

Call for evidence

AIFMD passport and third country AIFMs



Responding to this paper

ESMA invites stakeholders to provide information on all matters in this paper and in particular on the specific questions summarised in Annex 1. Responses are most helpful if they:

- respond to the question stated;
- contain a clear rationale; and
- distinguish clearly to which non-EU country the answer refers

ESMA will consider all responses received 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 close of the call for evidence, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. 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 not to disclose the response 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 Legal Notice.

Who should read this paper

- EU and non-EU fund managers and advisors, and their representatives
- EU and non-EU investors and their representatives
- Non-EU securities supervisors



Acronyms used

AIFMD	Directive 2011/61/EU on Alternative Investment Fund Managers
AIFM	Manager of Alternative Investment Funds
AIF	Alternative Investment Fund
ESMA	European Securities and Markets Authority
NCA	National Competent Authority

Table of Contents

1	Executive Summary	5
2	AIFMD: the passport for non-EU AIFMs and the marketing of non-EU AIFs by EU AIFMs	
	6	
2.1	Purpose and background	6
2.2	Criteria to be applied by ESMA	7
2.3	Questions.....	8
2.3.1	Questions on the functioning of the passport for EU AIFMs.....	8
2.3.2	Questions on the functioning of the national private placement regimes.....	9
2.3.3	Questions on the functioning of both regimes.....	10
3	Annexes	12
3.1	Annex 1 – Summary of questions.....	12
3.2	Annex II – Article 67 of the AIFMD	15

1 Executive Summary

Reasons for publication

By 22 July 2015 ESMA has to submit to the European Commission an opinion on:

- the functioning of the EU passport under the AIFMD; and
- the functioning of the marketing of non-EU AIFs by EU AIFMs in the EU and the management and/or marketing of AIFs by non-EU AIFMs in the EU.

ESMA must also issue advice on whether the passporting regime should be extended to the management and/or marketing of AIFs by non-EU AIFMs and to the marketing of non-EU AIFs by EU AIFMs. The aim of this call for evidence is to gather input on the key issues that will determine the orientation of ESMA's opinion.

Contents

Section I explains the background to this call for evidence. Section II sets out the topics on which ESMA is asking for feedback and the questions. Annex I summarises the questions, while Annex II reproduces the text of Article 67 of the AIFMD, which is the legal basis for ESMA's opinion and advice.

Next Steps

ESMA will consider the feedback it receives to this call for evidence in Q1 2015 and expects to deliver the opinion and the advice to the Commission by 22 July 2015.

2 AIFMD: the passport for non-EU AIFMs and the marketing of non-EU AIFs by EU AIFMs

2.1 Purpose and background

1. In accordance with Articles 36 and 42 of the Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD), non-EU AIFMs and non-EU AIFs managed by EU AIFMs are subject to the national private placement regime of each of the Member States where the AIFs are marketed or managed. However, the AIFMD makes provision for the passport to be potentially extended in future. Article 67(1) of the AIFMD establishes that, by 22 July 2015, ESMA shall issue to the European Parliament, the Council and the Commission the following:
 - An opinion on the functioning of the passport for EU AIFMs pursuant to Articles 32 and 33 of the AIFMD and on the functioning of the national private placement regimes set out in Articles 36 and 42 of the AIFMD.
 - An advice on the application of the passport to non-EU AIFMs and AIFs in accordance with the rules set out in Article 35 and Articles 37 to 41 of the AIFMD.
2. Within three months of receipt of positive advice and an opinion from ESMA, and taking into account the criteria of Article 67(2) and the objectives of the AIFMD, the Commission should adopt a delegated act specifying the date when the rules set out in Article 35 and Articles 37 to 41 of the AIFMD become applicable in all Member States. As a consequence, the EU passport would be extended to non-EU AIFs and non-EU AIFMs.
3. In order to produce this opinion and advice, ESMA must look into the elements listed in Article 67(2) of the AIFMD (see annex II), on the basis of the information provided by the national competent authorities (NCAs) about the EU and non-EU AIFMs under their supervision. Indeed, Article 67(3) of the AIFMD requires NCAs to provide information to ESMA quarterly as from 22 July 2013.
4. On 27 March 2014, ESMA submitted to the European Commission the advice on the content of the Level 2 measures that, in accordance with Article 67(5) of the AIFMD, the Commission should adopt in order to specify the contents of the information that NCAs should provide to ESMA quarterly¹. ESMA has received input from NCAs for the period covering from 22 July 2013 to 30 June 2014, and expects to continue receiving this input until the opinion and the advice to the Commission are issued.
5. In addition to the input that ESMA receives from the EU NCAs, ESMA has launched this call for evidence in order to receive information from the EU and the non-EU stakeholders about the issues mentioned in Article 67 of the AIFMD.

