



Alternative Investment Management Association

Mr Richard Stobo and
Mr. Emmanuel Dumas
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Dear Messrs. Stobo and Dumas

AIMA's response to ESMA's call for evidence - the Alternative Investment Fund Managers Directive (AIFMD or the 'Directive') passport and third country AIFMs

The Alternative Investment Management Association Limited¹ (AIMA) welcomes the opportunity to submit its comments to the European Securities and Markets Authority (ESMA) in relation to its call for evidence - AIFMD passport and third country AIFMs (the 'Consultation Paper').

AIMA represents a wide variety of alternative investment fund managers ('AIFMs'), including many that are established and authorised in various EU Member States ('EU AIFMs') and many that are established outside the EU and have registered funds for marketing in various Member States ('non-EU AIFMs'). EU AIFMs and non-EU AIFMs represented by AIMA manage and market a variety of alternative investment funds ('AIFs') running hedge fund strategies which have been established in various EU Member States ('EU AIFs') or outside the EU ('non-EU AIFs'). AIMA's manager members collectively manage more than \$1.5 trillion in assets. As a result, the Consultation Paper is of particular interest to AIMA membership.

Although our members have a variety of perspectives and opinions on the question of whether and when a passport should be made available with respect to non-EU AIFs managed by EU AIFMs and/or with respect to AIFs managed by non-EU AIFMs, it is fair to say that most have had experiences of the AIFMD passport and national private placement regimes ('NPPRs') that suggest that there are areas where the process could work better.

Article 35

AIMA supports the extension of the passport to be applicable to non-EU AIFs managed by EU AIFMs. AIMA represents members whose assets under management represent approximately 70% of the total hedge fund assets under management across Europe. For historical reasons, the vast majority of the EU-managed hedge funds in existence today have been established in non-EU jurisdictions, principally the Cayman Islands. As a result, hedge funds are disproportionately underrepresented among the population of AIFs (especially when judged against the population of private equity funds and real estate funds) currently potentially available to EU investors as a result of the operation of the passport. Consequently, the availability (or not) of many AIFs managed by EU AIFMs is dependent on the availability and terms of NPPRs which vary substantially from Member State to Member State in respect of their conditions and ease of access and use.

¹ As the global hedge fund association, the Alternative Investment Management Association (AIMA) has over 1,500 corporate members (with over 8,000 individual contacts) worldwide, based in over 50 countries. Members include hedge fund managers, fund of hedge funds managers, prime brokers, legal and accounting firms, investors, fund administrators and independent fund directors.

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The implementation of Article 35 to allow EU AIFMs to market the non-EU AIFs they manage via a passport rather than having to rely on various Member State NPPRs will significantly reduce operational complexity and legal costs. Moreover, fully authorised EU AIFMs are already complying with the requirements of the AIFMD and the marginal additional cost of a full depositary service is not expected to outweigh the expected benefits. AIMA believes that there are not any significant obstacles to the ability of Member States to regulate EU AIFMs with regard to the non-EU AIFs they manage. The competent authorities in major non-EU hedge fund jurisdictions (such as the Cayman Islands) are more than willing and able to cooperate with EU national competent authorities to the fullest extent necessary to ensure full implementation of the Directive. Finally, and most importantly, permitting EU AIFMs to use the passport to market their non-EU AIFs will substantially increase EU investor choice for AIFs pursuing hedge fund strategies.

With respect to the operation of the internal EU passport, however, AIMA believes that changes should be made to discontinue any existing fees or additional requirements being imposed as part of the passporting process and foreclose Member States from making any new requirements for fees or additional requirements for use of the passport, including, but not limited to, any fees or requirements that would apply differentially based on the home jurisdiction of the AIF.

Articles 37-41

We also support the implementation of AIFMD Articles 37-41 to make the option of a passport available to non-EU AIFMs.

However, we acknowledge that the extension of the passport to non-EU AIFMs presents more difficulties than the extension of the passport to EU AIFMs of non-EU AIFs. In particular, if the passport is extended to non-EU AIFMs, those AIFMs which utilise the passport will become authorised AIFMs for the purposes of other pieces of EU regulation, such as the European Market Infrastructure Regulation (EMIR)² and many other existing and pending pieces of legislation, which already contain detailed provisions on how third countries are to be dealt with. If a non-EU AIFM becomes an authorised AIFM within the context of such legislation, there will be instances where it becomes impossible for that AIFM to comply with all legislation that is applicable to it in its home jurisdiction and in the EU. In such instances, the provisions on the conflicts of laws that are present in Article 37(1) of the AIFMD would not be sufficient to address conflicts of laws which arise by virtue of 'authorised AIFMs' being included in the scope of other pieces of EU financial services law.

