Frankfurt am Main,
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European Commission Consultation Document on CMU Action on Cross-Border Distribution of Funds (UCITS, AIF, ELTIF, EUVECA and EUSEF) across the EU.

For the German fund industry, manufacturing hubs and consequently cross-border distribution play an important role. Cross-border management and marketing of funds, especially UCITS, is generally working quite well under the EU passporting rules. However, in some cases utilization of the EU passports is impeded by national gold-plating or discriminatory rules at national level. Cross-border marketing of UCITS could be further enhanced by full harmonisation of product-related marketing rules and further bundling of supervisory competences at the home state authority of the fund. BVI[1] therefore gladly takes the opportunity to present its views on the European Commission Consultation Document on CMU Action on Cross-Border Distribution of Funds (UCITS, AIF, ELTIF, EuVECA and EuSEF) across the EU.

We understand that the Commission has certain means at hand to improve cross-border distribution of funds. Some of these measures may be easy to achieve. In fact, we believe that the following measures which could improve practical issues could be implemented relatively easily:

- Common understanding of marketing, private placement and reverse solicitation. ESMA could draw up guidelines which could provide for a common understanding and would improve a coherent application of the aforementioned terms.
- Using the ESMA webpage to display certain information. This could include information on the fee structure of notification, thereby enhancing comparability between regulators.
- Encouraging national regulators to provide all information relating to their specific requirements generally and also in English.

Further significant improvement would comprise:

- Defining a European semi-professional investor type, e.g. by drawing a parallel to the EuSEF and EuVECA Regulations.
- A system where all NCAs would have to rely on approval and information provided by the home Member States' NCAs. Also in this regard, a centralised database at ESMA could improve the process. We would generally encourage this also for circumstances in which no passport is available, i.e. for distribution of AIFs to retail investors. Often such cross-border distribution is very burdensome and any possibility for NCAs to exchange information could facilitate the process.

We note, however, that in these instances legislative changes may be required.

As a general remark regarding statistical questions, we believe that it will be difficult for the Commission to aggregate the responses because we neither believe that you will receive a representative amount of answers nor do we think these answers will be provided in a sufficiently clear way that they may be aggregated meaningfully. However, there is certain statistical data around which could help you at least to identify reasonable estimates to your questions. First, fund managers are required to report to national central banks information on assets and liabilities according to Art. 4 para. 1 of Regulation ECB/2013/38. While these reports do not distinct between UCITS and AIFs, we believe they serve as a

[1] BVI represents the interests of the German investment fund and asset management industry. Its 96 members manage assets of some EUR 2.8 trillion in UCITS, AIFs and discretionary mandates. As such, BVI is committed to promoting a level playing field for all investors. BVI members manage, directly or indirectly, the assets of 50 million private clients in over 21 million households. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

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very good starting point regarding assets under management and number of funds. National central banks may likely provide you with a breakdown of these numbers as necessary. Second, NCAs at least have lists and consequently numbers of investment funds which are distributed cross-border. For instance, for Germany this information is available for retail funds within the investment fund data base[2]. Third, according to AIFMD, larger AIFMs are required to report to the NCAs the NAV of each AIF they manage according to Art. 110 AIFM Regulation No. 231/2013. Fourth, we collect our members' data which is available through our website. In case the lists maintained by the NCAs include the ISINs of the funds distributed, we believe national associations could help matching these with their statistical data. Should you need more specific information or breakdowns, please feel free to contact us at statistik@bvi.de. It might generally be more efficient for your overview to use the national associations' and / or the EFAMA's statistics in order to compile the numbers you are looking for.

Furthermore, we would like to refer you to published research regarding cross-border distribution. Such research includes:

- "Global Fund Distribution Poster 2016" by PwC Market Research Centre[3]
- CMS "Guide to Private Placement of Funds 2016"[4]
- CMS "A Guide to Passporting – Rules on Marketing Alternative Investment Funds in Europe"[5]
- Oliver Wyman „Domiciles of Alternative Investment Funds“[6]

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]*

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.

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

Question 1.1c – Please expand upon your reply.

BVI members manage UCITS and AIFs for both professional and retail investors. They neither manage EuVECAs, nor EuSEFs, nor ELTIFs. Nearly all BVI members are required to be licensed according to AIFMD since they manage AIFs. Licensed AIFMs, however, are not allowed to manage EuVECAs and EuSEFs so far. We hence appreciate the Commission's proposed changes to the regulation in favour of opening up the management of these funds to fully licensed AIFMs. An ELTIF has not yet been set up in Germany. It is doubtful whether the current ELTIF Regulation provides for benefits as compared to an ordinary AIF that outweigh the difficulties regarding portfolio composition, fund structure and distribution rules for retail investors.

[2] https://portal.mvp.bafin.de/database/FondsInfo/sucheFonds.do.
[3] www.pwc.lu/en/fund-distribution/docs/pwc-publ-gfd-march-2016-printer-friendly.pdf.
[4] cms.law/fr/content/download/78573/2997349/version/2/file/CMS-Guide-to-Private-Placement-of-Funds.pdf.
[5] cms.law/nl/content/download/77488/2984861/version/3/file/A_Guide_to_Passporting.pdf.
[6] www.oliverwyman.de/content/dam/oliver-wyman/global/en/2014/dec/Oliver_Wyman_Domiciles_of_Alternative_Investment_Funds.pdf

Traditionally, Germany's distribution landscape regarding retail funds is dominated by banks. Besides these, retail funds are also distributed through independent financial advisors ("IFAs"), insurance companies and through stock exchanges (in particular with regard to ETFs). BVI members without a management company in Germany distributing into Germany often set up a local entity. This might be a fully licensed management company as subsidiary, a subsidiary licensed as IFA, investment firm or simply be a branch of the licensed management company. The local entity usually is responsible for the relationship with the local distributors. Furthermore, BVI members cooperate with or operate fund platforms providing business for institutional customers (B2B).

Fund providers regularly distribute retail funds directly only to specific investor types, e.g. fund of funds or other professional investors or so-called semi-professional investors (cf. answer to q. 1.2). BVI members, however, manage 1,423 billion assets as of June 30, 2016 within a specific type of AIF professional funds, so-called *Spezialfonds*. These are generally designed according to the specific needs of and often negotiated with individual investors/small groups of investors and hence not marketed in the typical way. Institutional investors often engage consultants for the selection of the fund manager.

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

German Investment Law (*Kapitalanlagegesetzbuch* – "**KAGB**") recognises as semi-professional investors a sub-type of investors who qualify as retail investors according to MiFID. This type of investors was introduced in order to capture especially pension providers not qualifying as professional investors, foundations, churches, charitable trusts, municipalities and allow them to invest in *Spezialfonds*. Other countries have introduced similar types of non-professional investors, the definitions vary according to local law. Generally, we are aware of the following types of non-professional investors:

Country	Term	Description
Austria	Qualified Retail Investor	based on the European concept of a semi-professional investor as defined in the EuSEF and EuVECA Regulations. The investor has to invest a minimum of 100,000 Euro and has *inter alia* to confirm that he understands the risks and has unencumbered deposits and financial instruments in the amount of more than 500,000 Euro and provides proof that the investment when made does not exceed more than 20 percent of his assets.

Germany	Semi-professional investor	• based on the European concept of a semi-professional investor as defined in the EuSEF and EuVECA Regulations. The investor has to invest a minimum of 200,000 Euro and has *inter alia* to confirm that he understands the risks. • An investor who invests a minimum of 10 Million Euro. • An investor with a legal form of a public institute or a public foundation. • Members of the management board or employees of an AIF or an AIFM for investment in this AIF.
Luxemburg	*Investisseur averti*	• Professional investor • Institutional investor • Any other investor who: o has stated in writing that he adheres to the status of well-informed investor, and o either invests a minimum of 125,000 Euro in the fund o or has been subject of an assessment made by a credit institution according to CRD IV or MiFID or by a UCITS management company (or in specific cases by an AIFM) certifying his expertise, his experience and his knowledge to adequately appraise an investment in the fund.

Furthermore, BVI members use certain minimum investment thresholds for institutional share classes or specific funds. Unlike definitions of specific investor types, minimum thresholds are easy to verify.

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

The following table shows the Assets under Management as of July 31, 2016 according to our statistical data:

as of July 31, 2016	Net assets (in Mio. Euro)	Number of funds
UCITS		roughly 4,500
Thereof UCITS in Germany	314,258	1,756
Retail AIFs (total)		roughly 4300
Thereof Retail AIF in Germany	113,752	420
Professional AIFs	1,454,854	3933

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]*

Below table shows the domestic allocation of ISINs according to our statistical data:

as of July 31, 2016	Thereof domiciled in (the number of AIFs and UCITS)		
	UCITS	Retail AIFs	Professional AIFs
Total	roughly 4500	roughly 4300	3933
GER	1756	420	3815
Foreign (total)	roughly 2700	roughly 3900	118

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

Question 1.5a – If not, please explain why you do not use the passport.

