esma European Securities and Markets Authority

Opinion

ESMA's opinion to the European Parliament, Council and Commission and responses to the call for evidence on the functioning of the AIFMD EU passport and of the National Private Placement Regimes

30 July 2015 | ESMA/2015/1235

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Data protection

Information on data protection can be found at www.esma.europa.eu under the heading ‘Legal Notice’.

Who should read this paper

This document will be of interest to EU and non-EU investors and fund managers, and their related parties.

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Acronyms used

AIFMD	Alternative Investment Fund Managers Directive (2011/61/EU)
AIFM	Alternative Investment Fund Manager
AIF	Alternative Investment Fund
ESMA	European Securities and Markets Authority
EU	European Union
IOSCO	International Organization of Securities Commissions
MoU	Memorandum of Understanding
NCA	National Competent Authority
NPPR	National Private Placement Regime
UCITS	Undertaking for Collective Investment in Transferable Securities
UCITS Directive	Directive 2009/65/EC

Executive summary

Reasons for publication

In accordance with Articles 36 and 42 of the Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD), non-EU alternative investment fund managers (AIFMs) and non-EU alternative investment funds (AIFs) managed by EU AIFMs are subject to the national private placement regime (NPPR) of each of the Member States where the AIFs are marketed or managed.

However, the AIFMD makes provision for the passport, which is currently reserved to EU AIFMs and AIFs, to be potentially extended in future. Article 67(1) of the AIFMD establishes that, by 22 July 2015, ESMA shall issue to the European Parliament, the Council and the Commission 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 NPPRs set out in Articles 36 and 42 of the AIFMD.

This document sets out ESMA's opinion pursuant to Article 67(1) of the AIFMD.

Contents

The opinion is structured as follows:

a. First, feedback on the surveys conducted by ESMA on the AIFMD passport is presented (section 2.1);

b. ESMA then presents its opinion on the functioning of the EU passport (section 2.2);

c. ESMA then presents its opinion on the functioning of the NPPRs (section 2.3);

d. Two annexes detail the feedback received by ESMA via the responses to the call for evidence on the functioning of the EU passport and NPPRs.

Next steps

ESMA would see merit in the preparation of another opinion on the functioning of the passport after a longer period of implementation in all Member States.

1 Background and overall findings

1.1 AIFMD and the request to ESMA for an Opinion

1. In accordance with Articles 36 and 42 of the AIFMD, non-EU AIFMs and non-EU AIFs managed by EU AIFMs are subject to the NPPR of each of the Member States where the AIFs are marketed or managed. However, the AIFMD makes provision for the passport, which is currently reserved to EU AIFMs and AIFs, to be potentially extended in future. Article 67(1) of the AIFMD establishes that, by 22 July 2015, ESMA shall issue to the European Parliament, the Council and the Commission the following:

    - An opinion on the functioning of the passport for EU AIFMs pursuant to Articles 32 and 33 of the AIFMD and on the functioning of the national private placement regimes set out in Articles 36 and 42 of the AIFMD.

    - Advice on the application of the passport to non-EU AIFMs and AIFs in accordance with the rules set out in Article 35 and Articles 37 to 41 of the AIFMD.

2. Within three months of receipt of positive advice and an opinion from ESMA, and taking into account the criteria of Article 67(2) and the objectives of the AIFMD, the Commission should adopt a delegated act specifying the date when the rules set out in Article 35 and 37 to 41 of the AIFMD become applicable in all Member States. As a consequence, the EU passport would be extended to non-EU AIFs and non-EU AIFMs.

3. In order to produce this opinion and advice, ESMA must look into the elements listed in Article 67(2) and (4) of the AIFMD[1], notably on the basis of the information provided by the national competent authorities (NCAs) about the EU and non-EU AIFMs under their supervision. Indeed, Article 67(3) of the AIFMD requires NCAs to provide information to ESMA quarterly as from 22 July 2013.

4. ESMA has received input from NCAs for the periods covering 22 July 2013 to 31 March 2014, 1 April to 30 June 2014, 1 July to 30 September 2014, 1 October to 31 December 2014, and 1 January to 31 March 2015.

5. In order to supplement the input provided by NCAs via the quarterly surveys, ESMA launched a call for evidence[2] in November 2014 aimed at gathering information from EU and non-EU stakeholders on the functioning of the EU passport, the NPPRs and the potential extension of the AIFMD passport to non-EU countries.

6. ESMA received 67 responses (including 15 confidential responses), from 13 non-EU Authorities, 21 EU and non-EU trade associations of asset managers, 17 EU and non-EU

[1] This includes such aspects as the use made of the EU passport and any problems encountered in that context, the functioning of the NPPRs and, more generally, issues such as investor protection, market disruption, competition and the monitoring of systemic risk.

[2] http://www.esma.europa.eu/system/files/2014-esma-1340_call_for_evidence_aifmd_passport__3rd_country_aifms.pdf

asset managers, and 16 other trade associations and private firms (e.g. providers of services for funds, law firms etc).

1.2 Summary of the opinion

7. In relation to the timing of the assessment of the functioning of the EU passport, ESMA considers that the delay in the implementation of the AIFMD together with the delay in the transposition in some Member States make a definitive assessment difficult. ESMA would see merit in the preparation of another opinion on the functioning of the passport after a longer period of implementation in all Member States.

8. However, even at this early stage, ESMA has identified several issues in relation to the use of the EU passport. These issues include: i) divergent approaches with respect to marketing rules, including heterogeneity of fees charged by the NCAs where the AIFs are marketed and the definition of what constitutes a "professional investor"; ii) varying interpretations of what activities constitute "marketing" and "material changes" under the AIFMD passport in the different Member States. With that in mind, ESMA sees merit in greater convergence in the definition of these terms.

9. Nevertheless, ESMA is of the view that there is insufficient evidence to indicate that the AIFMD EU passport has raised major issues in terms of the functioning and implementation of the AIFMD framework.

10. In relation to the timing of the assessment of the functioning of the NPPRs, ESMA considers that the delay in the implementation of the AIFMD together with the delay in transposition in some Member states make a definitive assessment difficult. ESMA would see merit in the preparation of another opinion on the functioning of the NPPR Regime after a longer period of implementation has passed in all Member States (although this is linked to the decision to be taken by the European Parliament, the Council and the Commission on whether to extend the passport to one or more non-EU countries in the meantime).

11. ESMA is of the view that there is insufficient evidence to indicate that the NPPRs have raised major issues in terms of the functioning and implementation of the AIFMD framework.

1.3 Structure of the Opinion

12. The structure of the Opinion is the following:

    a. First, feedback on the surveys of NCAs conducted by ESMA on the AIFMD passport is presented (section 2.1);

    b. ESMA then presents its opinion on the functioning of the EU passport (section 2.2);

    c. ESMA then presents its opinion on the functioning of the NPPRs (section 2.3);

d. The annexes set out in detail the feedback received by ESMA via the responses to the call for evidence on the functioning of the EU passport and the NPPRs.

2 Opinion

2.1 Feedback on the surveys conducted by ESMA on the AIFMD passport

1. Background

Background and purpose

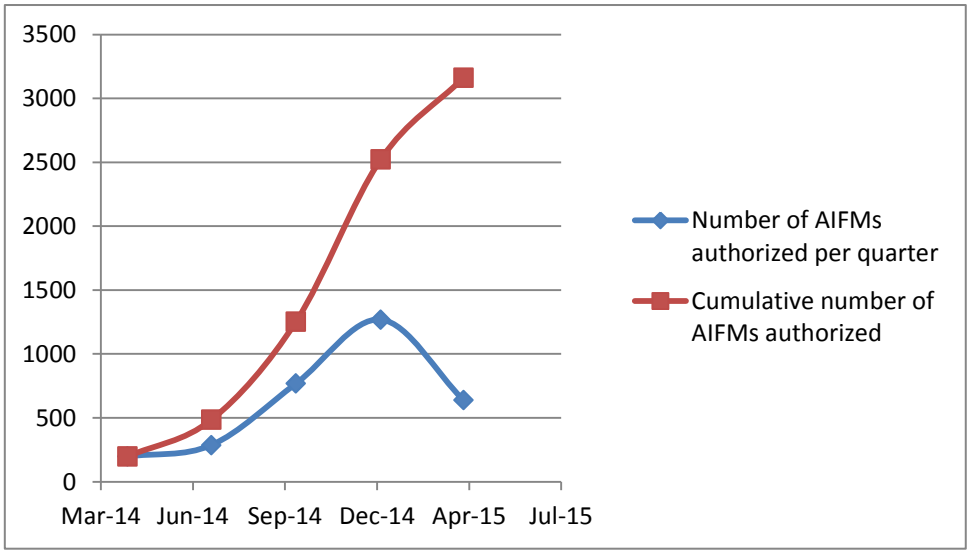
13. This section presents the most relevant data based on the information provided by the NCAs quarterly to ESMA pursuant to Article 67(3) of the AIFMD for the purpose of issuing the opinion on the functioning of the EU passport and of the NPPRs and advice on the potential extension of the EU passport to non-EU countries. This information was provided from the first quarter of 2014 to the first quarter of 2015.

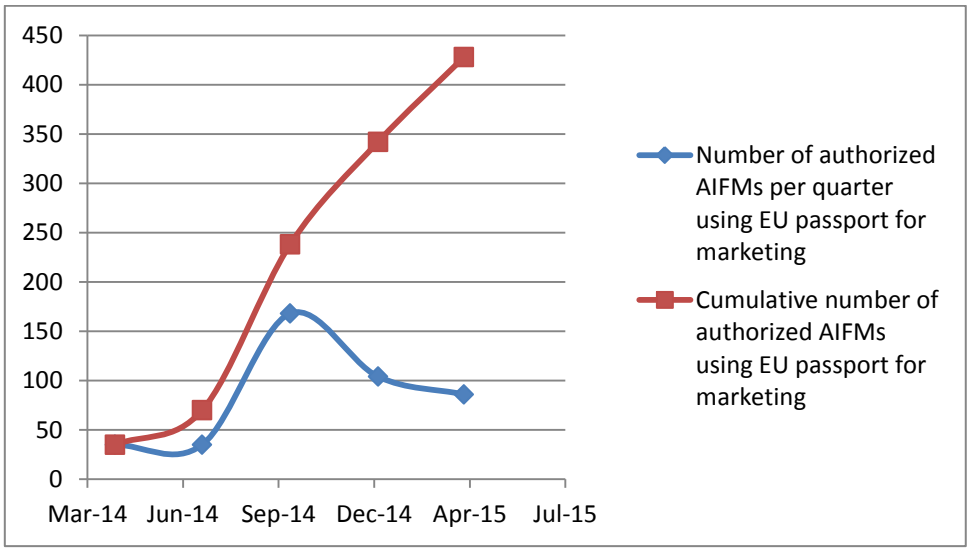
14. Please note that the data refers to activity (AIFMs authorised, AIFs notified, etc.) that took place during the periods of reference Q1 to Q5. Data on the first period (22 July 2013 – 31 March 2014) is presented between brackets as (Q1). Data on the second quarter (1 April – 30 June 2014) is presented as Q2. Data on the third quarter (1 July – 31 September) is presented as Q3. Data on the fourth quarter (1 October – 31 December) is presented as Q4. Data on the period from 1 January – 31 March 2015 is presented as Q5. Data on the entire period studied (22 July 2013 – 31 March 2015) is presented as Q1-5.

15. The purpose of this section is to provide feedback on the results of these surveys. These results have been used as input by ESMA in the development of its opinion on the functioning of the EU passport and of the NPPRs.

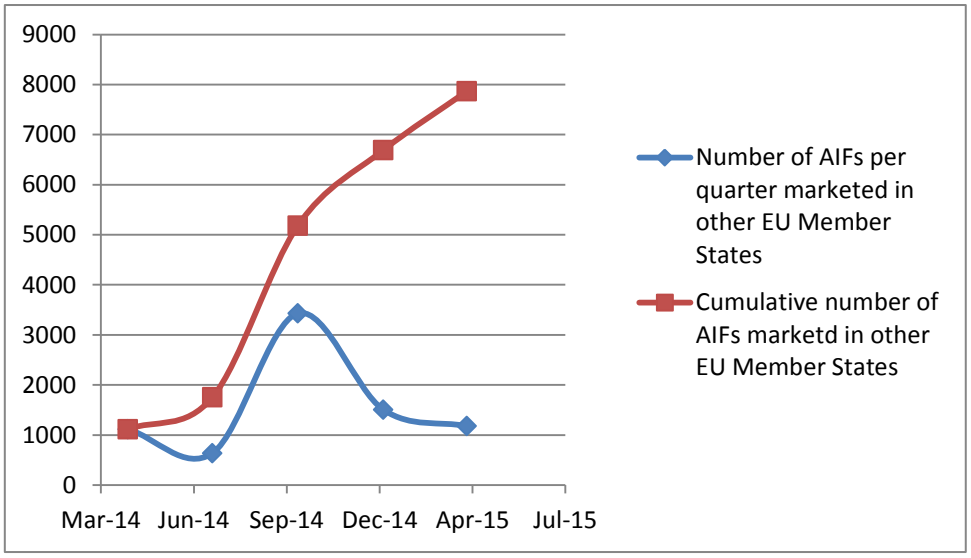
Functioning of the passport for EU AIFMs

16. 3161 AIFMs (638 AIFMs in Q5, 1269 in Q4, 769 AIFMs in Q3, 287 in Q2 and 198 in Q1) were authorised in accordance with Article 7 AIFMD in Q1-5. Of these AIFMs, 438 (86 AIFMs in Q5, 104 in Q4, 168 in Q3, 35 in Q2 and in Q1) use the EU passport for marketing AIFs.





17. 7868 AIFs (1178 AIFs in Q5, 1506 in Q4, 3430 AIFs in Q3, 639 in Q2 and 1110 AIFs in Q1), including sub-funds of umbrella AIFs, were notified for marketing in other EU Member States (MS) in accordance with Article 32 AIFMD, with the highest number of outbound notifications coming from the UK (5027 in Q1-5, 660 in Q5, 589 in Q4, 2440 in Q3; 492 in Q2 and 846 in Q1), followed by Luxembourg (1260 in Q1-5, 304 in Q5, 444 in Q4, 433 in Q3, 59 in Q2, 20 in Q1) and Ireland (1229 in Q1-5, 105 in Q5, 350 in Q4, 500 in Q3, 34 in Q2, 240 in Q1). The German authority was notified of 699 AIFs from other NCAs in Q1-5 (100 in Q5, 158 in Q4, 335 in Q3, 49 in Q2 and 57 in Q1), and the Netherlands of 672 AIFs from other NCAs in Q1-5 (96 in Q5, 120 in Q4, 358 in Q3, 41 in Q2 and 57 in Q1).



18. 348 AIFMs in Q1-5 (84 in Q5, 68 in Q4, 130 in Q3, 28 in Q2 and 38 in Q1) used the EU passport for managing AIFs in other Member States. In 1678 instances in Q1-5 (381 in Q5, 296 in Q4, 849 in Q3, 152 in Q2) AIFs were managed in other Member States.

19. Over the course of Q1-5 no NCA reported any of the cases that refer to the situations of potential challenges arising from the supervision of an AIFM between the home and the host competent authorities contemplated in paragraphs (5) to (8) of Articles 45 and 50(5) of the AIFMD.

20. NCAs issued requests for assistance, including exchange of information during the period covered by the survey (7 NCAs in Q5, 8 in Q4, 7 in Q3, 7 in Q2 and 6 in Q1). There were 377 requests in total in Q1-5 (84 in Q5, 74 in Q4, 77 in Q3, 74 in Q2 and 68 in Q1). Austria sent 113 requests in Q1-5 (13 in Q5, 23 in Q4, 22 in Q3, 25 in Q2 and 30 in Q1), Malta sent 70 requests in Q1-5 (55 in Q5 and 15 in Q4) and Germany sent 68 requests in Q1-5 (3 in Q5, 22 in Q4, 23 in Q3, 6 in Q2 and 14 in Q1).

21. No request for assistance was rejected.

22. The response time to the requests for assistance ranged from 2 to 30 days in Q1-5 (7 to 30 days in Q5, 5 to 30 days in Q4, 7 to 30 days in Q3, 2 to 30 days in Q2). The average response time was 2.5 weeks over the course of Q1-5.

23. No NCA undertook any on-the-spot verifications or investigations in another Member State in accordance with Article 54(1) AIFMD in Q1-5.

24. The time between the receipt of the complete notification file from an AIFM and the moment the home NCA notifies the host NCA ranged from 1 to 30 days in Q1-5 (1 to 25 days in Q5, 1 to 30 days in Q4, 1 to 20 days in Q3 and Q2). The average time in Q1-5 was 10 days.

25. The average time for notification to the AIFM that it can undertake cross-border activities, from the date of the transmission of the notification file, ranged from 0 to 40 days in Q1-5 (0 to 20 in Q5, 0 to 20 in Q4, 0 to 35 in Q3, 0.5 to 40 in Q2 and 0.5 to 14 days in Q1). The average was 6 days over the course of Q1-5.

26. In 476 cases in Q1-5 (70 cases in Q5, 101 cases in Q4, 162 in Q3, 76 in Q2 and 67 in Q1) NCAs asked the authority of the home Member State for clarification.

27. In Q1-5, no issues of investor protection in relation to AIFs marketed or managed from another Member State, including AIFs marketed under Article 43, were reported by the NCAs.

28. In Q1-5, the NCAs did not receive any complaints from investors in relation to AIFs marketed or managed from another Member State.

