



European Securities and  
Markets Authority

## Final report

ESMA's technical advice to the European Commission on the information that competent authorities should provide to ESMA pursuant to Article 67(3) of the AIFMD



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## **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

## **I. Executive Summary**

### **Reasons for publication**

ESMA is issuing this technical advice in response to the mandate received from the European Commission on 20 December 2013 for advice on the possible content of the delegated act required by Article 67(5) of the AIFMD, concerning the information that EU competent authorities have to provide quarterly to ESMA pursuant to Article 67(3) of the Directive. This information is needed in order to allow ESMA to produce the opinion and the advice required in Article 67(1) of the AIFMD, in relation to the possible extension of the AIFMD passport to non-EU AIFs and non-EU AIFMs.

### **Contents**

Section II describes the background of the proposal. Section III specifies the timing for the provision of the information to ESMA and lists the information that the competent authorities should provide quarterly to ESMA. The list of information is divided into three parts: the first refers to the information about the functioning of the passport for EU AIFMs; the second deals with the functioning of the national private placement regime for non-EU AIFs and non-EU AIFMs; and the third refers to the issues arising from the functioning of both systems. Finally, Section IV reproduces the mandate for advice issued by the European Commission.

### **Next steps**

ESMA will cooperate closely with the European Commission in order to facilitate an expeditious adoption of the delegated act required by Article 67(5) of the AIFMD.

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## II. Background

### 1. Extension of the passport rules to non-EU AIFs and non-EU AIFMs

1. Under the current rules of the AIFMD, EU AIFMs benefit from the EU passport when managing and marketing EU AIFs in the EU. Non-EU AIFs and non-EU AIFMs, on the contrary, are subject to the national private placement regime of each of the Member States where they market or manage AIFs. However, the AIFMD makes provision for the passport to be potentially extended in future.
2. In particular, 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:
  - a) 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.
  - b) An advice on the application of the passport to third country AIFMs and AIFs in accordance with the rules set out in Article 35 and Articles 37 to 41 of the AIFMD.
3. Within three months of receipt of a positive advice and opinion from ESMA, the Commission shall 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.
4. In order to produce this opinion and advice, ESMA shall base its assessment on information provided by the NCAs about the EU and non-EU AIFMs under their supervision. For this purpose, Article 67(3) of the AIFMD requires NCAs to provide information to ESMA quarterly as from 22 July 2013.
5. Article 67(5) of the AIFMD establishes that the European Commission shall adopt, by means of delegated acts, measures specifying the contents of the information that NCAs should provide to ESMA.
6. On 20 December 2013, the Commission requested ESMA's advice on the content of the delegated act envisaged in Article 67(5) of the AIFMD. The Commission asked ESMA to deliver the advice by 30 April 2014.

### 2. Information to be provided to ESMA

7. Article 67(2) lists a number of criteria on which ESMA should base the opinion and the advice. On the basis of this list, and following the mandate for advice of 20 December 2013, it is proposed that the Commission adopt a delegated act requiring NCAs to provide quarterly to ESMA the information listed in Section III.
8. NCAs from Member States that have not yet transposed the AIFMD are expected to provide the information as soon as the AIFMD is transposed in their legal systems.
9. Taking into account that the delegated act will only concern the NCAs that have to provide ESMA with the information, and will not impose burdens on market participants, ESMA does

not consider it appropriate to conduct a cost-benefit analysis or to consult on the proposed advice.

10. NCAs will have information on the majority of the items listed in Section III. However, to supplement the information NCAs may wish to consider seeking input from the national industry associations, in particular for responding to points 42 to 46.

