 €	494 €	309 852
Austria	1 100 €	600 €	89 033	1 110 €	600 €	79 206
Denmark	0 €	668 €	150 498	n.a.	n.a.	107 871
Spain	2 500 €	3 000 €	68 948	1 000 €	2 500 €	18 542
France	*2 000 €*	*2 000 €*	*919 879*	*2 000 €*	*2 000 €*	*762 929*
Greece	0 €	0 €	2 625	n.a.	n.a.	4 422
Ireland	0 €	0 €	451 952	n.a.	n.a.	1 446 873
Italy	0 €	varying	55 520	0 €	4 000 €	226 043
Luxembourg	2 650 €	2 650 €	559 341	2 650 €	2 650 €	2 946 860
Malta	1 250 €	4 000 €	7 412	n.a.	n.a.	2 737
Netherlands	0 €	0 €	n.a.	1 500 €	0 €	n.a.
Portugal	0 €	0 €	14 982	0 €	0 €	7 577
UK	0 €	varying	396 214	773 €	766 €	1 083 481

Sources: CMS Guide to passporting, 2016, ESMA, EFAMA, Caceis

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.

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.

According to the national regulatory fees for AIFs as made publicly available by several service providers, the maximum regulatory fees are:

- Max. entry registration fee of EUR 2,650 (Luxembourg)
- Max. ongoing annual registration fee of EUR 4,000 (Malta)

Those fees are to be multiplied by the number of Member States in which an asset manager wishes to market the funds.

We would like to stress that the different levels and structures of regulatory fees imposed by Member States can cause constraints regardless of the level of the fees.

AFG welcomes EFAMA's proposal for amending the EUVECA Regulation (COM(2016)421) by maintaining a central database hosted by ESMA publicly accessible on the internet, listing of 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. We believe this is a good practice at EU level that could be followed in the case of UCITS and AIFs.

In a similar way, **it could be envisaged that funds compliant with the UCITS, AIF, ELTIF, EUVECA and EUSEF Directives 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 then in the future maintain a repository of the list of these funds published on an internet portal. Such a European label would enhance transparency and safety to the benefit of the end investor.**

Thus, as mentioned in our answer to question 3.4a, in association with NCAs, ESMA should publish on a specific internet portal fully available in a language customary in the sphere of international finance legal, tax and practical information including :

- **a repository of all national marketing and pre-marketing regimes** including 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 on the national regulatory fees** regularly updated by the NCAs;
- **a single European register of ".eu" Isin codes' funds notified by NCAs**
- **a table presenting the main national tax regimes**.

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?

Yes.

Question 5.9a – Please explain your answer.

Yes, in particular as regards the different bases for regulatory fees. We also understand that regulatory fees for the passporting of AIFs required by national regulators across the EU still differ widely, which also doesn't enhance the cross-border marketing within the single market[16].

Please see AFG's answer to question 5.3a.

Section 6 – Administrative Arrangements

Question 6.1 – What are the main obstacles 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.

The first osbtacle to cross-border marketing in relation to administrative arrangements and obligations in Member States lies in divergent requirements regarding distribution set-up. A "paying and information agent" is to be appointed in Austria. An "information agent" must be appointed in Germany. A paying agent is required for cash & orders processing in Italy (for retail investors). A "paying agent" is to be appointed in Luxemburg, in Portugal, in Finland and in Sweden. A "paying agent" and "local representative" is to be appointed Denmark.

Secondly, 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 Italy, the banca corrispondente exercises the role of an intermediary between distributors, the management company and depositary institution, by executing payments, transferring unitholders' instructions, confirming transactions, levying taxes and overseeing foreign exchange conversions. In Ireland and Denmark, they function purely as information agents, making a fund's constitutive documents available to local investors. In Austria, their role is also to collect investors' subscriptions and process dividend payments, acting (as in Spain) as a representative for the local NCA. In Germany, such a paying agent is a necessary requirement for any funds to be registered and marketed in the case of retail AIFs. In France, the role of the centralising correspondent is defined by AMF (RG AMF 411-135). It is responsible for the process subscription and redemption requests, pays coupons and dividends and makes information documents available to investors. 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

[16] Please refer to the CMS study A Guide to Passporting "Rules on Marketing Alternative Investment Funds in Europe" (January 2016) available at https://cms.law/en/FRA/Publication/CMS-Guide-to-Passporting.

passport is dependent on a series of restrictive administrative arrangements that often seem to be at odds with the general aims and specific provisions of the UCITS and AIFM Directives.