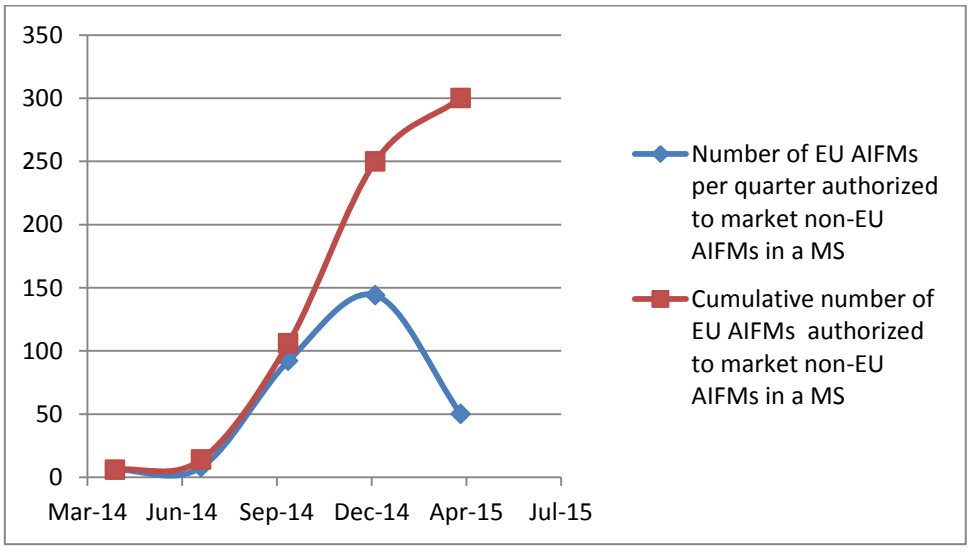
29. In Q1-5, no NCA received or shared information with other NCAs in relation to the monitoring of systemic risk as required by Articles 25 and 53 of the AIFMD.

Functioning of the national private placement regimes

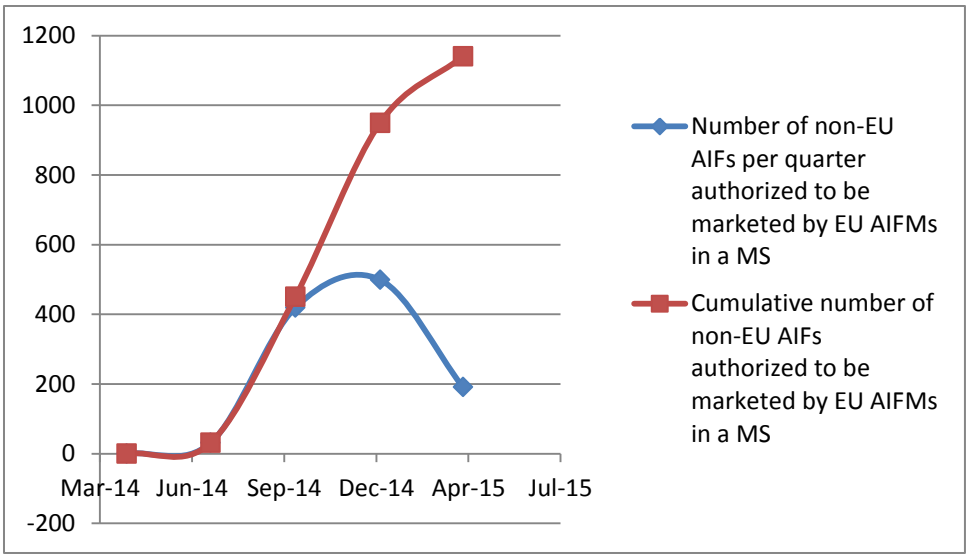
30. At the end of Q5, the national legislation of 4 NCAs did not allow the marketing of non-EU AIFs by EU AIFMs, in accordance with Article 36(1) AIFMD (Croatia, Latvia, Italy, and Poland). The same, plus Greece and Hungary, did not allow the marketing of AIFs by non-EU AIFMs, in accordance with Article 42(1) AIFMD.

31. At the end of Q5, the national legislation of 12 NCAs allowed the management of EU AIFs by non-EU AIFMs (Luxembourg, Portugal, The Netherlands, Austria, Ireland, Czech Republic, Bulgaria, UK, Slovakia, Lithuania, Malta and Cyprus).

32. 300 EU AIFMs in Q1-5 (50 new AIFMs in Q5, 144 in Q4, 92 in Q3, 8 in Q2 and 6 in Q1) were authorised to market non-EU AIFs in a Member State in accordance with Article 36 AIFMD.



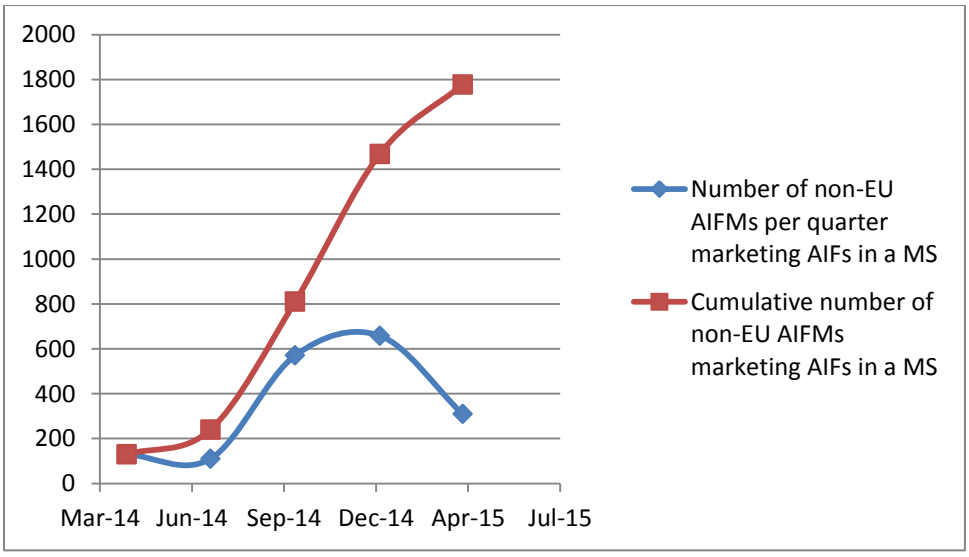
33. 1146 non-EU AIFs (191 in Q5, 499 in Q4, 419 in Q3, 31 in Q2 and 6 in Q1) were marketed in Q1-5 in the Member States by EU AIFMs in accordance with Article 36.



34. 47 requests for information in Q1-5 (5 in Q5, 16 in Q4, 18 in Q3, 8 in Q2 and 0 in Q1) were addressed to these EU AIFMs in relation to the marketing of those non-EU AIFs.

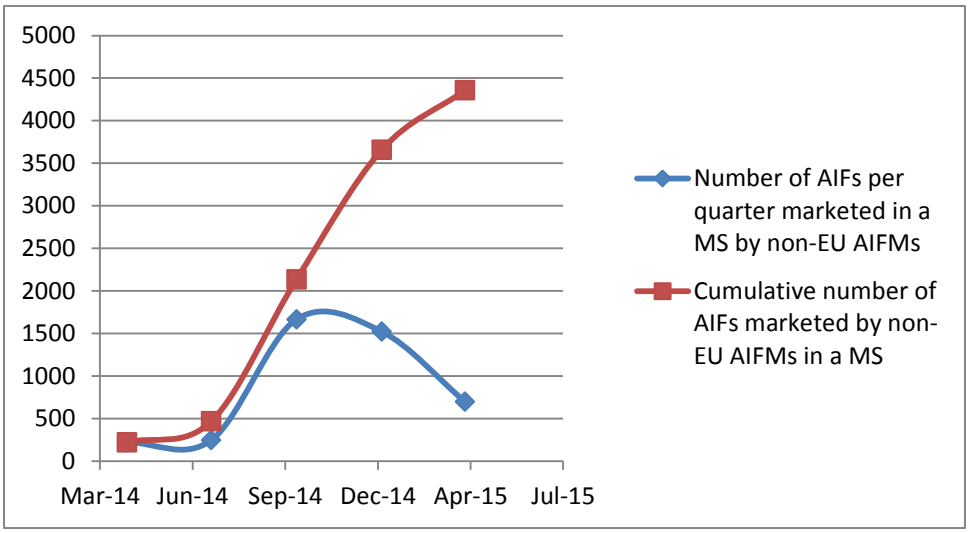
35. No enforcement or supervisory actions or sanctions were imposed on these EU AIFMs related to the marketing of those non-EU AIFs in Q1-5.

36. 1777 non-EU AIFMs in Q1-5 (309 new non-EU AIFMs in Q5, 658 in Q4, 570 in Q3, 110 in Q2 and 130 in Q1) marketed AIFs in the Member States in accordance with Article 42(1) AIFMD, including 1013 in the UK in Q1-5 (141 new in Q5, 496 in Q4, 235 in Q3, 44 in Q2 and 97 in Q1).



37. 4356 AIFs in Q1-5 (699 new AIFs in Q5, 1523 in Q4, 1666 in Q3, 247 in Q2 and 221 in Q1) were marketed in the Member States by non-EU AIFMs in accordance with Article

42(1) AIFMD, including 2657 in the UK (353 in Q5, 1167 in Q4, 837 in Q3, 119 in Q2 and 181 in Q1).



38. No enforcement or supervisory actions or sanctions were imposed on those non-EU AIFMs in relation to the obligations under Articles 22 to 24 and 26 to 30 of the AIFMD.

39. During Q1-5, NCAs addressed 93 requests for information to the non-EU AIFMs in relation to the marketing or managing of EU AIFs (36 in Q5, 15 in Q4, 42 in Q3).

40. During Q1-5, no NCA asked a non-EU authority to perform on-site visits on its behalf, in accordance with the AIFMD MoU. Equally, no NCA performed any on-site visits at the premises of non-EU AIFMs, in accordance with the AIFMD MoU.

41. During Q1-5, no NCA received unsolicited information from non-EU authorities about any known material event that could adversely impact an AIFM or any other covered entity, in accordance with the AIFMD MoU.

42. Equally, during Q1-5, no NCA shared with other NCAs information received from non-EU authorities for the purpose of monitoring systemic risk, in accordance with the AIFMD MoU.

43. During Q1-5, no NCA reported issues of investor protection in relation to non-EU AIFs marketed in a Member State.

44. During Q1-5, no NCA reported 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 its jurisdiction, or non-EU AIFs marketed in its jurisdiction.

45. During Q1-5, no activity was reported by NCAs about problems or obstacles originated by the regulatory and supervisory framework faced when exercising their supervisory functions on non-EU AIFMs or non-EU AIFs.

46. No NCA indicated that it had experienced any problems in getting information directly from non-EU AIFMs.

2.2 ESMA's Opinion on the functioning of the EU passport

Assessment by ESMA

Having regard to, inter alia, the different comments made by respondents to the call for evidence on the AIFMD passport in relation to the functioning of the EU passport (please see Annex 1), and to the data gathered using the surveys it conducted on the AIFMD passport, ESMA is of the view that:

- In relation to the timing of the assessment of the opinion on the functioning of the EU AIFMD passport, ESMA considers that the delay in the implementation of the AIFMD together with the delay in the transposition in some Member states makes a definitive assessment difficult. ESMA would see merit in the preparation of another opinion on the functioning of the passport after a longer period of implementation in all Member States.

- However, even at this early stage, ESMA has identified several issues in relation to the use of the EU passport. These issues include:

    - divergent approaches with respect to marketing rules, including heterogeneity of fees charged by the NCAs where the AIFs are marketed and the definition of what constitutes a "professional investor"; and

    - varying interpretations of what activities constitute "marketing" and "material changes" under the AIFMD passport in the different Member States[3].

With that in mind, ESMA sees merit in greater convergence in the definition of these terms.

[3] Further detail on these points can be found in paragraph 53 in Annex 1.

2.3 ESMA's Opinion on the functioning of the National Private Placement Regimes (NPPRs)

Assessment by ESMA

Having regard to, inter alia, the different comments made by respondents to the call for evidence in relation to the functioning of the NPPRs (please see Annex 2), and to the data gathered using the surveys it conducted on the AIFMD passport, ESMA is of the view that:

- In relation to the timing of the assessment of the opinion on the functioning of the NPPRs, ESMA considers that the delay in the implementation of the AIFMD together with the delay in transposition in some Member states make a definitive assessment difficult. ESMA would see merit in the preparation of another opinion on the functioning of the NPPRs after a longer period of implementation has passed in all Member States (although this is linked to the decision to be taken by the Commission on whether to extend the passport to non-EU countries in the meantime).

- ESMA is of the view that there is insufficient evidence to indicate that the NPPRs have raised major issues in term of the functioning and implementation of the AIFMD framework.

- As regards the interaction between the potential extension of the EU passport to non-EU countries and the NPPRs, regard should be had to ESMA's 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.

Annex 1 Summary of the feedback from the call for evidence on the functioning of the EU passport

47. This section is based on the responses to the call for evidence on the AIFMD passport launched by ESMA in November 2014 in relation to the functioning of the EU passport.

48. ESMA does not endorse the contents of the responses to the call for evidence presented in this section or comment on their accuracy. ESMA recognises that the content of the responses may in some instances focus on the situation of certain Member States while the same situation might also be observed in practice in other Member States.

- A. Overall summary of the feedback

Overall summary of the feedback from the responses to the call for evidence

49. This section provides an overall summary of the responses to the call for evidence.

Timing of the opinion on the functioning of the EU passport

50. A large number of respondents indicated that, due to the limited experience in relation to the EU passport, it was premature to assess its functioning, and that ESMA should delay its opinion, notably in order to allow the development of a true “AIFMD” brand, as in the case of UCITS.

Overall assessment

51. While some respondents indicated they were “satisfied” or “very satisfied” with the application process and use of the EU passport (some notably mentioned that it allowed them to gain economies of scale by merging all management activities relating to AIFs in one or more AIFMs within a group under Article 33 AIFMD), most respondents preferred to emphasise that there were in their view remaining issues in relation to the application process and use of this passport.

52. These respondents indicated that it remains unclear in their view which of these remaining issues are understandable start-up glitches and which are long-term difficulties potentially thinly disguising a desire by national competent authorities (NCAs) to create practical barriers to entry by non-domiciled fund managers authorised in other EU Member States wishing to manage or market funds in their country. These issues include the following:

Issues in relation to the application process and use of the EU passport

53. Several respondents indicated that a significant number of Member States have introduced additional requirements in the authorisation process of AIFs. As a result, these respondents indicated that what had promised to be a simple and cost-efficient process for managing and marketing funds in another Member State after receiving authorisation

in the Member State of the fund manager's domicile is in their view in many cases much more difficult. They mentioned the following issues:

- The fees charged by the NCAs where the AIFs are marketed, and the different levels of these fees in the different Member States. These respondents also indicated that the procedures surrounding these fees are in their view often opaque.

- Heterogeneity of the time taken before passport rights can be exercised in the different Member States, while this period should be standardised under the requirements of the AIFMD.

- Additional national requirements compared to the provisions of the AIFMD (e.g. in one Member State, a centralising agent through which all payments must be channelled).

- Inconsistent interpretation of what activities constitute "marketing" under the AIFMD passport (and the differences compared to the definition of "reverse solicitation"). These respondents indicated that there are Member States where a fund is considered to be marketed only after all fund documents are final and therefore ready for an investor to subscribe. In others, initial discussions between fund managers and investors regarding potential fund strategies or structures might be considered to be marketing by NCAs.

- Several respondents indicated that in one Member State the legislator requires that, in the case of an EU AIFM, there be a management company located in that Member State for AIFs taking the form of an FCP. This requirement was introduced on the basis that a non-legal personality fund such as an FCP can only be a fund established in this Member State with a management company established in this Member State.

- Although annex IV of the AIFMD provides details of the information/documents needed for the passport notification, several respondents indicated that many NCAs have not yet issued template notification letters, and for those that have, in some cases the level of required information varies widely.

- Some respondents indicated that there is uncertainty regarding the notion of material changes that may cause modifications of fund documentation. In one Member State, for example, these respondents indicated that it is the AIFM which decides whether the change is material or not. Moreover, these respondents mentioned that the process for the notification of material changes has not yet been clearly defined by many NCAs, leading to uncertainty on the period within which such notifications should or must occur;

- Emergence of new barriers for marketing AIFs across the EU**.** Respondents indicated that they observed that some new barriers had been introduced since the transposition of AIFMD by some Member States.

B. Detailed summary of the responses on the application process

54. In relation to the application process, three respondents indicated they were very satisfied with the EU passport application process. Other respondents indicated they were satisfied with the EU passport application process. Another respondent indicated they were satisfied with the EU passport application process but noted that the process was not fully efficient everywhere and that there were regulatory costs which are now faced where it was free in the past (the respondent hoped this was more a question of the process taking time to settle down than of hurdles being intentionally introduced).

55. Another respondent indicated that in general, it is very difficult to give a clear and complete picture of which problems encountered so far are structural and which are simply start-up issues that will be resolved in time. In addition, the amount of experience gained so far is necessarily limited given the short period of time that the new AIFMD passport regime has been in effect, which limits the completeness of the picture.

56. Nevertheless, their fund manager members have experienced a number of problems in the application process for a passport. Almost all of these relate to the fact that a significant number of Member States have introduced additional requirements with the effect that notification by the authorising Member State is often only the first step in a much more complicated, time-consuming and expensive process of obtaining the passport. As a result, this respondent indicated that what had promised to be a simple and cost-efficient process for managing and marketing funds in another Member State after receiving authorisation in the Member State of the fund manager's domicile is in many cases much more difficult. This respondent mentioned the following issues:

    - Fees**:** Fees are applied by a significant number of Member States that would appear to bear no relation to the additional costs of supervision by the Member State in which the passport is to be used. These fees vary widely but can be quite significant. Examples include:

        i. Austria, where the FMA charges EUR 1,000 per AIF for processing documents required for a marketing passport, plus EUR 220 for each additional sub-fund and EUR 600 annually once the fund is marketed;

        ii. France, where the AMF charges EUR 2,000 per AIF being marketed;

        iii. Germany, where BaFin charges 772 EUR per AIF for processing the passport notification and EUR 216 for each amendment;

        iv. Luxembourg, where the CSSF charges a flat fee of EUR 2,650 for AIFs with a single compartment and EUR 5,000 for EEA AIFs with multiple compartments;

v. Malta, where the regulator imposes an application notification fee of EUR 2,500 per AIF and an annual supervisory fee of EUR 3,000 per AIF and more if the AIF has sub-funds;

vi. Spain, where the CNMV has recently informed passporting managers that it will also require the payment of additional fees

57. Where additional fees are imposed, this respondent indicated that the procedures surrounding them are often opaque; for example it is frequently not clear where additional fees imposed for obtaining passport rights must be paid. Proof of payment of the fees can be difficult to provide, with the Member State of authorisation generally not being willing to transfer payment and the marketing or managing Member State having no clear process for accepting payment.