BVI members generally use the UCITS passport if a notification is required. In some countries where, due to the legal definition of marketing, private placements without any prior notification are still allowed, UCITS are also placed without using a passport.

Question 1.6 – Do you use the AIFMD passport in order to market your EU AIFs in other EU Member States?
Question 1.6a – If no, please explain why you do not use the passport.

BVI members generally use the AIF passport for the placement of units with professional investors in other Member States. In some countries where, due to the marketing definition, placements without any prior notification are still allowed, AIFs are also placed to investors without using a passport. Furthermore, Germany has also a considerable amount of retail AIFs which – if distributed cross-border – require a specific notification with the host Member State authority since they do not benefit from any EU passport. These funds include open-ended funds investing in similar assets as UCITS, open-ended real estate funds as well as closed-ended funds. Some of these funds are also marketed cross-border, however, generally the marketing process for such funds is burdensome, if possible at all. Besides specific national requirements or even prohibitions of distribution to retail investors, national regulators often require translations of all documents into national language.

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

Question 1.7a – What percentage of your funds have you received permission to be marketed in (a) at least one other Member State and (b) at least two other Member States with the passport? What value of Assets under Management do these represent?

Unfortunately, statistical data at hand does not allow us to distinguish between funds that have received a passport for only one member state and those which have received passports for more than one member state. We believe, however, that it is possible to derive this data from the NCAs lists of passported funds and the assets under management reported to central banks. The table below therefore only provides you with information on the funds which have received at least one passport.

	Passport received for other MS	
Type of funds	**Net assets (in Mio. Euro)**	**Percentage of total AuM**
UCITS	roughly 453,200	51%
AIFs to professional investors	31,440	2%
ELTIF	none	none
EuSEF	none	none
EuVECA	none	none

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

We are aware that BVI members market their funds in the following Member States:

- Austria
- Denmark
- Finland
- France
- Ireland
- Italy
- Luxembourg
- Netherlands
- Spain
- Sweden
- UK

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

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.

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

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

Unfortunately, our statistical data does not show in which Member States BVI members distribute their UCITS and AIFs. The table below, however, shows what percentage of the funds marketed in Germany are not domiciled in Germany.

Type of funds	Marketed cross-border in Germany
UCITS + AIF to retail investors	56 %
AIFs to professional investors	2%

Questions 1.10 to 1.15 addressed to investors:

No answer to be provided.

2. GENERAL OVERVIEW

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members) and where appropriate, distributors who market or advise funds to investors
Other respondents are welcome to respond to some or all of the questions below.

Question 2.1 – What are the reasons for any limitation on the cross-border distribution of your funds? *[for each host Member State - Regulatory costs and/or marketing requirements costs are too high, Lack of demand outside your home market, Host Market size is too small, Openness of the distribution network to third parties, Tax issues, Other]*
Question 2.1a – Please expand upon and provide more detail on your response – please explain, what the issues are and how they limit the cross-border distribution of funds. Please cite the relevant provisions of the legislation concerned if possible.

The decision to distribute funds cross-border is made based on a cost-benefit analysis. On the one hand investments have to be made and costs to be borne in order to analyse the market and related distribution risks in a Member State where the management company has not yet distributed its funds. On the other hand, cross-border distribution, if functioning well, can be a chance to tap into new markets. Management companies will regularly only decide to distribute their funds in a Member State for the first time if the benefits outweigh the costs. The following – often interrelated – reasons trigger direct or indirect costs and hence limit the cross-border distribution of funds:

- **Inconsistent and/or deviating legal definitions.** The legal understanding regarding the terms marketing, distribution, private placement and reverse solicitation influences cross-border distribution. Due to differing interpretations, the applicable requirements vary. Furthermore, besides the categories according to MiFID, there is a need for additional investor categories often for similar reasons, however, due to the lack of harmonisation, these vary on a national level. For instance, the categorisation of an investor as institutional according to Luxembourg law grants such investors access to a specific fund type. The same is true for the semi-professional investor according to the German fund law (KAGB). This investor type was created in order to continue allowing specific investors investments in the long established product *Spezialfonds* although the law implementing AIFMD implemented the MiFID distinction of investor types into German investment law. These inconsistencies are barriers. For each Member State in which the fund is distributed, further adjustments of the fund rules or structure might be necessary or prospectuses have to cover different situations caused by different investor types or understandings of the terms marketing, distribution and/or private placement.
- **Lack of transparency regarding NCAs' approach.** Interpretations regarding the aforementioned legal definitions are not necessarily public knowledge or publicly available. They might even vary on a case-by-case basis, if an NCA is not yet sure which position to adopt, or if internal coordination is lacking. More transparency regarding such definitions would be helpful. In this regard already the Commission's report on this consultation could be helpful. Further, ESMA could for instance undertake a survey asking specific questions relating to the definition of marketing, private placement and reverse solicitation which are crucial for the day to day cross-border distribution. Such questions could include whether there is a limited number of investors to whom it is possible to sell fund units without prior notification. Publication of results on the ESMA webpage would be helpful too.

- **Legal uncertainty requires expensive legal and tax advice**. In order to ensure that any offer of fund units is in compliance with national regulatory requirements, management companies often have to seek support of a local lawyer. Additional requirements in relation to the passporting rules generally create barriers in particular for middle-sized and smaller fund managers to offer their products cross-border. Furthermore, legal advice is also necessary in order to understand specific civil law requirements and to avoid any civil liability risks. In addition, taxation of funds and investors differs between the Member States. Consequently, an understanding of the tax implications of a specific fund is decisive.
  In order to deal with this legal uncertainty, management companies have to bear high direct and indirect costs. These costs include the advisors' fees but also internal expenses caused by identification of the legal issue, finding suitable advisors, negotiating and coordinating with such advisors as well as conveying the information received internally as necessary.
- **Language barriers.** Except for the Member States or the respective provisions which accept English as a language for communication by the national authority as well as for the major part of the fund documentation, language barriers have a significant impact on cross-border distribution. NCAs provide only to a limited extent information about legal requirements in English. It is difficult to navigate through a NCA's webpage if it is only partly available in English. In addition, translations of registration documents including the fund documentations such as a prospectus create further costs. Moreover, legal texts are often not available in English and if they are, usually only as convenience translation. Negotiating with regulators, distributors or advisors in a foreign language also provides for further barriers.
- **Distribution network.** The success of exploring a new market is highly dependent on the access to markets and the local distribution structure. In many countries (including Germany), banks dominate the distribution system. Management companies therefore depend on the opportunity of building up a business relationship with established distributors and convincing them of their products. Distribution to investors directly so far has proven to be difficult since management companies usually lack a channel to contact investors directly. However, technical developments may offer opportunities to broaden the investor bases in future. Nevertheless, it is a business decision how an expansion of direct distribution fits into the existing distribution relationships of the asset manager.
- **Lack of harmonisation regarding market exit.** The lack of harmonisation of a market exit causes practical problems and is consequently a barrier to entry to the market in the first place. There are markets were a deregistration of a fund is not possible as long as any investor of that nationality holds any interests in the fund.
- **National requirements trigger additional costs.** Often NCAs impose additional requirements such as provision of a paying agent, other local representatives, or they charge additional fees for processing passport notifications. Such additional requirements trigger both direct and indirect costs. Direct costs include for instance the costs to be paid to the local representative. Indirect costs include the costs for the process of finding the paying agent or in case of additional fees understanding the national standards as to when, to whom and in which way a fee shall be paid. Regarding the latter, there are considerable differences between the Member States. In terms of costs, provision of services in several EU jurisdictions can be an expensive exercise implying potential payments of ten thousands of Euros only for handling/storing the notification files collected by other EU authorities.
- **Legal requirements regarding marketing material.** There are differences between legal requirements regarding content of marketing material. Standards on how to display performance figures vary for instance whether it is allowed to display net or gross figures. Implementation of MiFID II may bring further harmonisation. Furthermore, some countries require filing or approval of marketing material before the management company or the distributor uses it.

