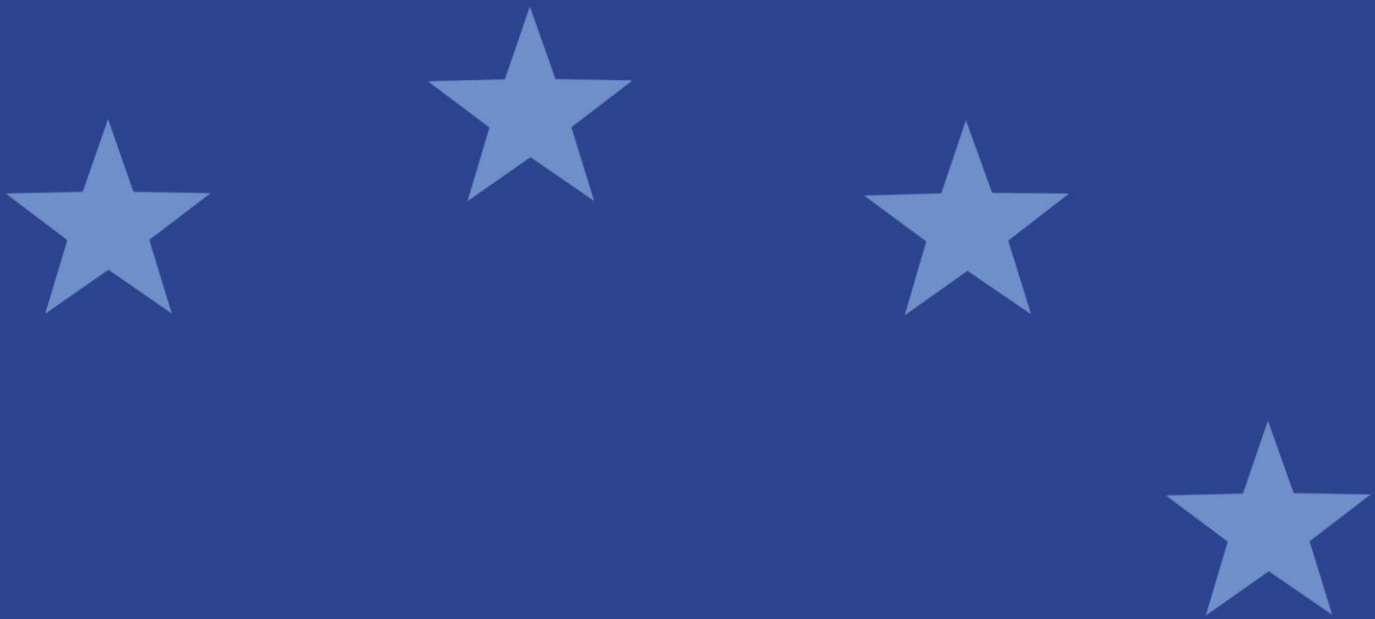




European Securities and  
Markets Authority

# **Notification frameworks and home-host responsibilities under UCITS and AIFMD**

**ESMA Thematic Study among National Competent Authorities**



## Table of Contents

Executive Summary .....	4
1 Introduction .....	6
2 Cross-border activities by UCITS management companies.....	8
2.1 Overview .....	8
2.2 UCITS management company passport.....	8
2.2.1 General considerations .....	8
2.2.2 Supervision of cross-border services by home Member State NCAs.....	9
2.2.3 Supervision of cross-border collective portfolio management by home Member State NCAs .....	11
2.2.4 Supervisory action taken by home Member State NCAs .....	12
2.2.5 Supervision of compliance with rules of conduct in host Member States .....	13
2.2.6 Periodic reporting on activities of branches in host Member States .....	13
2.2.7 Supervisory action taken by host Member State NCAs .....	14
2.2.8 Supervision of compliance with product rules in cases of cross-border management of UCITS.....	15
2.3 UCITS marketing passport.....	15
2.3.1 General considerations .....	15
2.3.2 Supervision of UCITS marketed on a cross-border basis .....	17
2.3.3 Supervisory action taken by home Member State NCAs .....	17
2.3.4 Supervision of compliance with national legislation by host Member State NCAs .....	17
2.3.5 Supervisory action taken by host Member State NCAs .....	19
3 Cross-border activities by EU AIFMs .....	21
3.1 Overview .....	21
3.2 EU AIF management passport .....	22
3.2.1 Supervision of cross-border services by AIFM home Member State NCAs .....	22
3.2.2 Supervisory action taken by AIFM home Member State NCAs.....	23

3.2.3	Supervision of cross-border activities through branches by NCAs in AIFM host Member States.....	23
3.2.4	Supervision of compliance with other national legislation .....	24
3.2.5	Supervisory action taken by AIFM host Member State NCAs .....	25
3.3	EU AIF marketing passport .....	25
3.3.1	Influence of cross-border marketing on supervisory activities by AIFM home Member State NCAs .....	25
3.3.2	Supervisory action by AIFM home Member States in regard to cross-border marketing of AIFs .....	26
3.3.3	Supervision of cross-border marketing by AIFM host Member State NCAs .....	26
3.3.4	Supervisory action in regard to cross-border marketing by AIFMs in host Member States.....	27
4	General issues around the notification frameworks .....	28
4.1	Reception and transmission of management passport notifications.....	28
4.2	Publication of data on cross-border management .....	28
4.3	Difficulties in the operation of the passporting frameworks .....	28
4.3.1	General suggestions .....	28
4.3.2	UCITS management and marketing passports .....	29
4.3.3	AIF management and marketing passports .....	30
4.4	General comments on the notification frameworks .....	30
5	Summary.....	31
5.1	Use of the passporting frameworks in EU Member States.....	31
5.2	Supervisory activity around the notification frameworks .....	31

Annex I – Data on cross-border activity by UCITS management companies and AIFMs .....33

Annex II – Questionnaire .....

## Executive Summary

### Reasons for publication

One of the key objectives of ESMA is to foster and increase supervisory convergence across NCAs. Thematic studies have been identified as a means of achieving this objective. Their aim is to review supervisory practice in the Member States, identifying good or best practices where possible. In 2016, ESMA conducted a thematic study on the operation of home and host responsibilities under AIFMD and UCITS with a view to promoting smooth operation of the EU passports for marketing and management, looking at the notification frameworks contained in the UCITS Directive and AIFMD. The findings of the thematic study form the core of this report. They are supplemented, where possible, by a number of recommendations on good supervisory practices.

### Contents

Section 1 of the report illustrates the setting for the thematic study, as well as the procedure.

Section 2 provides an overview on the extent of cross-border management and marketing activities pursued by UCITS and their management companies in the EU, and assesses their supervision under the UCITS Directive. The report identifies a number of good practices around supervisory activities by national competent authorities (NCAs), such as on cross-border services and cross-border collective portfolio management in the home and host Member State of the UCITS management company, on the supervision of compliance by branches of UCITS management companies when carrying out cross-border activities in a host Member State, and on the availability of required investor information when a UCITS is marketed on a cross-border basis.

Section 3 looks at cross-border management and marketing activities carried out by AIFMs in the EU, and provides an in-depth assessment of a number of issues around the supervision of those activities. In this section, good practices are identified regarding the influence of cross-border activity, including collective portfolio management, on the general supervisory approach pursued by NCAs. In addition, good practices are identified in regard to the supervision of the compliance of branches of EU AIFMs with the rules of conduct in host Member States of the AIFM, and on the supervision of AIF marketing activities carried out by AIFMs.

Section 4 provides a number of additional general findings on the administrative procedures around the passporting frameworks at national level. Besides looking at how NCAs receive and transmit passporting notifications, the report also assesses whether, how, and to what extent NCAs publish data on cross-border management. Additionally, the report includes a summary of difficulties linked with the day-to-day operation of the UCITS and AIFMD passporting frameworks, which were identified by competent authorities in the context of the thematic study.

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Section 5 concludes the report with a brief summary of the findings made in the thematic study, focusing on the use of the passporting frameworks in EU Member States and on the supervisory and administrative activity around the notification frameworks.

Annex I presents a range of statistical data on cross-border activity by UCITS ManCos, UCITS, and AIFMs. The questionnaire submitted to NCAs for the gathering of data for this study can be found in Annex II.

## **Next Steps**

This report concludes the thematic study carried out by ESMA on the notification frameworks under UCITS and AIFMD. ESMA has evaluated supervisory activity around the notification frameworks, and has identified a number of good supervisory practices. In the context of this work, NCAs also identified further issues around the day-to-day functioning of the passporting frameworks outside the scope of this study. Following this thematic study, further work will be carried out at ESMA level to identify, analyse and resolve the identified issues through one or more of the instruments at ESMA's disposal, with a view to enhancing supervisory convergence among NCAs by clarifying supervisory responsibilities and facilitating administrative procedures around the passporting frameworks. In this context, ESMA will also assess the possibility to contribute to the work on barriers to cross-border distribution of funds carried out by the European Commission.