In addition, when the passport is extended to non-EU AIFMs, we would request that ESMA and the European Commission (Commission), in the context of the review under Article 67 of the AIFMD, consider the following suggestions in order to render the regime workable:

1. Restrict the ability of individual Member States to impose additional requirements or fees in connection with the use of the passport, especially any such requirements or fees that would vary based on the home jurisdiction of the AIFM or the AIF concerned;
2. Construe the impossibility test in Article 37(1)(a) and the equivalence test in Article 37(1)(b) broadly and permit any AIFM that cannot market via the passport by reason of the test in Article 37 to continue to be able to access EU investors through an NPPR; and
3. If ESMA determines to extend the passport on a country-by-country basis, leave the NPPRs available for AIFs and AIFMs from any jurisdiction to which the passport has not been extended and adopt a clear methodology for the consideration in future of the extension of the passport to any such jurisdictions.

² Article 2(8) of EMIR defines 'financial counterparty' to include 'an alternative investment fund managed by AIFMs authorised or registered in accordance with Directive 2011/61/EU'. At present, non-EU AIFMs are therefore not 'financial counterparties' for the purposes of EMIR. If the passport were to be extended to them, non-EU AIFMs that used the passport would need to become authorised under the AIFMD and hence would become subject to the clearing obligations as 'financial counterparties' under EMIR.

We also consider that in order to make the third country regime workable, the following issues with Level 1 text will need to be resolved when ESMA and the Commission come to their review of the AIFMD under Article 69:

1. Allow non-EU AIFMs to appoint a depositary in any Member State to cut down on market disruption and to alleviate concerns about the non-availability of qualified and willing service providers; and
2. Modify the requirements of the Member State of reference determination to make it less likely that the Member State of reference determination will change frequently or without an intentional plan on the part of the AIFM.

Timing in respect of Articles 37-41

Ideally, we would like to see Articles 37-41 implemented and the impossibility and equivalence tests construed broadly, focussing on outcomes rather than particular requirements. However, many consider that, to date, there has not been enough experience with the operation of the Directive in any Member State that might be a Member State of reference for a non-EU AIFM for people to make a full assessment of what aspects of third country laws are likely to impose an impossibility of the type contemplated in Article 37(1)(a) or to judge the likely outcome of an equivalence finding as contemplated by Article 37(1)(b).

Given the current lack of experience with the operation of the AIFMD in practice, ESMA may consider delaying any determination about the extension of the passporting mechanism to third country AIFs. However, rather than delaying the implementation of Article 35 as well as Articles 37-41, we would suggest that ESMA consider suggesting that the Commission proceed with setting a date for the implementation of Article 35 (assuming ESMA was otherwise going to provide a favourable opinion and advice to this effect anyway) but that it not proceed at this time with setting a date for the implementation of Articles 37-41, instead setting a date for further consideration of the topic in the future.

Article 67 requires the Commission to specify a date for Articles 35 and 37-41 of the AIFMD to become applicable but the provision need not be read to require that all of the relevant Articles would become applicable on the same date. The implementation of Article 35 to allow EU AIFMs to market the non-EU AIFs they manage via a passport rather than having to rely on various Member State NPPRs will significantly reduce operational complexity and legal costs arising because of the divergences among Member States in the availability of and requirements for NPPRs and the additional cost of a full depositary service is not expected to outweigh the expected benefits. Article 67 can be read to allow a date to be set for the applicability of Article 35 and a different date to be set for the applicability of Articles 37-41. We would therefore suggest that it would be prudent to set an earlier date for the applicability of Article 35 and to review the functioning of the passport and the possible extension to non-EU AIFMs in 2017 when the review of the Directive envisaged in Article 69 is undertaken.