- **Fragementation of the investment operational chain.** Investment funds and asset managers represent the so-called buy-side of wholesale financial services. They are users of the post trading market infrastructure rather than providers of post trade services. However, the value chain of fund investing (subscription/redemption and occasionally secondary market trading of fund shares; and settlement, custody and asset servicing) generally works well in local markets in the EU and for most local funds. Problems arise in the area of cross-border distribution of funds. The European cross-border funds processing landscape is suffering from a medium to high level of fragmentation at both trading and post-trading levels, resulting in operational cost and risks. There are a few dominant order routing platforms supporting cross-border funds distribution, two of which are operated by the international central securities depositories, but there are third party-operated solutions as well. There is, however, no pan-European funds execution and processing life-cycle. Furthermore, domestic market infrastructures are different in each market. Execution of fund orders and initiation of settlement processes are to some extent still provided for manually and differ between domestic markets. Fragmentation is also inherent in communication standards, distribution channels and interfaces (e.g. different times for fund valuation in a market day, different numbers of decimals used for unit/share valuation, different settlement schedules, different policies regarding how public holidays impact the valuation of funds, etc). EFAMA and the SMPG Investment Funds Working Group are working on improving automation based on standardisation in the fund processing space. For details, please visit www.efama.org and www.smpg.info.
- **Changes in the legal environment.** Cross-border distribution into new markets is a project. Fund managers have to take into account any regulatory, tax, and operational changes that will take place during such project. However, in the past few years and in the upcoming years, market participants were and are confronted with changes regarding the distribution process (e.g. MiFID II) and the marketing materials (e.g. PRIIPs) and the realistic expectation that there, too, legal definitions will be inconsistent and/or deviating. This also has a significant impact on cross-border distribution projects.
- **Tax barriers.** Tax barriers include the need for costly investor tax reporting solutions in each Member States where distribution takes place, the lack of access to tax treaties for investment funds, difficulties in obtaining refunds of withholding taxes paid ("**WHT**") as well as discrimination through taxation of funds established in other Member States. The tax issues are explained in further detail in section 9.

Question 2.2 – In your experience, which of the following issues are the major regulatory and tax barriers to the cross-border distribution of funds in the EU? For the issues you consider to be major barriers, please rank them in order of importance [Different definitions across the EU of what marketing is, Marketing requirements imposed by host Member States, Regulatory fees imposed by host Member States, Administrative 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]

- **Regulatory barriers**. A ranking of the aforementioned barriers is difficult since this depends on the market and the type of funds and offer. However, dealing with legal uncertainty and providing for a local representative regularly represent most important barriers. Please see our answer to q. 2.2.

- **Tax barriers.** One of the most important issues is the high burden for investment funds to get treaty access and to recover foreign WHT. This may lead to a disadvantage for investors compared to their direct investments. We appreciate that these topics have been intensively discussed for many years, unfortunately, with only minor or no improvements so far.

  The Commission already consulted in 2011 on taxation problems that arise when dividends are distributed cross border to portfolios and individual investors and asked for possible solutions. In addition, the OECD and EU already took a specific look at the situation for Collective Investment Vehicles (see the OECD Report "The granting of treaty benefits with respect to the income of collective investment vehicles" dated 23 April 2010 as well as the work of the Commission's Tax Barriers Business Advisory Group). We welcome the fact that the Commission as well as the OECD have widely acknowledged in their work on cross border tax relief procedures that, in practice, claiming WHT relief under Double Taxation Agreements and/or a country's domestic tax laws is often cumbersome and time and resource intensive for governments, financial institutions, and foreign portfolio investors. 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. Although tax treaties operate well in the context of investment by a resident of one country into the other, for cross-border funds which pool investors from multiple jurisdictions the treaty access gets more complex or is even unfeasible. Against the background of an existing broad consensus about these problems, BVI welcomes the Commission's intended aim to address them. The time and costs of WHT recovery still act as deterrent for investment funds to invest in other than their residency states. We provide evidence of this in the specific questions below. Please see also our comments in the specific sections.

3. MARKETING REQUIREMENTS

Question addressed to all respondents
Question 3.1a – Are you aware of Member State interpretations of marketing that you consider to go unreasonably beyond of what should be considered as marketing under the UCITS Directive?
Question 3.1aa **–** Please explain your answer
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 already specified (cf. q. 2), we are aware that the marketing definition differs across the Member States causing the described problems. Unlike the AIFMD, the UCITS Directive does not define the term marketing. Accordingly, it is more difficult to determine whether any interpretation goes beyond what should be considered marketing. Furthermore, national implementation of AIFMD and UCITS Directive differ insofar as in some jurisdictions like Germany there is one legal statute for both AIF and UCITS and consequently, the marketing definition of the AIFMD also applies to the marketing of UCITS. In other jurisdictions, the national UCITS law is separated from the law for AIFs/AIFMs which also often prompts a different understanding of the marketing definition depending on the type of funds.

Based on the different understanding of what constitutes marketing, there is also an incoherent understanding of what can be considered marketing communication and what not. As a consequence, it is more difficult to raise seed money in some Member States than in others.

Below are some examples which – based on the interpretation of marketing – lead to inconsistencies:

- The German fund law KAGB does not apply the concept of reverse solicitation as provided for in the definition of marketing according to the AIFMD for marketing to retail investors. Consequently, every direct or indirect offering or placement of fund units or shares to retail investors including UCITS constitutes “marketing” irrespective of whether the offering or placement happened on the initiative of the management company.
- The German NCA BaFin considers every placement of fund units to an investor as marketing. There is consequently no possibility to limit an offer to a certain number of investors in order to ensure that no notification requirement is triggered. Other countries such as UK, Austria and Luxembourg consider marketing to a limited number of investors not as an act which would trigger the need for a prior notification of the fund for marketing.
- Furthermore, BaFin also considers a placement of fund units based on a decision of and by a portfolio manager providing the service of individual portfolio management to a retail investor as marketing (see BaFin Frequently Asked Questions regarding Marketing, question 1.7). Consequently, also funds which a portfolio manager decides to buy on behalf of an investor have to be approved for marketing in Germany. The UK regulator FCA, however, considers a portfolio manager purchasing fund units on behalf of a client as the investor himself (Chapter PERG 8.37.9 AIFMD Marketing, fshandbook.info/FS/html/FCA/PERG/8/37), hence qualifying the transaction as conducted with a professional client. The same position is taken by the French regulator, AMF, which considers “the purchase, sale or subscription of units or shares of a UCITS or AIF under the terms of a third party portfolio management agreement” not as “marketing” of such funds units or shares, provided that the transaction is authorized under the terms of the portfolio management

mandate (AMF Position – Guide to UCITS and AIF marketing regimes in France – DOC 2014-04 No. 1, p. 3). Accordingly, in the UK and France funds may also be used within an individual portfolio management mandate without notifying them for marketing to retail clients.
- BaFin generally considers any contact with investors as marketing once the fund is named. An exception is made if the fund is named according to a specified system such as numbers (e.g. fund 1, fund 2, fund 3) which is often the case for private equity structures.

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members) and where appropriate, distributors who market or advise funds to investors and National Competent Authorities Other respondents are welcome to respond to some or all of the questions below.

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

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

Cf. question 2.1 and questions 3.1. Beside the aforementioned difficulties, in some jurisdictions like Belgium and Italy, market participants have to file marketing material with the NCA. While in Belgium marketing communication has to be approved, in Italy the filing is required for documentation purposes. In particular in Belgium this is as reported by BVI members quite burdensome since aspects as feedback time or language requirements are not clear to all market participants.

In addition, practical problems due to national rules or interpretations arise. One example raised by a BVI member occurs when distributing *Spezialfonds* cross-border to Austria. *Spezialfonds* in Germany may only be acquired by professional or semi-professional investors. Since the definition of a semi-professional investor deviates from the definition of qualified retail investors according to Austrian law, a cross-border distribution of *Spezialfonds* to Austrian investors requires compliance with both definitions, i.e. only investors falling in the intersection of both definitions may be targeted. Otherwise, the fund would have to be registered as retail fund in Germany in order to be distributed to Austrian qualified retail investors who do not match the definition of a semi-professional investor under German law.

Furthermore, there are cases where the AIFM is required to notify distribution of retail AIFs in the home Member State in order to be able to notify for distribution in a host Member State. This issue becomes even more complex in case the AIFM intends to target a special group of investors which are not considered retail investors in the host Member State. A European harmonised approach regarding semi-professional investors could reduce barriers in this regard significantly.

Question 3.3 – Have you seen any examples of Member States applying stricter marketing requirements for funds marketed cross-border into their domestic market than funds marketed by managers based in that Member State?
Question 3.3a **–** Please explain your reply and provide evidence.

There is already a difference provided for in the AIFMD between an AIFM distributing cross-border or distributing within the jurisdiction where it is licensed (see Art. 31 on the one hand and Art. 32 and 33 on the other hand). A truly integrated process would not provide for any difference between a fund distributed in a home Member State and one distributed in a host Member State. While the AIFM's NCA needs to be informed of the jurisdiction in which the AIFM intends to market its funds, there should be no need for any further information just because the AIFM intends to distribute in another Member State.