B. Extra time required: This respondent indicated that the time taken before passport rights can be exercised is also far from standard..

58. This respondent also indicated that the review of fund manager and fund information undertaken by other Member State regulators that have received notification can also take quite a long time, often longer than the 20 days given for a marketing passport or the one to two months given for different managing passports. Many Member States imposing these requirements simply seem insufficiently staffed to review the additional information provided and to respond within the given time limits.

C. Additional requirements**:** this respondent mentioned that other requirements are sometimes also applied; for example, France requires the appointment of a centralising agent though which all payments must be channelled, a requirement seemingly borrowed from UCITS but not actually contained in AIFMD. The CNMV has also recently required the appointment of an entity in Spain that is responsible for various regulatory matters.

D. Inconsistent interpretation of what activities constitute “marketing”: this respondent mentioned another difficulty encountered, which has been the inconsistent interpretation of what activity constitutes “marketing” across the Member States. The interpretations in fact vary widely, which is the source of much uncertainty and confusion. Examples include Member States where a fund is considered to be marketed only after all fund documents are final and therefore ready for an investor to subscribe. In others, however, initial discussions between fund managers and investors regarding potential fund strategies or structures are at risk of being considered marketing by national regulators. This respondent indicated that this lack of consistency makes the commercial operating environment very unclear and entails significant extra legal costs to ensure no national regulations are violated.

E. Other inconsistencies: This respondent indicated that another inconsistency among Member States that has led to difficulties in exercising passport rights is the lack of clarity among Member States regarding the status of semi-

professional investors under NPPRs, which can also vary widely. Another example is that Denmark does not allow passport holders to market ancillary services.

59. This respondent concluded by stating that frustratingly, these random additional requirements are far from standard. The UK, the Netherlands and Ireland, for example, honour passport notifications from other Member States without imposing additional requirements or fees or requiring additional time. In general, they also do not request additional information after receipt of the notification of authorisation. This respondent was of the view that these Member States are much better examples of how the process should work, as well as of how AIFMD was intended to work.

60. Another respondent (an EU trade association of asset managers)[4] indicated that although their 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 capital has been committed. They mentioned that 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 in their view 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 have a much more restrictive view such that anything beyond a generic company document or teaser is marketing and therefore requires a passport.

61. This respondent indicated that 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 respondent added that 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. They 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.

[4] AREF - The Association of Real Estate Funds (AREF) describes itself as representing 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. Their 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.

C. Detailed summary of the responses on the use of the EU passport

62. **In relation to the use of the EU passport**, one respondent mentioned that, contrary to the application process for management of EU AIFs, they encountered some major problems using the AIFMD passport:

    - They were of the view that in Luxembourg the legislator requires in case of an EU AIFM in addition a Luxembourg located management company for AIF-FCP, stating that a non-legal personality fund such as a FCP can only be a Luxembourg fund with a Luxembourg management company – even a Luxembourg Branch of an EU AIFM would not be considered sufficient. In that perspective, and in contrary to UCITS-FCPs, a cross management of AIF-FCPs by an EU management company would not be possible;

    - Background: an existing French AIF which is intended to be taken over for management by an EU AIFM: In France they were of the view that the legislator / regulator makes no difference between management of EU-retail AIF and distribution of EU-retail AIF and thus prohibits in addition to the distribution also the management of French EU AIF by an EU AIFM even if such units of French EU AIF, held by French retail clients are no longer distributed but only managed. Thus the management of French Retail AIF by an EU AIFM would not be possible in that perspective.

    - More generally, in case of management of the EU AIF via a branch in the host Member State of the AIFM / home Member State of the branch the respondent was of the opinion that it is not always clear which law / regulation/regulatory requirement is applicable in a specific situation:

        i. Home Member State of the fund because fund related;

        ii. Home Member State of the AIFM because AIFM related – prudential supervision of a management company or;

        iii. in case of a branch, home Member State of the AIFM because it is concerning Rules of Good Conduct and rules concerning Conflicts of Interest;

        iv. Neither the AIFMD nor the regulator of the respective host Member States are always clear and consistent.

63. Another respondent indicated its members' experience with the use of the AIFMD passport was quite diverging. A few bigger members have taken the AIFMD as an opportunity to create economies of scale by merging all management activities relating to AIFs into one or a few AIFMs within a group under Article 33 AIFMD. Others make tentative use of the distribution passport under Article 32 AIFMD and market AIF units to professional investors cross-border. Overall, however, the experience with the use of the

AIFMD passports is quite limited due to the fact that many the members of this respondent were granted their AIFM licenses only a few months ago.

64. This respondent also indicated that there are some practical difficulties relating to the passporting procedure which stem mainly from differences in the national implementation/application of the passporting rules. In terms of AIF passporting into Germany, this respondent indicated that their members report on the following:

    - The German Capital Investment Code (Kapitalanlagegesetzbuch - KAGB) entitles the German supervisor BaFin to check the completeness of the AIF notification transmitted by the competent authority of the AIFM home Member State. The KAGB provides neither for a specific time period for such checks nor for a communication of their results. Under these circumstances, it is unclear whether or to what extent this additional scrutiny (which is not foreseen in the AIFMD) may delay the marketing of the relevant AIF into the German market;

    - According to the administrative practice adopted by BaFin, the notification submitted to the competent authorities of the AIFM home Member State shall also include the evidence of payment of the processing fee charged by BaFin. However, some national authorities refuse transmitting such evidence by way of the regulator-to-regulator procedure since it does not form part of the requirements under AIFMD. BaFin, on the other hand, is not willing to accept direct submission from the AIFM and insists on observing the regular notification procedure;

    - In more general terms, the processing fees charged by the host State authorities amount to a problem in both procedural and financial terms. Procedurally, the national standards as to when, to whom and in which way a fee shall be paid display considerable differences. In terms of costs, marketing of an AIF into several EU jurisdictions can be an expensive exercise implying potential payments of tens of thousands of Euros only for handling/storing the notification files processed by other EU authorities

65. Another respondent indicated that, given the issues encountered in the application process, its members' overall experience to date must be characterised as disappointing. This respondent indicated that it remains unclear which of these add-on requirements are understandable start-up glitches and which are long-term difficulties potentially thinly disguising a desire by Member State regulators to create practical barriers to entry by non-domiciled fund managers authorised in other EU Member States wishing to manage or market funds in their country.

66. In sum, this respondent mentioned that the desired outcome of an open market for alternative fund managers within the European Union seems far from being realised. The inconsistent and in some cases egregious imposition of fees in order to register and maintain a passport in place, and second, the timing of obtaining a passport when trying to work with the typical launch process for a closed-ended fund that normally requires

investors to receive and negotiate draft documents, makes conducting appropriate pre-marketing and finalising documentation in a manner consistent with the passporting process extremely challenging.

67. However, this same respondent stated that a general difficulty posed by this consultation is that it is still far too early to have a robust body of information and experience on the practical difficulties encountered when trying to use the passport.

68. Another respondent indicated that it is probably too early to be able to give a final view on the passporting regime; they would say it is a good start, even though some of their subsidiaries mentioned that the process was rather lengthy; the time to market might be longer than before, in particular since there is a need to receive marketing approval beforehand; finally there are questions about some situations such as funds dedicated to a specific clients : is it “marketing” or reverse solicitation ? – a very common practice. In those situations, this respondent mentioned that marketing teams are questioning the need for submitting passporting requests.

69. This same respondent further indicated that the difficulties they encountered when trying to use the passport were a lengthy process in some jurisdictions with some questions where they thought the passport would immediately grant access to local European markets; they indicated there is no clear-cut answer about the use they can make of the passport after filing the passport itself (they finally have to consider that they can market the AIFs to institutional clients though).

70. This respondent finally mentioned that in Germany, as they had heard that the national regulator requested a specific procedure between the Manco and the distributors with respect to the screening of eligible clients, they modified the distributions agreements in order to fit with this local requirement –which they understood as going beyond AIFMD itself. Therefore the process was slowed down, but not hampered.

71. Another respondent indicated that the problems they had encountered in the use of the passport were the following:

    - The fees due to certain European Authorities. Since AIFM is a harmonisation directive, they indicated that one would have expected to benefit from a fees mapping, and coherence between Member States. For instance: 772€ per compartment for the BaFin; 1100€ per compartment for a marketing passport in Austria; 5000€ up front per compartment for a marketing passport in Luxembourg, then 5000€ each year. This respondent added they have been deterred from using the passport in countries where excessive fees are required.

    - This respondent indicated that there are different methods among European countries: With Germany, they receive the invoice first, then they receive questions several weeks later. One of these questions is about the definition of a professional investor, authorised to subscribe in a Professional Fund of Capital Investment. This respondent was of the view that apparently the

definition is not the same in France and in Germany, where there are "professional investors" and "semi-professional investors". Semi-professional investors have to subscribe 200.000 € minimum in Germany, versus 100.000€ minimum in France. In the case of Sweden, this respondent indicated they have been asked for the reporting template of Annex 4 of Regulation 231/2013. However, it seems that a general description of the strategy is sufficient regarding article 5.2 of Regulation 231/2013.

- About the management passport in Luxembourg: this respondent indicated that it appears that the Luxembourg GP is mandatory when the vehicle is a *Société en Commandite par Actions*. This respondent thought that the AIFM had become the "main" manager. In fact, they have a "co-management" system, with a management agreement between them. This respondent indicated that for instance their pre-existing Luxembourg SIF SICAV must keep a GP, and also have an AIFM under management passport. This respondent stated that once again, AIFMD is a harmonisation directive, but there are also local fiscal and legal considerations at stake

- Finally, this respondent was of the view that it appears that the formalities are almost too easy and quick with the French Authority while long (several months) and disparate with other European authorities. The French Authority doesn't / can't assume a pivotal role in the process.

72. As a general comment, this respondent indicated that all the process is time consuming for people working in the asset management industry and that the European marketing passport is not unified yet, so not attractive, readable and predictable enough. This respondent added that a marketing passport is not necessarily useful for a professional fund open to professional investors and that in this case, reverse solicitation and / or private placement are sufficient. This respondent was of the view that however a marketing passport is perhaps a competitive advantage, even for a professional fund.

73. Another respondent noted that the AIFMD transposition into Italian law is not a reality yet, as the implementation has not been completely finalized. As a consequence, Italian asset management companies are not benefitting from the possibility to use a AIFMD passport yet. In the light of these circumstances, this respondent questioned the necessary granularity of information on the AIFMD passport that can be provided at this stage by market participants. This respondent suggested that a request for postponement of the assessment by the Commission could, therefore, be seen as a possible action ESMA could take, in order to allow some more appropriate time be in place for operators to ultimately provide the Commission with a more complete collection of evidence.

74. Another respondent indicated that their overall experience of using the passport has been very positive. Their Irish AIFM was authorised on 22 July 2013 and almost immediately began passporting in excess of 100 Irish AIFs across multiple Member States. As a very early adopter of the AIFMD passport for the cross-border marketing of multiple AIFs across a number of host Member States, they appreciates the broadly harmonised ability

to access different jurisdictions. The ability under AIFMD for an EU AIFM to conclude passport applications with a single home regulator creates significant efficiencies and a consistent process. They were particularly appreciative of the opinion provided by ESMA on 1 August 2013 which clarified that Member States which, at that time, had not yet implemented AIFMD should nevertheless still enable AIFMD compliant passported AIFs to market to professional investors within that jurisdiction.

75. However, this respondent indicated that they have experienced a number of host Member States charging disproportionately expensive passport processing fees (both initially and annually). This respondent mentioned that passporting AIFs into multiple Member States can be an expensive exercise, where the mere handling/storage of passport notification files by host Member State authorities can cost tens of thousands of Euros. This cost potentially represents a barrier to entry for EU AIFMs, particularly smaller managers. This respondent further indicated that it should be emphasised that, unlike with UCITS marketing passport applications, the work to process AIFMD marketing passports is almost exclusively performed by the home state regulator rather than the host state regulator. Consequently, they think it disproportionate for host state authorities to charge fees for the receipt of AIFMD passport notifications which are at the same level or comparable to fees charged for processing UCITS passport applications.

76. This respondent has also found that one Member State has applied additional requirements over and above the harmonised professional investor passport, in this case requiring that a local paying/information agent be appointed prior to marketing commencing. This respondent mentioned that although Article 43 of AIFMD permits a host Member State to apply additional requirements for the marketing of AIFs to retail investors, the professional investor passport under AIFMD operates on a fully harmonised basis and additional host Member State conditions or requirements should not be permissible. This respondent concluded by stating that deviation from this principle of harmonisation may act to weaken the attractiveness and usefulness of the professional investor passport and create barriers to entry, particularly for smaller managers.

77. Another respondent indicated that there are inconsistencies in the ways in which different Member States are operating the AIFMD passport. For example, this respondent indicated that over one-third of EEA States charge fees of varying amounts to AIFMs seeking to inwardly passport AIFs for marketing purposes. This respondent added that further inconsistencies are highlighted if they consider, by way of example, France, Germany, The Netherlands and the United Kingdom. This respondent indicated that in France, the AMF requires AIFMs to pay a filing fee of EUR 2,000 per fund or sub-fund and to appoint a centralising correspondent for non-French AIFs. In Germany, BaFin undertakes additional checks to those performed by the home state NCA and charges fees, the amount of which depends on the statutory seat of the AIFM and AIF. Conversely, passporting to professional investor. In the Netherlands it is relatively straightforward, although “top-up” rules apply if an AIFM wishes to market to non-professional investors. The Dutch AFM does not charge one-off or periodic fees for AIFMD passport notifications. The UK’s FCA has a similar approach and charges no fees for notifications

78. Another respondent indicated that generally speaking, they think ESMA and the European Commission should take account of the fact that any experience related to the AIFMD passport is based on a timeframe of a maximum of only one and a half years, and often less. In several EU countries, the implementation of the AIFMD is still incomplete. Managers that have been granted a licence went through the application process and may have started marketing for a while, but this respondent doubted that all or many are already in a position to make firm statements about the functioning of the passport as such. For UCITS, a management company passport within the EU was introduced 25 years following the adoption of a first directive, a timeframe during which a true brand was able to develop. This respondent indicated that the AIFMD was adopted against the background of a financial crisis with the primary aim to mitigate systemic risk. The introduction of a passport for managing and marketing alternative investment funds (AIFs) was rather considered an addition, and this respondent thought more time was needed to evaluate its functioning and benefits.

79. This respondent further indicated that passport application process in Luxembourg seems to be satisfactory in many respects (e.g. cooperative attitude, availability of guidance and certain templates, timely notifications of host regulators), at least in case of regulated AIFs. Based on what they have heard, the same seems to be the case in the UK and Ireland. At the same time, their members informed them of the following problems they encountered:

    - Many national regulators levy fees for the marketing of AIFs in their jurisdiction. Depending on the amount of the fee, this additional charge is likely to make the AIFMD passport less attractive;

    - Some Member States have introduced additional requirements, such as in France where each foreign AIF the shares or units of which are marketed to French investors must appoint a centralising agent. Moreover, the French, German and Austrian regulators require for the notification file a proof that regulatory payments were done;

    - Certain countries have not yet (fully) transposed the AIFMD into national law, which makes cross-border management or marketing under the passport difficult if not impossible;

    - Although annex IV of the AIFMD provides details of the information/documents for the passport notification, many regulators have not yet issued template notification letters. For those that have, in some cases the level of required information varies widely (E.g. the Luxembourg regulator requires a detailed mapping of article 23 (investor disclosure requirements) vis-à-vis the prospectus/offering memorandum including a copy paste of the actual text. On the other hand, the Irish and UK regulators agree to receive a mapping of where the text can be found in the prospectus/offering memorandum (e.g. only page number and section/title heading)). (E.g. the Irish regulator requires that for each sub-fund of the AIF, the classification of

the breakdown of investment strategy as per annex IV data type 10 of Commission Regulation 448/2013 is mentioned). This respondent added that another difference which causes practical issues is the decision by the UK regulator to submit to host state regulators only the information/documents as stated in annex IV of the AIFMD. All other information (e.g. proof of payment for Germany, Austria or France, or information on the centralising agent in France) must be communicated by the AIFM directly to the host state regulator. In this regard the Luxembourg and Irish regulators are much more flexible and actually require such "goldplating" documents to form part of the notification filing;

- The German regulator requires specific information regarding "Marketing Arrangements" that other regulators do not require (i.e. confirmation that arrangements have been established to ensure that the information duties specified in articles 22 and 23 AIFMD have been complied with; or confirmation that agreements with distributors have been established, which constrain these distributors to comply with the information duties specified in article 23 AIFMD). On the other hand, the German regulator often provides English translations of its guidelines, which is appreciated by the industry;

- Guidance/detailed information on the article 32 AIFMD passporting process (i.e. specific country requirements) is missing;

- There is uncertainty regarding the notion of material changes that may cause modifications of fund documentation. In Ireland, for example, this respondent indicated that it is the AIFM which decides whether the change is material or not. Moreover, the process for the notification of material changes has not yet been clearly defined by many regulators leading to uncertainty in the timing within which such notifications should or must occur.