Either or both of the above suggestions would allow time for all of the entities involved (non-EU AIFMs, third country competent authorities, EU national competent authorities, ESMA and the Commission) to gain further experience with the operation of the Directive in various Member States and the operation of the various cooperation arrangements. We request that ESMA confirm our understanding that the natural extension of this outcome would be that the three year period contemplated by Article 68 would not start to run at the date of the implementation of Article 35 alone, as Article 68 refers to Articles 35 and Articles 37-41 having become applicable in all Member States in the conjunctive. Thus if Article 35 has become applicable but Articles 37-41 have not, the three year period cannot begin.

In the event that ESMA determines to consider the extension of the passport on a country by country basis as part of its advice, we would welcome ESMA making it clear what the procedure would be going forward for having additional countries approved and granted access to the passport. We would also welcome ESMA's confirmation that, if the passport is made available to AIFMs or AIFs from some non-EU jurisdictions but not others, the three year period in Article 68 would not start



with respect to AIFMs or AIFs from any jurisdiction where the passport has not been made available and that the NPPRs would not be required to be discontinued with respect to any AIFMs or AIFs from any such jurisdictions unless and until the passport is made available to AIFMs and AIFs from such jurisdictions.

Need for continuation of NPPRs

As noted above, we support the implementation of Articles 37-41 AIFMD to make the option of a passport available to non-EU AIFMs. However, we also believe that the NPPRs should continue to remain available (and should not be shut down as contemplated in Article 68) to accommodate any non-EU AIFMs that are not able to utilise the passport as a result of the passport not being turned on with respect to the AIFM's home jurisdiction or as a result of the operation of the requirements in Article 37(2), especially if the impossibility and equivalence requirements are to be construed narrowly.

Functioning of the internal EU passport

Regardless of ESMA's ultimate conclusions on whether to provide a positive advice about the extension of the passport at the end of this consultation process, we respectfully urge ESMA to:

1. Seek to discontinue any existing fees or additional requirements being imposed as part of the passporting process and foreclose Member States from making any new requirements for fees or additional requirements for use of the EU passport; and
2. Continue to provide additional guidance in the form of Q&A's in respect of how AIFMs should complete the Annex IV systemic risk reporting forms with a view to reducing the number of inconsistencies between Member States and to improve the quality of the data ESMA ultimately receives.

Conclusion

AIMA members have encountered problems with the functioning of the internal EU passport and have made a detailed submission related to these problems on a separate occasion (letter attached). The problems mainly relate to the levying of fees on passported funds by a number of competent authorities as well as the introduction of additional requirements by host competent authorities which we believe are not in line with the Directive.

As regards the issue of introducing a passport for third country funds, we perceive the extension of such a mechanism to funds managed by EU AIFMs as non-problematic, fair, requiring little additional cost and achievable within a short timeframe. More time may be required to consider extending a full passport to fund managed by non-EU AIFMs. The entire passporting mechanism foreseen in Articles 37 to 41 of the Directive may need to be reviewed at the level of the primary legislation in order to obtain a more workable regime. We also strongly support a continued maintenance of national private placement regimes in parallel to any passporting arrangements for third country managers.

We hope you find our comments useful and would be more than happy to answer any questions you may have in relation to this submission. The responses to the detailed questions posed in the consultation document can be found in the *Appendix* to this letter.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Jiří Król", is written over a light blue circular stamp.

Jiří Król
Deputy Chief Executive Officer
Head of Government & Regulatory Affairs



Appendix³

Q1: Please describe your experience using the AIFMD passport:

a) Indicate your home Member State

AIMA represents a broad variety of hedge fund managers that have AIFMs in various different member states as well as non-EU countries. AIFMs that are members of AIMA are marketing a variety of funds in Member States.

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

See response to a) above.

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

See response to a) above.

Q2: How have you found the passport application process?

a) Very satisfactory _____

b) Satisfactory _____

c) Problems encountered. ☒X Please explain

Please see AIMA's response to Question 4 below.

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

As far as we are aware, our members have generally been satisfied with using the AIFMD passport, except for the difficulties encountered (see response to Question 4).

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

We understand that several Member States are charging authorised EU AIFMs to market EU AIFs in their jurisdictions under the AIFMD passport as well as imposing additional conditions, such as a requirement to appoint a local paying agent. Other Member States are imposing additional conditions or substance reviews as part of the notification process. AIMA considers that this is at odds with the harmonisation aim of the AIFMD and inconsistent with the Level 1 text. Accordingly, Member States should not be permitted to impose additional fees or conditions on EU AIFMs which are operating under the AIFMD passport. The passport should not be subject to country-by-country gold-plating but rather represent a single harmonised set of requirements across the EU as was envisaged in the Level 1 text. Further, if ESMA determines to extend the passport on a country-by-country basis, we would prefer that it leaves the NPPRs available for AIFs and AIFMs (including EU AIFMs managing EU AIFs) from any jurisdiction to which the passport has not been extended and adopts a clear methodology for the consideration in future of the extension of the passport to any such jurisdiction.

