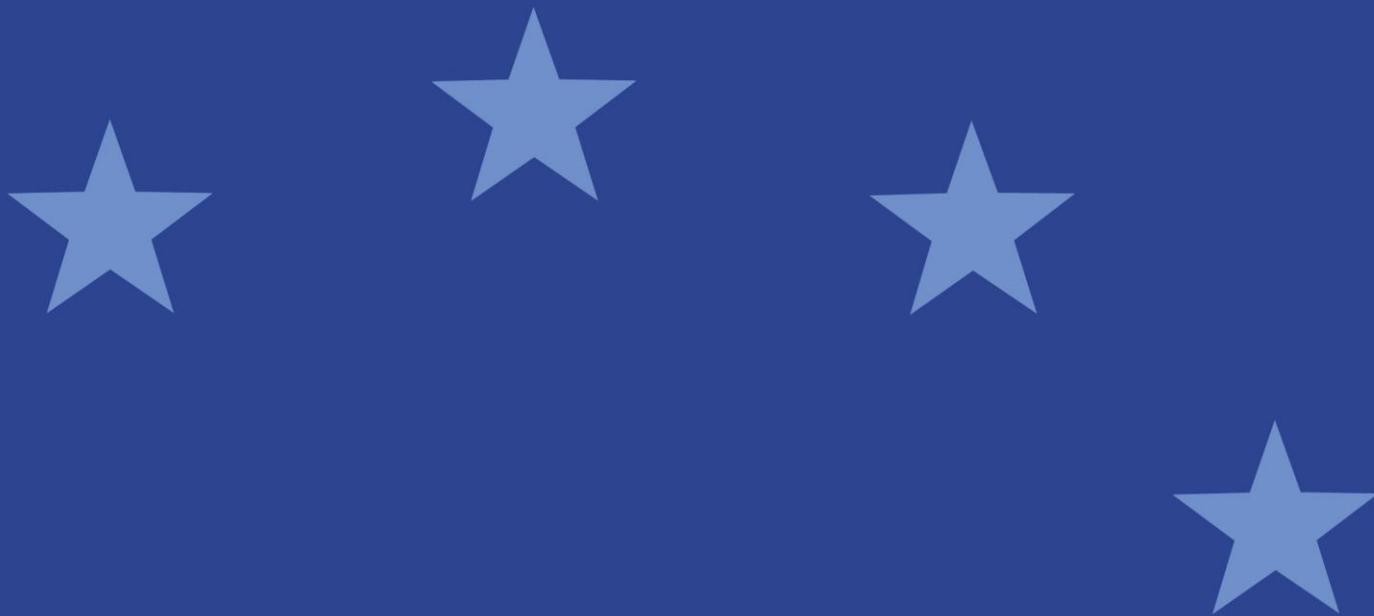




European Securities and
Markets Authority

Reply form for the Call for evidence AIFMD passport and third country AIFMs





European Securities and
Markets Authority

Date: 7 November 2014



Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Call for evidence - AIFMD passport and third country AIFMs, published on the ESMA website ([here](#)).

Instructions

Please note that, in order to facilitate the analysis of the responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

- i. use this form and send your responses in Word format;
- ii. do not remove the tags of type <ESMA_QUESTION_CE_AIFM_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- iii. if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

- i. if they respond to the question stated;
- ii. contain a clear rationale, including on any related costs and benefits; and
- iii. describe any alternatives that ESMA should consider

Naming protocol:

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA_CE_AIFMD_NAMEOFCOMPANY_NAMEOFDOCUMENT.

E.g. if the respondent were ESMA, the name of the reply form would be

ESMA_CE_AIFMD_ESMA_REPLYFORM or ESMA_CE_AIFMD_ESMA_ANNEX1

Responses must reach us by **8 January 2015**.

All contributions should be submitted online at www.esma.europa.eu under the heading ‘Your input/Consultations’.

Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested.

Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. Note also that a confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading ‘Disclaimer’.



Q1: Please describe your experience using the AIFMD passport:

- **Indicate your home Member State**

<ESMA_QUESTION_CE_AIFMD_1a>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CE_AIFMD_1a>

- **Number of funds marketed in other Member States (please provide a breakdown by host Member State)**

<ESMA_QUESTION_CE_AIFMD_1b>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CE_AIFMD_1b>

- **Number of funds managed in other Member States (please provide a breakdown by host Member State)**

<ESMA_QUESTION_CE_AIFMD_1c>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CE_AIFMD_1c>

Q2: How have you found the passport application process?