Besides the differences in the notification process already laid down in the AIFMD, we are not aware of examples of discrimination where the EU provides for a passport. There are, however, stricter marketing requirements for AIFs distributed cross-border to non-professional investors. The following examples show national requirements for the distribution of AIFs to retail investors:

Jurisdiction	Specific local requirements	Further information
Austria	AIFs may be marketed to “non-qualified” retail investors in Austria only under very strict product design rules. In addition, non-domestic AIFs must be approved for marketing to retail investors in their home state. Non-Austrian AIFs cannot be specifically designed for the Austrian market alone but must also take into account product design rules of their home state and undergo its national approval procedure.	*Alternative Investmentfonds Manager-Gesetz*, §§ 48 and 49
France	- an instrument of information exchange and mutual assistance in the area of discretionary asset management has to be in place between the AMF and the management company’s NCA; - the AIF has to meet the conditions provided by a mutual recognition agreement on AIFs that may be marketed to retail clients, entered into between the AMF and the management company’s NCA.	Guide to UCITS and AIF marketing regimes in France – DOC 2014-04
Germany	- local paying agent - Types and rules of retail AIFs have to be conform with requirements for retail AIFs according to German law - Information about the AIFM including share capital, formation date, fiscal year and interest in the depository as well as confirmation to provide BaFin with the AIFM’s annual report; for third country AIFMs further information is required - Information about the AIF to be marketed - all documents in other language then German have to be submitted with a translation	Secs. 317 et seq. KAGB BaFin Circular regarding notification according to Sec. 320 KAGB (in German)[7]

[7] www.bafin.de/SharedDocs/Downloads/DE/Merkblatt/WA/dl_140617_merkbl_320_kagb.pdf?__blob=publicationFile&v=2

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

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

Cf. question 2.1. In this regard it is important to take into account that distributing funds through MiFID firms has an important impact in particular on the marketing communication. MiFID provides for specific rules regarding marketing communication. Those rules are interpreted differently among the Member States, e.g. regarding what is allowed to show as past performance, which costs should be taken into account etc. We believe that MiFID II will enhance harmonisation in this regard, however, mandatorily it does only affect distribution through MiFID firms or exempt IFAs for which national legislators have to provide for equivalent rules. Nevertheless, BVI members have to engage expensive local advisors also in this respect in order to ensure compliance with national requirements.

For Germany regarding availability and comprehensibility of marketing requirements according to investment law only limited information is available in English. While the website of BaFin generally has improved over the last years, it is still difficult to find the relevant information without being familiar with the German legal system.

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

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

BVI members generally use a marketing materials mix ranging from leaflets to TV spots. If a fund is distributed cross-border in more than two countries, BVI members report that they focus sales activities abroad predominantly on professional investors. BVI members consider marketing communications as very important. They have to be customised for providing maximum use to the target groups in each jurisdiction. The set of communication activities for retail clients and distributors on the one hand and for institutional investors on the other hand vary. For institutional clients BVI members use market data, individual fund and market reports in printed form. In particular the requirement to prevent AIF shares and units for professional investors to be marketed to retail investors (Annex III lit. g) AIFMD) prevents management companies from using leaflets and flyers for funds which are tailored for professional investors.

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)]

BVI members use leaflets, flyer, booklets, image brochure, newspaper ads, magazine ads, TV ads, online ads, website (including closed area for clients), microsites, ambient media advertising (blow-ups in railway stations, ads on buses and tramways), pages in social networks, extranet webpages for distributors.

Questions addressed to distributors who market or advise investment funds to investors

Question 3.7 – When you market funds on a cross-border basis to retail investors do you use marketing communications (Leaflet, flyers, newspaper or online advertisement, etc.)? Please provide the percentage of funds marketed on a cross-border basis using marketing communications in the host country
Question 3.7a – To what extent are marketing communications important in marketing funds to retail investors? Please explain your answer.
Question 3.8 – When you market funds on cross-border basis to high net worth retail individuals do you use marketing communications? Please provide the percentage of your funds marketed on cross-border basis using marketing material in the host country
Question 3.8a **–** To what extent are marketing communications important in marketing funds to high net worth retail individuals? Please explain your answer.
Question 3.9 – When you market funds on cross-border basis to professional investors do you use marketing communications? Please provide the percentage of your funds marketed on cross-border basis using marketing communication in the host country
Question 3.9a **–** To what extent are marketing communications important in marketing funds to professional investors? Please explain your answer.

No answer to be provided.

Questions addressed in particular to investors
Question 3.10 – To what extent is the UCITS Key Investor Information Document (KIID) useful in your investment decision? Is a KIID is always provided to you?

Noting that this question is primarily addressed to investors, our general observation is that investors often do not accept the KIID as useful for their investment decision. Rather the KIID has failed in its goal of becoming an accepted information document considered to provide the investor with the information needed for the investment decision. One reason for this is that the synthetic risk reward indicator (SRRI) is often understood as a product risk classification ready to match with the risk type of the investor. However, due to their volatility, equity funds are generally attributed an SRRI of 6 or 7 which does not seem to be the correct category for general equity investments. It remains to be seen whether the PRIIPs KID will achieve the objective of providing key information which investors will accept as useful.

Question 3.11 – *To what extent do marketing communications play a role in your investment decision? Do you consult marketing materials before making your investment decision?*
Question 3.11*a* – Please expand upon your reply.
Question 3.12 – To what extent do you consider the marketing communications as providing a balanced views of the up-and downsides of a particular investment and do they contain meaningful information to assess risk and costs associated with the investment products?
Question 3.13 – To what extent is it important for you to have marketing communications in your national language?
Question 3.14 – How relevant is the disclosure of the following information in the marketing communications? [The asset management company, Price, Costs, Past performances, Scenario/ future potential performance, Performance of the benchmark, How to get additional information, Specific risks, How to make a claim, How to get your money back, Information on Tax treatment of income distributions by the fund, Other: Please specify]
Question 3.14a – Please explain the reasons for your response.

No answer to be provided.

Question addressed to all respondents
Question 3.15 – Do you consider that rules on marketing communications should be more closely aligned in the EU?
Questions 3.15a – Please explain your answer – and if appropriate, to what extent do you think they should be harmonised?

As already mentioned, there are different approaches regarding marketing communication. In our view, MiFID II and to some extent PRIIPs Regulation will influence and possibly harmonise marketing communication over the next few years. Any additional major measures should not be taken before the impact of these rules will be thoroughly analysed. Nevertheless, a general statement confirming that all marketing material compliant with MiFID II can be used in any jurisdiction also for direct distribution would be helpful. Market participants could then be sure that they can use their material in all Member States without having to adjust these to specific requirements laid down by local law.

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?

MiFID covers all financial instruments. Consequently, we expect further harmonisation regarding financial instruments based on MiFID II implementation. Such harmonisation should also be pursued across sectors, especially with regard to insurance-based investment products covered by IDD. While the new IDD framework encompasses the general principle on fair, clear and not misleading information which also extends to marketing communications, unlike the MiFID II framework it is not foreseen to provide for further specifications of this principle at Level 2. It should be therefore deemed the remit of the responsible authorities, in particular EIOPA, to provide for further alignment of standards in the supervisory practice.

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

We believe that ESMA should only supervise financial market participants where EU law provides for such direct supervision. In all other areas, ESMA should contribute to the single rulebook in the EU financial legislation within its powers. ESMA should not be considered universally competent to deal with any shortcomings or potential issues of concern in the EU financial markets regardless of the existence or non-existence of relevant acts of EU law. Consequently, the day-to-day supervision and monitoring of marketing communications should be the NCAs' responsibility. Nevertheless, ESMA can provide guidance and review supervisory practice in order to ensure that NCAs do not impose too many additional / specific requirements.

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.

We do not believe that more detailed requirements would be helpful in achieving harmonisation. Generally, market participants struggle to deal with all legal requirements imposed on them within the last decade. General principles which do not impose additional requirements but which allow financial market participants to rely on EU law could help on a daily basis (cf. question 3.15). This could include statements that e.g. compliance with requirements laid down in MiFID II should always be sufficient (also in case of direct distribution) and a clarification what constitutes marketing according to EU law. In this regard, the understanding of marketing for UCITS and AIFs should be the same throughout the EU.