Altogether, the requirement for a local agent means that fund distributors have 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, they frequently can 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").

AFG would like to stress that regarding the services these agents provide, these could in many cases be provided by any authorised entity (as proposed by ESMA in its draft RTS on the ELTIF Regulation).

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 when 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 as the requirement to appoint local facilities in the territory of the host Member State are proportionately very high for the cross-border distribution of investment funds. They represent a burden for all asset managers with often limited added value for investors.

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, AFG has already raised its 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, for some time now they do not always reflect the reality of the market and the needs of retail investors. The current technological developments have often made those facilities outdated, making their direct consequence 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 those specific arrangements, a requirement could be in place, providing that accessibility to the selling intermediary and the asset manager is ensured via a number of means:

- 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 access to the appropriate amount of information is not restricted only to the information provided by the asset manager, but should also include those that can be provided by the NCA. For that reason, improving the NCAs' websites and the access they provide to investors to information on the funds that have been authorized for marketing, will also significantly enhance the quality and level of information investors receive.

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 and an email address (rather than provision of a physical presence) 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, the additional burden would be little to no extra cost.

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), could probably be streamlined.

Section 7 – DIRECT AND ON LINE DISTRIBUTION OF FUNDS

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 an online platform across the EU, there are a number of obstacles that for the time

being do not make it feasible: different marketing rules, different definition and rules on advice, diversified fund pricing structures, additional registration requirements imposed by national frameworks, tax reporting constraints, etc. Moreover, electronic distribution often requires a local country website, which means further efforts that may not be connected to financial regulatory requirements (for instance rules related to national privacy rules and data retention).

Question 7.2 – What are the main obstacles 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. 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 on online platforms (especially retail) in multiple markets difficult under the applicable legislation/regulation.

Also, 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, secure and compelling tools/services for customers. Hence, technological obstacles 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 such as a number of Central and Eastern countries , there is a language obstacle that impedes a direct distribution via a global EU platform, as the NCAs require the provision of on-line information in local languages.

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. AFG, therefore, considers that this is an issue to be tackled within the EU digital single market agenda.

In that respect, AFG stands for EFAMA's response to the Green Paper on retail financial services: "over the long term, the Commission could 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 7.4 – What do you consider to be the main reasons why EU citizens are unable to invest in platforms domiciled in another Member State?

A main reason - sometimes unfortunately unjustified - is the lack of confidence. As mentioned in AMF's position paper published on September 2016 on "Cross-border distribution of funds in Europe: identify the real barriers", some platforms are not authorised and create a substantial risk of fraud. And when money is stolen, as it is in some cases, there are limited options for seeking remedies, including from European market authorities. Over the last six years, French judicial authorities estimate that French retail investors have lost €4.5 billion on "trading websites" specialising in (often false) trades in forex and complex derivatives. Where they are not merely scammers, these traders offer services through a "European passport" under the freedom to provide services. So, strict controls avoiding problems are confidence building and are in fact good for cross-border investment in well regulated and supervised products such as UCITS or AIFs.

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.

On-line distribution will be an increasingly important part of many consumers' experience. Responding to the ESAs' Joint Discussion Paper on automation in financial advice , 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, AFG 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, reflecting broader economic and social trends, and differences in the delivery of financial advice, effectively reflecting 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 investors currently enjoy, AFG supports EFAMA who invited ESAs in its response 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 such 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.

Section 8 – NOTIFICATION PROCESS

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

No.