### III. Possible content of the delegated act required by Article 67(5) of the AIFMD

1. The EU competent authorities should provide the information listed below quarterly to ESMA, in relation to the AIFMs that are managing and/or marketing AIFs under their supervision, either under the application of the passport regime provided for in the AIFMD or under the national private placement regimes.
2. Taking into account the nature of the information in points 42 to 46, ESMA would expect to receive the relevant input from NCAs every two quarters.
3. The competent authorities should provide ESMA with the information listed below according to the following schedule:

Period/Quarter	Deadline for delivery of the information
22 July 2013 – 31 March 2014	19 May 2014 (including points 42 to 46 of the annex)
1 April 2014 – 30 June 2014	8 August 2014
1 July 2014 – 30 September 2014	31 October 2014 (including points 42 to 46 of the annex)
1 October 2014 – 31 December 2014	31 January 2015
1 January 2015 – 31 March 2015	30 April 2015 (including points 42 to 46 of the annex)

#### III.I. Information on the functioning of the passport for EU AIFMs managing and/or marketing EU AIFs

1. Number of AIFMs authorised in accordance with Article 7 AIFMD.
2. Number of AIFMs authorised in accordance with Article 7 AIFMD that use the EU passport for marketing AIFs and number of AIFs, including sub-funds of umbrella AIFs<sup>1</sup>, notified for marketing in other EU Member States in accordance with Article 32 AIFMD (including a breakdown by Member State).
3. Number of AIFMs authorised that use the EU passport for managing AIFs and number of AIFs, including sub-funds of umbrella AIFs, managed in other EU Member States in accordance with Article 33 AIFMD (breakdown by Member State).

<sup>1</sup> In the total figure of AIFs the umbrella funds should not be counted.

4. Form of cross-border management (Article 33(1) AIFMD):
  - i) number of AIFMs that manage AIFs in other EU Member States by establishing a branch;
  - ii) number of AIFMs that manage AIFs in other EU Member States directly.
5. Number of cases in which your authority has notified to the home competent authority a situation as described in Article 45(5) AIFMD.
6. Number of cases in which your authority, after being notified as described in Article 45(5) AIFMD, has taken the measures mentioned in Article 45(5) AIFMD.
7. Number of cases in which your authority, after notifying to the home competent authority a situation as described in Article 45(5) AIFMD, has taken the measures mentioned in Article 45(6) AIFMD.
8. Number of cases in which your authority has notified to the home competent authority a situation as described in Article 45(7) AIFMD.
9. Number of cases in which your authority, after being notified as described in Article 45(7) AIFMD by a host authority, has taken appropriate measures to tackle the situation, as mentioned in Article 45(7) AIFMD.
10. Number of cases in which your authority, after notifying to the home competent authority a situation as described in Article 45(7) AIFMD, has taken the measures mentioned in Article 45(8) AIFMD.
11. Number of notifications sent and received under Article 50(5) AIFMD. Actions taken as a consequence.
12. Number of requests for assistance, including exchange of information, issued by your authority.
  - a) Number of requests rejected and reasons for doing so.
  - b) Degree of satisfaction with the assistance received
    - Very satisfied
    - Satisfied
    - Difficulties encountered. Please explain
  - c) Average time of response
13. Number of requests for assistance that your authority has received from EU NCAs.
  - a) Number of requests rejected and reasons for doing so.
  - b) Average time of response
14. Number of on-the-spot verifications or investigations that your authority has undertaken in another Member State, in accordance with Article 54(1) AIFMD.
15. Average time between the receipt of the complete notification file from an AIFM and the moment your authority notifies the host NCA.