AIMA has been in correspondence with the Commission regarding the imposition of additional requirements on the use of the AIFMD passport by some Member States. A copy of that correspondence was sent to ESMA in a letter dated 14 March 2014. In that correspondence, we

³ We have responded to the questions from the Consultation Paper in the order they appear in the Consultation Paper. However, for efficiency of reading, we have omitted any questions on which we had "no comment" but have left the numbering as it was in the Consultation Paper for your convenience.



explained why we consider that the imposition of fees and any other additional requirements on the operation of the AIFMD passport are contrary to the terms of the AIFMD, are likely to contribute to regulatory divergence and are likely to act as a disincentive to EU AIFMs looking to operate on a cross-border basis in the EU. Although many of these costs may not seem significant, they do add up as many of the fees are charged on a per fund and annual basis. For small funds, or funds with relatively few investors from a particular Member State, the costs will seem disproportionate from a cost benefit perspective. As a consequence, many funds may not be available to investors in those jurisdictions where the additional requirements or fees are acting as a barrier to entry.

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

Due to the additional conditions being imposed by certain Member States (see response to Question 4), some of our manager members have been deterred from using the passport in certain countries where they feel that the cost of the additional requirements imposed by the Member State will outweigh the benefit of being able to use the passport to market in that Member State.

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).

We are not aware of any particular complaints.

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 (marketing of AIFs by non-EU AIFMs in a Member State) of the AIFMD

AIMA's members include both entities that are marketing under Article 36 and entities that are marketing under Article 42.

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

We represent managers established in a variety of major fund management jurisdictions, including as the United Kingdom, the United States, Hong Kong and Switzerland. The non-EU AIFs managed by our members are domiciled in a variety of jurisdictions, including, but not limited to, the United States, the Cayman Islands, the British Virgin Islands, Jersey and the Isle of Man.

AIMA represents members whose assets under management represent approximately 70% of the total hedge fund assets under management across Europe. For historical reasons, the vast majority of the EU-managed hedge funds in existence today have been established in non-EU jurisdictions, principally the Cayman Islands. As a result, hedge funds are disproportionately underrepresented among the population of AIFs (especially when judged against the population of private equity funds and real estate funds) currently potentially available to EU investors as a result of the operation of the passport. Consequently, the availability (or not) of many AIFs managed by EU AIFMs is dependent on the availability and terms of NPPRs which vary substantially from Member State to Member State in respect of their conditions and ease of access and use.

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

We have generally found that the number of our manager members that are marketing funds in an EU Member State has decreased in proportion to the extent of the additional requirements that have been imposed by the particular Member State with respect to its NPPR.

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



We represent EU AIFMs that manage funds in a variety of EU jurisdictions, including Ireland, Luxembourg and Malta.

e) Number of funds managed in an EU Member State by a non-EU AIFM (please breakdown by Member State)

We also represent some non-EU AIFMs that manage funds in the EU, including in Ireland or Luxembourg.

We note that Article 42 relates to permission for marketing in the EU of AIFs managed by a non-EU AIFM and not permission for management, which is not covered by the AIFMD.

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

We are aware of some potential issues in Hong Kong but there is a pending consultation on regulatory changes to change the laws there to ensure the SFC is able to comply with the required cooperation arrangements.

Separately, we would note that non-EU jurisdictions such as Switzerland, Jersey and the Cayman Islands have taken (or plan to take) affirmative steps to align their regimes with the AIFMD.

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.).

AIMA is unaware of any particular issues.

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

The NPPRs have made it possible for European professional investors to continue to access certain non-EU AIFs. We have heard from our members that the introduction of the AIFMD has prompted many AIFMs to cease offering AIF products to European professional investors, or where rules are sufficiently clear, to rely exclusively on reverse solicitation. This has served to decrease the choice of products on offer to European professional investors. The NPPRs have at least made it possible for non-EU AIFMs (and EU AIFMs in respect of their non-EU AIFs) to continue to access those countries which have adopted an NPPR, although see our response to Question 16.

