



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>

The Association of Real Estate Funds (AREF) represents the UK unlisted real estate funds industry and has 67 member funds with a collective net asset value of €69 billion under management on behalf of their investors. Our members are UK AIFMs that manage UK AIFs, AIFs in other Member States and non-EU AIFs, and market these AIFs in the UK and other Member States.

<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>

Our members market AIFs in a range of Member States. We do not have meaningful breakdown by host Member State, but we are aware of members using the marketing passport in Denmark, Finland, France, Germany, Italy, Ireland, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden and UK.

<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>

Our members' EU AIFs within the scope of our representation are established in UK, Ireland or Luxembourg. We are aware that our members also manage AIFs in other Member States.

<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>

Problems encountered.

Although our members have found the application process satisfactory for fully-formed AIFs, they have experienced problems with new AIFs. It is common for closed-ended real estate AIFs to have a period of capital raising during which investors commit capital, but the AIF is not fully formed until after sufficient the capital has been committed. A problem arises because the AIF needs to be capitalised in order to obtain a passport and for the passport to be accepted in the host Member States, and it needs to be “marketed” in order to raise capital.

The key issue which needs to be addressed is the difference in interpretation of what represents pre-marketing versus marketing. While the UK and Germany take the position that an AIF is not being marketed until there are subscription documents ready to be signed, other jurisdictions (particularly Denmark, Netherlands and Sweden) have a much more restrictive view such that anything beyond a generic company document or teaser is marketing and therefore requires a passport. This is not conducive to the necessary process of negotiation between AIFMs and potential investors which shapes the final terms of a new AIF.

This inconsistency creates a major difficulty and has led to some AIFMs taking the conservative and time consuming approach of preparing full AIF documents in order to get a marketing passport, in the knowledge that the terms will change following negotiations with investors causing the AIFM to go back to their home competent authority with material changes. We understand that other AIFMs have adopted a more liberal stance of assuming that the UK and German approach represents common-sense and a defensible position and they are prepared to run a risk in other jurisdictions.

<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>

Overall our members' experiences has been driven by a patchwork of non-harmonised financial promotions rules which, in some Member States, force AIFMs to review and comply with specific local rules notwithstanding that they have a marketing passport. This is especially burdensome for AIFMs that don't have a branch in the other Member State and will only undertake business with professional investors on a cross-border basis. The end result is that in some Member States there is little practical difference between having the passport and complying with National Private Placement regimes, both are proving to be burdensome.

However, the experience has been satisfactory in some Member States that do not charge additional amounts for access to their markets or impose additional conditions in order to market AIFs there.

<ESMA_QUESTION_CE_AIFMD_3>

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

<ESMA_QUESTION_CE_AIFMD_4>

Our members have highlighted specific difficulties in a number of Member States that impose charges in order to operate the marketing passport in their territory and in France where it has been necessary to appoint a correspondent bank for each AIF. There is a need for greater harmonisation in relation to access to markets under the passports and to prevent some Member States from creating financial or other barriers to their markets.

Some Member States (particularly Austria, Denmark, France, Italy, Latvia, Luxembourg and Malta) require the payment of fees for the marketing of AIFs in their jurisdictions. At a practical level it is often unclear precisely when and how such fees should be paid, with the result that marketing is delayed. Also, these fees can discourage AIFMs which are required to pay without being able to survey investor interest in a potential AIF (see our answer to question 2 where we describe the interaction between AIFMs and potential investors necessary to establish the final terms of an AIF).

France requires the appointment of a correspondent bank for each AIF that an AIFM intends to market in France. This requirement significantly increases the cost of marketing AIFs in France and, although it might be appropriate for collective investment undertakings that target retail investors, it is excessive for AIFs marketed exclusively to professional investors.

Some Member States have a different interpretation of what constitutes an AIF for marketing purposes. For example, an AIF could be constructed of as a plurality of partnerships, in other words an AIF which is a series of parallel partnerships, but which is authorised and marketed as a single AIF. Our members have experienced such a structure being interpreted as a single AIF in some Member States and as a plurality of AIFs in other Member States.

<ESMA_QUESTION_CE_AIFMD_4>

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

<ESMA_QUESTION_CE_AIFMD_5>

Some of our members have been more selective in relation to the Member States in which they intend to operate the passport as a result of the costs charged by those Member States. In some instances our members have withdrawn their initial notification from Member States which charge additional fees and note that in some cases these fees were not known about, and not even enacted under local legislation, at the time of the original notification.

<ESMA_QUESTION_CE_AIFMD_5>

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>

Our members are UK AIFMs that market non-EU AIFs in a range of Member States under Article 36.