16. Average time for notification to the AIFM that it can undertake cross-border activities, from the date of the transmission of the notification file.
17. Indicate problems encountered in the notification, either as home or host authority. In particular, number of notifications on which your authority has asked the authority of the home Member State for clarification; number of notifications that led to a dispute with the authority of the home / host Member State.
18. Indicate whether there have been issues of investor protection in relation to AIFs marketed or managed from another Member State, including AIFs marketed under Article 43. In particular, indicate the following:
19. Number of complaints addressed to your authority from investors in relation to AIFs marketed or managed from another Member State. Reasons invoked and how they were solved.
20. Evidence of lack of clarity among investors as regards the distribution of supervisory tasks between the home and host NCAs.
21. Indicate any issues related to the functioning of the arrangements made by the AIFM for the marketing of AIFs and the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, as established in point (h) of Annex IV AIFMD.
22. In case your authority has asked for the mediation of ESMA, please indicate the degree of satisfaction with the mediation
  - Very satisfied
  - Satisfied
  - Difficulties encountered. Please explain
23. Number of occasions where your authority has received information from another NCA in relation to the monitoring of systemic risk. Please distinguish between information received:
  - a) in accordance with Article 25(2), first sentence of the AIFMD (recurring information made available from other NCAs);
  - b) in accordance with Article 25(2), second sentence of the AIFMD (bilateral information on important sources of counterparty risk); and
  - c) in accordance with Article 53 of the AIFMD (ad-hoc information bilaterally shared from another NCA).
24. Number of occasions where your authority has shared information with other NCAs in relation to the monitoring of systemic risk. Please distinguish between information received:
  - a) in accordance with Article 25 of the AIFMD (regular reporting information made available to other NCAs); and
  - b) in accordance with Article 53 of the AIFMD (ad-hoc information bilaterally shared with another NCA).

### **III.II. Information regarding 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**

Please indicate whether your national legislation allows:

- a) the marketing of non-EU AIFs by EU AIFMs, in accordance with Article 36(1) AIFMD
- b) the marketing of AIFs by non-EU AIFMs, in accordance with Article 42(1) AIFMD
- c) the management of EU AIFs by non-EU AIFMs

If yes, please indicate whether you apply the same set of rules to non-EU AIFMs, or explain the differences.

25. Number of EU AIFMs authorised in your jurisdiction that market non-EU AIFs in your jurisdiction in accordance with Article 36 AIFMD. Number of those non-EU AIFs.
26. Number of requests for information addressed to EU AIFMs in relation to the marketing of non-EU AIFs.
27. Indication of the enforcement or supervisory actions or sanctions imposed on EU AIFMs related to the marketing of non-EU AIFs.
28. Number of non-EU AIFMs that market AIFs in your jurisdiction in accordance with Article 42(1) AIFMD. Number of those AIFs.
29. Indication of the enforcement or supervisory actions or sanctions imposed on non-EU AIFMs in relation to the obligations under Articles 22 to 24 and 26 to 30.
30. Number of requests for information addressed to non-EU AIFMs in relation to the marketing of EU AIFs.
31. Number of requests for information addressed to non-EU AIFMs in relation to the management of EU AIFs.
32. Information about the requests for information or assistance that your authority has submitted to non-EU authorities in accordance with the AIFMD MoU.
  - a) Number of requests rejected and reasons for doing so.
  - b) Degree of cooperation
    - Very satisfied
    - Satisfied
    - Difficulties encountered. Please explain
  - c) Average time of response
  - d) Usefulness of the assistance provided
33. Number of on-site visits that you have requested the non-EU authority to perform on your behalf, in accordance with the AIFMD MoU.
34. Number of on-site visits that your authority has performed at the premises of non-EU AIFMs, in accordance with the AIFMD MoU.

35. Number of occasions where, in accordance with the AIFMD MoU, your authority has received unsolicited information from non-EU authorities about:
  - a) Any known material event that could adversely impact a Covered Entity; and
  - b) Enforcement or regulatory actions or sanctions, including the revocation, suspension or modification of relevant licenses or registration, concerning or related to non-EU AIFMs that market or manage AIFs in your jurisdiction
36. Number of occasions that your authority has shared with other NCAs information received from non-EU authorities for the purpose of monitoring systemic risk, in accordance with the AIFMD MoU.
37. Indicate whether there have been issues of investor protection in relation to non-EU AIFs marketed in your jurisdiction. In particular, indicate the following:
38. Number of complaints addressed to your authority from investors in relation to non-EU AIFs marketed in your jurisdiction.
39. Enforcement or regulatory actions or sanctions, including the revocation, suspension or modification of relevant licenses or registration, concerning or related to non-EU AIFMs that market or manage AIFs in your jurisdiction, or non-EU AIFs marketed in your jurisdiction by EU AIFMs.
40. Indicate problems or obstacles originated by the regulatory and supervisory framework that your authority has faced when exercising supervisory functions on non-EU AIFMs or non-EU AIFs.
41. In particular, indicate whether your authority has experienced any problem in getting information directly from non-EU AIFMs.

