



JERSEY FINANCE

VOICE OF THE INTERNATIONAL FINANCE CENTRE

23 September 2011

European Securities and Markets Authority ("ESMA")
103 Rue de Grenelle 75007, PARIS

SUBMITTED ONLINE ON 23 SEPTEMBER 2011

Dear Sir/Madam,

Response to Consultation Paper (the "Consultation Paper") on ESMA's draft technical advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive (the "Directive") in relation to supervision and third countries

A. Jersey Finance

Jersey Finance ("JFL") is the promotional body that represents the finance industry in Jersey. Our key objective is to promote and develop the benefits of Jersey as an international finance centre. The funds sector, alongside banking and fiduciary services, represents one of the three key pillars which underpin Jersey's success as an International Finance Centre. Funds under administration in Jersey are valued at £197 billion.

Jersey's funds industry specialises in funds for institutional, specialist and expert investors. In particular, alternative investments have become increasingly important as a way of supporting inward investment and Jersey has attracted a significant number of venture capital, private equity, mezzanine, real estate and hedge funds.

Jersey is recognised by institutional investors as having a strong and appropriate regulatory environment with significant depth and breadth of professional expertise developed over more than 30 years. Furthermore, the rigour of Jersey's regulatory environment has been recognised by the UK FSA, IOSCO and the FATF. With regard to other regulators, Jersey is a party to the IOSCO Multilateral Memorandum of Understanding and, as regards tax, Jersey has signed a total of 24 Article 26 OECD compliant Tax Information Exchange Agreements of which 10 are with EU Member States.

While the Island of Jersey is in legal terms a third country for the purposes of the EU single market, in practice its finance industry has a long history of trading financial services in the EU single market, notably with the City of London. Meanwhile, the data consistently shows a net inflow of globally sourced funds into the EU via the Channel Islands, which, as the UK's independent Foot Report noted, provided vital net liquidity during the financial crisis of 2008. JFL therefore appreciates this opportunity to help develop EU rules for fund management in a way that ensures the single market is also an open market.



B. Structure of this response

Our general comments are set out in section C of this response and our specific comments are set out in section D of the response.

C. General comments

We welcome the opportunity to comment on ESMA's draft technical advice to the European Commission on possible implementing measures of the AIFMD in relation to supervision and third countries.

Jersey Finance believes that while ESMA has put forward some very sensible proposals in relation to supervision and third countries, there are aspects of the proposals which are deeply concerning. Our concerns relate to the fact that the term 'equivalence' is poorly defined and as such risks over-reaching. Accordingly, we feel that to be able to support ESMA's proposals there is a need to fully understand how these measures will be implemented in practice. Indeed, the proposals remain high level and we are concerned that they leave uncertainty as to the application of criteria and the process and timelines involved in the recognition of third country regulatory AIFMD compliant regimes.

Jersey Finance calls for 'equivalent' to be defined as 'having the same effect as Union Law', with transparent and objective criteria, and the importance of avoiding resource intensive processes. It is absolutely critical that AIFMs based in third countries are given certainty of outcome where they meet clearly and objectively defined criteria by ensuring there is uniformity of assessment across all EU Member states.

There is a need for greater clarity on how third country regulators can apply for the AIFMD regulatory assessment to have the same effect as Union Law and also on the order of priority these requests will be dealt with. We would be most interested to learn how ESMA is proposing to deal with the enormous workload the third country regulation assessments will require and whether a resource plan for a third country assessment execution team has been formulated.

To limit ESMA's resource requirements, we believe it may be helpful and cost efficient if ESMA could appoint a regulator of an individual Member State that has excellent knowledge of the laws and regulations in specific third countries to help with the assessment. For Jersey, we would recommend appointing the FSA to conduct the assessment of our regulation. We also recommend that the findings of such an assessment should be binding for all other EU Member States. This approach of leveraging existing Member States' expertise and relationships with third countries would be consistent with the approach taken in determining equivalence under the Statutory Audit Directive.