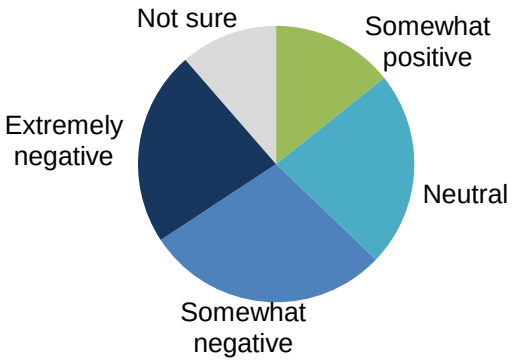
80. This same respondent also mentioned that the regulator-to-regulator notification process for marketing funds in another EU Member State (or EEA country) works well with the EU passport. From a Luxembourg perspective, this respondent was of the view that the creation of guidelines/circulars – at a home and host country level – providing detailed information on article 32 AIFMD registrations would result in the creation of a more harmonised passporting framework and would also help the promoters to better tailor their internal processes and documentations. From a UK perspective, this respondent was of the view that the streamlining of the notification process (especially by reducing the number of forms required, the need of the filing of the hard copies of the application documents) would result in a less burdensome process. From an Irish perspective, this respondent was of the view that the streamlining of the notification form to be in line with the requirements of annex IV AIFMD would result in a less burdensome process.

81. Another respondent indicated that as institutional investors, their members do not have direct experience with using the marketing Passport but can comment on its impact on investor protections, which was among the intended objectives of the AIFMD. On

balance, their members believed that the AIFMD Passport and the registration requirements associated with it have not resulted in enhanced investor protections. Among those surveyed, 52% of respondents believe that AIFMD registration requirements have in fact had a somewhat or very negative impact on European Limited Partners, due to uneven implementation of the AIFMD and the additional requirements posed by certain national regulators.

82. This respondent mentioned that it is worth noting that members' views on the functioning of the passport are preliminary, informed by limited experience in these initial months since the end of the AIFMD's transition period and their observations would benefit from more time and study of these issues: *"The regulation might make sense if fund managers were addressing retail investors, which is, however, not the case. We feel the regulation is restricting our access to top fund managers rather than providing us with any benefit." "[We] do not see any positive impact, only a potential delay in coming to market because of a lack of registration capacity by authorities."*

What impact have AIFMD registration requirements had on investor protections for European limited partners?



83. This respondent also indicated that in their members' experiences, there can be significant dispersion in returns between the highest performing managers and their peers within the same asset class. They mentioned that several European investors, particularly smaller institutions, report lower levels of access to top performing PE funds attributable to the functioning of the AIFMD Passport or the National Private Placement Regimes. They indicated that this is a serious concern as their members rely on the performance available from investments into private equity to meet beneficiaries' or members' target returns, whether for retirement planning or meeting other liabilities as they fall due. They mentioned that this is even more important in a low interest rate, and potentially deflationary economic environment. Their members were concerned that a poorly functioning Passport and National Private Placement Regimes hinder investor access to the highest performing managers available, thus resulting in lower returns to EU investors and a potentially elevated risk profile due to unintended geographic concentration within their portfolios.

84. This respondent further indicated that AIMFD implementation at the national level (and in some instances its lack of implementation) has in several areas added to further fragmentation of the EU internal market for private equity. In particular, they mentioned

that variance around the definition of marketing has raised barriers to investment rather than facilitate capital flows. Their members caution that the uneven requirements that have manifested within the current AIFMD Passport regime should not be allowed to persist if the Passport regime is extended to non-EU AIFMs.

85. Another respondent indicated that they welcomed and continued to support the concept of the EU passport as introduced by the AIFMD. However, they believed that it is still too soon to fully assess the AIFMD passport regime and how well it is functioning. While they recognised that ESMA is obliged under the AIFMD to provide its opinion on the functioning of the passport by 22 July 2015, the practical experience with the passport regime is only limited given the delay by many Member States in transposing the AIFMD into national laws, combined with the decision by many EU asset managers to avail of transitional periods and thereby delay applying for AIFM authorisation. So far, they indicated that the experience with the passport is showing problems in its day-to-day application due to a lack of harmonisation and consistency of certain requirements, such as around delegation. Furthermore, they mentioned that different requirements under national private placement regimes further hinder and fragment the distribution of EU AIFs within the EU. As a result, they indicated that market access is unnecessarily limited and barriers to entry are created which limit investors' ability to access a wider range of fund products, and which in turn, causes investors detriment and hampers the further integration of the EU Internal Market

86. Another respondent indicated that the possibility of managing directly AIFs registered in other countries provides a good opportunity. But they faced a major problem with the passport since they did not receive any information about fees to be paid to Regulators after passporting their funds which is worrying because they indicated they do not know what they will have to pay at the end of the day.

87. This respondent indicated they faced another problem with employee savings scheme (FCPE) which are now considered as AIF as some Regulators refused to provide a passport for these funds. They indicated that until now FCPE had no special cross border regime and were admitted without restriction by these regulators.

88. Generally speaking, they indicated that the question of costs for registration is the major problem they identified. For other aspects, they mentioned that the experience is too recent to draw conclusions.

89. Another respondent indicated that they have not encountered material difficulties, but their examination of the application process in relation to future business plans indicates that: i) application fees being charged and the amount varying between jurisdictions (it is not clear as to what these amounts relate to), ii) additional periods of time taken for review of the application in some Member States; iii) additional administration functions (such as centralised agent) being required to be undertaken in some Member States. In their view, all would seem to be over and above the strict requirements of the Directive and complicate the process as we look to use the passport in future. In addition local marketing requirements have proven problematic

90. Another respondent indicated that overall their 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. They mention that 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. They added that 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.

91. However, this respondent was of the view that 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.

92. This respondent further indicated that their 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. They mentioned that 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.

93. This respondent also mentioned that 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, this respondent was of the view that these fees can discourage AIFMs which are required to pay without being able to survey investor interest in a potential AIF. France requires the appointment of a correspondent bank for each AIF that an AIFM intends to market in France. This respondent was of the opinion that 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.

94. This respondent added that 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. Their 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.

95. Another respondent mentioned that the registration in the UK, Netherlands, Italy, and Spain was straight forward: no additional information or specific document was requested by the regulator, and no fees were requested. So for those countries, this respondent was of the view that the registration of an AIF is very quick: they just need to send the notification letter to the CSSF and to wait for the 20 days approval period.

96. However, this respondent indicated that for Germany, additional information was requested, essentially in relation to the arrangements for marketing: they had to state in the notification letter: a) whether they have established internal arrangements to ensure that the information obligations towards potential investors interested in the acquisition of shares are being complied with. (e.g. through relevant instructions and training for staff); and b) whether they have concluded agreements with all marketing partners acting on behalf of the EU AIF management company which compel these partners to comply with the duties to inform potential investors. In addition, this respondent mentioned that for France, the AMF is requesting that they appoint a Centralising Correspondent Agent in France, like they do for UCITS funds.

97. This respondent concluded that there is no clear picture/procedure for the time being to register an AIF in an EU country. Each time they register an AIF in a new EU countries, they indicate that they don't know where they go and how long it will take. In their view, the notification requirements should be harmonized in all Member States.

98. Another respondent indicated that many of their members have reported that, when trying to make use of the AIFMD passport to market funds in another Member State, they are faced by numerous unexpected charges from the Host State authority, both initially and annually. They indicated that these fees vary in nature, timing and size from Member State to Member State, causing procedural difficulties. In terms of cost, they mentioned that marketing an AIF into several other Member States can be an expensive exercise, costing tens of thousands of Euros merely to process the notification files to other EU authorities.

99. This respondent further indicated that while they understand that additional costs are to be expected when using the passport, these fees should be reasonable, proportionate, justified and not represent a level of national gold plating that creates a barrier to entry for authorised EU AIFMs. They mentioned that a lack of transparency in passport processing, and additional requirements demanded by Host States' authorities, for AIFMs already authorised in their Home State have also been identified as difficulties encountered by EU AIFMs.

100. Another respondent indicated that the limited use of the AIFMD passport across the European Union to date has generally been satisfactory, although there are certain recurring issues which require resolution. Firstly, they indicated that there remains a large degree of ambiguity around the concept of "marketing" which they believe has impeded the uptake of the passport regime. They mentioned that the lack of a uniform definition of "marketing" across the EU has led to a lack of clarity regarding the exact point at which the requirement to notify an AIF to a host Member State regulator is triggered. In a similar vein, they mentioned that the lack of a uniform definition of "particulars" and "material change" across the EU has led to a lack of clarity regarding the exact point at which the requirement to notify a home Member State regulator of a material change to any of the "particulars" communicated in the original passport notification is triggered.

101. In addition, this respondent was of the view that certain Member States regard any initial contact with a prospective investor as "marketing", whereas other Member States only consider "marketing" to take place when a final offer (eg subscription document) is presented to the prospective investor (and correspondingly permit a certain degree of "pre-marketing" activities in those Member States before AIFMD is considered to have been triggered). Equally, they mentioned that no application for a marketing passport can be processed until the relevant AIF is legally in existence. This therefore calls into question the validity of any communications with prospective investors prior to the formal establishment of the AIF (which is often one of the last stages in the process).

102. Furthermore, this respondent added that whilst the marketing passport permits an authorised AIFM to market in a given jurisdiction, in practice many AIFMs delegate the day-to-day marketing function to other entities. If, for example, an AIFM delegates the marketing of an AIF to a U.S. investment manager (in its capacity as the AIFM's delegate), this respondent was aware that certain Member States require either further local authorisation of that non-EU entity or the establishment of a local branch.

103. Secondly, this respondent was aware that certain Member States are imposing additional requirements relating to, among other things, the appointment of local correspondent banks, the provision of additional disclosure, and varying levels of registration and/or ongoing regulatory fees. They indicated that this lack of consistency between Member States is making the passport process difficult for EU AIFMs to navigate. They believed that it is imperative for the future success of the AIFMD passport that efforts be made to foster a more harmonised approach and to prevent Member States "gold-plating" in this manner.

104. They indicated that their principal concern, however, is that they believe that it is far too soon to be able to meaningfully assess the operation of the AIFMD passport regime. They recognise that ESMA is obliged pursuant to Article 67(1) of AIFMD to provide its opinion by 22 July 2015. They would however note that this timeframe was predicated on assumptions that AIFMD would- as required by Article 66 of AIFMD- have been fully implemented into national laws across the EU for two years by that date (and the passport regime therefore well embedded).

105. In reality, they mentioned that the delay by many Member States to transpose AIFMD into national laws, combined with the decision by many EU asset managers to avail of transitional periods/ continue to rely on national private placement regimes ("NPPRs") and thereby delay applying for AIFM authorisation, has resulted in far less practical experience of the passport regime to date than they submit would have been expected when AIFMD was drafted.

106. They believed that the decision of whether or not to extend the passport regime to non-EU AIFMs/ AIFs is of seismic importance to the future direction of the European funds industry. They in turn believed that no such decision should be taken until enough time has passed, and enough practical experience has been acquired, for a meaningful review of the passport regime to be carried out. They therefore suggest that ESMA might,

notwithstanding the timeframe mandated by Article 67(1), consider discussing with the Commission the possibility of postponing its opinion.

107. Another respondent indicated that the passport regime has not been implemented evenly across the EU, where definitions of marketing, additional regulatory burdens and costs vary. They indicated that the definition of 'marketing' in the AIFMD, does not include pre-marketing, which has been the position adopted by UK and Germany, but not followed by all Member States. They mentioned this has made it problematic to AIFs and AIFMs in practice, leading them to often go through lengthy and costly processes to set up AIFMD documentation in order to market in a jurisdiction without being able to first ascertain investor interest. They mentioned that if investors are found then this documentation is invariably negotiated and then requires material changes to be reported to the home NCA. This respondent was of the view that this does not add to investor protection, but does add additional burdens that are costs to the investor. Additionally they mentioned that the fees imposed by Member States in order to exercise the Passport are heavy. The cost of marketing into multiple jurisdictions a typical AIF can run into thousands of Euros before additional advice fees are considered. They further mentioned that marketing into France with the additional cost and burden of a paying agent is a specific example.

108. This respondent also indicated that they are aware that the definition of Professional Investor for the Passport and for MiFID has caused problems marketing to family offices or high net worth individuals, wishing to invest in AIFs.

109. Another respondent indicated that the passport is one of the key benefits of the AIFMD regime and should operate in a streamlined and harmonised way, but in practice this is not the case in a number of Member States for the following reasons:

- certain states, when acting as host Member States, have introduced local requirements which are not contemplated by the Directive. For instance, regulators in France, Austria, Denmark and Germany charge fees and, in some cases, continuing annual fees in relation to inward passporting notifications. In addition, this respondent mentioned that France has imposed a requirement for an AIFM exercising a passport right to market an AIF into France to appoint a local paying agent, although there is no legal basis in the Directive for such a requirement to be imposed;

- This respondent added that certain host Member State regulators have developed a practice of raising questions on passporting notifications and have indicated that the right to market an AIF into their respective countries is conditional upon these questions being satisfactorily addressed. Questions of this nature have been raised both with the home state regulator and directly with passporting AIFMs. This respondent indicated that the Directive permits an AIFM to commence marketing in a host Member State as soon as it receives notification from its home state regulator that the passport notification has been transmitted to the regulator in the host Member State. This respondent indicated that the Directive requires

the home Member State regulator to review a passport notification for the purposes of ensuring compliance with the Directive and does not contemplate that the host Member State regulator should do so or should be able to raise questions directly with passporting AIFMs. This respondent added that this practice creates legal and regulatory uncertainty, particularly where differing views are expressed by home and host state regulators. This respondent indicated that the Directive requires an AIFM to deal only with its home regulator in exercising its passport rights and the views of that regulator should prevail;

- This respondent also indicated that Member States have differing approaches to the notion of 'marketing' for the purposes of the Directive. The Directive defines 'marketing' by reference to the offering or placement of units or shares in an AIF. Certain countries, such as the UK and Germany, have aligned their approaches to this definition so that, in the UK for instance, 'marketing' occurs only at the point at which units or shares in an AIF are made available for subscription by an investor (e.g. by the investor being provided with subscription documents which can be executed in order to make the investment) – that is, the point at which an offering or placement occurs (see Section 8.37 of the Financial Conduct Authority's Perimeter Guidance Manual). This respondent indicated that other countries have taken a much broader approach and view preliminary promotional activities, such as discussing possible fund terms with a potential cornerstone investor in order to ascertain investor interest and the provision of draft fund documents to investors for review and discussion (which typically takes place, for instance, in the context of the establishment of private equity and venture capital funds) as marketing for the purposes of the Directive. This respondent indicated that provided the provisions of the Directive relating to marketing (such as the provision of investor disclosures) are met at the point at which units or shares in an AIF are made available for subscription by an investor, there is little, if any, additional investor protection conferred by requiring these provisions to be met at an earlier, more preliminary stage. However, this respondent mentioned that this wider interpretation of 'marketing', although not conferring any obvious benefit, does create significant practical issues for AIFMs and increases the cost burden of raising a new fund. This respondent indicated that in countries adopting this wider approach, it is problematic to engage with prospective investors without preparing the fund documentation required in order to obtain a marketing passport. This respondent indicated that this means the AIFM must bear the cost, and resulting risk, of doing so without knowing whether there is any interest in the fund from investors in that country. Additionally, this respondent indicated that if the AIFM is based in a country where a narrower interpretation of marketing applies, it will not be possible to obtain a marketing passport until late in the fundraising process, which creates a marketing disadvantage for the AIFM. This respondent indicated that further, the differing approaches taken by Member States to the concept of 'marketing' for the purposes of the Directive, means that AIFMs must incur costs, and spend time, assessing the approach in each Member State in which the AIFM wishes to marketing in order to ascertain which activities are permitted prior to a passport being obtained.

110. This respondent indicated that the lack of harmonisation resulting from the above issues makes the passport a less attractive option than should be the case. Usage of the passport has been very limited in a number of investment fund sub-sectors, particularly hedge funds and listed closed-ended funds and, in our experience, the usage of national private placement regimes (NPPRs) has been much more common. This respondent indicated that the overall experience of using the passport in a wide range of EU jurisdictions can prove to be unsatisfactory, as the time taken to meet the various domestic requirements and the cost of doing so (in particular, the payment of regulatory fees and the fees of paying agents) can be significant. This respondent indicated that this means that utilising national private placement regimes can be a more attractive option for fund management groups when deciding whether to establish a fund as an EU AIF with an EU AIFM in order to utilise the passport, or as a non-EU AIF or using a non-EU manager. This respondent indicated that where AIFMs have established EU AIFs in order to use the passport, this may be influenced (and, in our experience, has been influenced in a number of cases) by the perception that certain types of investor are only willing to consider investing in EU domiciled AIFs, rather than the perceived advantages of the passport itself.

111. This respondent further indicated that the AIFMD marketing regime in general is over-complicated, with a wide range of different requirements that may apply (including requirements at a local level) depending on where the marketing is carried and, and by whom; adding costs and complexity when fund raising in the EU. This respondent indicated that it is clear that a more harmonised and streamlined process for exercising the passport is needed in order to make the passport function in a more satisfactory manner.