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# 1 Introduction

1. One of the aims of the UCITS and AIFM Directives is to facilitate cross-border activities of fund managers and investment funds. To that end, the UCITS and AIFMD frameworks include a number of provisions on cross-border management and cross-border marketing of UCITS and AIFs, the so-called “passports”.
2. The management passport allows a UCITS management company (UCITS ManCo) or AIF manager (AIFM), which has been authorised in a Member State, to carry out its business in other EU Member States, either under the freedom to provide services or by establishing a branch. While such cross-border activity is subject to a notification procedure between the national competent authorities (NCAs) in the Member States involved, the fund manager does not have to take part in another (potentially lengthy) authorisation process.
3. The marketing passport allows UCITS or AIFs, which have been authorised by the NCA in an EU Member State, to be marketed in other EU Member States on a cross-border basis without the need for full authorisation. While the UCITS marketing passport allows the marketing of UCITS to retail and institutional investors, the AIF marketing passport is limited to marketing to professional investors only. Similar to the management passport, authorisation is replaced by a notification procedure between NCAs in different EU Member States.
4. The UCITS IV framework of 2009 introduced a number of changes to the notification frameworks under the UCITS Directive, aimed at facilitating cross-border distribution and management of UCITS. In 2011, AIFMD introduced similar provisions for cross-border management and marketing of AIFs. Although these provisions have been in effect for a number of years, there is still uncertainty around some aspects of the passporting frameworks among NCAs, e.g. in regard to the division of supervisory powers between home and host Member States, or due to diverging interpretation of the passporting provisions.
5. One of the key objectives of ESMA is to foster and increase supervisory convergence across NCAs. Thematic studies have been identified as a means of achieving this objective. Their aim is to review supervisory practice in the Member States, identifying good or best practices where possible. As part of the array of ESMA instruments, they are specifically mentioned in the ESMA supervisory convergence work programme.
6. To that end, ESMA’s Supervisory Convergence Work Programme for 2016 (SCWP) envisaged work on “a thematic study on the operation of home and host responsibilities under AIFMD and UCITS with a view to promoting smooth operation of the EU passports for marketing and management”<sup>1</sup>.
7. The scope of this thematic study was discussed within ESMA. The desire was expressed to focus on practical aspects of the passporting frameworks, including issues of

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<sup>1</sup> [ESMA’s Supervisory Convergence Work Programme 2016 \(ESMA/2016/203\)](#), p. 13 (para. 45a)

cooperation between NCAs. The review of an initial set of information provided by NCAs showed that there were a number of other issues concerning the functioning of the frameworks, regarding e.g. the potential for different interpretation of legislation, risk management of funds operating cross-border, the content of notification documents, or the submission of payment receipts as part of the initial notification. Due to their practical implications for NCAs, the study aims to identify issues at a general level. Potential follow-up work, if merited, will then be considered separately.

8. Regarding the passport frameworks in UCITS and AIFMD, the study will therefore aim at reviewing specific aspects of day-to-day supervision of cross-border activities by home and host Member States, depending on their individual responsibilities, and on the influence of these activities on the general supervisory approach taken by NCAs. Furthermore, the study will aim at assessing the potential for non-compliance by managers (UCITS ManCos and AIFMs) and UCITS, as well as the respective actions taken at national level.
9. These aspects will be assessed in regard to the following passporting regimes:
  - UCITS management company passport (to establish a branch or pursue activities under the freedom to provide services; with or without carrying out collective portfolio management; Articles 16-21 of the UCITS Directive);
  - UCITS marketing passport (to market UCITS in another Member State; Articles 91-96, 108 of the UCITS Directive, Commission Regulation (EU) No 584/2010);
  - AIFMD management passport (cross-border management of EU AIFs and/or provision of services referred to in Article 6(4) of AIFMD, with or without establishing a branch; Article 33 of AIFMD);
  - AIFMD marketing passport (EU AIFs in Member States other than the home Member State of the AIFM; Article 32 of AIFMD).
10. Concerning the extent to which the AIFMD sub-frameworks on management and marketing would be assessed in the thematic study, ESMA staff evaluated the responses to the quarterly AIFMD surveys. The figures provided by NCAs showed that, with respect to the escalation procedures regarding non-compliant AIFMs operating on a cross-border basis pursuant to Article 45, paragraphs (5) to (10) of AIFMD, there have as yet not been any cases where a host Member State NCA had to invoke these procedures. The study will therefore not aim at exploring supervisory practices concerning these procedures.
11. Data relating to the different parts of the study was collected via a questionnaire to NCAs, which can be found in the annex. To gain an overview on the extent to which UCITS- and AIFMD-related cross-border activities are taking place in the European Union, participants were also asked to provide a number of statistical data concerning asset managers, managed funds and managers/funds operating on a cross-border basis. All 31 NCAs provided ESMA with a response.

## 2 Cross-border activities by UCITS management companies

### 2.1 Overview

12. A UCITS ManCo may perform a number of activities on a cross-border basis. If it has set up UCITS in its home Member State (its domicile), it can choose to market these funds in other Member States. In this case, the ManCo makes use of the “marketing passport”.
13. A UCITS ManCo may also perform other activities on a cross-border basis, as long as they are included in the authorisation issued by the NCA in its home Member State. These activities include the provision of a number of investment services (also called “MiFID services”), such as managing portfolios of investments for individual clients, giving investment advice, or the safekeeping of assets. Furthermore, a UCITS ManCo can choose to carry out collective portfolio management on a cross-border basis, by setting up UCITS in other Member States. In these cases, the ManCo would make use of the “management company passport”.
14. The UCITS Directive contains a number of provisions on these passports. Chapter III, section 4 of the UCITS Directive (Articles 16 to 21) establishes the framework for the management passport, while chapter XI (Articles 91 to 96) contains the rules for the marketing passport.

### 2.2 UCITS management company passport

#### 2.2.1 General considerations

15. The UCITS management company passport allows a UCITS management company which has been authorised in an EU Member State (the “home Member State”) to pursue within other Member States (the “host Member States”) the activities for which it has been authorised, either by establishing a branch in one or more host Member States or under the freedom to provide services (Article 16(1) of the UCITS Directive). The establishment of a branch or the provision of services in host Member States shall not be subject to any authorisation requirement.
16. Furthermore, the UCITS management company passport framework foresees additional rules for UCITS ManCos managing UCITS on a cross-border basis, such as the division of responsibilities between home and host Member States of the ManCo and the UCITS, as well as further requirements regarding documentation and the exchange of information between NCAs.
17. To assess the extent to which stakeholders make use of the management company passport, NCAs were asked to provide a range of statistical data.<sup>2</sup> The data showed that in

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<sup>2</sup> Cf. Annex I for the full data set.



22 Member States, UCITS ManCos relied on the management company passport to provide cross-border (MiFID) services in other Member States; in 14 of these, UCITS ManCos had notified that they had set up branches in other Member States. Compared to setting up a branch in another Member State, the provision of cross-border services directly (under the freedom to provide services, and without setting up a dedicated branch) is carried out to a larger extent by UCITS ManCos, which could be a result of higher complexity involved in setting up a branch in another Member State.

18. As regards collective portfolio management pursued on a cross-border basis, 21 NCAs reported that UCITS ManCos domiciled in their territory had, in addition to general management activities, notified the provision of this activity under the freedom to provide services in other Member States, while ManCos domiciled in 12 of these Member States had also set up branches in other Member States to provide this activity. Only eight NCAs reported that UCITS management companies domiciled in their territory did not make use of the management passport at all.
19. Four NCAs reported that ten or more ManCos domiciled in their territory had notified cross-border management activities, reflecting, to some extent, the respective market share that these Member States hold in the European investment fund market. In eighteen Member States, only between one and nine ManCos had notified cross-border management activities in other Member States.
20. In addition to gathering a statistical overview on the extent of the provision of cross-border services, another aim of the thematic study is to analyse whether and to what extent the provision of cross-border services by UCITS ManCos has an influence on the supervision carried out by home and host NCAs. To that end, NCAs were asked a number of questions focusing on certain aspects of the passporting framework, such as supervision of cross-border management services, cross-border portfolio management, rules of conduct, periodic reporting of statistical data, and compliance of funds managed on a cross-border basis with fund rules in the home Member State of the fund. NCAs were also asked to report on any kind of supervisory action in regard to services provided on a cross-border basis.

### *2.2.2 Supervision of cross-border services by home Member State NCAs*

21. NCAs were asked how they specifically supervised (on a day-to-day basis) the provision of services (including MiFID services) in other Member States by UCITS ManCos domiciled in their Member State. They were also asked whether the fact that a ManCo performed cross-border management activities influenced their general supervisory approach.
22. Reflecting their general approach to supervision, most NCAs carry out a mix of activities which can be categorised as “on-site” and “off-site” supervision. On-site inspections take place on the premises of the supervised entity, and are either carried out by NCA staff or by appointed third parties, such as auditors, which could be accompanied by NCA staff. In contrast, off-site supervision is desk-based and consists of the evaluation of data and reports, as well as exchanges with other NCAs. Depending on the internal structure of the

competent authority, supervision can be carried out by one entity (e.g. a team, section or department) within the organisation, or be split up between several entities (not necessarily within the same department) tasked with supervision of different aspects in regard to the supervised entity. For example, one NCA stated that it supervised asset management activities in three different departments (Investment Management Department, Fund Authorisation and Supervision, and the Wholesale Sector Team), with the Investment Management Department in particular being responsible for supervising conduct activities with respect to authorised fund managers of UCITS. In other NCAs, supervision of UCITS ManCos and the funds they manage is carried out by the same team, regardless of the activities of the ManCo.