We consider that the continued availability of the NPPRs is of great importance to European professional investors who benefit from the increased choice of AIFs that are available for their investments. We would welcome an indefinite maintenance of the NPPRs currently in place in the absence of a robust and well-tested third country passport that is workable for all major fund management jurisdictions.

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

The fact that some countries have not adopted an NPPR is a clear barrier to entry for non-EU AIFMs and EU AIFMs of non-EU AIFs. However, even in those EU jurisdictions that have adopted an NPPR, in some countries the requirements have been gold-plated to such an extent that it is very difficult for managers to comply with the requirements imposed by those countries. The additional requirements imposed by some Member States are in many instances disproportionate and so costly for managers that they act as a deterrent to accessing that particular country. In certain instances the conditions imposed by some countries are so onerous with that it makes their NPPRs go beyond being a deterrent and in fact makes such NPPRs virtually impossible to use.

In addition, the lack of harmonisation generally across the EU in relation to the NPPRs has also led to much confusion from investment managers and investors alike and has served as an obstacle to

distribution of non-EU AIFs into the EU. A key issue has been the lack of clarity from EU Member States as to where the line between marketing and reverse solicitation is. We have been advised of several instances where our members have been approached by European investors who want to access non-EU AIFs but are being prevented from doing so as many non-EU AIFs are refusing money from EU investors. Even though they would appear to be within the definition of a reverse solicitation and these investors have clearly initiated contact with the AIFM of these non-EU AIFs, the lack of clarity and harmonisation across the EU in relation to the NPPRs as to what constitutes marketing/reverse solicitation and the potential liability involved for the AIFM have caused a number of non-EU AIFMs to refuse subscriptions from EU investors altogether, even if it is at the investor's request.

Another concern with the NPPRs under Article 42 is the need to report to each Member State in which an AIF is being marketed. This would be fine if all Member States were adhering to a single set of reporting requirements and working from a single set of interpretations about how responses should be made to individual questions on the Annex IV systemic risk reporting form. However, this is not the case. There is a division among Member States on many reporting related matters, not the least of which is whether and to what extent they will seek the additional information suggested in the ESMA opinion of 1 October 2013 (ESMA/2013/1340). The compliance costs and operational burdens of understanding and complying with the nuances of the reporting requirements in multiple Member States is a significant deterrent to AIFMs who might otherwise seek to market in multiple Member States.

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

Please see the response to Question 16.

Q18: What have been the costs?

The costs associated with the NPPRs vary significantly between Member States. Both the Article 36 and the Article 42 regime require initial and ongoing compliance costs. In the context of the Article 42 regime, the initial and ongoing costs of Annex IV reporting can be large due to the nuances of each different Member State's reporting requirements. In this regard, we welcome the Q&A's issued by ESMA in relation to reporting and encourage the continuation of ESMA's efforts to harmonise the reporting requirements across Member States.

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

We have heard from our members that some AIFMs have exited countries that have gold-plated their NPPRs to such an extent that it has made the marketing of their AIFs into those countries too costly or too difficult from a compliance perspective, or where reliance on uncertain rules surrounding reverse solicitation is considered too risky. Equally, and as with our response to Question 15, we have heard from our members that whilst some AIFMs have not necessarily exited countries in which they have existing investors, they have ceased any further 'marketing' within the Article 4(x) definition of the AIFMD, relying instead only on reverse solicitation.

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

As with our response to Question 19, we have heard from our members that some AIFMs have been deterred from marketing in countries that have gold plated their NPPRs to such an extent that it has made the marketing of their AIFs into those country too costly or too difficult from a compliance perspective.

Even where no additional requirements have been imposed at a national level, the costs of merely complying with the bare minimum requirements have dissuaded many AIFMs from seeking to market in the EU under the NPPRs. Again, please see the response to Question 19 concerning those AIFMs which have accordingly ceased all 'marketing' (within the definition of the AIFMD) in the EU.



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

AIMA members are supportive of the extension of the passport as contemplated in Article 67 of the AIFMD to both EU AIFMs of non-EU AIFs as well as non-EU AIFMs and we consider that an extension of the passport to non-EU AIFMs will have a positive impact on competition. The extension of the passport to non-EU AIFMs will create a more level playing field for EU and non-EU AIFM to access EU professional investors and provide investors with greater choice. The extension of the passport will also increase internal market competition and efficiency as well as bringing a greater number of AIFMs into the EU, with the additional economic benefits that would entail.