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

We do not believe that investment law should impose additional requirements regarding fund distribution compared to other financial instruments. Due to the risk diversification, the licensing and supervision of the issuer, the segregation of assets and its safeguarding by a depository, funds provide for much more safeguards and therefore a higher level of institutional security than other financial instruments. Imposing additional requirements on fund distribution which are not imposed on other financial instruments would only serve to increase the unlevel playing field and would discriminate against financial instruments which provide for the best developed supervisory system of checks and balances according to EU law.

In this respect, it is worth noting that due to the AIFMD not applying the concept of public offering versus private placement, fund units have a competitive disadvantage compared to other types of securities. All other securities offered, where both the product and the issuer may be completely unregulated, benefit from a number of exemptions including even from the disclosure requirement according to the Prospectus regime. For instance, securities may be placed without providing for a prospectus if fewer than 150 non-qualified investors per EEA Member State are addressed. We believe that there is no reason for discriminating funds compared to other types of securities. A coherent private placement regime should consequently readjust AIFMD in this respect, and we appreciate that the Capital Markets Union project already has taken note of this issue.

Question 3.20 – Do you consider that detailed requirements – or only general principles on marketing materials, at the EU level, should be imposed when funds are marketed to professional investors only?
Question 3.20a – Please explain your reply.

We generally believe that any guidance on marketing material for funds marketed to professional investors only should be considered very carefully. Professional investors generally ask for and get the information with the content and in the form they require. For instance, practical experience since coming into force of AIFMD shows that professional investors are neither interested nor do they ask for the standardised information the AIFM has to provide according to Art. 23. The majority of professional investors are involved in the set up of the fund in order to have it tailored according to their request. Also, professional investors require different investment objectives, limits, and information based on their business, their professional background and often the regulation they have to comply with such as insurance companies under Solvency II or banks under CRD/CRR. Consequently, any information provided to professional investors is tailor-made and hence any requirements or even general principles may lead to more disclosure obligations which serve neither the investor nor the market participants. For instance, in case of “multiple option PRIIPs” within the meaning of the PRIIPs Regulation, asset managers will be required to provide specific data to the product provider, usually an insurance company, which serves as the basis of information for a product for the benefit of the clients of the insurance company technically acting as investor of the fund.

4. COSTS

Respondents to the CMU and CfE noted the relatively high cost of distributing funds – in terms of work to comply with regulation, fees charged by regulators and distribution costs. This section asks about the overall costs to asset managers wishing to market cross-border, and section 5 asks about fees charged by the regulatory authorities specifically.

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members) and where appropriate, distributors who market or advise funds to investors
Other respondents are welcome to respond to some or all of the questions below.

Question 4.1 – What proportion of your overall fund costs relate to regulation and distribution depending on the Member State where the fund is marketed 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]

It is very difficult to provide estimates of costs since the level of costs (esp. legal costs, regulatory fees and administrative arrangements) in relation to the overall fund costs vary significantly. The following aspects influence the pricing:

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

As a very cautious estimation, based upon samples, the costs range between 1 to 4 percent of the overall fund costs excluding any commission payments. Although such overall distribution costs do not seem significant, they do not comprise internal costs of coordinating the legal and organisational aspects of a multi country cross border distribution with deviating requirements of different markets. These require dedicated resources and any harmonisation would contribute to cost savings.

5. REGULATORY FEES

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members)
Other respondents are welcome to respond to some or all of the questions below.

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

Neither the existence nor the level of regulatory fees are decisive for the distribution strategy, however, it is generally burdensome that different NCAs charge different fees for the same situation but for different reasons. While it might be generally justified to charge fees, in particular in case the NCA is fully self-financed, there is a lack of transparency regarding such fees. BVI members even reported cases where the NCA had to issue invoices several times because the amount of fees to be charged according to the rules was not entirely clear.

In order to solve this, the Commission could take a similar approach for all funds that benefit from a passport as it proposed in the revision of the EuSEF and EuVECA Regulations, i.e. prohibiting NCAs to impose fees in case a passport is used for distribution. Should this not be feasible, it might be helpful to set general rules for a fee structure, i.e. how to deal with several notifications, with sub-funds, etc. It could further improve transparency, e.g. through a centralised database which shows the fees charged by each NCA including the incidents triggering the fee, the fee structure, the legal basis as well as due dates and other payment requirements or by requiring NCAs to publish their fee structure according to a customized table.

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

Yes. This is, however, due to the fact that different provisions for such notifications apply. For instance, a German retail AIF managed by a German AIFM requires (1) approval of fund rules[8] (costs between 500 and 2,000 Euro) and (2) a marketing notification[9] for 1,531 Euro. A retail AIF from any other Member State managed by an AIFM from another Member State requires a marketing notification[10] which costs 2,520 Euro. Domestic UCITS do not require a marketing notification but only approval of the fund rules whereas the assessment of a UCITS passport notification for cross-border distribution[11] costs 115 Euro. The notification of marketing to professional investors for a German AIFM regarding German or EU-AIF costs 1,523 Euro whereas the assessment of a passport notification for an AIFM from another Member State regarding German or EU-AIF costs 772 Euro. However, already the legal basis for the marketing notification of the domestic fund differs from the cross-border notification according to the AIFMD (Art. 31 vs. Art. 31).

While we understand that these fees are based on the NCA's efforts to review the notifications, however, we generally doubt that there is a consistent understanding and system how domestic notifications, passport notifications or non-passport cross-border notifications should be charged. In this regard, we appreciate the general approach taken in the Commission's proposal to revise the EuSEF and EuVECA Regulations, i.e. the

[8] Sec. 163 KAGB.
[9] Sec. 316 KAGB.
[10] Sec. 320 KAGB.
[11] Sec. 310 KAGB.

explicit prohibition for host Member States NCAs to impose fees and other charges in relation to cross-border marketing of EuVECA and EuSEF.

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

No, they do not and they should not. We believe that there is no reason for a regulatory charge to reflect any potential returns from marketing but rather to cover the NCA's internal expenses. It is, however, unclear why the internal expenses should vary across Europe the way they do without any apparent connection to the labour costs in the relevant Member State.

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

Please refer to the EFAMA position paper which provides a list of regulatory fees.

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

Please refer to the EFAMA position paper which provides a list of regulatory fees.

Question 5.6 and 5.7 addressed to National competent Authority

No answers to be provided.

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members) and National Competent Authorities
Other respondents are welcome to respond to some or all of the questions below.

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

Not in Germany. The fee level for ongoing supervision in Germany is the same for domestic funds and foreign funds. This is the case even though for domestic funds BaFin supervises compliance with more rules than for foreign funds to which only certain rules apply.

Question 5.9 – Do differing national levels of, and bases for, regulatory fees hinder the development of the cross-border distribution of funds?
Question 5.9a – Please explain your answer.

While we do not believe that the decision whether or not to market a fund cross-border is based on the regulatory fees, they provide for additional barriers to be dealt with (cf. q. 5.1).

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

BaFin charges the fees to the manager. However, regulatory fees can be deducted from the funds' assets.

6. ADMINISTRATIVE ARRANGEMENTS

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members)
Other respondents are welcome to respond to some or all of the questions below.
Question 6.1 – What are the main barriers to cross-border marketing in relation to administrative arrangements and obligations in Member States? Please provide tangible examples of where you consider these to be excessive.

Member states regularly impose specific administrative arrangements and obligations. Many of these obligations require involvement of any kind of national service provider, often paying agents. A dedicated process for interaction with the service provider has to be implemented and additional costs are triggered. In some host Member States appointed distributors have to be registered and any information on these updated. Furthermore, some countries do not allow for a direct cross border settlement on a very standardised, secure and efficient "delivery vs. payment" scheme because the management company has to appoint local paying agents. Moreover, in order to fully understand the local requirements market participants often need to involve expensive advisors.

Below is a basic list of examples regarding administrative arrangements which BVI members came across in specific Member States.

Jurisdiction in which fund is marketed	Administrative arrangements
Austria	Paying/facility agent
Germany	Appointment of credit institution or branch of credit institution as paying agent for UCITS and retail AIFs
Ireland	Paying/facility agent
Italy	• national register for retail investors • registration for settlement • list of distributors has to be filed • list of notified funds has to be submitted
Luxembourg	Credit institution required as paying agent for UCITS. UCITS are required to inform CSSF about changes to distribution arrangements.
Poland	• national register for investors • prohibits omnibus accounts
UK	Paying/facility agent

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.

Specific requirements to cross-border funds are generally based on the fact that the management company has been licensed and / or the fund rules have been approved by an NCA of another Member State. It is therefore difficult to allege that specific requirements are only imposed on passported funds and their managers. The situation for passported funds is different from the situation for domestic funds.