¹ The advice can be found here: http://esma.europa.eu/system/files/2014-esma-312 - l2_advice_to_com_article_675_aifmd.pdf

2.2 Criteria to be applied by ESMA

6. In accordance with Article 67(4) of the AIFMD, in order to issue positive advice, ESMA should be convinced that "*no significant obstacles regarding investor protection, market disruption, competition and the monitoring of systemic risk*" impede the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States. Against this background, ESMA should assess the following aspects in relation to the relevant non-EU countries:
 - 1) Investor protection:
 - a) Smooth cooperation between the EU and the non-EU authorities:
 - i. Efficient collaboration in accordance with the provisions of the MoU on supervisory cooperation.
 - ii. Swift collaboration in case of emergency situations.
 - iii. Non-requested information shared with the EU authorities at the initiative of the non-EU authority.
 - b) Obstacles that impede an EU NCA from performing its supervisory duties in a non-EU country:
 - i. Legal limitations for sharing information or performing on-site visits.
 - ii. Lack of cooperation from the non-EU AIFMs.
 - c) Issues of investor protection arisen in the different countries.
 - 2) Risk of market disruption and distortion of competition that would put the EU fund industry at a disadvantage vis-a-vis the fund industry of non-EU countries taking into account the regulatory environment (e.g. financial regulation and supervision, tax, anti-money laundering rules and any general or specific difficulties which EU AIFMs and UCITS managers encounter in establishing themselves or marketing AIFs or UCITS they manage in third countries).
 - 3) Monitoring of systemic risk
 - a) Existence of adequate surveillance of systemic risk in the non-EU country
 - b) Smooth cooperation between EU and non-EU authorities when monitoring systemic risk.

7. It should be noted that ESMA's advice will not treat all non-EU countries as a single block. The advice will distinguish between non-EU countries, so that only the funds or managers of the non-EU countries that satisfy the criteria set out in Article 67(4) of the AIFMD would benefit from the extension of the passport.

2.3 Questions

2.3.1 Questions on the functioning of the passport for EU AIFMs

8. The input sought under this heading refers to the experience of the EU asset management industry and investors on the functioning of the passport for EU AIFMs managing and/or marketing EU AIFs. ESMA would like to receive information on the use made of the passport, the problems on the functioning of the passport and any issues of investor protection that might have occurred.

Q1: Please describe your experience using the AIFMD passport:

- a) Indicate your home Member State
- b) Number of funds marketed in other Member States (please provide a breakdown by host Member State)
- c) Number of funds managed in other Member States (please provide a breakdown by host Member State)

Q2: How have you found the passport application process?

- a) Very satisfactory
- b) Satisfactory
- c) Problems encountered. Please explain

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

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

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

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).

2.3.2 Questions on the functioning of the national private placement regimes

9. ESMA would like to receive information on the experience of the EU and non-EU asset management industries and investors concerning the functioning of the national private placement regimes (i.e. marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the applicable national rules). In particular, ESMA is interested in the views of the EU asset management industry and the investors on issues of compliance with the applicable AIFMD requirements by the non-EU AIFMs or non-EU AIFs and issues of investor protection that might have occurred.

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

- a) 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
- b) Identify the non-EU country of the AIFM and/or the AIF
- c) Number of funds marketed in an EU Member State (please provide a breakdown by Member State)
- d) Number of funds managed in an EU Member State (please breakdown by Member State)

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

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

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

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

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

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.

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).

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

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

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

Q18: What have been the costs?

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

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

2.3.3 Questions on the functioning of both regimes

10. The EU asset management industry and the EU investors are invited to share its experience and observations on the coexistence of both systems (EU passport and national private placement regime). In particular, stakeholders are invited to present their views on the potential impact of market disruptions and distortions in competition in the EU that an eventual extension of the passport to non-EU AIFMs may produce.

11. In addition, ESMA invites the EU asset management industry to share its experience about any general or specific difficulties which EU fund managers may encounter in establishing themselves or marketing AIFs and UCITS they manage in any non-EU country.

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

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

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.

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.

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.



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.

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?

12. Finally, ESMA invites the non-EU supervisors to comment on any general or specific difficulties which EU AIFMs and UCITS management companies may encounter in establishing themselves or marketing or managing AIFs or UCITS in the non-EU countries. The non-EU asset management industry is also invited to respond to these questions.

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.

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

3 Annexes

3.1 Annex 1 – Summary of questions

Q1: Please describe your experience using the AIFMD passport:

- a) Indicate your home Member State
- b) Number of funds marketed in other Member States (please provide a breakdown by host Member State)
- c) Number of funds managed in other Member States (please provide a breakdown by host Member State)

Q2: How have you found the passport application process?