Also, as a general observation, we have seen the proposed submissions on this Consultation being prepared by AIMA and by IMA. We concur, in general, with the technical observations made by AIMA with regard to the desirability of adopting e.g. IOSCO standards and not "gold plating" them in a manner not called for by the Level 1 text. We also share the concerns outlined by IMA that, if the 3rd country architecture designed by ESMA does not function efficiently, there will be material detriment to the EU, not only for investors but also for those SMEs which benefit from investment by AIFM and AIFs domiciled offshore.



Specific Comments

Possible Implementing Measures on Delegation (Art 20(1)(c), 20(1)(d) and 20(4))

<p><i>Q1: Do you agree with the above proposal? If not, please give reasons.</i></p>	<p>We agree with the proposals to adopt an IOSCO compliant MMoU in principle. As outlined in our general comments, we are deeply concerned about the lack of clear and objective criteria to define the term 'equivalent' and believe that the principle should be that the entity undertaking portfolio or risk management is subject to "regulation to the same effect as Union Law". We therefore recommend ESMA's final technical advice to the European Commission should be amended to require that regulation and supervision in third countries have the same effect as Union law. A grandfathering period should be introduced in order to ensure that, if a delay in assessment of the legislation of a third country occurs due to for example resource constraints, this does not impact the ability to delegate portfolio or risk management functions to an undertaking based in that third country. With regard to specifics in Box 1, we also have concerns over several of the items referred to under paragraph 4, which appear disproportionate, for example the right to demand on-site inspections and receive documents. Both of these need to be subject to local regulatory and legal constraints. Furthermore, 4e) would appear to fail to recognise individual jurisdictions discretions. The existence of a robust history of enforcement is the relevant test.</p>
<p><i>Q2: In particular, do you support the suggestion to use as a basis for the co-operation arrangements to be signed at EU level at the IOSCO Multilateral Memorandum of Understanding of May 2002 and the IOSCO Technical Committee Principles for Supervisory Co-Operation?</i></p>	<p>We agree with the suggestion to use the IOSCO MMoU of 2002 and the IOSCO Technical Committee Principles for Supervisory Co-operation. However, we understand that IOSCO are reviewing their methodology, thus we recommend that third country regulators are given sufficient time to implement the new methodology so that where the IOSCO assessment based on the new methodology highlights deficiencies, countries should be allowed to remedy these within reasonable timeframes without restricting the ability to delegate a portfolio or risk management function to an undertaking based in that third country.</p>



Possible Implementing Measures on Depositary Art 21 (6)

<p><i>Q3: Do you agree with the above proposal? If not, please give reasons</i></p>	<p>Unfortunately, we cannot agree with these proposals. Level 1 of the AIFMD requires depositaries to be capitalised and regulated to the same effect as the rules applicable within the EU whereas the consultation paper expressly states that capital requirements, operating conditions and regulation must be equivalent to the EU approach specifically to credit institutions or investment firms. Please note that depositaries based in third countries may not be regulated as banks or investment firms but could be regulated under laws that ultimately have the same effect as the specific Directives mentioned. Banks based in third countries may not qualify if there is a mismatch between the requirements in the third country and the EU requirements for credit institutions. This would be unacceptable and therefore the principle of 'regulation to the same effect' should be used in line with the AIFMD level 1 requirement. Care should be taken not to close down depositaries in local markets that are required to give EU investors access to key or developing asset classes.</p>
<p><i>Explanatory text point 8</i></p>	<p>We support that any MMoUs are negotiated centrally by and signed with ESMA provided a framework is implemented where third countries can sign up to such an MMoU without delay. We also believe that where regulators operate under existing bilateral MMoUs these should continue.</p>