For domestic funds, the host Member State regularly supervises also the domestic management company and consequently has much more insight than the host Member State's NCA. This is possibly the reason why – according to our observations – host Member State NCAs feel the need to collect certain information related to the management company themselves. While we have sympathy for such need to some extent, we believe that it contradicts an integrated, "single" financial market in the EU. Consequently, enhancing trust and reliance between NCAs is an important precondition to remove barriers for the cross-border distribution. Besides this, we are not aware of obligations for EU funds being stricter than for domestic funds.

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

It is difficult to define a percentage of the overall costs. The price schedules for the administrative arrangements vary largely. Prices for the involvement of for instance a paying agent are subject to competition and are not necessarily identifiable in percentage of overall costs. According to a very cautious estimation, the range could be up to 5 basis points of the local volume of a target market placed.

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?

We believe that retail investors are generally well-protected. European regulation ensures that the fund providers are supervised. Management companies have to provide information on how investors can complain and where they can get more information. In case services are solely provided on a digital basis, where there is no physical possibility to contact the management company or a distributor in the host Member State, investors need to have the possibility to contact the management company and getting a response within a reasonable time frame. Furthermore, the Alternative Dispute Resolution ("ADR") Directive requires the establishment of ADR entities also for financial services and UCITS V has strengthened retail investor protection by means of a requirement to implement a whistleblowing mechanism. However, it has to be clear that information requests and complaints to the management company are dealt with. Generally, the proposed Level 2 measures of the ELTIF Regulation allow management companies to provide their services electronically. These ideas could be used as a basis for mandatory arrangements in order to provide for the necessary level of investor protection.

Nevertheless, the information about the distribution activity of the national point of sales should not be object of any information obligation of a foreign management company. The majority of national distributors are MiFID firms, MiFID exempt IFAs which are subject to national supervision, or supervised insurance companies. We therefore believe that the distribution itself is supervised sufficiently. Consequently, we do not see a need for national regulators to receive lists of distributors for the funds.

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

We generally believe that any regulatory requirements for the administrative arrangements for the marketing of funds to professional investors should be considered very carefully. Professional investors are generally not in need of mandatory administrative arrangements but rather see them as additional cost trigger. The majority of professional investors in Germany are involved in the set up of the fund in order to have it tailored according to their request. Unlike retail investors, professional investors are usually known to the management company, consequently, they do not require the administrative arrangements which are made to ensure that the retail investor receives the information he reasonably requests and has access to a mechanism where he can complain.

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.

Basically any requested administrative arrangement not based on a harmonised approach should be questioned in order to reduce burdens to access a market and contribute to an efficient procedure for the benefit of investors and market participants.

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

As described before, the proposed Level 2 measures of the ELTIF Regulation provide for a good balance between efficient and contemporary ways of distributing and investor protection.

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

Generally, we do not believe that there should be any administrative arrangements with and across Member States. Clearly, some Member States are comfortable without imposing any administrative arrangements. The fact that other Member States do seems to be rather a problem of reliance on the home Member States supervision.

Questions addressed in particular to investors:
Question 6.9 – In general have you experienced any problems in being able to obtain information on, and invest, in foreign EU funds?
Question 6.9a – Please describe your experience.
Question 6.10 – Which facilities would you deem necessary to invest in EU funds domiciled in another Member State? Please explain.
Question 6.11 – What are your main problems when investing in funds domiciled in jurisdictions other than your jurisdiction of residence? Are differences in languages an important issue?
Question 6.12 – What is the best way to overcome such problems and facilitate your transactions?
Question 6.12a – Please clarify.
Question 6.13 – Which kind of information do you need when making transactions on EU funds domiciled in another Member State?

No answer to be provided.

7. DIRECT AND ONLINE DISTRIBUTION OF FUNDS

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members) and where appropriate, distributors
Other respondents are welcome to respond to some or all of the questions below.

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

According to our understanding, the factors hindering direct distribution comprise:

- **Limited access to investors.** Investors are so far not used to acquire fund units directly from the fund company. Direct distribution to investors has proven to be difficult since management companies usually lack a channel to contact investors personally. However, younger generations may be more inclined to use technical means in order to invest. In this regard the technical developments may offer opportunities to broaden the investor bases in future. Nevertheless, it is a business decision how an expansion of direct distribution fits into the existing distribution relationships of the asset manager. This may largely hinge on the structure of the group the asset manager belongs too. The use and scope of direct distribution, for instance by means of digitalisation, may be decided by a different group entity than the asset manager.
- **Fragmentation of the investment operational chain.** Progress towards a truly integrated and flexible European infrastructure model for transaction and back office processing of investment funds requires close cooperation among market players and where necessary, public action. In addition, differing rules regarding know-your-customer and anti money laundering make it difficult for management companies to distribute directly. It remains to be seen whether this changes once the revised AML Directive is implemented.
- **Need to retain a distributor.** It should also be noted that neither UCITS nor AIF management companies may act as principal for tied agents in another EU member state. Asset managers who intend to enter the market of another EU member state often wish to do this by using a smaller local distribution agent. Those asset managers need to create or retain a different entity which has a MiFID license passported into the relevant EU member states in order to act as principal of a tied agent.

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

While there are barriers regarding direct distribution through traditional channels, in case of online distribution additional barriers add to the complexity of the process. The online distribution process might, however, turn out to be of significant value for any direct distribution because it might become easier for management companies to get access to investors.

Nevertheless, online distribution throughout the entire distribution chain would only be possible if all services necessary could be provided online. Due to the aforementioned specific requirements, direct cross border fund unit settlement with the management company, a transfer agent or via intermediaries (e.g. international clearer) is not feasible. In addition, differing rules regarding know-your-customer and anti money laundering makes it difficult for management companies to distribute directly.

Online distribution of funds has been established over the last decade but usually only on a national level. In our view these are the main barriers that hinder online distribution cross-border:

- Setting up a platform which complies with all legal requirements in all Member States is a very complex exercise. First, European legislation is applied differently, for instance, in the UK asset managers generally have a MiFID license and consequently have to comply with all MiFID requirements. Second, goldplating adds complexity since market participants cannot solely apply the European legislation but need to verify any additional aspects of national specifies. Third, national tax and civil law add another layer of barriers.
- Access to investors is a key element in order to successfully distribute online. While a website might be available to investors for online distribution, popularity of a website depends on many circumstances.
- Technical features have to be set up in a way that they comply with the different investor identification and information requirements in each Member State.
- Generally, language is also a barrier, even though less than in the context of non-digital distribution. Nevertheless, an English website can provide access to some extent at least to the younger generation who might be less reluctant to use digital means in English for their investments.

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

We are not aware of further barriers other than those described in our answers.

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?

For the reasons described in answer 7.2, so far asset managers have not provided their services cross-border online at a larger scale. The same is true for online distributors.

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.

We do not believe that there should be a specific framework for cross-border platform distribution. Rather, to ensure the same level of investor protection, to avoid further fragmentation of regulatory requirements and to avoid any unintended consequences, it is necessary to analyse existing regulation thoroughly and clarify which regulation applies to which kind of online service provided. Furthermore, any limitation with regard to the fund unit transaction processing of a local distributor directly or indirectly to the management company or the custodian bank or transfer agent of the fund should be abandoned to permit a safe and efficient cross border fund unit settlement. In addition, the administrative arrangements foreseen by the UCITS and AIFM Directives (e.g. update of the notification via host country for UCITS according to Art. 93 para. 8 UCITS Directive and via home country for AIF according to Art. 32 para. 7 AIFM Directive) should be streamlined.

The European transaction processing landscape for funds in our view comprises of the following:

- a sufficient number of infrastructure providers (but not one single provider);
- a European funds processing model that offers flexibility across the key dimensions (local market practices, infrastructures, regulatory/legal and tax regimes; interfaces; distribution channels). Flexibility should enable the future European fund transaction processing landscape to create value through connecting and leveraging existing custody and settlement infrastructures and by providing service components which are not yet available from domestic platforms and players;
- sufficiently scalable processing capability;
- an open architecture that connects and integrates existing and future national or cross-border platforms and players, including increased choices in harmonisation of settlement (T2S);
- higher benefits of integration and automation to regulator and investors alike;
- further harmonisation and standardisation in trading, clearing, settlement, custody, asset servicing (including identification of investors and distributors) of fund units and shares;
- standardised identifiers (LEI for all companies and ISIN for all instruments);
- using blockchain technology where feasible for order-routing, settlement and asset servicing in one “go” and increased transparency of ownership.