112. Another respondent indicated that they have encountered 5 problems:

- This respondent indicated that private equity funds are typically partnerships and not UCI in the legal sense. Participation in these arrangements is negotiated with each partner individually and there is no general offer or other ‘marketing’ in the sense intended by Articles 31 and 32. This respondent indicated that this makes for a very fluid closing process where material points are in flux and a static pre-authorisation process is unrealistic (especially in the context of complying with the general principles of Article 12(1)) and has the effect of pushing back fund launches (increasing commercial risk);

- This respondent indicated that it is unclear what would constitute a ‘material change’ for the purposes of Articles 31 and 32 and this uncertainty may in due course be relied upon to challenge the contractual validity of investor commitments. This respondent indicated that this uncertainty is a particularly sensitive issue in a high value, institutional context where ordinary contractual principles should apply (under the one agreed law of the relevant AIF to avoid the unnecessary conflict of law issues that are now arising);

- This respondent also indicated that it is not always obvious in advance in which Member States passport rights should be exercised and whether the process is proportionate for just one or two possible investors in any jurisdiction. This problem is exacerbated by the following issue;

- This respondent mentioned that exercising passport rights is not automatic and appears to be dependent on the payment of certain regulatory fees in around a third of Member States, which were not adequately disclosed in advance. This respondent indicated that these fees are both upfront and annual, and the annual fees appear to continue even after the marketing of closed-end funds has ceased (assuming, they presume, that such fees would have to be contingent on the existence of actual investors at that point). This respondent indicated that these fees are levied without any legal foundation and if they are to be tolerated by the Commission, they anticipate above inflation increases over the years. Funds under the AIFMD seem an easy target for such revenue raising measures.

- This respondent indicated that the AIFMD has not yet been included in the EEA-agreement and the passport, therefore, has been unavailable in EEA state.

113. This respondent further indicated that it should be easy to contrast the approach of the French authorities in requiring a local correspondent, with that of the German authorities undertaking additional checks with the more straightforward approach of the UK or Dutch authorities. Passporting, like NPPR, seems unnecessarily politicised and many Member States appear to be attempting to restrict the free flow of investment capital with the imposition of 'border controls'.

114. Another respondent indicated that 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, they respectfully urge ESMA to: i) 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 ii) 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.

115. Another respondent indicated that their members encountered problems in the use of the EU passport. This respondent indicated that the implementation of the process has been more complex than expected. Information exchanges between the regulators have not been an easy task. They identified some issues which have created difficulties to market across the EU, as described below:

- Lack of harmonisation of the concept of "marketing". This respondent indicated that for the purposes of AIFMD, "marketing" means a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the

AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the EU. They acknowledged that national regulators do not have the same approach to the concept of "marketing". This respondent indicated that their Private Equity and Venture Capital funds are basically closed-ended AIF. In this context, fundraising requests preliminary discussions with prior investors about the terms upon which they might be prepared to invest in the manager's next funds. This is called "pre-marketing' or 'soft circling'. This respondent indicated that the UK and others members' states like Germany or Sweden or Denmark consider that "pre-marketing" or "soft circling" would not constitute marketing under AIFMD. This respondent indicated that they share this approach. It should be possible to test the interest of non-retail investors before the creation of a closed-ended AIF (marketing presentation without any subscription). They considered that as long as the AIF does not exist legally, it cannot be marketed or be able to apply for marketing passport. This respondent indicated that they noted with concern that some other Member States like France have a different position and consider that "marketing" is actually even as the AIF does not yet exist legally. This respondent indicated that these differences of views cause difficulties for AIFM. They invited ESMA to take a position which should be applied across EU in line with MIFID and AIFMD.

- Emergence of new barriers for marketing AIF across EU**.** This respondent indicated that they observe that some new barriers have been introduced since the transposition of AIFMD by some Member States. For example, since the end of December 2013, this respondent indicated that the German law on the taxation of investment (Investmentsteuergesetz-"InveStG") has been modified to adapt it to the new provisions from the transposition of the AIFMD. This respondent indicated that one of the key measures presented as an anti-abuse measure leads to fiscally disqualifying the closed-ended funds in the form of mutual funds ("fonds commun de placement") which are not considered as transparent structures. This respondent indicated that they note with concern that only limited partnerships and Luxembourg special limited partnerships are considered as transparent structures and can benefit of a preferential tax regime. This respondent indicated that this measure would reduce the interest of marketing passport for private equity and venture capital AIF which are almost exclusively closed-ended funds constituted under form of mutual funds.

Lack of information regarding fees and charges levied by some host national regulators**.** This respondent indicated that they also find that some national regulators require fees for the exercise of the marketing passport. The fees and charges levied by some host national regulators are an additional requirement which is not mentioned in AIFMD and not always known by AIFMs. This respondent indicated that those fees and charges could lead AIFM to renounce the marketing in the host country. This respondent indicated that they understand that the European commission is examining whether

those fees and charges are in line with the European legislation. Nevertheless this respondent indicated that each national regulator imposes various amounts of fees and calculation. Their members regret the lack of information regarding those amounts and the calculation method. This respondent indicated that they noticed that some Member States do not apply fees and charges for exercising marketing passport (i.e. UK, Ireland, Netherlands, Hungary or Sweden). They suggested that this information should be given to each AIFM before the beginning of the process of marketing passport. All national regulators should send to AIFM clear information of on fees requested by the host national regulator.

This issue would avoid AIFMs to request the withdrawal of the marketing passport.

They also suggested that those fees and charges levied by host national regulators should be required only during the subscription period for closed-ended AIF. It does not make sense to continue to levy fees when for an AIF when subscription is not possible anymore.

- Additional requirements imposed by some host national regulators for amendments of the legal documentation of the AIF during the process of notification. Finally, they acknowledged that local administrative rules are applied in addition to the level of requirements required by the AIFMD. This respondent indicated that another limit for the marketing passport is relating to additional requirement imposed by some host national regulators. For example, Germany requires that the legal documentation of an AIF provides specific references to the 'semi-professional' investors' status. This respondent indicated that the legal documentation of the AIF should be amended and mentioned that investors could have the ability to invest €200 000 at least. The requests for amendment of the legal documentation of the AIF take place during the process of marketing passport while the AIF is, moreover, marketed in other Member States. The update of legal documentation requires sending, where appropriate, specific information to existing investors which induces additional costs. This respondent indicated that another example is concerning Spain which asks to appoint a solidarity representative resident in Spain for the payment of marketing fees (despite the UE Court of Justice's judgment dated December 11, 2014 (case C-678/11). They suggested imposing a principle of transparency. All the AIFM should be informed before the beginning of the process about any additional requirements imposed by host national regulators.

- This respondent indicated that one of their members points out a difficulty regarding the use of the management passport through the freedom of services in Luxembourg. Indeed, this respondent indicated that the CSSF requires that the notification it receives from the AMF specifies the denomination of each AIF concerned. This respondent indicated that this implies for the AIFM to ask the AMF to send an update to the CSSF for each new fund before having the right to

manage a new Luxembourg AIF. This adds intermediaries in the process for fund creation and uncertainties regarding the duration of the fund creation process.

116. Another respondent indicated that they welcome the introduction of the marketing passport and consider its availability to be the main benefit associated with the burden of complying with the AIFMD. Although they considered that the passport has the potential to strengthen the European private equity and venture capital market and contribute ultimately to the provision of capital to the European real economy, they are concerned that a number of practical issues associated with its exercise are undermining its value. By way of background, there are three general points they would like to make upfront:

117. i) only six months have elapsed since the end of the transitional period under the AIFMD - ESMA should take this into account when reviewing the responses and formulating recommendations; ii) there are material inconsistencies in the ways in which different Member States have implemented the passport; iii) experience with the current EEA AIFM passport may be very limited in a number of Member States due to delayed/incomplete transposition of the AIFMD. For example, this respondent indicated that Italy has not yet completed its implementation process of the AIFMD so no experience relating to the use of the passport by Italian AIFMs is available at this stage. The same goes for countries like Poland, Lithuania and Romania. At the same time, Member States like Belgium, Spain and Portugal have only recently completed national transposition so experience in those countries will also be rather limited.

118. This respondent indicated that uneven requirements that have manifested within the current AIFMD passport regime should not be allowed to persist, especially if the passport regime is expanded to non-EU AIFMs. This respondent indicated that these problems should be addressed sooner rather than later. They already saw how problems with the implementation of the AIFMD EU passport limit its usefulness to EEA investors.

119. This respondent set out below the key difficulties that their members have encountered when seeking to use the marketing passport.

120. *Fees and charges imposed by host Member State regulators in response to the exercise of the passport*

121. This respondent indicated that a number of host Member State regulators are imposing fees on AIFMs when they seek to exercise their marketing passport rights in that Member State. This respondent indicated that the imposition of such fees – which can, as described below, be substantial – is acting as a disincentive to many of their members to market their funds in those Member States where fees are being charged. This issue is felt most acutely where the investor base in the host Member State is comparatively small and these additional regulatory costs are disproportionate to the perceived fundraising potential. As a result of this practice, this respondent indicated that investors in those Member States risk having fewer investment opportunities open to them or facing higher costs to access opportunities where they remain available.

122. This respondent indicated that this issue is particularly significant for those of their members which are smaller venture capital firms, because they tend to raise smaller funds and, as a result, the imposition of additional fees tends to be felt more acutely. This respondent indicated that given the European Commission's commitment to helping innovative SMEs across Europe access venture capital funding, it would be extremely disappointing if the actions of certain Member State regulators were to adversely impact the development of the European venture capital market. They set out below some examples of the AIFMD (upfront and/or annual) fees which are being charged by Member State regulators:

- Austria: Initial fee of EUR 1,100 per AIF and an annual fee of EUR 600 per AIF thereafter (additional fees apply where there are sub-funds in the structure). We understand that the annual fee must be paid every year for notified funds and that the obligation to pay the annual fee falls away only when the passport is cancelled.

- Denmark: DKK 2,062.50 annually per AIF for 2014 (plus, where relevant, additional fees per compartment).

- France: EUR 2,000 per sub-fund. We understand that the AIFM must pay this fee to the AMF and receive proof of payment before it submits to its home Member State regulator the marketing passport notification form. We understand also that proof of payment must be included in the notification file.

- Germany: EUR 772 for processing the marketing passport notification.

123. This respondent indicated that the impact of these charges is particularly acute where annual fees are levied. In those cases, it is not always clear whether jurisdictions expect a fee to be paid: (a) only during each year that marketing takes place; or (b) even after marketing has ceased but where there are still investors in the fund in that jurisdiction. (For private equity and venture capital funds, there is no marketing after 'final close' (broadly, the point after which no new investors can be admitted to the fund).) This respondent indicated that some Member State regulators seem to have implied in correspondence with their members that fees would cease to be due only if the AIFM cancelled its marketing passport but the position remains unclear and divergent approaches appear to be being taken by regulators.

124. This respondent indicated that in addition, these fees are disproportionate and lack any consistency or link to the amount of work being performed, and whilst on their face they may not look particularly significant, they can end up being substantial given how most private equity and venture capital funds are structured. This respondent indicated that most such funds consist of several (perhaps six or seven) parallel limited partnerships, each of which is an AIF. Each limited partnership will have slightly different characteristics to suit the needs of investors in different jurisdictions. By way of example, it has been common in the past for English AIFMs to use mainly English limited partnerships with a parallel German KG for German and Austrian investors. There may also be English limited partnerships denominated in different currencies (e.g. EUR and USD) to fit the preferences of the funds' investors. As noted above, each limited partnership is an AIF. This respondent indicated that where fees are charged on a 'per-

AIF' basis, and where funds are marketed into a number of Member States each of which is imposing fees or charges, this means that the total fees incurred can be substantial. This is demonstrated by the worked example below.

- An AIFM wishes to exercise its marketing passport rights in respect of five parallel limited partnerships, each of which is an AIF. The average fee charged by host Member State regulators is EUR 1,200 per AIF.

- If the AIFM markets into 28 Member States, each of which charges a fee, the total fee incurred is EUR 168,000. A conservative assumption would be that the cost of appointing a paying agent in France (see further below) and one other Member State would bring the regulatory charges associated with exercising the passport to EUR 200,000.

- This is, however, before indirect costs such as the management cost of attending to the administration involved and the cost of payment transfers are included. This is also before taking into account ongoing annual regulatory fees, such as those charged in Austria and Denmark.

125. This respondent indicated that these fees and charges clearly add up to a large amount in absolute terms. Although for a large fund this amount might be only a small percentage of total fund commitments, for a smaller fund (and particularly venture capital funds), it will be a meaningful addition to the total expense ratio. This respondent indicated that if a non-EEA AIFM decides that such fees are material to its marketing activities it is possible that such fees may look to be recouped by non-EEA AIFMs, either as a direct fund cost or indirectly out of a higher management fee. This respondent indicated that this could mean that the AIFMD has the effect of unintentionally increasing the cost of investing for EEA investors.

126. A more comprehensive overview of the applicable fees and charges for EEA AIFMs intending to exercise marketing passport rights into Europe and to market on a cross-border basis ("passport") into the relevant jurisdictions is set out in an Annex provided with by this respondent. It should be noted that this is not an exhaustive list and it cannot be ruled out that other countries may follow suit and also start charging host fees.

127. *AMF requirement for the appointment of a French paying agent*

128. This respondent indicated that in addition to the fees described above, the AMF also requires AIFMs to appoint a French paying agent when they market into France pursuant to the passport. Not only do this respondent considered this requirement to be illegal (in our view, there is no legal basis in the AIFMD for such requirement to be imposed) but they also considered it to be a wholly disproportionate obligation for private equity and venture capital AIFMs and in fact, the imposition of the paying agent may result in costs many magnitudes more than the passport fee.

129. This respondent indicated that in a private equity and venture capital context, the only payments to investors tend to be distributions made following either the realisation of an

investment or a refinancing. There are, therefore, typically very few payments made during the life of an investment. Further, this respondent indicated that although there is a requirement for a paying agent in the UCITS market, this is partly to ensure that there is a local entity, the employees of which speak the language of the host Member State, which investors can approach if necessary. This respondent indicated that whilst this is not an unreasonable requirement in the retail market, it is disproportionate in the professional investor market, where all involved parties speak English, meaning that a local paying agent is unnecessary. Setting aside the issue of illegality, to require a private equity or venture capital AIFM to incur the costs and administrative burden associated with the appointment of a paying agent is therefore a disproportionate obligation. As in the case of the fees and charges described above, this respondent indicated that this obligation is likely to deter many (and particularly smaller) AIFMs from marketing into France. This respondent indicated that this renders the passport redundant in terms of accessing French investors, is anti-competitive and further undermines the single market for non-UCITS funds which the AIFMD sought to establish.

130. *Certain host Member State regulators commenting on materials (such as Article 23 disclosures) communicated to them by the home Member State regulator*

131. This respondent indicated that as ESMA will be aware, when applying for a marketing passport an AIFM must submit, to its home Member State regulator, a notification comprising the documentation and information described in Annex IV to the Directive (Article 32(2) of the Directive). Under Article 32(3) of the Directive, the competent authority of the AIFM's home Member State must, no later than 20 working days after receiving a complete notification, transmit the notification to the competent authorities of the Member State(s) where it is intended that the AIF will be marketed. The competent authority of the home Member State will only transmit the notification if it is satisfied that the AIFM's management of the AIF complies with the Directive. The competent authority of the home Member State must inform the AIFM of the notification's transmission and the AIFM may start marketing the AIF in the host Member State(s) as of the date of that notification (Article 32(4) of the Directive).

132. This respondent indicated that as is clear from the above, nowhere in Article 32 of the Directive (or elsewhere in the AIFMD) is it contemplated that the host Member State competent authority should review the content of the notification (and, in particular, the 'Article 23 disclosures') and/or contact the AIFM about its intended marketing activity in their Member State. Theye are, however, aware that both of these things have been occurring in practice.

133. This respondent indicated that some host Member State regulators have been communicating with AIFMs either through the relevant home Member State regulator or directly. This respondent indicated that where this concerns obvious omissions or errors in the mandatory Article 23 disclosures not identified by the home Member State regulator, there can be little objection. On some points, however, this respondent indicated that there is a risk of multiple divergent views being expressed by different regulators (e.g. how to approach disclosure of NAV when this will fluctuate). Given that

under the architecture of the Directive an AIFM is required only to deal with its home Member State regulator in the context of the marketing passport, this respondent indicated that the views of that regulator must be determinative. This respondent indicated that any other result undermines the operation of the passport, creates legal and regulatory uncertainty and will hinder AIFMs' cross-border marketing activities.

134. This respondent indicated that they are also aware that in some cases, local expectations about the content of a marketing passport notification go beyond the requirements set out in the Directive. They understand, for example, that at least one national regulator is in some instances requiring an AIFM to provide certain confirmations in its passport notification about its marketing arrangements and (where relevant) the arrangements in place to prevent marketing to retail investors. Whilst they acknowledge that, pursuant to Article 32(5) of the Directive, such arrangements are subject to the laws and supervision of the host Member State, they believed this means that the arrangements should secure compliance with the local laws and do not think that a host Member State competent authority has any legal basis on which to require additional confirmations from an AIFM as part of its passport notification.

135. This respondent would suggest that it is for competent authorities to develop common supervisory expectations about the passport and the contents of the passporting notification through ESMA's Investment Management Standing Committee and to communicate those expectations to the industry. This respondent indicated that this would allow the marketing passport application process to function more effectively, provide AIFMs with the certainty they need to ensure their notifications will meet regulatory expectations on a cross-border basis and avoid disruption to AIFMs' fundraising activities. Accordingly, they invited ESMA to publish guidelines in order to harmonise practices.

136. *Initial marketing notification, followed by 30 days' notice of planned "material changes", is inconsistent with/difficult to apply in the context of closed-ended funds' iterative marketing process*

137. This respondent indicated that the marketing passport notification process – where an initial notification must be made to the AIFM's home Member State regulator followed by subsequent notifications to that regulator of any "material changes" to the contents of the initial notification – is difficult to apply in the closed-ended fund context where marketing takes place on an iterative basis. They described below their members' typical approach to fundraising and the problems they are encountering with the notification process given this approach.

138. *Typical private equity/venture capital fundraising process.* This respondent indicated that private equity funds are typically partnerships (or other negotiated structures), and not off-the-shelf unitized collective investment funds as such, which are merely "sold" to investors. This respondent indicated that participation in these co-investment arrangements is negotiated with each partner (and their advisors) individually and there is no general offer or "marketing" in the customary sense (as opposed to the technical

interpretation of the AIFMD term, which varies from Member State to Member State). This respondent indicated that this makes for a very fluid closing process, where negotiations with individual investors/partners can typically take 6 months or even longer and where often critical points (typically in favour of the investors) are agreed quite late in the process.