23. The intensity of on- and off-site supervision carried out by an NCA depends on a number of factors. One of these is the size of the market to which the participants belong. In a number of Member States with comparatively smaller investment funds markets, NCAs do not have to allocate their supervisory efforts to specific groups of market participants, but are able to give their full supervisory attention to all market participants in the same way. Other NCAs in Member States with larger funds markets have implemented systems which are “risk-based”. These systems allow NCAs to allocate their supervisory resources primarily, but not exclusively, to certain groups of supervised entities, e.g. those with the highest amount of assets under management, or those which potentially pose the highest risk to the market and its investors.
24. In terms of supervision of cross-border activities, NCAs reported a number of different approaches. In Member States with only a very small number of ManCos carrying out cross-border activities, NCAs do not pursue a specific supervisory approach in regard to these activities, preferring instead an integrated, all-encompassing approach. In contrast, NCAs which pursue risk-based supervision stated that cross-border activities would be taken into account in the risk assessment of the ManCo, either in regard to the actual activities and their complexity, or via the amount of assets under management. One NCA reported that it assessed a ManCo’s suitability to perform cross-border services already at the time of its initial authorisation.
25. A number of NCAs which carry out regular on-site inspections, either by themselves or through auditors, stated that cross-border activities formed a regular topic of these inspections. One NCA reported that it generally performed ‘nursery visits’ within a year after it had authorised a management company.
26. Regarding off-site supervision, NCAs reported that cross-border activities were mostly assessed through financial reports and statements, annual closing documents, analysis of other key figures, auditors’ reports, and signals received from investors.

27. Where NCAs supervise UCITS management companies which pursue cross-border activities, it could be regarded as **good practice** to follow a supervisory approach which not only focuses on the activities of the UCITS ManCo in its home Member State, but which also takes into account the activities carried out on a cross-border basis, in particular when carried out through a branch. These activities could be taken into account in several areas of supervision, such as in the risk assessment or – in cases where competent authorities pursue an integrated approach to supervision – in the planning and execution of on- and off-site activities.

### *2.2.3 Supervision of cross-border collective portfolio management by home Member State NCAs*

28. In cases which involve cross-border management of UCITS, Article 19 of the UCITS Directive stipulates that a management company pursuing the activity of collective portfolio management on a cross-border basis shall comply with the rules of the ManCo's home Member State which relate to the organisation of the management company, including delegation arrangements, risk management procedures etc. (Article 19(1) of the UCITS Directive). Furthermore, the ManCo shall decide and be responsible for adopting and implementing all the arrangements and organisational decisions which are necessary to ensure compliance with the rules which relate to the constitution and functioning of the UCITS and with the obligations set out in the fund rules or in the instruments of incorporation, and with the obligations set out in the prospectus (Article 19(6) of the UCITS Directive).

29. Where the UCITS is managed on a cross-border basis, the ManCo shall comply with the rules of the UCITS home Member State which relate to the constitution and functioning of the specific UCITS, as well as with the obligations set out in the fund rules and the prospectus (Article 19(4) of the UCITS Directive).

30. In terms of the supervision of these activities, the Directive stipulates a split of supervisory powers between NCAs of the home Member State of the UCITS ManCo and the competent authorities in the home Member State of the UCITS, along the lines of the different national legislations involved. Competent authorities in the home Member State of the UCITS shall be responsible for supervising the ManCo's compliance with the rules which relate to the constitution and functioning of the UCITS which is to be managed on a cross-border basis, while the NCA in the home Member State of the UCITS ManCo shall be in charge of supervision of the ManCo's compliance with the general rules relating to the organisation of the ManCo. Furthermore, the NCA in the home Member State of the ManCo shall be responsible for supervising the adequacy of the arrangements and organisation of the ManCo regarding the obligations and rules which relate to the constitution and functioning of all the UCITS it manages.

31. To assess whether, and to what extent, the requirement to supervise the adequacy of the arrangements and organisation of the ManCo regarding the constitution and functioning of all the UCITS managed by the same ManCo has an influence on supervisory practice, NCAs were asked how they supervised the adequacy of the arrangements and

organisation of the ManCo in regard to cross-border collective portfolio management (Article 19(7) of the UCITS Directive).

32. Most NCAs in Member States where UCITS ManCos engage in cross-border portfolio management stated that they supervised the adequacy of the arrangements and organisation of the ManCo upon receipt of the initial notification of this activity. Other competent authorities generally stated that, within the risk-based supervisory approach followed by these NCAs, cross-border portfolio management contributed to the assessment of the ManCo in the risk assessment.
33. A large number of the NCAs which assessed the adequacy of the arrangements upon receipt of the initial notification reported that they also supervised these requirements on an ongoing basis or as need be, while one NCA stated that it did not. On-going supervisory activities include reviewing major changes to the organisation and structure of the ManCo subsequent to the initial authorisation, with emphasis on capital adequacy/minimum substance requirements, delegation arrangements, and internal control functions. Several competent authorities also stated their reliance on auditors' reports as a means to ensure regular supervisory oversight.
34. Further examples for the information assessed in the review of the arrangements and organisation of the ManCo included business plans, governance memoranda, additional information about the organisational structure, periodic reports, programmes of activity, minimum substance requirements, delegation arrangements, and other internal procedures
35. A small number of NCAs stated that in addition to evaluating the initial notification, they supervised the adequacy of operational activities during on-site inspections.

36. Where management companies perform collective portfolio management on a cross-border basis, it could be regarded as **good practice** for NCAs to take this activity into account in their regular supervisory approach, with the amount of supervisory activity reflecting the size and impact of the management activity carried out by the management company. Supervision of this activity should not only be event-driven (upon initial or subsequent notification by the ManCo).

#### *2.2.4 Supervisory action taken by home Member State NCAs*

37. To assess the extent to which NCAs, as home MS NCAs, have taken supervisory action against ManCos in regard to services provided on a cross-border basis, they were asked whether (and in that case, how often) they had taken such action between 1 January 2014 and 30 June 2016. "Action" in this context was to be understood to cover any supervisory action, such as supervisory letters, circulars, enforcement or other measures at the disposal of the NCA.
38. Apart from a number of cases where the notification transmitted to the NCA contained insufficient information in regard to the services to be provided and the human resources,

leading to additional information being requested, no NCA reported any other form of supervisory action.

### *2.2.5 Supervision of compliance with rules of conduct in host Member States*

39. Article 17(4) of the UCITS Directive stipulates that a management company which pursues activities by a branch within the territory of the host Member State shall comply with the rules of conduct drawn up by the management company's host Member State pursuant to Article 14. The UCITS Directive places the responsibility for supervising compliance with the rules of conduct with the competent authorities of the management company's host Member State (Article 17(5)).

40. NCAs were asked to provide details on how they supervised the compliance of a branch set up in their Member State with the rules of conduct in place in their jurisdiction.

41. A number of NCAs stated that they relied on the details provided in the initial notification transmitted by the home Member State NCA. The evaluation of responses also shows that supervision of compliance with the rules of conduct is mainly carried out through on-site inspections or via the evaluation of periodic and ad-hoc reports (such as auditors' reports, MiFID reporting, or other annual disclosure statements) as well as reliance on additional information channels which can lead to the adoption of supervisory measures (such as customer complaints).

42. In Member States where competent authorities pursue a risk-based approach to supervision, the information gathered through on- and off-site supervisory activities feeds into the risk analysis carried out on a regular basis.

43. It could be regarded as **good practice** to review the compliance of the branch with the rules of conduct in the host Member State not only on receipt of the notification to set up a branch, but also after the initial notification, similar to the supervisory activities carried out vis-à-vis supervised entities domiciled in the Member State.

### *2.2.6 Periodic reporting on activities of branches in host Member States*

44. The UCITS Directive, in its Article 21(1), gives host Member States the right to require, for statistical purposes, all management companies with branches within its territory to report periodically on their activities pursued in that host Member State to the competent authorities of that host Member State.

45. To assess the amount to which this reporting activity is taking place in Member States, NCAs were asked to provide insight into whether, and to what extent, branches set up in their Member State were subject to such a reporting obligation.

46. A number of NCAs reported that they required branches of UCITS ManCos to report on a regular basis. In most of these cases, ManCo branches are asked to report financial data, such as information about the UCITS managed by the branch and its portfolio, information

on the assets under management by the branch, or other financial statements concerning the branch e.g. (balance sheet, profit and loss accounts). The reporting frequency in different Member States varies between quarterly reporting and annual reporting.

47. In contrast, the majority of NCAs stated that they either did not have a dedicated reporting system for branches in place, or that UCITS ManCo branches had not yet been set up in their Member State. A number of NCAs provided details on reporting schemes; however, these reporting obligations did not seem to stem from Article 21(1), but from other legal frameworks, such as MiFID.

### *2.2.7 Supervisory action taken by host Member State NCAs*

48. To assess the extent to which NCAs, as host MS NCAs, have taken supervisory action against ManCos in regard to services provided on a cross-border basis, they were asked whether (and in that case, how often) they had taken such action between 1 January 2014 and 30 June 2016. As with home MS NCAs (see above), “action” in this context was to be understood to cover any supervisory action, such as supervisory letters, circulars, enforcement or other measures at the disposal of the NCA.

49. Seven NCAs reported that, during the period in question, they had taken supervisory action against UCITS ManCos or their branches in regard to cross-border activity.

50. Cases reported by NCAs focused on the following issues:

- Insufficient information on the services to be provided in the host Member State;
- Inadequate staffing and professional skills at the level of the branch;
- High number of breaches of investment limits;
- Valuation/accounting of assets;
- Non-compliance with the investment strategy of a UCITS;
- Individual portfolio management;
- Potential closet indexing;
- Suspension of the redemption of units.

51. While some of the cases are still pending, others were resolved through exchanges of letters. In one of the cases, the matter was referred to ESMA for mediation under Article 19 of the ESMA Regulation, following a disagreement between the NCAs involved.