### **III.III. Information regarding the functioning of both systems**

42. Evidence showing that AIFMs in your jurisdiction have moved to non-EU countries (if possible, please provide aggregate figures for the number of AIFs and AuM). Indicate the reasons for such a move.
43. Do you consider there is market disruption or distortion of competition in your country between EU and non-EU AIFMs? If yes, please specify.
44. Evidence showing that AIFMs in your country have encountered difficulties or limitations in establishing themselves or marketing AIFs they manage in any third country. Please specify the third country.
45. Evidence showing that existing difficulties or limitations in third countries have deterred AIFMs in your jurisdiction from deciding to establish themselves or market AIFs they manage in any third country. Please specify the third country.
46. Indications of any other general or specific difficulties which EU AIFMs encounter in establishing themselves or marketing AIFs they manage in third countries. Please specify the third country.



## **IV. European Commission's mandate to provide technical advice**

### **Introduction**

The services of the European Commission (hereafter, the 'Commission') would like to request the advice of ESMA<sup>2</sup> on the content of the delegated acts to be adopted pursuant to Article 67(5) of the Directive on Alternative Investment Fund Managers ('AIFMD')<sup>3</sup>.

While the AIFMD does not contain specific deadlines for the delivery of the delegated acts, it is important to ensure that ESMA receives information concerning the functioning of the EU passport and the functioning of the so-called national regimes as soon as possible. The Commission therefore requests that ESMA delivers its advice by 30 April 2014.

In accordance with the principles of Better Regulation, the Commission might be required to prepare an **impact assessment** to accompany the delegated act. When providing advice on the content of the possible delegated act mentioned above, ESMA is invited to justify its advice by identifying, where relevant, a range of options and undertaking an assessment of the costs and benefits of each option. The results of this assessment should be submitted alongside the advice.

According to its established policy on transparency, the Commission will publish this request for advice on the DG Internal Market and Services website once transmitted to ESMA.

### **Information to be provided to ESMA pursuant to Article 67(2) in relation to the assessment of the functioning of the EU passport and the national regimes**

#### **I. Background**

By July 2015<sup>4</sup>, ESMA is required to 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 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; 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 (so called 'third country passports').

ESMA is required to base its opinion and advice on the assessment of the set of elements listed in Article 67(2). National competent authorities are required to report quarterly to ESMA information on the AIFMs that are managing and/or marketing AIFs under their supervision, either under the application of the passport regime or under their national regimes. Furthermore such quarterly reporting to ESMA should also contain information needed for the assessment of the elements referred to in Article 67(2). The Commission is empowered in Article 67(5) to adopt delegated acts specifying the contents of the information to be provided to ESMA pursuant to Article 67(2).

Provided that ESMA issues positive advice and an opinion, the Commission will adopt a delegated act, taking into account also the elements listed in Article 67(2) and the objectives of the AIFMD. Such delegated act would specify when the third country passport rules (Articles 35, 37 to 41 of the AIFMD) would become applicable.

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<sup>2</sup> European Securities and Markets Authority

<sup>3</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174/1

<sup>4</sup> Article 67(1) of AIFMD

The technical advice should aim at ensuring that the information to be provided to ESMA is clearly defined, adequate in terms of scope, detail and granularity, comparable, and covers all the elements referred to in Article 67(2).