139. This respondent indicated that ultimately these negotiations will lead to a series of "closings" where investors are admitted to the partnership (or 'fund') (become parties to the partnership agreement). Contractual certainty is critical in a private equity context given the size and long-term nature of these commitments and the need for investors (co-investment partners) to rely upon one another to adhere to the terms of the co-investment agreement.

140. This respondent indicated that these series of negotiations typically imply that it takes somewhere between 12 to 18 months before a private equity fund holds its final "close". As a consequence of the negotiated nature of these co-investment arrangements, it is only very late in the process where the limited partnership (and the AIFM as the case may be) is established and the information memorandum (which is not a subscription document) summarizing the investment strategy, the main commercial terms and how the fund is to be operated is finalized. This typically only occurs just before or in connection with the first "closing".

141. *Problems encountered by their members.* This respondent indicated thata planned "material change" to the contents of an initial marketing notification requires one month's prior notification to the AIFM's home Member State regulator before 'implementing' the change. In the closed-ended fund context, they consider 'implementing' a change to mean closing (i.e. admitting investors) on the basis of the change. An unplanned material change requires notification only after the change has taken place. This respondent indicated that whilst the term "material change" is used in the marketing context, it is defined only in the context of an AIF's annual report. In that context, Article 106(1) of the Level 2 Regulation provides that, "*Any changes in information shall be deemed material within the meaning of [Article 22(2)(d) of the Level 1 Directive] if there is a substantial likelihood that a reasonable investor, becoming aware of such information, would reconsider its investment in the AIF, including because such information could impact an investor's ability to exercise its rights in relation to its investment, or otherwise prejudice the interests of one or more investors in the AIF*" (the "Article 106 test").

142. This respondent indicated that whilst the Article 106 test does not technically apply in the marketing context, they consider that it sets a sensible basis on which to commence an analysis of whether changes to the information or documentation provided to a regulator as part of an initial marketing notification (which will include the limited partnership agreement) must subsequently be notified to that regulator. Whilst the UK FCA has helpfully expressly adopted this test in its AIFMD marketing notification forms, they understand that not all Member State regulators are taking this approach.

143. This respondent indicated that although they consider it sensible broadly to apply the Article 106 test in the marketing context (that is, under Articles 31(4) and 32(7) of the Directive), they think the test would benefit from an additional gloss in this context. They considered that a change which is advantageous to investors (such as a reduction in the management fee payable by investors) and/or purely administrative (such as a change of name of an AIF) is not a material change at all for the purposes of Articles 31(4) and 32(7) of the Directive and therefore does not require prior notification to the AIFM's home Member State regulator.

144. This respondent indicated that adopting this interpretation would not adversely impact investor protection but would both minimise disruption to AIFMs' businesses and reduce the administrative burden on Member State regulators. This respondent indicated that unless Member State regulators either accept that changes to fund documentation during the negotiation process described above are "unplanned" (and therefore subject only to a post-change notification requirement) or the approach set out here is adopted (our preferred approach), fundraisings will be disrupted by a series of one-month wait periods before closings. This respondent indicated that this is frustrating for both managers and investors (the latter will have agreed to the changes during the negotiation process and will therefore be aware of them) and does not benefit any parties.

145. Finally, this respondent indicated that whichever test is adopted it would be helpful if all Member State regulators could adopt the same approach to assessing materiality and whether changes require notification. This respondent indicated that this would ensure that there is a level playing field across the EU and avoid there being a more onerous (and therefore anti-competitive) regulatory notification burden in some Member States. From a practical perspective, there is a risk of uncertainty for an AIFM if its home Member State regulator adopts the Article 106 test but a host Member State does not (although, as noted above, we consider that the Directive considers the opinion of the home Member State regulator to be determinative).

146. Another respondent indicated that regarding the current assessment of the functioning of the intra-EU AIF and AIFM passports, their members can just provide for first feedbacks, as the entry into force of these passports is very new (to their knowledge, some Member States have not even transposed the Directive yet). Therefore, their members consider that it is too early to draw general conclusions on the way of functioning of these EU passports. At this stage, this respondent indicated that it just appears that there are a series of frictions regarding the processes followed by national regulators, as well as some specific requests which were not always expected or disclosed in advance:

- The costs of fees for registration by host regulators are too high, and not always disclosed in advance. Their members would wish a pan-European harmonisation of fees taken by host regulators;

- More generally, the processes for registration by host regulators are often not enough transparent and known in advance.

147. In addition, this respondent mentioned that the Management Company passport does not work yet in some Member States, such as in Luxembourg (in Luxembourg, a differentiation seems to be made between the UCITS Directive, which provides for a full asset management company passport, and the AIFM Directive which is felt – wrongly they believed – not to provide such a "full" passport).

148. For most of their members this current situation - as long as it will not be improved in the future - is worse than the previous situation of national private placement regimes, which ensured some flexibility and worked rather better than the new product passport approach.

149. This respondent indicated in more details that according to our members, the situations vary a lot: i) From Member State to Member State ii) If they speak about the Product Passport or the other AIFM Passports. The ultimate conclusion from most of their members is to wonder if these passports are really bringing any advantage as compared to the situation which prevailed before, i.e. national private placement regimes and reverse solicitation. More details can be brought in about the existing issues:

150. *Cost and non-transparency of fees required from Host regulators, and more generally lack of transparency on the whole assessment processes followed by Host regulators, when AIFMs are notifying passports to them***.** First, their members consider that the cost of fees required from Host regulators is too high – as compared to the benefit of passporting vs. private placement and reverse solicitation. For details on each Member State, this respondent indicated to refer for instance to various reports issued recently by service providers, such as the CMS "*Guide to Passporting*"[5]. As an example, one of their members gave the following practical case of fees taken by host national regulators: i) Marketing of a compartment in Germany: 772 euros ii) Marketing of a compartment in Austria: 1100 euros iii) Marketing of a compartment in Luxembourg: 5000 euros upfront, then 5000 euros each year. Their members would wish a pan-European harmonisation of fees taken by national regulators. Second, their members consider that the levels of fees are usually non-transparent, and in particular are not disclosed by regulators in advance. More generally, this respondent indicated that the processes followed by host regulators for assessing AIF and AIFM passports do not seem transparent enough (including, but not limited to, fees).

151. *Difficulty in making use of the Management Company Passport for Luxembourg-domiciled funds:* their members complain about the CSSF: i) requiring a General Partner located in Luxembourg for locally-domiciled SIFs under the form of Sociétés en Commandite par Actions, despite the AIFM Management Company passport. In this case, a "co-management" system is imposed, with a management agreement imposed between the two entities (the GP and the AIFM). ii) requiring a majority of SICAV Directors to be based in Luxembourg.

[5] "*A Guide to Passporting – Rules on Marketing Alternative Investment Funds in Europe*", CMS, 22nd September 2014.

152. *Difficulties with additional questions raised by the German, the Swedish and the Spanish regulators:*

- Germany: some of their members have the following difficulties with the Bafin:
  - For some French AIFs, e.g. FPCIs (Fonds Professionnels de Capital Investissement – Private Equity Professional Funds), which are one category of France-domiciled Private Equity Funds, the Bafin asked for amending the rules of the fund:
    - If clients invest less than 200 000 euros, which are then classified by Germany as "*semi-professional*" investors
    - Depositary fees must be indicated
    - Special national reporting must be done on leverage
- Sweden: some of their members have mentioned that the Swedish regulator raised complementary questions as compared to the Directive.
- Spain: this respondent indicated that there was a lack of answer from the regulator in some cases.

153. *Specific difficulties for France-based employee saving schemes (FCPEs) to be used by group subsidiaries based in some Member States*: Their members mentioned that regarding the France-based employee saving schemes (FCPEs), which are qualified as AIFs by the French regulator AMF, it is not possible any more (there was no problem before) for French companies to offer them to their employees based in these Member States: these regulators do not accept them any more in the context of the AIFM passport.

154. *Specific difficulties for real estate fund product passport***:** In many Member States, the forms to be fulfilled for notifying the entry of AIF funds do not fit real estate funds, for instance for real estate debt. In addition, in the UK the use of reception-transmission of orders is problematic.

155. Another respondent indicated that on a general note they would like to raise the point that the overall timeline for having gained experiences on the AIFMD passport was much shorter than originally anticipated when AIFMD Level 1 was adopted and a date for ESMA to provide advice on a possible extension "hard wired" into the legislation. Due to the late (and in some cases still incomplete) transposition of AIFMD into Member State law, asset management companies had to delay their respective applications and some have only received them in July of 2014. Under these circumstances, they are raising the question whether the timing of such an advice might not be considered too early, since it will ultimately lack material granularity which would be needed in properly assessing the progress made. Consequently, if no meaningful experiences from market participants can be collected, they would suggest that ESMA should ask the Commission to delay its

assessment for an appropriate time to make sure that such a collection is more feasible in order to provide the requested assessment to the co-legislators.

156. In general terms, this respondent indicated that the processing fees charged by the Host State authorities amount to a problem in both procedural and financial terms. Procedurally, national standards as to when and in which way a fee shall be paid display considerable differences. In terms of costs, this respondent indicated that marketing of an AIF into several EU jurisdictions can be an expensive exercise implying ten thousands of Euros only for handling/storing the notification files processed by other EU authorities. While they understand that additional costs are to be expected when using the passport, these fees should be of proportionate nature and should not represent a level of national gold-plating that is creating an entry barrier for authorised EU AIFMs. Moreover on a general note, this respondent indicated that additional requirements demanded by Host States' authorities for already authorised AIFMs and a lack of transparency in Host Member States' passport processing have also been identified as further difficulties encountered.

157. **In relation to what could deter from using the EU AIFMD passport**, one respondent indicated that the availability of the passport to UK domiciled investment companies had not been particularly relevant to the sector. The shares and securities of UK investment companies are exclusively admitted to trading on UK stock markets. AIC indicated that they are overwhelmingly owned by UK institutions and retail.

158. This respondent indicated that they 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. This respondent indicated that other Member States are imposing additional conditions or substance reviews as part of the notification process. This respondent indicated that they consider that this is at odds with the harmonisation aim of the AIFMD and inconsistent with the Level 1 text. Accordingly, this respondent indicated that Member States should not be permitted to impose additional fees or conditions on EU AIFMs which are operating under the AIFMD passport. This respondent indicated that 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. This respondent indicated that it has been in correspondence with the Commission regarding the imposition of additional requirements on the use of the AIFMD passport by some Member States.

159. Another respondent indicated that they were aware of concerns about the cost of applying to become a full scope EEA AIFM and the consequent compliance burden. They indicated that a new AIFM has to become fully compliant before being able to market an AIF under the passport and thus has to incur all of the related costs of compliance and of a fund launch before having any assurance of a successful fundraise. These costs represent a barrier to entry, which has a negative effect on competition, and also result in a diminution in the number and range of AIFs being offered in different Member States.

160. Another respondent indicated that they could be interested by the management passport in Luxembourg but this is deterred by the requirement of a General Partner located in Luxembourg. They indicated that the fact that the majority of SICAV Directors have to be based in Luxembourg is another impediment.

161. Another respondent indicated that some of their 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.

162. **In relation to the requests by EU NCA to AIFMs,** one respondent mentioned their members have only received such requests within their duties of registration.

163. **In relation to possible issues of investor protection in relation to the EU passport under the AIFMD**, one respondent indicated that they have no evidence of specific issues of investor protection relating to the cross-border marketing of EU AIFs.

164. Another respondent indicated that its members have not reported any issues regarding insufficient investor protection in relation to AIFs marketed or managed from another Member State. In this regard, this respondent noted that its membership base includes a large percentage of the institutional investors. As a result, they say that it is likely that they would have heard such complaints if they felt there were inadequate protections.

Annex 2 Summary of the feedback from the call for evidence on the functioning of the National Private Placement Regimes (NPPR)

165. This section is based on the responses to the questions raised in the call for evidence on the AIFMD passport launched by ESMA in November 2014 in relation to the functioning of the NPPR.

166. ESMA does not endorse the contents of the responses to the call for evidence presented in this section. ESMA recognises that the content of the responses may in some instances focus on the situation of certain Member States while the same situation might also be observed in other Member States

A. Overall summary of the feedback on the functioning of the National Private Placement Regimes (NPPR)

Summary of the feedback from the responses to the call for evidence

167. This section provides an overall summary of the responses to the call for evidence.

Timing of the potential extension of the AIFMD passport to non-EU countries

168. A large number of respondents indicated that due to the limited experience in relation to the NPPRs, it was premature to assess their functioning, and that ESMA should delay its opinion. These respondents encouraged ESMA and the Commission to conduct a review based on a longer period of implementation before making any recommendations on the functioning of the NPPRs, to ensure there is sufficient information on which to base such recommendations.

Overall assessment

169. Most respondents indicated they were satisfied with the NPPRs and were of the opinion that these regimes should remain in place whatever the decision on the extension of EU passport would be.

170. These respondents were of the view that Article 42 of the AIFMD creates a balance between market access and robust regulation. They mentioned that one Member State is able to ensure it is content with the level of regulation imposed while at the same time, other Member States are able to determine for themselves if they wish to grant access to non-EU funds and managers and, if so, what terms they might impose.

171. However, other respondents indicated that the NPPRs are very difficult because there are no common rules across the EU Member States. Therefore, the legal framework has

to be identified for every single EU Member State, which results in time consuming processes and very high costs.

172. In particular, several respondents indicated that duplication of filing/reporting obligations is an issue – non-EU AIFMs using the NPPRs are subject to periodic reporting and filing obligations (including periodic 'Annex IV' reporting under Article 24 and the notification of major holdings and control in EU companies under Articles 27 and 28) in each Member State in which a fund is marketed using NPPRs. These respondents were of the view that this results in duplication of effort and complexity (and, therefore, additional costs), particularly since individual Member States may have differing interpretations as to the detailed requirements necessary to comply with these obligations and different forms and processes for doing so

173. Other respondents pointed out that some non-EU fund managers now find it harder to approach institutions in some EU jurisdictions on a private placement basis. Germany and Spain were given as examples where non-EU fund managers had marketed previously and were no longer doing so. These respondents indicated that the additional requirements imposed by the Directive on NPPRs, especially the requirement that remuneration be disclosed, are potentially very difficult for many managers. These respondents indicated that these could easily become a deterrent from undertaking private placement in the future.

174. These respondents were of the view that a consequence of the wide disparity between NPPRs, combined with the high cost of full AIFMD compliance required in order to use the passport, is a concentration of investment opportunities within those Member States, such as The Netherlands and the United Kingdom, where private placement is not unduly burdensome.

175. Other respondents indicated that NPPRs may act as a disincentive for non-EU countries to act to restrict the ability of EU AIFMs to market their funds into such non-EU countries. Without the existence of NPPRs, these respondents were of the view that third countries may be more inclined to reciprocate by imposing restrictions or prohibitions on marketing by EU AIFMs, which would be disadvantageous to EU fund managers and to the EU economy more generally.

NPPRs and the specific case of AIFs under the thresholds

176. Several respondents indicated that NPPRs are also the only way in which funds managed by smaller, 'sub-threshold' AIFMs which have not opted in to the Directive (and which are not able to qualify, or which have not qualified, as European venture capital funds) can access EU investors outside their home jurisdiction and are thus important in ensuring that such funds have access to a wider investment base than would otherwise be the case and are not disadvantaged.

Impact of the extension of the AIFMD passport while switching off the NPPRs

177. Several respondents were of the view that an extension of the passport to non-EU AIFMs, which would imply imposing the full requirements of the AIFMD on these AIFMs, had the potential to lead to significant market disruption if this was a precursor to switching off the NPPRs. They were of the view that moving the regime in this direction would limit market access to only those AIFMs able to comply with the full AIFMD requirements and that this would threaten to exclude non-EU AIFMs/AIFs where non-EU jurisdictions were not prepared to adopt the detailed requirements of AIFMD. They indicated that this would potentially disrupt international capital market flows and raise precisely the same risks to EU markets and investors which were identified when the Directive was first debated.

NPPRs and the non-EU AIFMD passport

178. Therefore, the vast majority of respondents were of the view that it was of paramount importance to keep the NPPRs in all non-EU countries that would not benefit from the passport, and even, in the view of some respondents, in those non-EU countries to which the passport would have been extended. They indicated that the NPPRs allow Member States to set the standards imposed according to the needs of their national market, and that they should remain for an indefinite period.

179. Several respondents also pointed out that there is no urgent need to change the current regime in relation to the NPPRs.

180. However, other respondents emphasised that the NPPRs were burdensome because of the fragmentation of the rules applied by the different Member States (in that respect, please also see the opinion on the functioning of the NPPR).

181. Other respondents indicated that as long as the NPPRs and the non-EU passport were available at the same time, and considering that the requirements set by the AIFMD are usually more burdensome compared to what is required by NPPRs, there would be an unlevel playing field from the perspective of EU AIFMs, because most non-EU managers would presumably not take the first option (passport regime).

182. Considering the country-by-country approach envisaged by ESMA, some respondents indicated that it was also worth noting that if the NPPRs were to remain in force in those countries that were not selected for the passport, this would result in market distortion between those non-EU countries taking advantage of the AIFMD passport and those still using the NPPRs.

B. Detailed summary of the feedback on the functioning of the National Private Placement Regimes (NPPR)

183. **In relation to the benefits and drawbacks of the NPPR**, one respondent indicated that the National Private Placement Regime has been a significant benefit to non-EU investment companies. This respondent stated that there are around 100 non-EU investment companies, with total assets of around £30billion.