## *2.2.8 Supervision of compliance with product rules in cases of cross-border management of UCITS*

52. The UCITS Directive, in its Article 19(3) and (4), states that a management company which pursues the activity of collective portfolio management on a cross-border basis by establishing a branch or in accordance with the freedom to provide services shall comply with the rules of the UCITS home Member State which relate to the constitution and functioning of the UCITS. The management company shall also comply with the obligations set out in the fund rules or in the instruments of incorporation, and the obligations set out in the prospectus, which shall be consistent with the applicable law as referred to in paragraphs 1 and 3 of Article 19 of the UCITS Directive, which is the law of the home Member State of the UCITS.
53. According to Article 19(5) of the UCITS Directive, the supervision of compliance of the ManCo with Article 19(3) and (4) shall be carried out under the responsibility of the competent authorities of the UCITS home Member State. NCAs were therefore asked to provide details as to how they supervised the compliance of the UCITS ManCo with these requirements in regard to UCITS domiciled in their territory and managed on a cross-border basis.
54. NCAs generally replied that they supervised all the UCITS domiciled in their territory in the same manner, regardless of whether their ManCo was a domestic or foreign one. Supervision upon initial authorisation is carried out via the approval of fund documents, such as articles of association, fund rules, and depositary agreements. Ongoing supervision mostly relies on off-site and on-site inspections. If fund management is carried out through a branch, supervision is carried out in cooperation with the home Member State NCA of the ManCo, subject to the UCITS Directive and subsequent Level 2 regulation.

## **2.3 UCITS marketing passport**

### *2.3.1 General considerations*

55. The UCITS marketing passport allows a UCITS which has been authorised in an EU Member State (the “UCITS home Member State”) to market its units within other EU Member States (the “UCITS host Member States”), after having submitted a notification letter to the competent authorities of its Member State (Article 93(1) of the UCITS Directive). To that end, UCITS host Member States shall ensure that UCITS are able to market their units within their territories upon notification, and shall not impose any additional requirements or administrative procedures on UCITS in respect of the field governed by the UCITS Directive (Article 91 (1) and (2) of the UCITS Directive).
56. Where UCITS are marketed in host Member States, the UCITS shall comply with a number of requirements. UCITS are required to ensure that facilities are available in the host Member State for making payments to unit-holders, as well as redeeming or repurchasing units, and for making available the information which UCITS are required to provide (Article 92 of the UCITS Directive). Furthermore, UCITS have to provide the same

information to the investors in their host Member States which they have to provide to investors in the home Member State of the UCITS, pursuant to a number of additional requirements to accommodate for the official language of the host Member States, as well as additional regulation which could be in force in the host Member States (Article 94 of the UCITS Directive).

57. In regard to the marketing of a UCITS on a cross-border basis, the supervisory responsibilities of NCAs in home and host Member States are split to ensure the functioning of the passporting framework. Pursuant to Article 108(1), only the authorities of the UCITS home Member State shall have the power to take action against that UCITS if it infringes any law, regulation or administrative provision or any regulation laid down in the fund rules or in the instruments of incorporation of the investment company. However, the authorities of the UCITS home Member State may take action against that UCITS if it infringes the laws, regulations and administrative provisions in force in that Member State that fall outside the scope of the UCITS Directive or the requirements set out in Articles 92 and 94.
58. Similar to the analysis of the UCITS management passport, one aim of the thematic study is to analyse whether and to what extent the marketing passport influences the supervision carried out by UCITS home and host NCAs. To that end, the questionnaire to be filled in by NCAs contained a number of questions focusing on the influence that cross-border marketing could have on supervision, as well as on the extent to which supervisory action had been taken by NCAs, in regard to cross-border marketing, over a given period of time.
59. NCAs were also asked to provide statistical data on the number of UCITS (including compartments) domiciled in their Member State and on the extent to which these were marketed on a cross-border basis.<sup>3</sup> On average, 969 UCITS are domiciled in each Member State (median: 289). Seven NCAs reported that more than 1,000 UCITS (including compartments) were domiciled in their Member State (out of these, three NCAs reported 3,500 or more UCITS and compartments). At the lower end of the scale, ten NCAs stated that less than 100 UCITS were domiciled in their Member State.
60. As to cross-border marketing, one NCA reported that out of the 9,806 UCITS (including compartments) domiciled in its Member State, over 8,000 (85%) were marketed in other Member States, while in six further Member States, more than 100 of the domiciled UCITS (including compartments) were marketed cross-border. In contrast, five NCAs stated that none of the UCITS domiciled in their territory were marketed on a cross-border basis. On average, 22% of the funds domiciled in a Member State are marketed in other Member States (median: 16%).

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<sup>3</sup> Cf. Annex I for the full data set.



### *2.3.2 Supervision of UCITS marketed on a cross-border basis*

61. NCAs were asked whether, and to what extent, the fact that a UCITS domiciled in their respective Member State was marketed in other Member States had an influence on the supervision of that UCITS.
62. Most competent authorities reported that cross-border marketing did not have any direct influence on the supervision of the UCITS as such. However, a number of NCAs stated that this activity could have an indirect impact on the supervision of the UCITS ManCo, e.g. as regards the risk assessment of the ManCo, or in regard to the scope of on-site supervision, or by fostering cooperation between UCITS home and host NCAs.
63. In regard to the aspect of marketing material used in the host Member State, ESMA found the following statement made by a competent authority to be instructive: “As to marketing material, the [NCA] relies on the host authority. The host supervisor should be the only [authority] responsible for the supervision of marketing material. Such an approach ensures that supervision is adapted to local markets and ensures best (retail) investor protection and investor’s confidence in financial markets; moreover, it ensures the existence of comprehensible marketing material and safe and proper marketing of funds as well as a healthy competition between all players. The host supervisor knows best the national language(s), national market specificities, national distribution channels and applicable regulatory requirements (taxation, marketing/consumer protection rules). On the contrary the home supervisor does not have the adequate knowledge and would be confronted with significant additional costs and operational challenges if the responsibilities were transferred.”

### *2.3.3 Supervisory action taken by home Member State NCAs*

64. The thematic study aims at assessing whether cross-border marketing by way of the marketing passport framework has given rise to supervisory action. UCITS home Member State NCAs were therefore asked whether they had, between 1 January 2014 and 30 June 2016, taken action against any UCITS specifically in regard to marketing activities in other Member States. Where competent authorities had taken such action, they were requested to state the total figure, as well as the cause and the action taken (in the form of a brief overview on up to three individual cases).
65. While a number of NCAs referred to cases where notifications lacked correct data and/or necessary documentation, one NCA reported a number of cases where it became active due to issues with distributors of UCITS in other Member States, which were resolved by an exchange of letters between the UCITS in question and the authority.

### *2.3.4 Supervision of compliance with national legislation by host Member State NCAs*

66. Although a UCITS marketed on a cross-border basis is, in general, subject to the national legislation in place in its home Member State, there are a number of provisions in place in the national legislation of the host Member State in which the UCITS is to be marketed.

67. As discussed above, the UCITS Directive limits the power of the UCITS host Member State authorities to a number of specific provisions within the UCITS Directive itself. Furthermore, the Directive acknowledges that UCITS host Member State authorities may take action against a UCITS marketed cross-border if it infringes the legal provisions outside of the scope of the UCITS Directive (Article 108(1)(2) of the UCITS Directive).
68. Article 92 of the UCITS Directive states that UCITS shall, in accordance with the laws, regulations and administrative provisions in force in the Member State where their units are marketed, take the measures necessary to ensure that facilities are available in that Member State for making payments to unit-holders, repurchasing or redeeming units and making available the information which UCITS are required to provide.
69. Article 94 of the UCITS Directive requires a UCITS marketing its units in a UCITS host Member State to provide to investors within the territory of such Member State all information and documents which it is required to provide to investors in its home Member State.
70. UCITS host Member State NCAs were therefore asked how they supervised the compliance of foreign UCITS marketed in their territory with the above provisions.
71. In most Member States, supervision of compliance with *Article 92 of the UCITS Directive* (regarding facilities for making payments to unit-holders and providing information to investors) is carried out by assessing the information concerning these facilities which forms part of the notification letter. While most NCAs stated that they required the paying agent to be a credit institution (or branch thereof), some Member States allow the paying agent to be a MiFID investment firm or UCITS management company.
72. A number of NCAs stated that they had implemented additional supervisory measures to ensure that entities required by Article 92 were set up, such as obtaining a confirmation from the credit institution or other entity serving as paying agent, and scrutinising additional documentation required by national legislation (“addendum for investors”), which contains information about these entities. Furthermore, NCAs reported that they relied on complaints and other specific input received by stakeholders, and that they carried out on-site inspections. Three NCAs stated that the paying agent did not have to be domiciled in their respective Member State.
73. In a similar way, the supervision of compliance with *Article 94 of the UCITS Directive* (provision of information and documents to investors) is mainly carried out within the assessment of the information contained in the notification letter. A number of NCAs stated that they routinely checked that electronic copies of the documents referred to in the notification were available to investors.
74. It could be regarded as **good practice** to check – either routinely or on a sample basis – whether electronic copies of the documents referred to in the notification letter are available to investors.

75. In regard to ongoing supervision of compliance with the requirements set out in Article 94, NCAs specified various approaches, such as regular on- and off-site inspections, as well as bespoke ad-hoc and thematic investigation. Other practices stated were the reliance on complaints by stakeholders and investigation thereof, scrutiny of marketing material, and mystery shopping.
76. The evaluation of responses given by competent authorities showed that the supervision of compliance with *other national legislation* outside the scope of the UCITS Directive (cf. Article 108(1), second subparagraph) mainly focused on marketing activities, including the marketing material used by the UCITS, as well as other regulation, such as anti-money-laundering rules.
77. Some NCAs also specifically mentioned the supervision of compliance with the MiFID rules of conduct and suitability. Regarding ongoing supervisory activity, NCAs broadly presented a range of on- and off-site activities, subject to a risk-based approach where implemented at national level, mirroring the answers given in regard to supervision of Articles 92 and 94 of the UCITS Directive.