The problems are not necessarily linked to the initial notification process, but also arise for the 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. **However, AFG strongly believes that NCAs should keep supervising the notification process of UCITS and AIFs, as mentioned in AMF's position paper published on 19 September 2016 on "*Cross-border distribution of funds in Europe: identify the real barriers*"**[17].

Question 8.2 – If yes, please describe those difficulties.

A. Initial Notification

Some EU Member States make a distinction between registration procedures for marketing to retail and registration procedures for marketing to institutional investors. Indeed, 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.

In Italy, several additional requirements seem to 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 specific regulatory fees to the CONSOB (see reply to Question 5.4 above and Appendix 4.3).

[17] AMF's position paper is available online at: http://www.amf-france.org/en_US/Publications/Rapports-etudes-et-analyses/Epargne-et-prestataires.html?docId=workspace%3A%2F%2FSpacesStore%2Fc4c760cd-5eed-49ee-aba9-a8f499146b47&langSwitch=true.

A practical example of lack of efficiency in the initial notification material when it comes to the UCITS notification process relates to the standard notification form used to inform the NCAs (Annex 1 to Commission Regulation (EU) 584/2010 of 1 July 2010) which foresees only three options (Part A of the format includes three concrete types of legal forms (common fund, unit trust, investment company), which means that any other legal forms are not covered (for instance in Norway UCITS are 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 (e.g. the prospectus, the KIIDs, annual and semi-annual reports, etc.) with the host NCA 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, risk classifications of funds, etc[18]. AFG would propose this information to be reduced to an efficient level (e.g. KIIDs, notifications to customers).

C. Deregistration

With regard to a fund's de-registration from a host country, the process is not standardised and in any case harmonised. There are the 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. Spain, Belgium and Poland) permit de-registration of a fund only once the number of clients drops below a minimum specified amount (in Belgium the threshold is 100 investors) or after certain publication requirements are fulfilled. Prompting redemptions by the asset management company may be envisaged, provided the decision is left up to the client.

We therefore recommend focusing primarily on further standardizing requirements such as:

- 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 prospect, 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 European register of .eu funds notified by the NCAs
- A table on the regulatory fees regularly updated by the NCAs

[18] 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.

- 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.

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

No.

Question 8.3a – Please describe your experiences?

No unjustified delay has been reported to AFG but there are still significant differences as to the quickness reaction of the NCAs concerning the treatment of the notification files.

Question 8.4 – Do you have difficulties with the AIFMD notification process?

Yes.

Question 8.4a – If yes, please describe these difficulties.
The AIFM registration process and the requirements regarding transparency, disclosures and reporting vary among the EU jurisdictions. In particular, the different requirements applicable to cross-border marketing of AIFs hinder the cross-border marketing of funds in the single market.

Furthermore, in practice, a significant 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. We, therefore, recommend focusing primarily on further standardising a number of requirements such as:

- 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.

Please see also our response in question 8.2 on our proposal for an ESMA specific internet portal. The registration process, requirements regarding transparency, disclosure and reporting vary from jurisdiction to jurisdiction. The requirements applicable to cross-border marketing of AIFs which are not harmonised hinder the cross-border marketing of funds in the single market.

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 material amendment of the offering documentation has to be fully reviewed and lead 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 is costly and extremely time consuming and as it doesn't involve initial registration rather than modifications to the marketing documentation it is not proportionate.

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

It could be envisaged that funds compliant with the UCITS, AIF, ELTIF, EUVECA and EUSEF Directives 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 then in the future maintain a repository of the list of these funds published on an internet portal. This initiative would enhance transparency and safety to the benefit of the end investor.

A centralized record of notifications of ".eu" funds to which all NCAs and fund managers can connect to hosted by ESMA would be a way forward. The provisions foreseen in the recently published Proposal for amending the EuVECA Regulation are coherent with this proposal.

Such a central record managed at EU level could cover all initial registrations and following modifications and update of the marketing material, as well as any de-registration of the fund from a Member State. 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.

The same type of platform can be envisaged also concerning the AIFMD reporting requirements, which 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 small 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.