- **Very satisfactory**
- **Satisfactory**
- **Problems encountered. Please explain**

<ESMA_QUESTION_CE_AIFMD_2>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CE_AIFMD_2>

Q3: What is your overall experience of using the passport of the AIFMD? Please explain

<ESMA_QUESTION_CE_AIFMD_3>

The limited use of the AIFMD passport across the European Union to date has generally been satisfactory, although there are certain recurring issues which require resolution.

Firstly, there remains a large degree of ambiguity around the concept of "marketing" which we believe has impeded the uptake of the passport regime. The lack of a uniform definition of "marketing" across the EU has led to a lack of clarity regarding the exact point at which the requirement to notify an AIF to a host Member State regulator is triggered. In a similar vein, the lack of a uniform definition of "particulars" and "material change" across the EU has led to a lack of clarity regarding the exact point at which the requirement to notify a home Member State regulator of a material change to any of the "particulars" communicated in the original passport notification is triggered.

In addition, certain Member States regard any initial contact with a prospective investor as "marketing", whereas other Member States only consider "marketing" to take place when a final offer (eg subscription document) is presented to the prospective investor (and correspondingly permit a certain degree of "pre-marketing" activities in those Member States before AIFMD is considered to have been triggered). Equally, no application for a marketing passport can be processed until the relevant AIF is legally in existence. This therefore calls into question the validity of any communications with prospective investors prior to the formal establishment of the AIF (which is often one of the last stages in the process).

Furthermore, whilst the marketing passport permits an authorised AIFM to market in a given jurisdiction, in practice many AIFMs delegate the day-to-day marketing function to other entities. If, for example, an AIFM delegates the marketing of an AIF to a U.S. investment manager (in its capacity as the AIFM's delegate), we are aware that certain Member States require either further local authorisation of that non-EU entity or the establishment of a local branch.



Secondly, we are aware that, we are aware that certain Member States are imposing additional requirements relating to, among other things, the appointment of local correspondent banks, the provision of additional disclosure, and varying levels of registration and/or ongoing regulatory fees. This lack of consistency between Member States is making the passport process difficult for EU AIFMs to navigate. We believe that it is imperative for the future success of the AIFMD passport that efforts be made to foster a more harmonised approach and to prevent Member States "gold-plating" in this manner.

Our principal concern, however, is that we believe that it is far too soon to be able to meaningfully assess the operation of the AIFMD passport regime. We recognise that ESMA is obliged pursuant to Article 67(1) of AIFMD to provide its opinion by 22 July 2015. We would however note that this timeframe was predicated on assumptions that AIFMD would- as required by Article 66 of AIFMD- have been fully implemented into national laws across the EU for two years by that date (and the passport regime therefore well embedded).¹

In reality, the delay by many Member States to transpose AIFMD into national laws, combined with the decision by many EU asset managers to avail of transitional periods/ continue to rely on national private placement regimes ("NPPRs") and thereby delay applying for AIFM authorisation, has resulted in far less practical experience of the passport regime to date than we submit would have been expected when AIFMD was drafted.

We believe that the decision of whether or not to extend the passport regime to non-EU AIFMs/ AIFs is of seismic importance to the future direction of the European funds industry. We in turn believe that no such decision should be taken until enough time has passed, and enough practical experience has been acquired, for a meaningful review of the passport regime to be carried out. We therefore suggest that ESMA might, notwithstanding the timeframe mandated by Article 67(1), consider discussing with the Commission the possibility of postponing its opinion.

<ESMA_QUESTION_CE_AIFMD_3>

Q4: What difficulties have you encountered when trying to use the passport?

<ESMA_QUESTION_CE_AIFMD_4>

TYPE YOUR TEXT HERE

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Q5: Have you been deterred from using the passport and, if so, why?

<ESMA_QUESTION_CE_AIFMD_5>

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Q6: Have you experienced issues of investor protection in relation to AIFs marketed or managed from another Member State, including AIFs marketed to retail investors under Article 43? If so, please provide details (e.g. number of complaints from investors, the reasons for those complaints etc).

<ESMA_QUESTION_CE_AIFMD_6>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CE_AIFMD_6>

Q7: Please describe the activity of your organisation in the EU:

- **Identify whether your organisation operates under Article 36 (marketing of non-EU AIFs by EU AIFMs in a Member State) or Article 42 (management and/or marketing of AIFs by non-EU AIFMs in a Member State) of the AIFMD**

<ESMA_QUESTION_CE_AIFMD_7a>

¹ See Recital 88 of AIFMD which provides that "two years after the deadline for transposition of this Directive, ESMA should issue an opinion on the functioning of the passport then in force and on the functioning of national private placement regimes."