184. This same respondent mentioned that non-EU investment companies offer investment exposure not provided by their UK counterparts: while some non-EU investment companies invest in quoted shares and other conventional asset classes, a significant proportion offer exposure to so called 'alternative' assets. This includes property, infrastructure and private equity. The investment company structure is an excellent mechanism for investors to gain exposure to these illiquid asset classes: investors are able to trade their shares between one another on a public stock market. Their investments are therefore liquid, even though the underlying assets may not be. The use of public stock markets means that the underlying assets do not have to be sold to meet redemptions (as with an open ended structure). The fund can be fully invested without any 'cash-drag' (that is, there is no need to hold cash to meet potential demand for redemptions so the end investor is fully exposed to the investment strategy of the fund). Access to non-EU investment company shares therefore allows UK investors to diversify their asset exposure while maintaining the liquidity of their holdings. They can make long term asset allocation decisions while retaining the flexibility to alter their exposure if their circumstances or needs change. As UK investment companies are less able to offer such exposure efficiently, this respondent indicated that the NPPR has been invaluable in maintaining this position without disruption or significant extra costs being imposed on investors.

185. A number of non-EU members of this respondent act as their own AIFM. In this situation the company is both the AIF and the AIFM and both entities are outside the EU. These companies gain access to the UK market under Article 42. This respondent indicated that this has been a significant benefit as they have been able to comply without their access to the market being disrupted.

186. At the same time, this respondent was of the view that investors have continued to benefit from the wide array of regulatory mechanisms already established through EU law. Where investment company shares are admitted to trading on the main market of the London Stock Exchange, the Prospectus and Transparency Directives apply. Also, the Market Abuse Directive and EU money-laundering rules protect both consumers and the integrity of these public markets. The mechanisms involved in trading the shares, including settlement and best execution, follow the high standards set by MiFID. This network of EU regulation represents a very robust regime.

187. This respondent added that additional rules imposed by the UK further support very high standards. The UK Listing Rules, for example, impose independence requirements on the boards of investment companies as well as controls on 'related party' transactions.

188. This respondent also mentioned that its non-EU members are also subject to high standards in their accounting practices. Customarily they apply IFRS: some non-EU investment companies voluntarily adopt EU-IFRS.

189. These rules are applied in addition to the Article 42 requirements on the annual report, other disclosures to investors and reporting to the competent authority.

190. This respondent was therefore of the view that the Article 42 of the AIFMD regime creates a balance between market access and robust regulation. The UK is able to ensure it is content with the level of regulation imposed. At the same time, other Member States are able to determine for themselves if they wish to grant access to non-EU investment companies (or other types of AIFM) and, if so, what terms they might impose. The control exercised by Member States includes determining whether or not retail investors should be allowed to purchase any AIF which is available in their domestic market.

191. Another respondent indicated that NPPR is the official permission to promote the fund at least in individual EU member countries. At the present time it is the only possibility based on the fact that a EU Pass application for third countries is only possible in the near future.

192. However, this same respondent indicated that the NPPR is very difficult because there are no common rules between the several EU member countries. Therefore, the legal framework has to be researched for every single EU member country what results in very much work and very high costs. This respondent mentioned that particularly in Germany, it is almost impossible to get the authorisation without any local legal support and it is very expensive. Furthermore, this same respondent was of the view that there are no clear rules for publicly listed investment companies of what is being qualified as marketing respectively offering in the specific EU member countries – e.g. road shows without offering shares of funds. In addition, this respondent indicated that there is insofar a disadvantage of publicly traded investment companies towards publicly traded holding companies as investment companies are subordinated to AIFMD unlike holding companies.

193. This same respondent also indicated that the total costs of registering through the NPPR varied from 0 in the UK to EUR 60 000 in Germany, with an average country-specific research costs of at least EUR 5 000-10 000.

194. Another respondent indicated that as one of the leading investment banks in their country, they would regularly underwrite investment units issued by various J-REITs listed in the Tokyo Stock Exchange, and on a regular basis sell these units through public offerings opened not only to domestic investors but also to overseas institutional investors including those who are based in the EU region. This respondent mentioned that:

195. Since the implementation of the AIFMD, they have been giving J-REIT Asset Managers cautious advice with regard to the filing and disclosure requirements

necessary to conduct marketing activities in the EU region. On the other hand, they are facing countless complaints by investors who have been supposedly affected by the directive either because the investor is based in EU or their managing funds originate from an EU country (e.g. Netherlands). Below would be a portion of the complaints raised by their client investors, as they report it:

- Since they organization is viewed as an “EU investor” under the AIFMD, they are restricted, against their will, from participating in numerous public offerings as well as IR meetings conducted by J-REITs that do not yet meet the criteria required under the AIFMD, thus making it extremely difficult for them to manage our portfolio.

- In order to conduct marketing activities to “EU investors”, J-REIT Asset Managers need to meet certain disclosure and filing requirements under the AIFMD, which they consider absolutely unnecessary, taking into account that sufficient disclosure and necessary document has been already filed under the requirements of the Stock Exchange and laws of their country.

- To meet the necessary requirements under AIFMD, J-REIT Asset Managers must prepare additional disclosure and filing documents by owing additional expenses that would lower their dividend yield ultimately. Therefore, in terms of J-REITs, the current AIFMD regulation does not meet its objective to protect investors, but actually it is working against it.

196. This respondent concluded that while they are not perfectly sure if ESMA would have an intention to ease the regulations over AIFs and AIFMs, they believe this would be a good opportunity for them to make the regulators aware how their key investor clients as well as J-REIT clients have been suffered from the excessive regulation to non-EU based publicly traded investment funds. This respondent hope ESMA would recognize the irrationality here and make some kind of adjustment to the overall scope of the directive in the near future.

197. Another respondent from the same country shared exactly the same views and further specified that:

198. J-REITs (real estate investment corporations) are closed-end vehicles and also listed on the Stock Exchange. Therefore, based on the rules stipulated by this stock exchange, J-REITs are required to conduct the following procedures: 1. Undergo underwriting examination by securities companies (investment banks) when listing (listing examination), 2. Disclose information including timely disclosures, and 3. Make reports regarding information on management structures and systems of the issuer and its asset manager, such as governance and compliance, available for public inspection.

199. In addition, investment corporations are subject to the Act on Investment Trusts and Investment Corporations and asset managers are subject to the Financial Instruments and Exchange Act. Thus, their governance structure, supervising and auditing, information disclosure, fund procurement, etc. are strictly stipulated by laws.

Furthermore, investment corporations and asset managers are under the supervision of the Ministry of Finance, Financial Services Agency and Ministry of Land, Infrastructure, Transport and Tourism. Investment corporations must register with the Ministry of Finance, while asset managers need to register with the Financial Services Agency and obtain a license from the Ministry of Land, Infrastructure, Transport and Tourism. Moreover, preparation and operation of investor protection structures and systems are required, such as on-site inspections of investment corporations and asset managers are implemented by the Securities and Exchange Surveillance Commission, one of the organizations under the Financial Services Agency. From these facts, J-REITs are judged to be vehicles having appropriate governance, compliance and disclosure. Thus, this responded believed it is unnecessary to have J-REITs be subject to AIFMD. They hope J-REITs will be excluded from the scope of AIFMD, in the same way that USREITs are already excluded.

200. To meet the necessary requirements under AIFMD, this responded mentioned that J-REIT must prepare additional disclosure and filing documents at additional expense that would ultimately lower our dividend to the unit holders. Therefore, in terms of J-REITs, the current AIFMD regulation does not meet its objective of protecting investors, but actually it is working against it. Furthermore, there are also disadvantages for EU investors, such as communication with an EU investor who we visited as part of the investor relations activity in the past being broken down due to the increased cost burden.

201. In practical terms, this respondent indicated that barriers to entry of the NPPR were additional costs and time/labor required for the AIFMD filing. In order to file with the Netherlands, in their case 3.5 million yen of costs were accrued initially and 0.3 million yen of other costs arise annually. This respondent indicated this is about the same as the personnel costs for one assistant. This respondent also mentioned that due to the heavy cost burden, they have only made one filing with the Netherlands. However, if the burden becomes even heavier, they might have to consider suspending the filing itself.

202. However, another respondent indicated that the NPPRs in many, but not all, Member States have worked reasonably well for our members, which include both investors and fund managers. This respondent detailed that member States where the process remains one of registration or pre-approval but in respect of which there has been little “gold-plating” of AIFMD requirements include Belgium, Finland, the Netherlands, Norway, Sweden and the UK, from experience to date. Private placement into Denmark and Germany is possible but quite burdensome. Many other Member States have effectively excluded their investors from having US funds marketed to them, for instance.

203. This respondent stated that the benefits in the countries where it has worked well have been that the regime is familiar, stable and workable, even if sometimes quite expensive. This respondent was of the opinion that if the passport were not extended in relation to particular jurisdictions, however, the continuation of the NPPRs in respect of those jurisdictions should be contemplated.

204. This same respondent mentioned that the obstacles or barriers to entry of the NPPR have been relatively minor in some Member States and significantly more burdensome in others. These include many of the same issues mentioned regarding the AIFMD EU passport regime, which appear in most cases to have been carried over from the NPPR regime into the AIFMD EU passport regime.

205. This respondent mentioned that additional burdens, apart from the depositary light requirements, include in some cases the non-EU AIFM having to obtain a license or even to become regulated in an EU Member State; however, once a fund manager complies with that requirement, it may as well set up an EU platform in its own right and access the passport, effectively removing any practical option to use the NPPR.

206. When trying to register through the NPPR regime, this same respondent mentioned that there have been minimal obstacles in Member States where a more restrictive regime has not been imposed, especially in those Member States where only a notification process applies. The main issue in other Member States with more burdensome requirements becomes one of timing in respect of the registration process and providing final documentation, versus investors having the ability to negotiate the documentation. Once negotiated, a close of the fund would ideally follow very swiftly and not wait for a further review period. Therefore this respondent indicated that the costs of the NPPR have also been relatively minor in a handful of Member States, but are significant in others.

207. This same respondent finally mentioned that some non-EU fund managers now find it harder to approach institutions in some EU jurisdictions on a private placement basis. Germany and Spain are examples where non-EU fund managers have marketed previously and are no longer doing so. This respondent also indicated that the additional requirements imposed by the Directive on NPPRs, especially the requirement that remuneration be disclosed, are potentially very difficult for many managers. This respondent indicated that these could easily become a deterrent from undertaking private placement in the future. In addition, the reporting and disclosure issues being encountered are generally more difficult for first time funds and smaller, owner managed groups.

208. Another respondent indicated that NPPR is not their preferred option but where it was the only possibility to market our funds, they used it; indeed they mentioned that in those situations there is a benefit which is the possibility to access one specific market.

209. Another comment this respondent would like to make is about the future of NPPRs related to non-EU AIFS: NPPRs are not equivalent to a passport regime as one non-EU fund sold through NPPR could not get automatic access to the European market but only to one part of it; in case the European passport is not granted for any reason to non EU-AIFs and/or AIFMS managing EU-AIFs, this respondent was of the view that consideration should be paid to maintaining for those funds the NPPRs in the future. In their view it would be a good compromise for excluded jurisdictions providers as it does

not hamper their existing situations, while avoiding that European players are at competitive disadvantage.

210. This same respondent added that NPPRs are very different from a country to another one; therefore there is a need to adapt their marketing efforts in a tailored way, which is an obstacle, but not a barrier. This respondent indicated that the corresponding costs are lawyers costs to analyse and sometimes to file the process.

211. Another respondent indicated that with the implementation of AIFMD and the resulting changes / unclarity / inconsistency of the NPPRs the result has become a patchwork of rules which differ by country and provide a means of accessing institutional investors only with great difficulty. This respondent was of the view that the key of national private placement regimes was that they regulated what marketing of AIF was permitted on a private basis and without registration the NPPR are a significant step back from that.

212. This respondent suggested developing a standardized set of rules for Private Placement – i.e. distribution on a private basis to institutional investors only – which applies across Europe. This respondent mentioned that this would ensure access for European institutions to the complete universe of AIF in a more cost efficient manner, whilst safeguarding investors who need protection (say the retail investor but clearly other definitions are possible as well). With the current approach this respondent indicated that European Institutions are deprived of (cost) efficient marketing by measures of regulation which provide a level of investor protection which greatly exceeds what is commensurate for them.

213. This respondent further indicated that for non-EU AIF- the practical hurdles (complexity, cost, time, requirements) of the NPPRs are so big that they are not a viable option in a fundraising programme which is not looking to raise multi billion amounts in Europe.

214. Another respondent indicated that private equity and venture capital industry is an inherently global business. This respondent mentioned that private equity is about raising money worldwide to invest locally and/or regionally. This respondent also indicated that cross-border structures and cross-border marketing are key elements of the industry and the free movement of capital on a global basis is important both for European companies, which are the recipients of significant third country private equity investment and European investors, who invest in third country private equity funds as part of their asset allocation and risk diversification strategies.

215. This respondent also mentioned that managers raise funds from professional investors which are then invested into the real economy. As a commercial matter, the location of the manager does not limit where funds are raised or where funds are invested. For instance, provided the relevant laws permit this, a US manager can raise funds from European investors for investment in Europe. Similarly an African manager can raise money from European investors for investment into Africa. This respondent was of the view that indeed, foreign direct

investment from emerging markets private equity funds is a critical source of capital for businesses in emerging markets and for the economies in which those businesses operate. Under the current AIFMD regime, this respondent mentioned that the only legal avenue to raise and invest money in this way is the NPPR regime. In this sense NPPRs have provided a benefit to their members, and to those emerging markets businesses and economies, in that without NPPRs there would be no such avenue. However, their members view a robust passporting system as a far superior, effective, and impactful architecture than the existing NPPRs.

216. This respondent indicated that indeed, their non-EU AIFM members have faced a number of practical issues when seeking to market into Member States under NPPRs. They noted the experience of their members who have stressed the high cost of seeking counsel's guidance in order to comply with marketing restrictions and seek waivers where appropriate and then discovering that there is a surprising lack of clarity in the final responses. This respondent indicated that the uncertainty seems to be the result of uncertainty within the national regulatory authority around the AIFMD rules and the regulator's reluctance to be "early" to interpret the rules. This respondent also notes their members' support of EVCA's detailed analysis of some of the barriers and obstacles the NPPRs raise including among others, lack of harmonization, compliance costs and time, registration requirements at differing points in time and ambiguous disclosure requirements.

217. This respondent further mentioned that some of their members have experienced significant difficulties with current national private placement regimes ("NPPRs") and question whether the changes which were made to a number of European NPPRs as a result of the AIFMD might have actually worked against the interests of investors in the affected countries, as they have decreased investor choice (though discouraging non-EU GPs from marketing their funds in Europe) without meaningfully increasing investor protection.

218. Another respondent indicated that continued choice for EU investors and their ability to access the best investment strategies wherever located is fundamental and so the continued availability of workable NPPR remain vital for EU professional investors in the absence of a workable and proven third country marketing passport for third country managers and funds. This respondent mentioned that in the event that the third country marketing passport is activated on an individual country-by-country basis, they believe that the indefinite maintenance of NPPR for other third countries yet to benefit from the third country passport will be vital for continued EU professional investor choice.

219. This respondent indicated that the key obstacles or barriers to entry for NPPR are typically not requirements within AIFMD Level 1 itself, but are national-level NPPR requirements over and above the requirements within Articles 36 or Article 42, which are applied at that individual Member State level only where NPPR is sought. This respondent indicated that these take the form of impractical, disproportionate or costly local requirements which either in aggregate or individually mean that NPPR access to

that individual Member State is either not feasible from a cost/benefit basis or not possible from a practical perspective. Examples of such requirements include:

- A Member State not applying the derogation under Article 22(3) AIFMD, therefore requiring the annual report of the third country AIF to meet local Member State audit standards rather than continuing to be prepared to meet existing internationally recognised audit standards;

- A Member State requiring the third country AIFM's home regulator to confirm that the third country AIF is managed in accordance with the local rules of that Member State;

- A Member State requiring that the third country of the AIF grants reciprocal marketing access to funds from that Member State

220. Notwithstanding the above, this respondent was of the view that it should be emphasised that a number of Member States do not apply any additional national-level only NPPR requirements over those set out in Article 36 or Article 42. More generally across Member States which permit NPPR, this respondent was of the view that it is noted that the level of initial and ongoing Article 36 and Article 42 registration fees, together with the cost of navigating non-harmonised registration processes, may cumulatively act to deter managers, particularly smaller managers, from registering funds for NPPR. Furthermore, for Article 42 AIFMs, this respondent indicated that the cumulative burden and cost of providing regulatory reporting to NCAs in each Member State where the AIF is registered for NPPR is an important consideration for managers contemplating NPPR across a number of Member States

221. This respondent also mentioned that there are both initial and ongoing regulatory registration costs for Article 36 and Article 42 registrations. These cumulatively have been expensive, running to tens of thousands of Euros. This respondent mentioned that the initial registration process will typically also require assistance from local legal counsel which incurs further costs. In the view of this respondent, for Article 42 registrations the costs of ongoing compliance with AIFMD are an important consideration. This is particularly the case for Annex IV regulatory reporting, as Article 42 AIFM are obliged to provide regulatory reporting to NCAs in each Member State where they have registered AIFs for marketing. Any differences between Member State filing and reporting processes or deviation from the ESMA Annex IV template can be burdensome and create additional costs for managers.