<ESMA_QUESTION_CE_AIFMD_7a>

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

<ESMA_QUESTION_CE_AIFMD_7b>

Our members' non-EU AIFs within the scope of our representation are established in Jersey or Guernsey. We are aware that our members also manage AIFs in other third countries.

<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>

Our members have 18 AIFs established in Jersey or Guernsey that are marketed in the EU.

<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>

We do not represent any non-EU AIFMs managing AIFs in the EU.

<ESMA_QUESTION_CE_AIFMD_7d>

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>

One of our members has reported receiving a number of requests and has an average response time of about a week.

<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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<ESMA_QUESTION_CE_AIFMD_9>

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>

Not in respect of the UK. Both the Jersey and Guernsey were early signatories to the ESMA “MOUs” regarding regulatory co-operation with EU NCAs.

<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>

Where National Private Placement Regimes can be accessed with relative ease (for example, Luxembourg) our members have experienced effort and cost that are comparable to operating with the passport.

<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>

There is no consistency in terms of the registration requirements across each Member State with a variety of registration regimes having been implemented since the introduction of the AIFMD. Certain Member States have imposed extremely strict registration requirements, making it almost impossible to market in those jurisdictions under the NPPR (notably France and Italy).

<ESMA_QUESTION_CE_AIFMD_16>

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

<ESMA_QUESTION_CE_AIFMD_17>

In some Member States (for example Denmark, Sweden) our members have experienced prolonged application processes with multiple follow up questions. However these barriers have not been insurmountable and the NCAs in question have been clear and fair in their requests. Also we are aware of the following obstacles that have been encountered: Italy has refused registrations through the NPPR until the passport is made available to non-EU AIFMs; France has refused registration of open-ended AIFs unless the AIFM can benefit from reverse solicitation; there is limited guidance on the scope of reverse solicitation in most Member States; and registration requirements for EU sub-threshold AIFMs appear to be stricter than the requirements for non-EU AIFMs in some Member States (for example, Netherlands).

<ESMA_QUESTION_CE_AIFMD_17>

Q18: What have been the costs?

<ESMA_QUESTION_CE_AIFMD_18>

Variable and ranging from nil up to about €2,500).

<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>

We are aware of AIFMs that are considering discontinuing marketing under the NPPR in some Member States because it is no longer cost effective.

<ESMA_QUESTION_CE_AIFMD_19>

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

<ESMA_QUESTION_CE_AIFMD_20>

We are aware of AIFMs who are no longer actively undertaking private placement in certain Member States because of the increased cost and burden involved.



<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>

We would expect the extension of the passport to non-EU AIFMs to increase competition without undermining the competitive position of EU AIFMs. Potentially the passport will enable more non-EU AIFMs to market AIFs in Member States, therefore increasing the number of AIFMs in the market and increasing investors' global choice of AIFMs and AIFs.

<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>

We think the risks of extending the passport to non-EU AIFMs are likely to be low provided that the non-EU AIFMs operate in third countries with EU-equivalent regulatory environments (financial regulation, supervision, tax and anti-money laundering provisions). Jersey and Guernsey have implemented the necessary regulations to comply fully with the AIFMD. The successful introduction of the passport would provide investors' a greater global choice of AIFMs and AIFs and could lead to a decreased concentration of systemic risk within the EU.

<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>

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<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>



Jersey and Guernsey grant market access to EU AIFMs and UCITS management companies under equivalent conditions to their domestic AIFMs.

<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>

EU AIFMs and UCITS management companies are subjected to the same regulatory requirements as Jersey or Guernsey AIFMs. Moreover, in practice, the regulatory application process will take comfort from the domestic regulatory status of the EU AIFM or UCITS management company because the Jersey or Guernsey Financial Services Commission, as the case may be, will be able to co-operate with the respective EU competent authorities in accessing the fitness, propriety and track record of the principal persons of such companies. In respect of marketing activity, there are already well established regulatory regimes for the circulation in the Channel Islands of foreign fund prospectuses to Channel Island investors with no filing fees and short regulatory response timeframes.

<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>

The regimes in Jersey and Guernsey are both fully equivalent to the EU framework. Jersey and Guernsey have each implemented the necessary regulation to comply fully with AIFMD. Jersey and Guernsey also meet the relevant AIFMD standards as regards compliance with international standards to counter money laundering and terrorist financing as required by the FATF and has committed to effective exchange of information in tax matters in compliance with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital.

<ESMA_QUESTION_CE_AIFMD_29>