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<ESMA_QUESTION_CE_AIFMD_7a>

- **Identify the non-EU country of the AIFM and/or the AIF**

<ESMA_QUESTION_CE_AIFMD_7b>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CE_AIFMD_7b>

- **Number of funds marketed in an EU Member State (please provide a breakdown by Member State)**

<ESMA_QUESTION_CE_AIFMD_7c>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CE_AIFMD_7c>

- **Number of funds managed in an EU Member State (please provide a breakdown by Member State)**

<ESMA_QUESTION_CE_AIFMD_7d>

TYPE YOUR TEXT HERE

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Q8: How many times has your organisation received a request for information from an EU NCA? Please indicate your average response time.

<ESMA_QUESTION_CE_AIFMD_8>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CE_AIFMD_8>

Q9: How many times has your organisation refused to provide the information requested by an EU NCA? Please explain the reasons.

<ESMA_QUESTION_CE_AIFMD_9>

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Q10: How many times has an EU NCA performed an on-site visit at your organisation?

<ESMA_QUESTION_CE_AIFMD_10>

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<ESMA_QUESTION_CE_AIFMD_10>

Q11: How many times has an EU NCA initiated enforcement action against your organisation?

<ESMA_QUESTION_CE_AIFMD_11>

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<ESMA_QUESTION_CE_AIFMD_11>

Q12: How many times has an EU NCA imposed a sanction on your organisation?

<ESMA_QUESTION_CE_AIFMD_12>

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<ESMA_QUESTION_CE_AIFMD_12>

Q13: Are there any specific limitations in the legal framework in your country that impede or limit your organisation from collaborating with an EU NCA? If yes, please specify.

<ESMA_QUESTION_CE_AIFMD_13>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CE_AIFMD_13>



Q14: Has your organisation experienced issues of investor protection in relation to AIFs marketed or managed in an EU Member State? If so, please describe (e.g. number of complaints from investors, the reasons for those complaints etc).

<ESMA_QUESTION_CE_AIFMD_14>

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<ESMA_QUESTION_CE_AIFMD_14>

Q15: What have been the benefits of the National Private Placement Regimes (NPPR) to you?

<ESMA_QUESTION_CE_AIFMD_15>

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<ESMA_QUESTION_CE_AIFMD_15>

Q16: What have been the obstacles or barriers to entry of the NPPR to you?

<ESMA_QUESTION_CE_AIFMD_16>

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<ESMA_QUESTION_CE_AIFMD_16>

Q17: What obstacles did you encounter when trying to register through the NPPR?

<ESMA_QUESTION_CE_AIFMD_17>

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<ESMA_QUESTION_CE_AIFMD_17>

Q18: What have been the costs?

<ESMA_QUESTION_CE_AIFMD_18>

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<ESMA_QUESTION_CE_AIFMD_18>

Q19: Have you exited countries since the entry into force of the AIFMD NPPR and, if so, why?

<ESMA_QUESTION_CE_AIFMD_19>

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<ESMA_QUESTION_CE_AIFMD_19>

Q20: Have you been deterred from undertaking private placement and, if so, why?

<ESMA_QUESTION_CE_AIFMD_20>

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<ESMA_QUESTION_CE_AIFMD_20>

Q21: What is the possible impact on competition of an eventual extension of the passport to non-EU AIFMs?

<ESMA_QUESTION_CE_AIFMD_21>

An eventual extension of the passport to non-EU AIFMs would increase the choice of fund products available to professional investors in the EU, and in turn likely promote competition and efficiencies within the European funds industry. A third country passport could therefore have a positive overall impact, but only if applied and enforced correctly. It is critically important that measures be taken to ensure that non-EU AIFMs/ AIFs would be subject to a level of regulatory scrutiny (both during the authorisation process and on an ongoing basis) which is at least equal to that imposed on EU AIFMs/ AIFs, so as to safeguard a genuine level playing field between EU and non-EU jurisdictions.

For example, light-touch regulatory regimes in certain non-EU AIF domiciles facilitates the charging of lower initial and ongoing costs for the establishment and operation of AIFs in those domiciles. Failure to ensure that equal levels



of regulation are applied to EU and non-EU AIFs which avail of the AIFMD passport could result in EU domiciles being undercut on price by non-EU domiciles, with a likely ensuing distortion of the market.

For that reason, we also endorse ESMA's proposal in its Call for Evidence to consider the validity of extending the passport on a country-by-country basis, and in particular would encourage ESMA to take into account reciprocity of market access for EU AIFMs into each such non-EU country.