Questions addressed in particular to investors
Question 7.6 – Do you invest in funds via an on-line fund platform or a website?
Question 7.6a – Please expand upon your reply.
Question 7.6b – If you have invested in funds online, what kind of information on the suitability or appropriateness of the investment was made available to you?
Question 7.6c – If you do not invest in funds via fund platform or a website, why do you not do so?
Question 7.7 – What are your expectation when you invest via fund platform or a website?
Question 7.8 Do you invest in funds platform or a website domiciled in another Member State?
Question 7.9 – What do you consider to be the main reasons why EU citizens are unable to invest in platforms domiciled in another Member State?

No answer to be provided

8. NOTIFICATION PROCESS

Questions addressed in particular to asset managers (professional associations are invited in addition to consolidate information on behalf of their Members) and where appropriate, to national competent authorities
Other respondents are welcome to respond to some or all of the questions below.
Question 8.1 – Do you have difficulties with the UCITS notification process?
Question 8.2 – If yes, please describe those difficulties.

There are several difficulties regarding the notification process itself and the subsequent relationship with the host state NCA. In terms of process the distinction can be made as follows:

- **Notification**. The notification itself for UCITS works quite well. In some cases (see below) NCAs require additional obligatory documents or documents in local language contrary to the UCITS Directive. Those forms have to be filed with the regulator but the exact date of filing depends upon the procedure of the notification and the time needed itself. The interdependency creates an unjustified level of coordination and cost. Furthermore, in case any interaction between NCAs is required, this may lead to additional difficulties because this depends on the relationship between the NCAs. While some relationships work well, others seem to be more difficult.

  BVI members reported the following examples:

  - An NCA required in one case translation of UCITS prospectus despite Art. 94 para. 1 c UCITS-Directive.
  - An NCA did not forward a notification letter of a UCITS being open to retail investors to the distribution to institutional investors only in another jurisdiction, since this limitation is not eligible in home member state.
  - Comments from home regulator to assign a paying agent for a host country where this is not being requested.
  - Comments from home regulator to attempt or reject or limit an offer to a group of professional investors in a host country where this is permitted.

- **Maintenance of notification.** There is no standardised process for the maintenance of notification. Therefore, NCAs deal with updating of legal documents such as prospectus, KIIDs and annual report differently. Some NCAs require filing of an updated KIID, others do not. Some NCAs require ongoing information which could include information on distributors, sales or risk classification.

- **Deregistration**. The lack of harmonisation of a market exit causes practical problems. There are markets were a deregistration is not possible as long as any investor of that nationality holds any interests in the funds. Furthermore, NCAs charge significant costs for deregistration. Difficulties in deregistration considerably influence the decision to access a market in the first place: Should the management company not be successful in the market, it is still bound to the costs maintaining compliance.

  BVI members report the following examples regarding deregistration:

Jurisdiction in which fund is marketed	Additional requirements
Belgium	do not permit a deregistration of a fund if some (or a special number) clients remain invested
Germany	Publication in the Federal Gazette

Poland	do not permit a deregistration of a fund if some (or a special number) clients remain invested
Spain	do not permit a deregistration of a fund if some (or a special number) clients remain invested

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

In many jurisdictions, the periods for distribution notifications is suspended if the regulatory authority declares amendments to the submitted notification, regardless how significant such amendment is. In some cases such amendments may even only be correction of typos. This approach contradicts the purpose of the periods for filing provided in the UCITS Directive.

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

Although the AIFMD notification process is not as long in force as the notification process according to the UCITS Directive, the aforementioned problems (cf. q. 8.1 and 8.2) also apply to a certain extent to the AIFMD notification process. Certainly the concept of the AIFMD and the UCITS Directive differ insofar as the former regulates the management company whereas the latter in particular regulates the fund but also the management company. Accordingly, the NCA for an AIF marketing notification is the NCA in the jurisdiction in which the AIFM is domiciled, however, the NCA for a UCITS marketing notification is the NCA in the jurisdiction in which the UCITS and not its management company is domiciled. We believe that the former notification process is generally more consistent since the NCA of the home Member State of the management company should be in the best position to supervise the management company's activities.

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?

The experiences regarding unjustified delay in the notification process for AIFs are similar to the ones relating to UCITS. Particularly with respect to notification of AIFs it has been observed that some NCAs do not differentiate between an incomplete notification file and comments on the contents of a document (prospectus etc.) submitted. Every comment renders the notification file as "incomplete", the result of which is that the notification period starts to run again as from the day the new document has been received by the NCA.

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

The process of maintaining notification should be streamlined. In particular, only the home Member State should be allowed to request updated documents or filings of some sort. Furthermore, there should be clear rules what constitutes an incomplete filing and in what cases the NCA simply requests changes without any impact on the notification period. In addition, the deregistration process should be harmonised. It should be possible to deregister funds from distribution in a Member State even if there are still investors invested in that fund.

NCAs often feel that they have the responsibility to assess themselves whether the management company or the fund to be notified is in compliance with legal requirements. Furthermore, to some extent there seems to be a need for collecting documents which have already been filed with the home Member State NCA. The background may be legal reasons, i.e. if the national law obliges the NCA to assess certain aspects but we generally observe that NCAs are reluctant to rely on another NCA's assessment. We believe that on the one hand, European law could be clearer in allowing one NCA to rely on another NCA's assessment. Further, a centralised database for management companies and funds accessible for the NCAs as it is foreseen in the Commissions' proposal regarding the EuSEF and EuVECA Regulations. This could also help in case specific questions are raised and could help building trust and reliance between NCAs and consequently improve the notification process. In any case, NCAs should not request any information just in order to have a documented chain if such information has already been filed with the NCA in the home Member State or even the same NCA e.g. on the basis of supervision of the distributors.

The need for documents seems to be particularly an issue for cases where no passport is available. If a distribution for retail AIFs is allowed in a specific Member State, the notification process is usually very difficult. While we understand that the reason is the absent of harmonisation with respect to retail AIFs which might neither be desirable nor feasible, we think that EU law could provide rules for facilitating the process such as rules for information exchange between the NCAs.

9. TAXATION

Questions addressed in particular to asset managers and where appropriate, distributors (professional associations are invited in addition to consolidate information on behalf of their Members)
Other respondents are welcome to respond to some or all of the questions below.
Question 9.1 – Have you experienced any difficulties whereby tax rules across Member States impair the cross-border distribution and take-up of your UCITS or AIF or ELTIF or EuVECA or EuSEF?
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.

Yes. The tax treatment on investment in European transferable securities, tax rates, and tax relief processes for European Collective Investment Undertakings ("CIUs") is far from harmonised. 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.

For instance, the European Commission should be aware that national tax reportings that need to be prepared by investment funds for their investors (e.g. Belgium, Austria, UK, Italy) are based on national legislative requirements. Such tax reporting obligations are not harmonised across Europe and therefore represent entry barriers for non-local players and consequently to the development of cross-border fund distribution.

Local rules require asset managers to provide specific data that are absolutely necessary to get the appropriate tax treatment for investors. 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 as well as cost for having tax data published in a newspaper). These local specificities are an impediment to cross border distribution of funds in particular since each country has its own approach.

Besides, WHT currently applied at national level and the fact that in many cases investment funds do not have direct access to reduced WHT rates available under tax treaties create a barrier (see in more detail in section 9.2a).

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.*
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.

Yes. In certain circumstances, tax treaties operate well in the context of investment by a resident of one country into the other, but to a lesser degree well for cross-border funds which pool investors from multiple jurisdictions. Investment funds are generally exempt from tax in the territory where they are domiciled. Eligibility for tax exemption according to tax treaties often depends on qualification as 'tax resident', a criterion which investment funds often struggle to meet. This was recognised by the OECD in its 2010 report on collective investment vehicle (CIV) tax treaty access, but little practical progress has been made since in improving the tax treaty access for investment funds.

The main difficulty is that German open-ended retail CIUs (UCITS as well as AIFs) are widely distributed and generally held through CSDs (Central Securities Depositors). All the information with respect to the end investors lies with the distributors (e.g. account holder banks or IFAs) which – mostly for commercial and legal reasons – often are not willing or able to share the information with the issuer, i.e. the management company. Therefore, the management company would only have information about those distributors, if any, but not of their “end” investors. Tax treaties, however, often foresee rules on limitation on benefits (“**LoB-rules**”) in order for the funds to obtain treaty entitlement. LoB-rules require the funds to proof their “end” investor base (nationality/residence).

In addition, compared to domestic funds, European investment funds distributed cross-border were for a long time treated differently with respect to WHT and have been forced to challenge this at the European Court of Justice and national courts. Significant progress has been made, but not all discriminatory treatment has yet been eliminated. We would encourage a renewed effort be made by the EU to discourage discriminatory WHT on non-domestic investment funds by Member States.

Therefore, 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 barrier. The time and costs of recovery of WHT – if possible at all - in many cases act as deterrent for investment 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.