### *2.3.5 Supervisory action taken by host Member State NCAs*

78. To assess the extent to which supervisory activity has led to supervisory action, NCAs were asked to report whether, between 1 January 2014 and 30 June 2016, they had taken action against any foreign UCITS specifically in regard to marketing activities in their Member State. In this context, information was requested in regard to the total figure, as well as to the cause and the action taken. NCAs were requested to provide a brief overview on up to three individual cases.
79. Six NCAs reported that they had taken action against a number of entities (UCITS, ManCos, distributors) in regard to issues around the publication of reports, incomplete data in notifications, lack of payment of annual fees, misleading advertising, and failure of redemption. Three further NCAs stated that they had not yet taken any supervisory action, but were carrying out investigations in regard to wrongful distribution of units, or publication of non-approved advertising material.
80. One NCA outlined a case where marketing of a UCITS was carried out in violation of national law. In this case, the NCA prohibited further marketing of the UCITS in question, after the UCITS ManCo had been informed of the NCA's intent.
81. Another NCA reported two cases of misleading investment advice. In these cases, on-site inspections showed that two financial investment advisors domiciled in the home Member State of the NCA had, to their customers, marketed foreign UCITS which had no authorisation to be marketed in the home Member State of the NCA and which were dedicated to experienced investors. Moreover, in one of these cases, the information given through commercial documentation was not clear about risks and liquidity; in the other case, the financial investment advisor provided false information to the custodian about investors' profiles so that they could subscribe to the UCITS. The authority made a communication to professional associations to put emphasis on the obligations of financial



investment advisors about diligence on financial products they market. It also made a request to the NCA of the home Member State of the UCITS in order to obtain the list of subscribers domiciled in the home Member State of the reporting NCA.

## 3 Cross-border activities by EU AIFMs

### 3.1 Overview

82. In a similar way to the cross-border activities carried out by UCITS Management Companies, AIFMs can operate on a cross-border basis, carrying out a number of management-related activities by way of the “AIF management passport” pursuant to Article 33 of AIFMD. These activities can consist in managing EU AIFs established in other Member States, or in providing the so-called “MiFID services”, namely investment advice, safe-keeping and administration in relation to shares or units of collective investment undertakings, and reception and transmission of orders in relation to financial instruments (Article 6(4) of the AIFMD), if the AIFM is authorised accordingly. Cross-border activities based on the passport are subject to prior notification of the AIFM’s home Member State NCA.
83. According to data supplied by NCAs,<sup>4</sup> AIFMs in 15 Member States had notified the provision of MiFID services, while AIFMs in seven of these Member States had notified to their competent authorities the setup of branches for the provision of these services in other Member States.
84. In 21 Member States, AIFMs had notified the management of EU AIFs on a cross-border basis through direct provision of services, while in nine of these Member States, AIFMs had notified the establishment of one or more branches in other Member States to carry out this activity
85. Only six NCAs stated that ten or more AIFMs made use of the AIF management passport in their jurisdiction, either in regard to management of EU AIFs or the provision of MiFID services. In contrast, AIF managers domiciled in nine Member States do not carry out any cross-border management (including MiFID services) of AIFs at all.
86. In addition to the management passport, AIFs domiciled in an EU Member State (“EU AIFs”) can be marketed in other EU Member States by an EU AIFM on a cross-border basis, making use of the “AIF marketing passport” pursuant to Article 32 of AIFMD, subject to prior notification of the competent authorities.
87. Data supplied by NCAs shows that AIFs and their AIFMs have been set up (and are domiciled) in 26 Member States. In five of these Member States, more than 1000 AIFs have been set up, while in six Member States, fewer than 10 AIFs had been set up until the end of the reporting period (30 June 2016).
88. AIFMs domiciled in 21 Member States market their AIFs (domiciled in the home Member State of the AIFM) in other EU Member States by way of the AIF marketing passport. However, only three NCAs reported numbers of more than 100 AIFs marketed on a cross-

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<sup>4</sup> Cf. Annex I for the full data set.

border basis, while 11 NCAs stated that less than 10 AIFs domiciled in their Member State were marketed across the border.

89. The significantly lower uptake of the AIFMD marketing passport, as compared to its UCITS equivalent, could be explained by a number of reasons, such as the relatively short implementation period of AIFMD as well as the late transposition of AIFMD in a number of EU Member States (including the EEA EFTA Member States), or the limitation of marketing activities to professional investors only, if marketing is to be carried out by way of the passport.
90. As AIFMD does not require that the AIFM and the AIFs it manages share the same domicile, 17 NCAs reported that AIFMs domiciled in their Member State marketed EU AIFs (not domiciled in the same Member State as the AIFM) in the Member State of the respective NCA, while 18 NCAs stated that AIFMs domiciled in their Member State also marketed EU AIFs in other Member States.

## **3.2 EU AIF management passport**

### *3.2.1 Supervision of cross-border services by AIFM home Member State NCAs*

91. As stated above, one goal of this thematic study is to analyse supervisory practices around cross-border activities of fund managers and their funds in EU Member States. To that end, NCAs were asked to report how they specifically supervised (on a day-to-day basis) the provision of services (cross-border management or MiFID services) in other Member States by AIFMs domiciled in their own Member State.
92. Most NCAs stated that they generally followed the same supervisory approaches as in the case of supervision of UCITS ManCos (see above), namely on-site and off-site supervision. A large number of NCAs reported that they had not implemented specific supervisory measures tailored to cross-border activities, but instead relied on the same set of supervisory tools used to supervise entities domiciled in their home Member State. The evaluation of responses shows that where NCAs have implemented a system of risk-based supervision, cross-border activities are seen as a contributing factor in the risk assessment of the AIFM.
93. According to NCAs, off-site supervisory activities can take various forms, such as examining audits and business plans of supervised entities, evaluation of governance memoranda, communication with supervised entities through their senior management, and cooperation with competent authorities in other EU Member States. In addition, one NCA pointed out that in regard to AIFMs which are not authorised as a UCITS ManCo, day-to-day supervision also makes use of the periodic reporting under Article 24 of AIFMD.
94. On-site supervision can take the form of a full-scope assessment of the manager, or be limited to a thematic review of certain aspects of managerial activity. On-site investigations are mainly carried out by NCAs themselves or through third parties, such as auditors, which

could be accompanied by NCA staff. In this context, cross-border activities can form one part of the (full or thematic) assessment.

95. Similar to the supervision of UCITS management companies, and taking into account the level of investor protection under the AIFMD framework, it could be regarded as **good practice** to pursue a supervisory approach vis-à-vis AIFMs which not only focuses on the activities in the home Member State of the AIFM, but which also considers the activities carried out on a cross-border basis, in particular when carried out through a branch. These activities could influence supervision in several areas, such as in the risk assessment or – in cases where competent authorities pursue an integrated approach to supervision – in the planning and execution of on- and off-site activities.
96. Where AIFMs perform collective portfolio management on a cross-border basis, it could be regarded as **good practice** for NCAs to take this activity into account in their regular supervisory approach, with the amount of supervisory activity reflecting the size and impact of the management activity carried out by the AIFM, as well as the level of investor protection provided for under AIFMD. Supervision of this activity should not only be event-driven (upon initial or subsequent notification by the AIFM).

### *3.2.2 Supervisory action taken by AIFM home Member State NCAs*

97. To assess the extent to which cross-border activities by AIFMs and their supervision by home Member State NCAs had given rise to supervisory action, NCAs were asked whether, between 1 January 2014 and 30 June 2016, they had taken any such action against any AIFM specifically in regard to services provided on a cross-border basis. In the event that they had taken such action, NCAs were further asked to state the total figure, as well as the cause and the action taken, including a brief overview on individual cases.
98. Two NCAs reported that they had taken supervisory action. One authority presented a case which dealt with whistleblowing in regard to a potential conflict of interest. Cases reported by another competent authority focused on providing assistance for proper notification of activities in other Member States further to the national implementation of the AIFMD framework.

### *3.2.3 Supervision of cross-border activities through branches by NCAs in AIFM host Member States*

99. When an AIFM carries out cross-border activities, the responsibility for the prudential supervision is split between the competent authorities of its home and host Member State. Pursuant to Article 45 of AIFMD, the prudential supervision of an AIFM shall be the responsibility of the competent authorities of the home Member State of the AIFM, whether the AIFM manages and/or markets AIFs in another Member State or not, without prejudice to the provisions of the AIFMD which confer the responsibility for supervision on the competent authorities of the host Member State of the AIFM (Article 45(1)). However, the supervision of an AIFM's compliance with Article 12 (rules of conduct) and Article 14 (conflicts of interest) shall be the responsibility of the competent authorities of the host

Member State of the AIFM where the AIFM manages and/or markets AIFs through a branch in that Member State (Article 45(2)).

100. In regard to this division of supervisory powers between home and host Member States, NCAs were asked to state how they supervised the compliance of such a branch with Articles 12 and 14 of AIFMD.

101. Fourteen NCAs stated that branches of EU AIFMs had not yet been set up in their territory, and could not provide further input on this issue. Of the remaining NCAs, the majority stated that supervision of the compliance of a branch with Articles 12 and 14 of the AIFMD was initially carried out at the time of the notification of the intention to set up a branch, and on an ongoing basis after the branch had been set up.

102. Ongoing supervision in this area is carried out in various forms, such as through MiFID reports (concerning the activities of the branch, distribution channels et al.), other forms of regular and ad-hoc reporting, and evaluation of complaints made by investors.

103. In Member States where NCAs have implemented risk-based supervision, the provision of cross-border services through a branch serves as a contributing factor in the risk classification of the AIF manager, or is taken into account in other analytical tools used by the competent authorities. A number of authorities also carry out regular on-site inspections, focusing – inter alia – on the rules of conduct and conflict of interest policies, and rely on ad-hoc exchanges of information with other competent authorities supervising the AIFM.