As noted in our answer to Question 18, the disparity amongst Member States in their approaches to Annex IV reporting have made the use of the NPPRs by non-EU AIFMs quite costly and time consuming. Extending the passport to non-EU AIFMs would mean that non-EU AIFMs would only be required to report to their Member State of reference. This would not only decrease the burden of compiling multiple reports for those non-EU AIFMs that market AIFs in multiple Member States but also decrease the burden on regulators of processing so many reports.

However, the ideal and theoretical benefits discussed above will depend on steps being taken to ensure that any extension of a passport to non-EU AIFMs (and EU AIFMs managing non-EU AIFs) does not lead to the type of national gold-plating discussed in Question 4 and Question 16 above. For a non-EU AIFM passport to gain meaningful traction, it will need to offer genuine harmonised market access and freedom of competition.

Although AIMA does support the extension of the passport and the implementation of Article 35 and Articles 37-41, given the current lack of experience with the operation of the AIFMD in practice, ESMA might consider delaying any determination about the extension of Article 35 and Articles 37-41. Rather than delaying the implementation of Article 35 as well as Articles 37-41, we would suggest that ESMA consider suggesting that the Commission proceed with setting a date for the implementation of Article 35 (assuming ESMA was going to provide a favourable opinion and advice to this effect anyway) but that it not proceed at this time with setting a date for the implementation of Articles 37-41, instead setting a date for further consideration of the topic in the future.

Article 67 requires the Commission to specify a date for Articles 35 and 37-41 of the AIFMD to become applicable but the provision need not be read to require that all of the relevant Articles would become applicable on the same date. The implementation of Article 35 to allow EU AIFMs to market the non-EU AIFs they manage via a passport rather than having to rely on various Member State NPPRs will significantly reduce operational complexity and legal costs arising because of the divergences among Member States in the availability of and requirements for NPPRs and the additional cost of a full depositary service is not expected to outweigh the expected benefits. Article 67 can be read to allow a date to be set for the applicability of Article 35 and a different date to be set for the applicability of Articles 37-41.

Either or both of the above suggestions would allow time for all of the entities involved (non-EU AIFMs, third country competent authorities, EU national competent authorities, ESMA and the Commission) to gain further experience with the operation of the Directive in various Member States and the operation of the various cooperation arrangements. We request that ESMA confirm our understanding that the natural extension of this outcome would be that the three year period contemplated by Article 68 would not start to run at the date of the implementation of Article 35 alone, as Article 68 refers to Articles 35 and Articles 37-41 having become applicable in all Member States in the conjunctive. Thus if Article 35 has become applicable but Articles 37-41 have not, the three year period cannot begin.

In the event that ESMA considers the extension of the passport on a country by country basis as part of its advice, we would welcome ESMA making it clear what the procedure would be going forward for having additional countries approved and granted access to the passport. We would also welcome ESMA's confirmation that, if the passport is made available to AIFMs or AIFs from some non-EU jurisdictions but not others, the three year period in Article 68 would not start with respect



to AIFMs or AIFs from any jurisdiction where the passport has not been made available and that the NPPRs would not be required to be discontinued with respect to any AIFMs or AIFs from any such jurisdictions unless and until the passport is made available to AIFMs and AIFs from such jurisdictions.

As noted above, we support the implementation of Articles 37-41 AIFMD to make the option of a passport available to non-EU AIFMs. However, we also believe that the NPPRs should continue to remain available (and should not be shut down as contemplated in Article 68) to accommodate any non-EU AIFMs that are not able to utilise the passport as a result of the passport not being turned on with respect to the AIFM's home jurisdiction or as a result of the operation of the requirements in Article 37(2), especially if the impossibility and equivalence requirements are to be construed narrowly.

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

We do not foresee any major or lasting risks in relation to investor protection from extending the passport to non-EU AIFMs.

The extension of the passport is likely to lead to greater harmonisation across jurisdictions of the investor protection requirements. Many jurisdictions, such as Switzerland and Jersey, have already implemented AIFMD compliant regimes and market disruption in these countries is therefore likely to be minimal.