<i>Q4: Do you have an alternative proposal on the equivalence criteria to be used instead of those suggested in point b above?</i>	<p>It would be preferable that the level 2 requirements would set out that, in determining whether a regulatory regime of a third country is of the same effect as European Law, that the competent authorities should consider the third country's compliance with relevant international standards, including but not limited to the Basel Core Principles and IOSCO Principles. This would bring a benefit of increased objectivity and transparency, as well as a practical benefit of enabling reliance on existing international assessments as a means of evaluating the degree of compliance, rather than imposing an undefined equivalence procedure which purports to mirror requirements for banking entities and investment firms which may not be workable. We believe specific criteria should be agreed at Level 3 in order to facilitate convergence of regulatory practice between respective third countries and the Union. This could also provide an opportunity for third countries to work with specific EU Member states that have similar regulatory and legal frameworks and terminology, in order to jointly propose applicable Level 3 criteria.</p>
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Possible Implementing Measures on Co-operation between EU and third country competent authorities for the purpose of Article 34(1), 36(1) and 42(1) of the AIFMD

<i>Q5: Do you agree with the above proposal? If not, please give reasons.</i>	<p>Our recommendation would be that participation in the IOSCO MMoU of May 2002 would satisfy this requirement.</p>
<i>Q6: In particular, do you support the suggestion to use as a basis for the cooperation arrangement to be signed at EU level the IOSCO Multilateral Memorandum of Understanding of May 2002 and the IOSCO Technical Committee Principles for Supervisory Co-operation?</i>	<p>We support the use of the IOSCO MMoU of May 2002 and the IOSCO Technical Committee Principles for Supervisory Co-operation for the co-operation arrangement to be signed at EU level subject to the comments provided in our response to Q2.</p>



Possible Implementing Measures on Co-operation arrangements between EU and non-EU competent authorities as required by Articles 35(2), 37(7)(d) and 39(2)(a) of AIFMD.

<i>Q7: Do you agree with the above proposal? If not, please give reasons.</i>	We would like to raise a concern over the proposal in Box 4 paragraph 2. We would recommend that the necessary safeguards required for a third country passport regime are communicated to third country regulators without delay (i.e. now) to ensure that those regulators can assess the standard they must meet and where required make adjustments to their regulatory frameworks. We would like to draw your attention to the statement made in paragraph 4 of page 6 (background and introduction) that “implementing measures have to be in place as from the first day the national laws transposing the AIFMD take effect in 2013”. This statement conflicts with the proposal to delay a decision on passport provisions until 2015.
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Possible Implementing Measures on Member state of reference: authorisation of non-EU AIFMs - Opt-in (Article 37(4))

<i>Q9: Do you have any suggestions on possible further criteria to identify the Member State of reference?</i>	Although we agree with the principle for selecting a member state of reference is, it would be useful for ESMA to provide further clarification as to their criteria of the expression “most effective marketing” means: i.e. whether this would include criteria such as the number of investors targeted, the value of assets raised in respect of jurisdictions or the level of marketing activity carried out in respective EU jurisdictions, and how these criteria would be ordered.
<i>Q10: Do you think that any implementing measures are necessary in the context of Member State of reference given the relatively comprehensive framework in the AIFMD itself?</i>	Jersey Finance would welcome implementing measures to specify how, pursuant to Art 37(4), competent authorities will make the decision about the Member state of reference where more than one Member state of reference is possible. It would be helpful if ESMA could put together a decision tree with a clear path for AIFMs to understand the different steps involved in the decision making process. This would also ensure different regulators adhere to the same process helping to ensure consistency and a level playing field.



<i>Q11: Do you agree with the proposed time period for competent authorities identified as potential authorities of references to contact each other and ESMA?</i>	We agree with the proposed time period.
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Should you have any questions at all regarding the above, or would like to discuss these matters further, please don't hesitate to contact me using the contact details at Appendix 1 below.

Yours faithfully,

P.P. Heather Bestwick
Technical Director



Appendix 1: contact details

Jersey Finance website: www.jerseyfinance.je

Contact details Heather Bestwick, Technical Director Jersey Finance:

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