104. Similar to the supervisory practice regarding branches of UCITS ManCos, it could be regarded as **good practice** to review the compliance of branches of EU AIFMs with the rules of conduct in the host Member State not only on receipt of the notification to set up a branch, but also after the initial notification, similar to the supervisory activities carried out vis-à-vis supervised entities domiciled in the Member State.

#### 3.2.4 *Supervision of compliance with other national legislation*

105. In addition to the rules set out in the AIFMD framework, there might be other legislation in place at national level to which an AIFM pursuing cross-border services would be subject. To assess the extent to which national legislation could have an influence on cross-border activities, competent authorities were asked to report whether there were any other rules in place in their respective Member State which an EU AIFM pursuing activity in their MS (directly or by establishing a branch) would have to comply with.

106. 14 NCAs stated that there were no additional rules in place which an EU AIFM pursuing cross-border business would have to comply with. In contrast, of the remaining NCAs, a large number reported that rules on marketing, anti-money-laundering, and consumer protection would have to be complied with, as well as local company law, rules on corporate registration, and national legislation in respect of marketing funds to retail investors.



### *3.2.5 Supervisory action taken by AIFM host Member State NCAs*

107. To assess the extent to which cross-border activities by AIFMs and their supervision by host Member State NCAs had given rise to supervisory action, NCAs were asked to state whether, between 1 January 2014 and 30 June 2016, they had taken action against any AIFM specifically in regard to services provided on a cross-border basis. NCAs were further asked to state the total figure, as well as the cause and the action taken, including a brief overview on individual cases.

108. In addition to cases where notifications contained insufficient information in regard to the services to be provided in the host Member State, one NCA reported a case where the national regulator investigated issues around individual portfolio management carried out by an AIFM on a cross-border basis. The investigation focused on the determinants of the risk-return profile of the portfolio and on high concentration in three specific financial instruments.

## **3.3 EU AIF marketing passport**

109. Similar to the UCITS marketing passport (see above), the AIFMD marketing passport allows an AIFM domiciled in the EU to market EU AIFs in Member States different from the Member State in which the AIFM is domiciled. To this end, the AIFM is required to submit a notification to the competent authorities in its home Member State, which is transmitted to the NCA in the Member State or States where the AIFM intends to market the AIF (Article 32(2) and (3) of AIFMD).

### *3.3.1 Influence of cross-border marketing on supervisory activities by AIFM home Member State NCAs*

110. The thematic study aims at assessing the extent to which marketing activities carried out by AIFMs on a cross-border basis have an influence on the supervision of these AIFMs by the competent authorities in the home Member State of the AIFM. NCAs were therefore asked to report whether, and how, the fact that an AIFM domiciled in their Member State was marketing EU AIFs in other Member States influenced the supervision of that AIFM carried out by the NCA.

111. In most Member States, cross-border activities of domiciled AIFMs do not have a specific influence on the supervision carried out by NCAs. However, most of the NCAs which stated that cross-border activities did not have any influence on the supervision of AIFMs seem to take these activities into account on a general basis within their regular supervisory approach.

112. A small number of NCAs stated that cross-border marketing activities by AIFMs did have an influence on the supervision of these AIFMs. Several of these NCAs reported that they regarded cross-border marketing of AIFs as an additional risk factor which would be taken into account in the risk assessment of the AIFM. Some NCAs stated that cross-

border marketing led to closer cooperation between their authority and the competent authorities of the host Member States.

113. It could be regarded as **good practice** that supervision carried out by a home authority is not limited to the marketing activities which an AIFM pursues in its home Member State, but that it should take into account all marketing activities, regardless of whether they are carried out in its home Member State or on a cross-border basis. To this end, ESMA recognises that NCAs have a large number of supervisory instruments at their disposal.

### *3.3.2 Supervisory action by AIFM home Member States in regard to cross-border marketing of AIFs*

114. To assess the extent to which cross-border marketing by AIFMs and their supervision by home Member State NCAs had given rise to supervisory action, NCAs were asked to state whether, between 1 January 2014 and 30 June 2016, they had taken action against any AIFM domiciled in their Member State specifically in regard to activities concerning the marketing of EU AIFs in other Member States. NCAs were further asked to state the total figure, as well as the cause and the action taken, including a brief overview on individual cases.

115. Above and beyond cases of insufficient data contained in the notification letter, one authority stated that it had exchanged letters with an AIFM in regard to distribution activities by a local distributor of a fund managed by that AIFM and marketed on a cross-border basis.

### *3.3.3 Supervision of cross-border marketing by AIFM host Member State NCAs*

116. As seen above, Article 45(1) places the responsibility for supervising an AIFMD with the competent authorities of the home Member State of the AIFM, unless the AIFMD specifically states otherwise. In the context of cross-border marketing of AIFs, Article 32(5) states that arrangements referred to in point (h) of Annex IV of the AIFMD shall be subject to the laws and supervision of the host Member State of the AIFMD.

117. Point (h) of Annex IV specified these as the arrangements made for the marketing of AIFs and as the arrangements established to prevent units of shares of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF.

118. To gain an overview on the way that these arrangements are supervised in AIFM host Member States, NCAs were asked to provide information on how exactly they supervised compliance with Article 32(5) of AIFMD and the arrangements pursuant to Annex IV(h) of AIFMD.

119. NCAs presented a number of ways to supervise compliance with these arrangements. Most frequently, NCAs stated that they evaluated the content of the notification letter and its annexes in regard to the information on the arrangements.

120. In addition to evaluating the notification documents, a number of NCAs also scrutinise the marketing material used by the AIFM in their Member State, assessing the information on the arrangements made for marketing and prevention of marketing to retail investors. In some cases, this includes continuous monitoring of marketing campaigns in different media channels.
121. In regard to ongoing supervision after the initial notification, authorities generally referred to on-site and off-site supervisory activities, or explained that they had adopted a risk-based approach to supervision in their territory.

#### *3.3.4 Supervisory action in regard to cross-border marketing by AIFMs in host Member States*

122. To assess the extent to which cross-border marketing by AIFMs and their supervision by host Member State NCAs had given rise to supervisory action, NCAs were asked to state whether, between 1 January 2014 and 30 June 2016, they had taken action against any EU AIFM not domiciled in their Member State specifically in regard to activities concerning the marketing of EU AIFs in their Member State. NCAs were further asked to state the total figure, as well as the cause and the action taken, including a brief overview on individual cases.
123. In addition to several cases of insufficient information contained in the notification, two NCAs reported that they had taken supervisory action during that period. One authority stated that it had prohibited marketing activities of six different EU AIFMs, totalling nine different EU AIFs, due to failure to pay the annual fee. Another NCA reported that it had identified several EU AIFs marketed without a notification within its territory.

## **4 General issues around the notification frameworks**

### **4.1 Reception and transmission of management passport notifications**

124. The UCITS framework contains specific provisions on how marketing passport notifications are to be exchanged between the home and host Member State NCAs (Article 4 of Commission Regulation (EU) No 584/2010). In contrast, as regards the management passports, no similar provisions exist. To gain an overview on the state of play around the reception of management passport notifications, NCAs were asked to state the ways in which stakeholders could submit these notifications. The majority of NCAs stated that they accepted the submission of notifications via email and, in a number of Member States cases, also on paper. Only four NCAs stated that they accepted notifications on paper only. One authority reported that it only accepted certified email.

125. Asked about whether templates were available to stakeholders regarding the notification of cross-border management activities, 20 NCAs responded that they did not make such templates available, while eight stated that they did.

### **4.2 Publication of data on cross-border management**

126. NCAs were asked how they recorded data on cross-border management and whether they made this data available to the public. While most NCAs stated that they used an internal database, only half of all NCAs responded that they also made all or some data on cross-border management activities available to the public on their websites.

### **4.3 Difficulties in the operation of the passporting frameworks**

127. Further to the specific issues around the notification frameworks presented above, one aim of the thematic study was to gather input on other difficulties encountered by competent authorities in the day-to-day operation of the passporting frameworks. NCAs were therefore asked to identify any difficulties which they had encountered in the operation of the passporting frameworks, as well as further issues around the passporting frameworks which could be addressed at the level of ESMA.

#### *4.3.1 General suggestions*

128. On each of the different passporting frameworks, NCAs presented a number of suggestions for improvement, possibly feeding into one or more workstreams at ESMA level. NCAs made the following general suggestions:

- Updated list of email addresses used by NCAs for receiving notifications;
- Clearer labelling of documents contained in notifications;
- Harmonised level of detail regarding the content of notifications;

- Harmonised standards regarding the completeness of documents;
- Standardised medium/system for transfer of notifications between authorities;
- Common standards regarding the disclosure of information in home and host MS;
- Clarification of cooperation between home and host authorities;
- Clarification of home and host responsibilities in regard to the supervision of branches (due to implementation of Articles 12/14 UCITS Directive/AIFMD in respective Level 2 regulation);
- Common understanding in terms of notification of pre-marketing activities;
- Further harmonisation and supervisory convergence.

129. On the cooperation between home and host authorities under Article 108(4) and (5) of the UCITS Directive and Article 45(7) and (8) of AIFMD in cases of direct provision of services (without a branch), one competent authority suggested that there was room for improvement, as entities acting under the freedom to provide services were less closely supervised regarding the provision of these services than a branch, both from the perspective of the home and host authority. One way forward could be to agree a practical arrangement on a voluntary, case-by-case basis, which would enable the host authority to act on behalf of the home authority. Such an arrangement would be limited to cases in which management activities are provided within the territory of another EU Member State under the freedom to provide services and which correspond to Article 108(4) of the UCITS Directive or Article 45(7) of AIFMD. NCAs could agree on a timeframe for signing the agreement.