## **II. Scope of the Commission's delegated powers**

*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.*

## **III. Level 1 text**

*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.*

#### IV. Questions

1. ESMA is requested to advise the Commission on the list of data, definitions and the level of detail and granularity, that is necessary to adequately assess, individually and collectively, each of the items listed below:
  - (a) as regards the functioning of the passport for EU AIFMs managing and/or marketing EU AIFs:
    - (i) the use made of the passport:
      - the number, type and size of EU AIFs established in a MS different than the home MS of the AIFM;
      - the number, type and size of EU AIFs marketed in MS other than the home MS of the AIFM;
      - information on intra-EU master-feeder structures;
      - form of cross-border management : via branch or via direct provision of services;
      - information on subsidiaries of AIFMs established in MS different than the home MS of the AIFM;
      - information on any requirement imposed by host MS with respect to matters not covered by the AIFMD (Art 33(5)).
    - (ii) the problems encountered regarding an effective cooperation among competent authorities:
      - number of requests for exchange of information under Article 50 AIFMD;
      - average time for submitting information following such requests and number of refusals;
      - number and type of actions taken pursuant to Article 45 AIFMD;
      - number and type of actions taken pursuant to Article 50(5) AIFMD;
      - number and type of actions taken pursuant to Article 54 AIFMD, including on-spot-verifications, refusals to cooperate;
    - (iii) the problems encountered regarding an effective functioning of the notification system:
      - number of notification files sent and received;
      - number of files transmitted to the host countries and those whose transmission was refused;
      - average time for the transmission of notification files between authorities;
      - average time for notification of the AIFM that it can undertake cross-border activities;
      - language and format of information and documents transmitted;
    - (iv) the problems encountered regarding investor protection:
      - number of investor complaints received in relation to AIFs which are managed and/or marketed cross-border; reasons invoked and how they were solved;
      - Functioning of the arrangements referred to in point (h) of Annex IV that are subject to the laws and supervision of the host MS of the AIFM

(v) the problems encountered regarding mediation by ESMA, including the number of cases and the effectiveness of the mediation;

(vi) the effectiveness of the collection and sharing of information in relation to the monitoring of systemic risks by national competent authorities, ESMA and ESRB as well as the instances of exchange of information pursuant to Article 53 AIFMD.

(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 AIFMD:

- information on stricter rules imposed on the AIFM under the national regimes;

- information on the entity(ies) appointed to carry out the duties laid down in Articles 21(7)-(9) and in case the AIFM manages also EU AIFs evidence as to the compliance with Article 21 for the EU AIFs managed;

- information on any measures (including number and type) taken against the AIFM under Article 46(e)-(g), (i)-(m) or under national law for non-compliance;

(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:

- information on stricter rules imposed on the AIFM under the national regimes;

- information on any measures (including number and type) taken against the AIFM under Article 46(e)-(g), (i)-(m) or under national law for non-compliance ;

(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:

- information on the cooperation arrangements with third countries and the use of such arrangements (number of instances of requests for information or cooperation, average time for feedback, on-the spot-verifications, refusals of cooperation or of exchange of information);

(iv) any issues relating to investor protection that might have occurred:

- number of investor complaints received in relation to AIFs which are managed/marketed cross-border; reasons invoked and how they were solved;

(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 as well as any and legal, regulatory, administrative, technical or language barriers encountered.

(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:

(i) which actors are most likely to be affected and how?



(ii) what could be potential market disruptions or competitive distortions and how could they potentially be prevented or mitigated?



## **V. Cost-benefit analysis and consultation**

In its request for advice, the Commission asked ESMA to carry out an analysis on the costs and benefits of its proposals. Since the advice relates exclusively to information to be provided to ESMA and does not impose burdens on external stakeholders, ESMA took the view that there was no need to analyse the costs and benefits. Similarly, ESMA did not consult publicly on its proposals since the matter concerns exclusively reporting obligations of NCAs.