If the passport is extended it would cause less market disruption if the rules regarding the location of depositaries were to be made less restrictive. In particular, many of our EU manager members that are marketing non-EU AIFs in the EU via Article 36 have appointed depositary-lite providers within the EU but not necessarily within the home Member State of the AIFM. If the passport is extended for their non-EU AIFs, it would cause less market disruption if they were able to retain their depositary-lite provider and expand their activities so as to comply with the whole of Article 21 of the AIFMD (with the exception of Article 21(5)(b)) rather than needing to appoint an entirely new entity which is located in either their home Member State or the country where the AIF is domiciled, where depositaries may be limited in numbers.

Our members also consider that the Member State of reference regime is also likely to prove problematic as the identity of the Member State of reference is capable of changing over time which, if that occurs, will cause major operational costs and disruptions for the AIFM which will effectively have to re-do the authorisation and passporting exercises in the new Member State of reference.

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.

We are not aware of any particular non-EU countries where an extension of the passport would result in a disadvantage for EU AIFMs and UCITS management companies.

We note that this Question as well as Questions 24-27 refer not only to AIFMs but also to UCITS management companies. The call for evidence states that "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." This appears to be based on Article 67(2)(c), which states:

"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:

- (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.”

The Level 1 text of the AIFMD therefore appears to consider only the difficulties EU AIFMs may have and does not extend to the broader asset management community.

In relation to Questions 23-27 we also note that Article 67 of the AIFMD does not give ESMA a mandate to consider the reciprocity of third country regimes as a condition to extending the marketing passport to any third country. Article 67(2)(c), set out above, does not contain any direct or implied consideration of or requirement for reciprocity. It only makes reference to competition within the internal market. Furthermore, Article 67(4) of the AIFMD provides that:

“Where ESMA considers that there is 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.”

This provision does not contain any requirement for reciprocal marketing access as a condition to extending the marketing passport to any third country. The reference to “competition”, in the context of Article 67(4), is to harmonised internal marketing across the EU and is not an assessment of marketing within non-EU countries. Article 67(2)(c) refers exclusively to the EU internal market alone and does not refer to at all to reciprocal marketing access for EU AIFMs to third countries. The reference to ‘any third country’ in the second part of Article 67(2)(c) was put into the Level 1 text by the legislator in order to address the possibility that EU AIFMs managing and/or marketing non-EU AIFs within the EU under Article 36 may have experienced difficulties becoming authorised as AIFMs in their home Member State. We therefore do not consider that reciprocity should be a consideration in the extension of the passport to third country AIFMs.

The references in Articles 67(2) and 67(4) to competition should be read to consider level playing fields within the EU and the way EU rules would apply to non-EU AIFMs seeking to compete in the market for EU investors. The references to competition should not be expanded to consider the ways that EU AIFMs compete in markets outside the EU. As noted above, reciprocity is not a relevant factor in the Level 1 text.

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.

We are not aware of any particular non-EU countries imposing heavier requirements with respect to the marketing of funds to professional investors. However, as mentioned in our response to Question 23, due to the wording of Article 67 we do not consider that reciprocity should be a consideration in the extension of the passport to third country AIFMs. We also do not consider it to be necessary that this Question refers to UCITS management companies as Article 67(2)(c) of the AIFMD only refers to EU AIFMs and does not extend to the broader asset management community.

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.

We are not aware of any particular difficulties or limitations in establishing or marketing AIFs or UCITS in any non-EU country. However, as mentioned in our response to Question 23, due to the wording of Article 67 we do not consider that reciprocity should be a consideration in the extension of the passport to third country AIFMs. We also do not consider it to be necessary that this question



refers to UCITS management companies as Article 67(2)(c) of the AIFMD only refers to EU AIFMs and does not extend to the broader asset management community.

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.

As mentioned in our response to Question 23, due to the wording of Article 67 we do not consider that reciprocity should be a consideration in the extension of the passport to third country AIFMs. We also do not consider it to be necessary that this Question refers to UCITS management companies as Article 67(2)(c) of the AIFMD only refers to EU AIFMs and does not extend to the broader asset management community.

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?

As mentioned in our response to Question 23, due to the wording of Article 67 we do not consider that reciprocity should be a consideration in the extension of the passport to third country AIFMs. We also do not consider it to be necessary that this Question refers to UCITS management companies as Article 67(2)(c) of the AIFMD only refers to EU AIFMs and does not extend to the broader asset management community.