<ESMA_QUESTION_CE_AIFMD_21>

Q22: What are the risks of an eventual extension of the passport to non-EU AIFMs in relation to market disruptions and investor protection?

<ESMA_QUESTION_CE_AIFMD_22>

In our view, the principal investor protection risk is that if non-EU AIFMs could obtain a passport without being subject to quite the same degree of regulatory scrutiny (in principle and in practice) as applies to EU AIFMs, then investor protection within the EU would be diluted and undermined. We note that Article 37 of AIFMD (addressing the potential authorisation process for non-EU AIFMs) includes various procedural safeguards designed to apply and maintain equivalent standards, in particular through relying on the concept of the Member State of Reference. However, the geographical disconnect between a non-EU AIFM and its Member State of reference, as well as the unavoidable reliance on the local regulator of the non-EU AIFM to assist with supervision and enforcement, creates the potential for standards of regulatory oversight (and accordingly standards of investor protection) to dip below those which apply to EU AIFMs authorised and supervised from within their home Member State. As investor protection is one of the core principles of AIFMD, no steps should be taken towards a third country passport without certainty that the same standards of oversight and AIFMD compliance are applied to AIFMs in the relevant third countries.

In our view, the principal market disruption risk concerns how the concept of the Member State of Reference ("MSoR") will operate in practice following the implementation of a third country passport, including but not limited to the impact on the depositary market.

Article 21.5 currently contemplates that a non-EU AIF, upon securing a marketing passport, would be required to appoint a depositary located in its home jurisdiction, in the home Member State of the AIFM, or in the MSoR.

We believe that the requirement regarding depositary location in the context of the third country passport creates the potential for unnecessary market disruption, risk, uncertainty and confusion for investors. A range of concerns arise in relation to the application of the depositary location requirement in the context of the third country passport:

1. **The Member State of Reference is potentially subject to change and uncertainty.** The process of determining the MSoR is complex, particularly where distribution is envisaged in several Member States, as no single deciding factor on the MSoR is provided. Instead regulators must come to a mutual agreement and in the absence of such agreement, ESMA will arbitrate the decision. The MSoR can also change subject to distribution and management activities in the EU. Consequently, the MSoR concept does not provide a reliable basis for the selection and appointment of a depositary, as changing a depositary is a very significant task which must be carefully planned, executed and notified to investors. A change in depositary is not a project which an AIFM or its investors will want to contemplate frequently, given the costs, disruption and potential risks involved.
2. **The home Member State of the AIFM may not have access to a recognised selection of depositaries.** The provision of depositary services to EU regulatory standards is a highly specialised activity, carrying with it very significant responsibilities and liabilities. Many AIFMs will want to maintain the appointment of depositaries with whom they have existing relationships and are comfortable with from a due diligence perspective. Specialist AIF depositaries with the requisite capabilities are not established in all EU markets and it is entirely possible that the home Member State of the AIFM may not have access to a recognised

selection of depositaries. The current requirement could limit the AIFM's scope to appoint an appropriate depositary specialised in its area of business. This would prove disruptive to markets and run contrary to investors' interests to restrict the choice that an AIFM may have and to force them to appoint a depositary in a particular jurisdiction without a developed depositary business. It was as a result of this concern that Article 61.5 provided that an AIF may appoint a depositary outside of its home Member State until 22 July 2017, provided that the depositary is located in the EU.