In order to solve those issues, two aspects should be considered:

- In order for the fund to obtain treaty access, the fund itself should be regarded as the beneficial owner (or a qualified person) and should qualify for double tax treaties 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.
- 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 or to impose an EU wide limit on the WHT rate equal to the rate foreseen in most double tax treaties which is 15 percent.

The latter is a less radical proposal than it may at first appear. First, generally abolishing WHT or limiting applicable WHT rates on cross border dividend payments were possible options 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 percent (e.g. Netherlands, Belgium, Germany from 2018). Other Member States do not levy WHT on certain types of income paid on the basis of their domestic legislation (e.g. UK).

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 set an EU wide limit on the WHT rate equal to the rate foreseen in double tax treaties which is 15 percent. Since 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.

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?

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.

Yes. Besides difficulties described in q. 9.2a, BVI members experienced several difficulties due to inconsistent WHT recovery processes which are defined and applied at national level:

- The deadlines for claiming refunds as well as the reclaim 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 standardise the relevant processes and this lack of consistency is expensive and time consuming.
- Tax authorities refuse to sign foreign tax forms.

There are also substantial and fundamental discrepancies between Member States on the tax treatment of transferable securities:

- Some Member States impose WHT on dividends and/or interest, some of them do not.
- The WHT rates are different among those Member States which impose WHT on dividends and/or interest.
- In the application of tax relief, some Member States provide tax relief at source based on specific tax documentation provided, some of them do not.

Member States have different types of best practices in place:

- Relief at source (only for some instruments).
- Simplified documental evidence (e.g. length of validity of certificate of residence).
- Refund in different periods of time (positive: from 7-30 days; negative: up to 10 years).
- Single point of contact for handling refund claims.
- Claim forms available online/ possibility to complete the whole process online.
- Possibility for intermediaries to claim relief on behalf of their clients.

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?

Costs are hard to assess, however, compliance costs in particular include costs for legal and tax advice.

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 reportings that need to be prepared by investment funds for their foreign investors (e.g. Belgium, Austria, UK, Italy) are based on national legislative 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.

Local rules require asset managers to provide specific data that are absolutely necessary to get the appropriate tax treatment for investors. 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 as well as cost for having tax data published in a newspaper). These local specificities are an impediment to cross border distribution of funds in particular since each country has its own approach. This is also true when distributing in third country markets.

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?

No.

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?

We have not received information in this respect.

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.

- According to our knowledge, in France a French investor can only credit foreign WHT on foreign dividends earned through a fund if the investor invests through a French fund, but not if the investor invests through a foreign fund.
- In the Netherlands, only a Dutch fund can pass on a tax credit on Dutch WHT to a Dutch investor, whereas a foreign fund cannot; the foreign fund is discriminated in this respect.

Question addressed to investors

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

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

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

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

No answer to be provided.

10. OTHER QUESTIONS

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

We observe the following obstacles which generally influence cross-border distribution of UCITS and AIFs:

- **General notion of AIFs due to political background of AIFMD**. AIFs are often mistaken for hedge funds or private equity funds. This is based on the fact that the regulatory background for the AIFMD which has been initiated at the peak of the financial crisis was to regulate hedge fund and private equity fund managers. However, since there is no acknowledged definition of hedge funds which captures all relevant investment strategies, the term AIF was defined very broadly as every fund which does not qualify as a UCITS. As a consequence, a broad range of funds which are much more like UCITS than hedge funds or private equity funds are now subject to the AIFMD. For instance, German *Spezialfonds* with a volume of 1,423 billion Euro assets as of June 30, 2016 are considered AIFs, even though they are highly conservative products in which regulated investors such as insurance companies and banks, but also municipalities, foundations and other institutional investors traditionally invest.

  Nonetheless, in the political perception, AIFs are still being broadly equated with hedge funds and prompt disproportionate defence mechanisms by rulemakers at different levels. Examples are the discussions on the treatment of AIFs under the draft Banking Structural Reform Regulation or the EBA Guidelines on limits for banks' exposures to shadow banking.

- **Understanding of complex products.** While MiFID II defines non-complex products in order to determine which products may be sold execution only, there is no overall concept dealing with complexity. However, the distinction within MiFID II is used more and more broadly without the rule and the qualification of financial products as complex or non-complex being analysed for such purpose. Consequently, the understanding which product should be considered as complex and further consequences deriving from this differ between Member States. In some jurisdictions sale of complex products to retail investors is generally prohibited. Given the lack of an overall complexity concept in the MiFID II, we think such general prohibition is not justified. In particular, for the purpose of execution only, MiFID II allows all listed shares to be considered as non-complex, including penny stocks or bonds even where the issuer has a problematic credit rating. On the other hand, also related to the general understanding of AIFs, AIFs are often mistaken as complex products even if they comply with risk diversification, eligible assets requirements and investment limits having a regulated and supervised issuer and a product approved for marketing. For instance, a product is already considered as complex according to MiFID II – again for the purpose of execution only – if the investor is bound for a number of years. We believe that if clearly explained, it is easy for investors to understand that they are bound for a specified time which comprised a couple of years. By comparison, investors are bound for a certain time with insurance based investment products which are not generally considered as complex. We believe that the understanding of complexity according to MiFID II cannot serve as a general indicator in which products retail investors should or should not invest. Therefore, regulators should be aware that the approach within MiFID II should not be used without analysing it whether it fits for the specific purpose.

- **Competitiveness of the EU.** Following the financial crisis, the EU regulatory framework has significantly focussed on enhancing investor protection and improving systemic stability. While many of the initiatives have been necessary, the EU's competitiveness with other markets providing for prudent regulation has not improved. Regulatory requirements, inconsistencies and constraints increase costs to the disadvantage of EU-based market players, products, and ultimately investors. Regulators, market players as well as investors have an interest to avoid unnecessary regulatory costs. We believe that from the regulators' point of view, this has been disregarded to a large extent in the aftermath of the financial crisis. We therefore highly appreciate the Commission's initiative to remove inconsistencies, e.g. with respect to reporting requirements for management companies.

  Competitiveness is not only a matter of an effective regulation, but also of access for EU players to other markets. We therefore support the EU's approach in insisting on reciprocal market access. If other jurisdictions remain protective of their local players, it is important that the EU only allows access in case reciprocal market access is granted. Therefore, we fully support the approach adopted by ESMA in assessing the conditions for extending AIFM passports to fund managers domiciled in third countries on a country-by-country basis. In particular, we welcome that ESMA considers the anticipated impacts on competition, including accessibility of the respective third-country markets for EU players as important criteria for the overall evaluation.

With respect to the upcoming AIFMD review, we consider the following measures as very helpful.

- **Defining a new investor type between professional and retail investors.** This type of semi-professional investors should cover institutions not in all regards qualifying as professional investors according to MiFID such as pension providers, foundations, municipalities and high net worth individuals. While the definitions of such or similar investors currently in place in each Member State may be different, the objective is generally the same: Giving access for such investors to institutional AIFs which would not be available for them if only the definition of professional investor (as used in the AIFMD) were to be applied. In order to define this investor base, one could think of drawing a parallel to the EuSEF and EuVECA Regulations which both allow marketing to non-professional investors provided that they: (1) commit to invest a minimum of EUR 100.000 and (2) state in writing in a document separate from the contract that they are aware of the risks associated with the envisaged commitment (cf. Article 6(1) of the EuSEF and EuVECA Regulations respectively).
- **Expanding the AIFMD passport regime to marketing to the new investor type.** Marketing of certain AIFs to the newly defined type of semi-professional investors should be admitted under the current AIFMD passporting regime. In order to define the sub-type of AIFs which should become eligible for such extended distribution, we suggest relying on the criterion of leverage. The AIFMD requirements for AIFs employing leverage on a substantial basis should be taken as a starting point of the definition and supplemented by further leverage limits in order to distinct new sub-types of AIFs which would allow to better reflect the different types of AIF covered by this expression.
- **Re-shaping the marketing definition.** One reason for the different interpretations regarding marketing is the definition of marketing according to AIFMD. While some jurisdictions interpret the definition very strictly, others still see room to allow a placement to investors in a smaller circle. The consultation regarding the Capital Markets Union also questioned the understanding of private placement. Unlike other European financial regulation, AIFMD does no longer follow the concept of public offering versus private placement. Compared to other forms of investments, fund units hence have a competitive disadvantage. For instance, securities may be placed without providing for a prospectus if fewer than 150 non-qualified investors per EEA Member State are addressed. A

coherent private placement regime should readjust AIFMD in this respect and align it with the understanding of prospectus requirements according to the new Prospectus Regulation.