#### *4.3.2 UCITS management and marketing passports*

130. In regard to the UCITS management and marketing passports, authorities made the following suggestions:

- Unified template for notifications;
- Clarity around the activities and the amendments which have to be notified;
- Advance notification of provision of services (where a specific UCITS is not yet managed);
- Marketing of AIFs by UCITS ManCos.

### 4.3.3 AIF management and marketing passports

131. On the AIF management passport, one NCA suggested clarifying whether AIFs packaged in insurance-based investment products were targeted to retail or professional investors.
132. A number of NCAs made suggestions on improving the functioning of the AIF marketing passport. These were:
- Supplemented notification template, allowing to select between closed-ended and open-ended AIFs;
  - Harmonised approach on acknowledging receipt of notification by host Member State NCAs;
  - Clearer specification of investment strategy of AIF in notification template;
  - Common approach on limitation of passport in regard to marketing to professional investors only;
  - Harmonised approach to notifying marketing activities (similar to UCITS marketing passport);
  - Harmonised approach on cessation of marketing.

### 4.4 General comments on the notification frameworks

133. In addition to specific suggestions on the improvement of the notification frameworks, NCAs were also asked whether they wanted to highlight any other comments on the notification frameworks.
134. In addition to the suggestions presented above, one NCA expressed its desire for a centralised database with designated links to the national rules on the marketing of EU AIFs, applicable in EU Member States. Other NCAs proposed a centralised procedure for notifications, in place at ESMA level, as well as a centralised register for funds marketed on a cross-border basis. Another NCA illustrated supervisory challenges which could be posed by increased complexity in regard to structure involving cross-border management and marketing, with technological evolution posing further challenges to national regulators.

## 5 Summary

### 5.1 Use of the passporting frameworks in EU Member States

135. The passporting frameworks have been established for a number of years. Nonetheless, the data collected from NCAs<sup>5</sup> shows that the extent to which they are used varies extensively across the Member States. Under the UCITS framework, UCITS management companies in 21 Member States carry out various kinds of cross-border management activities, including collective portfolio management. The extent of these activities is mostly consistent with the size of national fund markets and the share the respective Member State has in the single European fund market.

136. Compared to cross-border management, the cross-border marketing of UCITS plays a significantly bigger role. Figures show that there is cross-border marketing activity in most Member States, with only a handful of Member States not reporting any outbound cross-border marketing activity at all. Again, a number of Member States have a larger share in cross-border marketing of UCITS, reflecting their central role in the single European financial market.

137. The statistics for the AIFM passporting frameworks mirror the above findings to some extent. While cross-border management activities are only carried out relatively extensively in a small number of Member States, the use of the AIF marketing passport is more widespread. However, AIF managers make use of the AIFMD passports to a much lesser extent and in fewer Member States, compared to the UCITS framework, reflecting the lower number of AIFs set up in Europe overall, the relatively short implementation period of AIFMD, as well as the late transposition of the AIFMD framework in a number of Member States, and the limitations around cross-border marketing by way of the passport to professional investors only.

### 5.2 Supervisory activity around the notification frameworks

138. In terms of supervisory activity, the assessment of various issues around the notification frameworks showed that, in general, these frameworks and their administrative procedures are well-established and functioning at NCA level on a daily basis. While the evaluation of the responses provided by NCAs did not show any immediate shortcomings, it was nonetheless possible to identify a number of good practices, aimed at enhancing the supervision of cross-border activities pursued by UCITS management companies, UCITS, and AIF managers.

139. Good practices could be identified in a number of areas. Regarding the UCITS framework, these relate to the supervision of UCITS management companies which pursue cross-border activities (para. 27) or carry out cross-border collective portfolio management (para. 36), carried out by competent authorities in the home Member State of the UCITS

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<sup>5</sup> Cf. Annex I for the full data set.

management company, as well as to the supervision of branches set up by UCITS management companies in host Member States and their compliance with the rules of conduct in place in the host Member State (para. 43), and to the supervision of compliance of UCITS marketed cross-border with requirements on disclosure of documentation to investors (para. 74).

140. As regards the AIFMD framework, good practices could be identified around the general supervision of cross-border activities carried out by AIFMs (paras. 95 and 96), the compliance of branches set up by AIFMs in host Member States with the rules of conduct in place in the host Member State (para. 104), and the supervision of marketing activities pursued by AIFMs on a cross-border basis (para. 113).
141. Competent authorities have identified a number of other issues around the notification frameworks which did not form part of the assessment. As already indicated, further work will be conducted at the level of ESMA to enhance cooperation and supervisory convergence among NCAs on those issues.



## Annex I – Data on cross-border activity by UCITS management companies and AIFMs

Cross-border services under the UCITS management company passport<sup>6</sup>

Member State	CC	Total number of managers (UCITS ManCo/ authorised AIFM)	Cross-border services (CBS) provided by UCITS ManCo	CBS provided through a branch of UCITS ManCo	Collective portfolio management (CPM) by UCITS ManCo	CPM by branch of UCITS ManCo
Austria	AT	32	5	2	5	2
Belgium	BE	25	6	3	5	2
Bulgaria	BG	30	0	0	0	0
Cyprus	CY	15	0	0	0	0
Czech Republic	CZ	30	3	1	3	1
Germany	DE	130	8	4	6	1
Denmark	DK	97	0	0	0	0
Estonia	EE	9	3	1	3	0
Greece	EL	21	5	0	3	0
Spain	ES	116	49	1	41	0
Finland	FI	47	2	2	1	1
France	FR	416	102	16	105	20
Croatia	HR	29	0	0	0	0
Hungary	HU	68	0	0	0	0
Ireland	IE	173	1	0	9	2
Iceland	IS	10	3	0	1	0
Italy	IT	98	9	1	8	1
Liechtenstein	LI	14	3	0	5	0
Lithuania	LT	8	1	1	0	0
Luxembourg	LU	332	18	6	42	24
Latvia	LV	12	0	0	0	0
Malta	MT	64	6	3	2	1
Netherlands	NL	126	5	3	5	0
Norway	NO	50	3	0	4	0
Poland	PL	61	1	0	1	0
Portugal	PT	20	0	0	0	0
Romania	RO	26	0	0	0	0
Sweden	SE	100	4	2	5	2
Slovenia	SI	9	4	0	1	0
Slovakia	SK	6	1	0	1	0
United Kingdom	UK	842	22	1	15	1

<sup>6</sup> Date of reference: 30 June 2016 (FI: Date of reference: 31 December 2015).

## Cross-border services under the AIF management passport<sup>7</sup>

Member State	CC	Total number of managers (UCITS ManCo/ authorised AIFM)	Cross-border services (CBS) provided by AIFM	CBS provided by AIFM through a branch	Direct cross-border management of EU AIF by EU AIFM	Cross-border management of EU AIF through branch of EU AIFM
Austria	AT	32	4	1	3	1
Belgium	BE	25	3	3	3	3
Bulgaria	BG	30	0	0	0	0
Cyprus	CY	15	0	0	2	0
Czech Republic	CZ	30	2	0	2	0
Germany	DE	130	10	2	8	1
Denmark	DK	97	13	0	10	0
Estonia	EE	9	1	0	1	0
Greece	EL	21	0	0	3	0
Spain	ES	116	4	0	4	0
Finland	FI	47	0	0	4	1
France	FR	416	61	9	71	7
Croatia	HR	29	0	0	0	0
Hungary	HU	68	1	0	4	0
Ireland	IE	173	0	0	15	1
Iceland	IS	10	0	0	0	0
Italy	IT	98	2	1	2	1
Liechtenstein	LI	14	0	0	0	0
Lithuania	LT	8	0	0	0	0
Luxembourg	LU	332	5	6	37	10
Latvia	LV	12	0	0	1	0
Malta	MT	64	7	0	7	0
Netherlands	NL	126	8	2	7	0
Norway	NO	50	2	0	8	0
Poland	PL	61	0	0	0	0
Portugal	PT	20	0	0	0	0
Romania	RO	26	0	0	0	0
Sweden	SE	100	6	0	6	0
Slovenia	SI	9	0	0	0	0
Slovakia	SK	6	0	0	1	0
United Kingdom	UK	842	209	13	153	7

<sup>7</sup> Date of reference: 30 June 2016 (FI: Date of reference: 31 December 2015).

## Cross-border marketing activity under the UCITS and AIFMD notification frameworks<sup>8</sup>

	UCITS domiciled in home Member State (including compartments)	UCITS marketed in other Member States (including compartments)	Local AIFs (incl. compartments) marketed in home MS by AIFM domiciled in home MS	EU AIFs (incl. compartments) marketed in home MS by AIFM domiciled in home MS	Local AIFs (incl. compartments) marketed in other EU MS by AIFM domiciled in home MS	EU AIFs (incl. compartments) marketed in other EU MS by AIFM domiciled in home MS
AT	1057	629	1052	3	17	2
BE	624	n/a	639	1	5	5
BG	116	0	0	0	0	0
CY	20	6	8	n/a	2	2
CZ	54	8	193	11	4	0
DE	1381	74	277	2	27	69
DK	600	230	378	3	21	0
EE	14	4	4	0	2	0
EL	165	1	8	5	0	5
ES	2015	2	3464	2	4	n/a
FI	392	105	314	2	11	6
FR	3500	589	1047	89	88	77
HR	76	3	30	0	0	0
HU	21	8	654	0	0	n/a
IE	3929	n/a	79	18	376	50
IS	46	0	0	0	0	0
IT	883	16	690	0	7	0
LI	329	87	28	0	0	0
LT	13	10	1	0	1	0
LU	9806	8331	3063	0	704	21
LV	28	13	6	0	1	3
MT	81	36	0	n/a	13	5
NL	371	39	940		70	16
NO	344	10	133	13	6	13
PL	289	0	870	0	0	0
PT	130	0	0	0	0	0
RO	78	0	0	0	0	0
SE	602	152	83	22	5	13
SI	115	20	3	0	0	0
SK	67	8	22	2	1	2
UK	2862	437 (managers only)	4689	1342	338	316

<sup>8</sup> Date of reference: 30 June 2016. FI: date of reference for UCITS: 31 December 2015. NO: records for UCITS marketed cross-border incomplete, number likely higher. UK: date of reference for AIFMD figures: April 2015.