One additional problem funds are faced with when marketed cross-border is the lack of consistency and clear information as to the de-registration process. Due to that, there is a certain hesitation in deciding to launch any action of cross-border marketing. Given that the de-registration process is left to a country-by-country approach so far, a more harmonized approach, possibly via ESMA Guidelines, could help lifting this obstacle and hesitation for the cross-border players.

Section 9 - TAXATION

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, see comment below.

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, as the European Commission knows, national tax reporting need to be prepared by investment funds managers for their investors (e.g. Austria, Belgium, Denmark, Finland, Germany (until 2017 included), Italy, Spain, United Kingdom) are based on national legislations' requirements. Such tax reporting obligations are not harmonised across Europe and therefore represent barriers to entry for non-local players and consequently to the development of cross-border offer of funds. Sometimes the reporting is not provided by the law but must nevertheless be done for marketing purposes (e.g. in order to markt funds in Belgium, fund's managers have to provide Belgian investors with interest and dividends payments received by the French FCPs.

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.

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.

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 one or 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' i.e. subject to tax and investment funds usually 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.

Most of the treaties signed by France do not accept that the fund itself is a taxable person.

In other cases, the fund qualifies provided it demonstrates that its investors are French residents. For instance, that is the case for treaties signed by France with the following European countries:

- Germany : the treaty advantages are limited to the percentage held by French investors;
- Austria: the treaty advantages are limited to the percentage held by French investors;
- Belgium : only a SICAV benefiting from a "*certificat d'établissement*" signed by the French Revenue may benefit from the treaty;
- Spain : only Spanish source dividends paid to UCITs funds (and not AIF) may benefit from the reduced withholding tax rate;
- Finland: The reimbursement is subject to a n°6203 from which is almost impossible to produce.

It should also be noted that old treaties may refer to the former 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.

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 often are not able or willing 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, usually 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. Therefore, only dedicated CIUs (i.e. set up for one or very few investors and often managed under their instructions) have a treaty access where widely-held CIUs (i.e. held by a big number of investors who do not interfere in the management) haven't.**

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. **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**. We would encourage a renewed effort be made by the EU to discourage discriminatory WHT on non-domestic investment funds by Member States.

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.

In our view, 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 obstacle. 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 obstacle 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 easiest and justifiable solution consists in abolishing WHT for payments made to UCITS and AIFs within the EU and partner jurisdictions.

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). 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.

AFG'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.

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.

It should be noted that, in France, the AMF recommends to value the chance of the success of the claim as well as the costs prior to launch the procedure. Should the chances of success be limited or

the costs too important compared to the expected reimbursement, the procedure should not be pursued.

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, Spain, UK) are based on national legislations' requirements. Such tax reporting obligations are not harmonised across Europe and therefore represent obstacles to entry for non-local players and consequently to the development of cross-border offer of funds.

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.

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?

AFG's 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?

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.

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.

See above.

Question 9.12 – Do you see any other tax obstacles 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

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). This would be very harmful for distributing funds of FTT participating member states cross border in non FTT participating member states and third country states.

Master-feeder structures

UCITS IV allows for the pooling of assets into a master fund. Several feeder funds are 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. Master/feeders structures remain useful tool to use when a promoter wants for strategic and /or marketing reasons to duplicate an existing local UCITS in some other countries rather than distributing directly the local UCITS. When the Commission is striving to develop the cross border distribution of funds, it is surprising to see that the treatment of these structures is called into question (even banned) by the works done on the upcoming Money Market Fund Regulation where the same Commission is taking part. Efama urges the Commission to remedy this anomaly and permit Money Market Funds post reform to benefit from cross border tools like master feeder structures that the Commission itself imagined for UCITS.

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 other European countries. 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:

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. 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.

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 obstacles 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 distributing 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 way how advice can be financed differs 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 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, thus 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 National Competent Authorities to unilaterally extend the scope of complex instruments which can also lead to some Member States considering 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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Paris, 30 September 2016