3. **Requiring the depositary to be located outside the EU is a higher risk approach.** As currently drafted, the only other option open to non-EU AIFs/AIFMs is to appoint a depositary in the location of the AIF. We do not regard this as an optimal outcome from an investor protection perspective, as it is not immediately apparent that all non-EU jurisdictions would have the appropriate legal and regulatory framework or developed depositary business with the specialised expertise, infrastructure, resources and capacity to carry out depositary duties to AIFMD standards. The appointment of a depositary located outside the EU could in some cases create an unnecessary divergence of depositary eligibility and present greater risks for investors.
4. **Many AIFMs already marketing in the EU will be forced to dismantle existing depositary arrangements causing significant market disruption.** Under Article 36, EU AIFMs marketing non-EU AIFs in the EU will already have appointed a depositary. These AIFMs may consequently be forced to unbundle existing depositary arrangements only recently agreed, creating the unintended consequence of less choice in terms of available depositaries and additional costs in changing depositary. Furthermore, some NPPRs (e.g. Germany, Denmark) require AIFs to appoint a depositary in order to be permitted to market in that jurisdiction. Absent a change in the provisions, the acquisition of a marketing passport would have the effect of requiring some AIFs to change their depositary arrangements, potentially to a non-EU depositary in a case where they are already using an EU-based depositary. There is no evident benefit to investors in requiring an AIFM to appoint a depositary in a non-EU jurisdiction but it is a bizarre and unintended outcome not to permit AIFMs to appoint a depositary in an EU Member State of their choice.
5. **The current requirements would limit the ability of the AIFM to appoint the most appropriate depositary.** The location of an AIF's assets rarely bears (and does not need to bear) any correlation to the domicile of the AIF or the AIFM or the jurisdiction(s) in which the AIF may be marketed. There is no apparent benefit to investors, therefore, in requiring the depositary to be located in one of these jurisdictions, while it would additionally prove disruptive to markets to cause AIFs to move depositary in order to comply with the requirements of Article 21.5 as currently drafted. We propose that any non-EU AIF being marketed to EU investors should be permitted to appoint the most suitably qualified and appropriate depositary specialised in its area of business. Any additional investor concern arising from the AIF being located outside of the EU can be offset by the additional flexibility afforded to AIFMs in their selection of an appropriate depositary.

Consequently, we strongly suggest that in advance of activation of the third country passport, ESMA and the Commission should seek to ensure sufficient flexibility in relation to the location of the depositary within the EU. Ultimately, this would entail a change to the Level 1 text, in which case we propose that the words “*....or in any Member State, so long as the depositary so appointed meets the criteria in Article 21.3 of this Directive*” be added to the end of paragraph b) of Article 21.5.

<ESMA_QUESTION_CE_AIFMD_22>

Q23: Is there any particular non-EU country where, as a consequence of the regulatory environment (financial regulation, supervision, tax and anti-money laundering provisions), an eventual extension of the passport would put EU AIFMs and UCITS management companies at a disadvantage vis-a-vis the AIFMs from that country? Please specify and explain.

<ESMA_QUESTION_CE_AIFMD_23>



We are aware that our membership has experienced local barriers to entry of a fiscal, regulatory and/or operational nature when attempting to market Irish AIFs/ UCITS into certain non-EU jurisdictions. We expect that certain of those members will respond under separate cover and provide specific examples in this regard. However, it is clear to us that a risk does exist that EU AIFMs and UCITS management companies will be placed at a comparative disadvantage if AIFMs from those non-EU countries were to be granted passport access to the EU.

We therefore encourage ESMA to consider equivalence of market access as part of any case-by-case determination of whether to extend the passport to AIFMs/ AIFs from non-EU jurisdictions.

<ESMA_QUESTION_CE_AIFMD_23>

Q24: Is there any particular non-EU country that imposes heavier requirements for EU AIFMs or UCITS management companies in comparison to those that non-EU AIFMs have to comply with in order to do business in the EU? Please specify and explain.

<ESMA_QUESTION_CE_AIFMD_24>

Please see response to Q23.

<ESMA_QUESTION_CE_AIFMD_24>

Q25: Have you experienced difficulties or limitations in establishing or marketing AIFs or UCITS in any non-EU country? Please specify the non-EU country and the specific difficulties or limitations that you have encountered.

<ESMA_QUESTION_CE_AIFMD_25>

Please see response to Q23.

<ESMA_QUESTION_CE_AIFMD_25>

Q26: Do you have evidence showing that existing difficulties or limitations in non-EU countries have deterred fund managers in your jurisdiction from deciding to establish or market AIFs or UCITS they manage in the non-EU country? Please specify the non-EU country and explain the difficulties or limitations.

<ESMA_QUESTION_CE_AIFMD_26>

Please see response to Q23.

<ESMA_QUESTION_CE_AIFMD_26>

Q27: Could you please identify the non-EU countries that, in your opinion, grant market access to EU AIFMs and UCITS management companies under broadly equivalent conditions?

<ESMA_QUESTION_CE_AIFMD_27>

Please see response to Q23.

<ESMA_QUESTION_CE_AIFMD_27>

Q28: What are the conditions that EU AIFMs and UCITS management companies have to comply with in order to manage or market AIFs or UCITS in your jurisdiction? Please specify.

<ESMA_QUESTION_CE_AIFMD_28>

Please see response to Q23.

<ESMA_QUESTION_CE_AIFMD_28>

Q29: In what way is your current regime (regulatory, tax etc.) different from the EU framework? Please explain.

<ESMA_QUESTION_CE_AIFMD_29>

Please see response to Q23.

<ESMA_QUESTION_CE_AIFMD_29>