## Annex II – Questionnaire

### General questions on the management passports

1. On 30 June 2016, regarding managers (UCITS/AIFMD, internal and external) for which your Member State (MS) is the home Member State, please state<sup>9</sup>:
  - a. – the total number of managers (UCITS/authorised AIFM);  
– the number of UCITS management companies (ManCos);  
– the number of authorised AIFMs;  
– the number of companies authorised as both UCITS ManCo and AIFM;
  - b. – the number of UCITS ManCos providing cross-border services (Article 6(3) of the UCITS Directive) (total figure);  
– the number of UCITS ManCos providing cross-border services (Article 6(3) of the UCITS Directive) with a branch or branches in other MS;  
– the total number of UCITS ManCos pursuing collective portfolio management on a cross-border basis (total figure)  
– the number of UCITS ManCos pursuing collective portfolio management on a cross-border basis which have a branch or branches in other MS;
  - c. – the number of authorised AIFMs providing cross-border services (Article 6(4) of AIFMD) (total figure);  
– the number of authorised AIFMs providing cross-border services (Article 6(4) of AIFMD) which have a branch or branches in other MS;  
– the number of authorised AIFMs managing EU AIFs on a cross-border basis (total figure);  
– the number of authorised AIFMs managing EU AIFs on a cross-border basis with a branch or branches in other MS.
2. (home MS)<sup>10</sup> How does your NCA receive notifications of UCITS management companies and AIFMs to provide cross-border services (e.g. on paper, electronically, or via email)? Does your NCA offer templates for the notifications?
3. (home MS) How does your NCA record which UCITS ManCos/AIFMs provide services in other Member States? (e.g. via files, database, etc.). Does your NCA make these records public? If so, how?

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<sup>9</sup> Where your NCA is aware of differences between the intended use of the passport (as notified to your NCA) and the actual use of the passport by ManCos/managers, please state both figures (notified use/actual use), if available.

<sup>10</sup> Questions marked “(home)” or “(home MS)” should be answered from the perspective of your NCA being the NCA in the home Member State within the respective notification framework. Questions marked “(host)” or “(host MS)” should similarly be answered from the perspective of your NCA being the NCA in the host Member State.

## **Cross-border activities by UCITS management companies (management company passport)**

4. (home MS) How does your NCA specifically supervise (on a day-to-day basis) the provision of services (including MiFID services) in other Member States by UCITS ManCos domiciled in your Member State? How does the fact that a ManCo performs cross-border management activities influence the general supervisory approach pursued by your NCA?
5. (home MS) How does your NCA supervise the adequacy of the arrangements and organisation of the ManCo in regard to cross-border collective portfolio management (Article 19(7) of the UCITS Directive)?
6. (home MS) Between 1 January 2014 and 30 June 2016, has your NCA (as home MS) taken any action<sup>11</sup> against any UCITS ManCo specifically in regard to services provided on a cross-border basis (either directly or via a branch)? Please state the figure, as well as the cause and the action taken (please provide a brief overview on up to three individual cases), for cases concerning:
  - a. services provided through a branch; and
  - b. services provided under the freedom to provide services.
7. (host MS) How does your NCA supervise the compliance of a branch set up by a foreign UCITS ManCo in your Member State with the rules of conduct in place in your Member State?
8. (host MS) Do you require foreign UCITS ManCos with branches in your territory to periodically report on their activities pursued in your Member State (pursuant to Article 21 of the UCITS Directive)? Please describe the content of the data to be reported.
9. (host MS) Between 1 January 2014 and 30 June 2016, has your NCA (as host MS) taken action against any UCITS ManCo specifically in regard to services provided on a cross-border basis? Please state the total figure, as well as the cause and the action taken (please provide a brief overview on up to three individual cases).
10. (host MS) When supervising UCITS funds domiciled in your Member State and managed by a UCITS ManCo on a cross-border basis, how does your NCA supervise compliance of the UCITS ManCo with paragraphs 3 and 4 of Article 19 of the UCITS Directive? (cf. Article 19(5))

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<sup>11</sup> In the context of this study, “action” should be understood to cover any supervisory action, such as supervisory letters, circulars, enforcement or other measures at the disposal of the NCA.

### **Cross-border activities by EU AIFMs (management passport)**

11. (home MS) How does your NCA specifically supervise (on a day-to-day basis) the provision of services (cross-border management or MiFID services) in other Member States by AIFMs domiciled in your Member State?
12. (home MS) Between 1 January 2014 and 30 June 2016, has your NCA (as home MS) taken action against any AIFM specifically in regard to services provided on a cross-border basis? Please state the total figure, as well as the cause and the action taken (please provide a brief overview on up to three individual cases).
13. (host MS) Regarding an EU AIFM with a branch in your Member State, how does your NCA supervise the compliance of said branch with Articles 12 and 14 of AIFMD (rules of conduct, conflicts of interest) in place in your Member State?
14. (host MS) Are there any other rules in place in your Member State which an EU AIFM pursuing activity in your MS (directly or by establishing a branch) has to comply with?
15. (host MS) Between 1 January 2014 and 30 June 2016, has your NCA (as host MS) taken action against any AIFM specifically in regard to services provided on a cross-border basis? Please state the total figure, as well as the cause and the action taken (please provide a brief overview on up to three individual cases).

### **Cross-border marketing of UCITS (marketing passport)**

16. (home MS) On 30 June 2016, how many UCITS, including UCITS compartments, were:
  - a. domiciled in your Member State; and
  - b. marketed in other Member States by way of the marketing passport?
17. (home MS) Does the fact that a UCITS domiciled in your Member State is marketed in other Member States influence the supervision of that UCITS by your NCA? If so, how?
18. (host MS) How does your NCA supervise compliance of foreign UCITS marketed in your Member State:
  - a. with Article 92 of the UCITS Directive (regarding facilities for making payments to unit-holders etc.)?
  - b. with Article 94 of the UCITS Directive (regarding provision of information and documents to investors)?
  - c. with other national legislation outside the scope of the UCITS Directive (cf. Article 108(1), second subparagraph)?
19. (home MS) Between 1 January 2014 and 30 June 2016, has your NCA (as home MS) taken action against any UCITS specifically in regard to marketing activities in other Member States? Please state the total figure, as well as the cause and the action taken (please provide a brief overview on up to three individual cases).

20. (host MS) Between 1 January 2014 and 30 June 2016, has your NCA (as host MS) taken action against any foreign UCITS specifically in regard to marketing activities in your Member State? Please state the total figure, as well as the cause and the action taken (please provide a brief overview on up to three individual cases).

### **Cross-border marketing of EU AIFs (marketing passport)**

21. (AIFM home MS) As of 30 June 2016, how many of the following types of AIF, managed by an AIFM domiciled in your Member State, were marketed in your Member State<sup>12</sup>:

- a. EU AIFs (including compartments, where applicable) domiciled in your Member State;
- b. EU AIFs (including compartments, where applicable) domiciled in other Member States?

22. (AIFM home MS) As of 30 June 2016, how many of the following types of AIF, managed by an AIFM domiciled in your Member State, were marketed in another Member State<sup>13</sup>:

- a. EU AIFs (including compartments, where applicable) domiciled in your Member State;
- b. EU AIFs (including compartments, where applicable) domiciled in other Member States?

23. (AIFM home MS) Does your NCA make use of the notification template developed by ESMA? If not, does your authority provide other templates for the notification letter?

24. (AIFM home MS) Does the fact that an AIFM domiciled in your Member State is marketing EU AIFs in other Member States influence the supervision of that AIFM by your NCA? If so, how?

25. (AIFM host MS) Regarding AIFMs not domiciled in your Member State which are marketing EU AIFs in your Member State pursuant to Article 32 of AIFMD, how exactly does your NCA supervise compliance with Article 32(5) of AIFMD (regarding information about arrangements pursuant to Annex IV(h) of AIFMD)?

26. (AIFM home MS) Between 1 January 2014 and 30 June 2016, has your NCA taken action against any AIFM domiciled in your Member State specifically in regard to activities concerning the marketing of EU AIFs in other Member States? Please state the total figure, as well as the cause and the action taken (please provide a brief overview on up to three individual cases).

27. (AIFM host MS) Between 1 January 2014 and 30 June 2016, has your NCA taken action against any EU AIFM not domiciled in your Member State specifically in regard to activities concerning the marketing of EU AIFs in your Member State? Please state the total figure,

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<sup>12</sup> Where your NCA is aware of differences between the intended use of the passport (as notified to your NCA) and the actual use of the passport by AIFMs, please state both figures (notified use/actual use), if available.

<sup>13</sup> See previous footnote.



as well as the cause and the action taken (please provide a brief overview on up to three individual cases).

### **General**

28. What difficulties have you encountered in the operation of the passporting frameworks?  
Are there further issues around the passporting frameworks which could be addressed at the level of ESMA?
29. Do you have any other comments on the notification framework you would wish to highlight here?