- a) Very satisfactory
- b) Satisfactory
- c) Problems encountered. Please explain

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

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

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

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).

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

- a) 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
- b) Identify the non-EU country of the AIFM and/or the AIF
- c) Number of funds marketed in an EU Member State (please provide a breakdown by Member State)

d) Number of funds managed in an EU Member State (please breakdown by Member State)

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

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

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

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

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

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.

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).

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

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

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

Q18: What have been the costs?

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

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

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

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

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.

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.

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.

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.

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?

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.

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

3.2 Annex II – Article 67 of the AIFMD

Delegated act on the application of Article 35 and Articles 37 to 41

1. By 22 July 2015, ESMA shall issue to, the European Parliament, the Council and the Commission:
 - a) an opinion on the functioning of the passport for EU AIFMs managing and/or marketing EU AIFs pursuant to Articles 32 and 33 and on the functioning of the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States pursuant to the applicable national regimes set out in Articles 36 and 42; and
 - b) advice on the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the rules set out in Article 35 and Articles 37 to 41.
2. ESMA shall base its opinion and advice on the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States, *inter alia*, on:
 - a) as regards the functioning of the passport for EU AIFMs managing and/or marketing EU AIFs:
 - (i) the use made of the passport;
 - (ii) the problems encountered regarding:
 - effective cooperation among competent authorities,
 - effective functioning of the notification system,
 - investor protection,
 - mediation by ESMA, including the number of cases and the effectiveness of the mediation;
 - (iii) the effectiveness of the collection and sharing of information in relation to the monitoring of systemic risks by national competent authorities, ESMA and ESRB;
 - b) as regards the functioning of the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the applicable national regimes:
 - (i) compliance of EU AIFMs with all the requirements established in this Directive with the exception of Article 21;

- (ii) compliance of non-EU AIFMs with Articles 22, 23 and 24 in respect of each AIF marketed by the AIFM and, where relevant, with Articles 26 to 30;
 - (iii) existence and effectiveness of cooperation arrangements for the purpose of systemic risk oversight and in line with international standards between the competent authorities of the Member State where the AIFs are marketed, in so far as applicable, the competent authorities of the home Member State of the EU AIF and the supervisory authorities of the third country where the non-EU AIFM is established and, in so far as applicable, the supervisory authorities of the third country where the non-EU AIF is established;
 - (iv) any issues relating to investor protection that might have occurred;
 - (v) any features of a third-country regulatory and supervisory framework which might prevent the effective exercise by the competent authorities of their supervisory functions under this Directive;
- c) as regards the functioning of both systems, the potential market disruptions and distortions in competition (level playing field) or any general or specific difficulties which EU AIFMs encounter in establishing themselves or marketing AIFs they manage in any third country.
3. To that end, as from the entry into force of the national laws, regulations and administrative provisions necessary to comply with this Directive and until the issuance of the opinion of ESMA referred to in point (a) of paragraph 1, the competent authorities of the Member States shall, quarterly, provide ESMA with information on the AIFMs that are managing and/or marketing AIFs under their supervision, either under the application of the passport regime provided for in this Directive or under their national regimes, and with information needed for the assessment of the elements referred to in paragraph 2.
 4. Where ESMA considers that there are no significant obstacles regarding investor protection, market disruption, competition and the monitoring of systemic risk, impeding the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the rules set out in Article 35 and Articles 37 to 41, it shall issue positive advice in this regard.
 5. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying the contents of the information to be provided pursuant to paragraph 2.
 6. The Commission shall adopt a delegated act within 3 months after having received positive advice and an opinion from ESMA, and taking into account the criteria listed in paragraph 2 and the objectives of this Directive, such as those relating to the internal market, investor protection and the effective monitoring of systemic risk, in

accordance with Article 56 and subject to the conditions of Articles 57 and 58, specifying the date when the rules set out in Article 35 and Articles 37 to 41 become applicable in all Member States.

If there is objection to the delegated act referred to in the first subparagraph in accordance with Article 58, the Commission shall re-adopt the delegated act pursuant to which the rules set out in Article 35 and Articles 37 to 41 shall become applicable in all Member States, in accordance with Article 56 and subject to the conditions of Articles 57 and 58, at a later stage which seems appropriate to it, taking into account the criteria listed in paragraph 2 and the objectives of this Directive, such as those relating to the internal market, investor protection and the effective monitoring of systemic risk.

7. If ESMA has not issued its advice within the time limit referred to in paragraph 1, the Commission shall request the advice to be provided within a new time limit.