222. This respondent also indicated that they have exited marketing of non-EU funds from a Member State since the entry into force of AIFMD NPPR. This has been due to this Member State:

- not applying the derogation under Article 22(3) AIFMD, therefore requiring the annual report of the third country AIF to meet local Member State audit standards rather than continuing to be prepared to meet existing internationally recognised audit standards;

- requiring the third country AIFM's home regulator to confirm that the third country AIF is managed in accordance with the local rules of that Member State;

- They have not been able to register non-EU AIFs for NPPR in another Member State due to that Member State requiring that the third country of the AIF grants reciprocal marketing access to funds from that Member State

223. Another respondent indicated that the obstacles or barriers to entry of the NPPR he had identified were the following:

- Lack of commonality among NPPR requirements; need to understand the different requirements in each Member State in which you wish to market. For example, this respondent mentioned that Member States have not coordinated what forms of documentation are deemed acceptable to support an application. Consequently supporting documentation that is acceptable in one Member State may be rejected in another Member State;

- Lack of clarity as to the substantive and procedural requirements in a number of jurisdictions;

- Lack of engagement by NCAs during the application/notification process. Certain NCAs were not equipped to deal with the additional workload arising from NPPR applications. This has resulted in responses and queries to individual NCAs going unanswered;

- Certain Member States in which we would otherwise wish to market AIFs have imposed additional requirements beyond those required for AIFMD authorisation in our home Member State (e.g. (i) Germany due to, amongst other things, the requirement for pre-investment investor disclosures to be made available to investors in hard copy format rather than through our website as is currently the case for UK purposes under article 22 and to cover additional information than is required under the UK NPPR and (ii) Austria due to the requirement to obtain a letter from our home state regulator as to compliance with Austrian implementation of AIFMD and the requirement for an AIFMD-compliant annual report to be submitted prior to being required under AIFMD itself); others do not have an NPPR at all (e.g. Spain and France);

- Costs. For example, a number of Member States levy a fee in respect of each AIF in respect of which an Article 36 notification is made. Depending on the jurisdiction in question, this fee is either paid once at the time of the notification or both initially and on an annual basis. Up-front costs of approx. €10,000, based on applications/notifications submitted in the six Member States they were in contact with plus (i) Germany, where they initially submitted an application (and paid the associated fee) but subsequently abandoned this (and have been unable to claim a refund), and (ii) Austria,

where they would have made an application but for the problems previously referred to they gave up. Ongoing fee of €2,650 per annum in Luxembourg

224. Another respondent indicated that the private placement regime has the beneficial effect of allowing a manager who, for whatever reason, cannot or does not wish to, expend time and financial resources on becoming a full scope EU AIFM, to market certain AIFs in selected Member States relatively easily. This respondent mentioned that this has been particularly beneficial to non-EEA AIFMs and small AIFMs who might otherwise have chosen not to offer their AIFs in the EEA at all or might have had to cease offering certain AIFs in any Member States. This respondent added that it has also benefitted investors in those Member States with less burdensome private placement regimes, who continue to have access to a range of AIFs to include in their portfolios. In their view, the private placement regime has a beneficial effect on investor choice, on the internal movement of capital and on competition. Any phasing out of the private placement regime, for example in association with a broadening of the passport regime, would in their view have a detrimental effect.

225. This same respondent indicated that the compliance requirements for national private placement regimes vary significantly. This respondent mentioned that in the case of certain EEA countries, national private placement rules are highly restrictive, Germany and France are examples. Under the 2013 German Capital Investment Code, there are stringent hurdles for non-EEA AIFs or funds managed by non-EEA AIFMs. These include Investment Code compliant management of the AIF, certain depositary tasks and the provision of information to BaFin and investors. In the case of France, funds generally need to obtain a specific authorisation from the AMF. Less restrictive rules apply within The Netherlands and the UK, where only the basic requirements set out in AIFMD apply.

226. This respondent was of the view that a consequence of the wide disparity between national private placement regimes, combined with the high cost of full AIFMD compliance required in order to use the passport, is a concentration of investment opportunities within those Member States, such as The Netherlands and the United Kingdom, where private placement is not unduly burdensome. Investors in other Member States are, in our experience, being offered a more limited range of investment.

227. Another respondent indicated that generally speaking, their members have observed that the interest in article 36 and 42 AIFMD notifications has surpassed the article 32 AIFMD passporting process, which was not expected and not necessarily intended in the view of this respondent. However, as the AIFMD only sets minimum requirements for NPPRs, this respondent was of the opinion that the current picture is fragmented and confusing to both investors and the fund industry. For example, non-EU managers can quite easily access the Luxembourg, Irish and UK markets, whereas Germany and Austria have set burdensome requirements.

228. This respondent indicated that it is worth noting that there is no common understanding of what “reverse solicitation” means. Moreover, some regulators have

developed the notion of “pre-marketing”, others not. These differences in terminology lead to different treatment of cases and thus may cause market distortion. This respondent was of the opinion that it would be important for practitioners to have clarity about when activities are considered as marketing activities. At least in the context of the passport and towards regulators in the EU, this respondent was of the view that it would be preferable to consider that marketing starts once final fund documents are available.

229. According to feedback received from its members, this respondent indicated it would categorise EU-15 countries as follows:

- None or minor goldplating requirements:
    - United Kingdom
    - Ireland
    - Luxembourg
    - The Netherlands
- Moderate goldplating requirements:
    - Denmark
    - Finland
    - Belgium
    - Sweden
- Significant goldplating requirements or article 36/42 AIFMD filings are not possible:
    - Germany
    - Austria
    - France
    - Portugal
    - Greece
    - Italy
    - Spain

230. Generally, this respondent was of the view that an article 36 AIFMD notification should be more straightforward than an article 42 AIFMD by virtue of having an EU AIFM but this is not always the case: E.g. (given by this respondent): UK AIFMs wishing to market Cayman AIFs into Germany: The German regulator wishes to receive a confirmation from the UK regulator that the UK AIFM complies with the requirements of the AIFMD. Discussions between the two regulators are apparently ongoing and until this is resolved, the UK AIFMs cannot market as they need to receive the German regulator’s approval prior to commencing activities; the German regulator has issued guidelines (“Merkblatt”) both in English and German for Article 32 and 42 AIFMD notifications, yet no such document is available for Article 36 AIFMD notifications.

231. In relation to costs, this respondent indicated that there are substantial differences in fees levied by national regulators for marketing funds in their jurisdictions. In particular, some jurisdictions apply fees at sub-fund level and others only at fund level. This respondent was of the view that whereas the UK, Irish and Belgian regulator seem to apply no or reasonable fees, the fees levied by the German and Austrian regulator seem to be very high. The fees levied by the Luxembourg, French and Finnish regulator seem

not to be excessive, but still not related to the work performed in the view of this respondent. Apart from regulatory fees, overall costs for getting the AIFM licence are significant, as well as costs for reporting etc. In addition, this respondent mentioned that the costs of filing Article 42 funds in multiple jurisdictions is significant and each country has specific requirements which requires customisation in delivery of the files and in some cases, in the format.

232. Another respondent indicated that under Article 42 of the AIFMD, non-EU AIFMs are able to market AIFs to professional investors and, in EU Member States where this is permitted, to certain retail investors in an EU jurisdiction under that particular jurisdiction's NPPR. 3 Article 42 permits non-EU AIFMs to market any AIF into the EU as long as they comply with certain requirements, including reporting and disclosure, and cooperation agreements are in effect between the relevant jurisdictions. This respondent encouraged ESMA to recommend that the European Commission maintain the NPPR under Article 42. In their views, many non-EU firms continue to operate under and rely on Article 42 and would face significant challenges if the AIMFD passport were turned on for these firms and the NPPR were eliminated. These firms have determined to comply with Article 42, which would be a reasonable and rational alternative to non-EU firms operating under the potential AIFMD passport.

233. This respondent further mentioned that the NPPR is operating as intended by providing some flexibility to individual EU Member States in setting standards for private placements, and these jurisdictions continue to monitor and address the potential risks and activities of AIFMs. Thus, this respondent was of the opinion that the protections under Article 42 are robust and effective. If the EU eliminated the NPPR, this respondent mentioned that some AIFs would be eliminated unfairly as investment options for EU investors. For example, this respondent mentioned that some AIFs may provide valuable investment options for investors who wish to obtain portfolio exposure to a particular asset class or seek international diversity. Given these protections and benefits of the NPPR, this respondent recommended ESMA provide an opinion not to eliminate the NPPR and to continue to permit this type of marketing under the NPPR.

234. Finally, this respondent indicated they noted the importance of permitting private placement requirements that do not replicate all or substantially all of the AIFMD requirements, which can result in regimes as burdensome and costly as registering as an AIFM. Some of their members have experienced difficult administrative and procedural burdens in the implementation of certain Member States' NPPRs that may cause firms to avoid certain jurisdictions. In that regard, this respondent encouraged ESMA to consider reforms to the NPPRs and would welcome the opportunity to work with ESMA to share the experiences of non-EU AIFMs under the NPPRs.

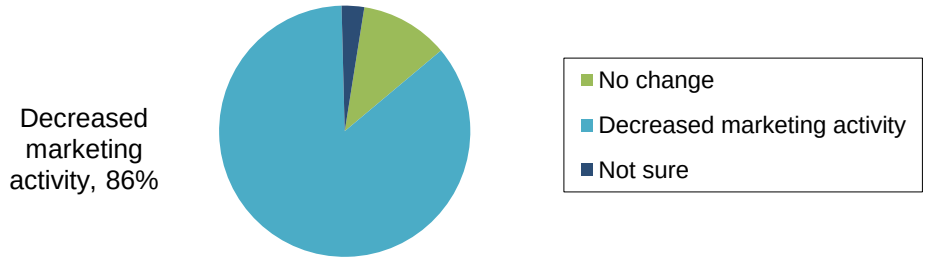
235. Another respondent indicated that since the end of the transition period of the AIFMD, the continued availability of the National Private Placement Regimes for non-EU AIFMs without access to the Passport has been an important, and often EU investors' only channel for information about investment opportunities beyond Europe, particularly when an investor has no pre-existing relationship or awareness of the non-EU AIFM. This

respondent mentioned that investors' ability to access these opportunities is critical to their ability to select best in class managers that will help them achieve their overall investment objectives and fulfil their fiduciary obligations to their ultimate beneficiaries, i.e., pensioners, savers, research and academic institutions, etc.

This same respondent indicated that National Private Placement Regimes have been an important mechanism for preserving investors' access to non-EU opportunities but are generally viewed as having changed for the worse since the implementation of the AIFMD. They mentioned that Non-EU AIFMs are reportedly deterred from marketing in certain countries due to registration requirements or costs perceived as excessively onerous relative to the pool of investor capital available, resulting in decreased investor access to potentially attractive investment opportunities. Among their members surveyed, 52% report that changes to national private placement regimes have been somewhat or very negative. Additionally, they indicated that the introduction of additional processing time has been the source of delays that have hurt investors' ability to secure preferential fee discounts or to invest in their top choice AIFMs.

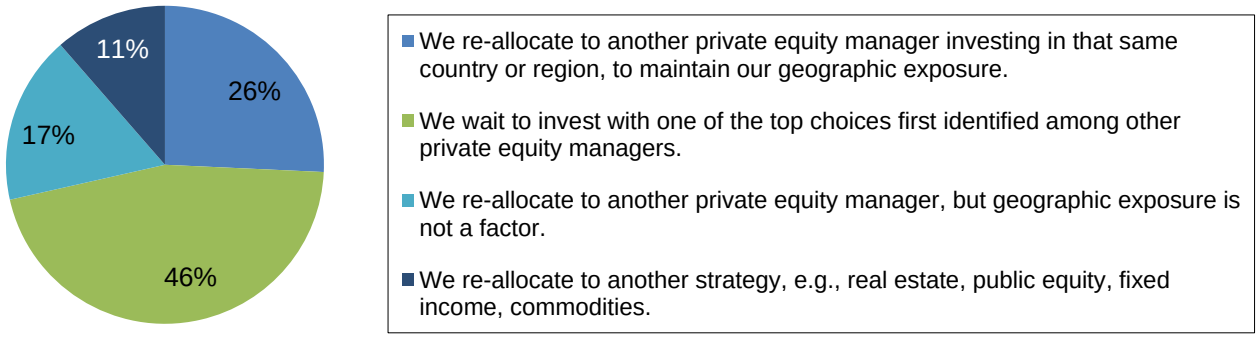
236. This respondent added that when unable to invest into their top choice of AIFMs, European investors most often prefer to wait until one of their first choice AIFMs becomes available (46% of respondents). European investors confronted by narrowed manager

Have you observed a change in marketing activity levels among non-EU AIFMs since the implementation of the AIFMD?



choice are being forced to rethink how to achieve the diversification necessary to meet their investment objectives, as increased allocations within Europe may pose geographic concentration risk that is sub-optimal for the overall portfolio. "*As a France-based LP, AIFM has been extremely negative for our investment program as it makes contact very difficult with non-French GPs (US but also Europe); it forces to make use of various techniques to adjust, probably not in the intent of the initial legislation*" *"It forces us to allocate more to Europe, which is definitely not in the interest of the pension savers*."

If you are unable to invest with your top choices among private equity managers, how will your organization proceed?



237. This respondent indicated that investors also report that the diversity and quality of AIFMs from which they can choose has diminished. While large, well-established AIFMs have the infrastructure to either apply for a Passport, or register across multiple national private placement regimes, smaller niche players offering sometimes very compelling investment strategies are less available to investors. "*The quality of the funds stays the same, we just need to do more work to be in contact with them. The risk of missing out on a good quality investment opportunity has increased a lot.*" ""*It is more challenging to find a large enough non-European group of managers to evaluate and after due diligence to invest with. The risk is that you miss someone interesting because it is more difficult for them to contact a European investor.*"

238. This respondent further indicated that they also refer to the specific points on the obstacles encountered by AIFMs seeking to register through the different National Private Placement Regimes related to the cost, time and complexity resulting from divergence in fees, informational and other requirements. They mentioned that it was worth noting from an investor's perspective, delays in processing registrations may cause EU investors to miss the window to invest with a first choice manager altogether and the additional direct costs to AIFMs of compliance with national private placement regimes may ultimately be passed on to investors.

239. This respondent further concluded that their members are concerned that a poorly functioning Passport and National Private Placement Regimes hinder investor access to the highest performing managers available, thus resulting in lower returns to EU investors and a potentially elevated risk profile due to unintended geographic concentration within their portfolios. Their members' experiences with several National Private Placement Regimes have been on balance negative. European investors have observed a decrease in marketing activity of non-EU AIFs. They indicated that having multiple and different rules in place across the EU deters managers from seeking to raise capital from some markets, due to complexity and cost, especially for markets where there are comparatively fewer institutional investors. As a result, they mentioned that their European members believe that they are missing out on good quality investment opportunities as well as valuable market intelligence on other geographies and sectors, and smaller institutions and investors in smaller countries in particular are at a stark competitive disadvantage to their peers outside Europe. They further mentioned that the

complexity of the National Private Placement Regimes also causes some of our members to devote more time and personnel cost to proactively identifying and engaging non-EU AIFMs who are otherwise deterred from marketing in certain European countries. In some instances, processing delays by national regulators have resulted in investors missing the window to invest with their preferred managers altogether.

240. Another respondent indicated that in relation to the functioning of the NPPRs, their response differs, depending on the particular NPPR in question. Their clients' experience with the UK and Netherlands NPPRs has in general been very good. These two NPPRs provide a high degree of certainty as to what is required procedurally to be able to market units, how long compliance will take and at what point marketing will be permitted. By using the NPPRs of these two Member States, their clients have been able to access UK and Dutch investors successfully. They indicated that the FCA's forms and guidance in particular are extremely helpful. Similarly, they mentioned that the UK's guidance on issues such as what constitutes "marketing", and when marketing is not considered to be on behalf of, or at the initiative of, the AIFM, has provided our clients with the certainty they need as to when authorisation is/is not required.

241. They indicated that their clients have not successfully managed to utilise the NPPR of any other jurisdictions. For many jurisdictions they mentioned that this is because, based upon local legal advice obtained, the procedures for obtaining authorisation (or successfully filing notification of intent to market) range from cumbersome, slow and expensive to "in practice, impossible to obtain". The reasons vary from jurisdiction to jurisdiction, but they include: i) requirements for local independent depositories ii) requirements for local agents iii) requirements for specific "approval" of a J-REIT's manager by a local competent authority, which is discretionary on the part of such authority iv) requirements to wait, for an unspecified amount of time, post-submission of notification, for a confirmation of submission before marketing can begin v) failure to implement necessary local AIFMD-related regulations vi) "gold-plated" disclosure requirements that go beyond the minimum requirements of the AIFMD.

242. This respondent added that certain of their clients no longer market units in certain EU countries, including France, Germany, Spain and Sweden, following implementation of the AIFMD for these reasons.

243. This respondent also mentioned that in the period immediately following the transposition of the AIFMD into local law in both the UK and the Netherlands, they found that often specific forms and procedures applicable to non-EU AIFMs were not yet prepared. However, they generally found regulators willing to discuss such matters and provide certain guidance for successfully using the NPPRs in these two jurisdictions despite such initial obstacles. Additionally, they indicated that useful forms and clear procedures for registration were eventually implemented.

244. This further indicated that the costs applicable to their clients in that context generally include legal fees to, for instance, (1) explain the AIFMD framework, including future reporting obligations, in detail, (2) ensure that the offering document for an offering

satisfies the various requirements of the AIFMD, and (3) assist in the preparation of and review initial post-registration reports to competent authorities. Additional costs include time spent in preparation of post-registration reports and information to investors, including where provision of certain information, such as remuneration information, has not previously been required under applicable Japanese law.

245. Another respondent indicated that National Private Placement regime has a major advantage: it does not generate registration costs. In addition they mention it is a quite flexible regime and they consider that it fits well for Institutional Investors. Therefore they considered that this regime should be maintained in Europe despite the enforcement of AIFMD. In addition they mentioned it provides a good solution for non EU AIFs. They were of the view that it would be less paradoxical to maintain this status instead of introducing the passport for non EU AIFs and for non EU AIFMs.

246. Another respondent indicated that national private placement regimes have provided them with the flexibility to continue to market non-EU AIFs in selected Member States meaning they can continue to meet the savings needs of clients. If the passport is only provided on the basis as set out in the call for evidence they would support the continuation of private placement regimes in countries where a passport is not provided.

247. With the introduction of the passport, this respondent indicated that national regulators have reacted in one of the following ways: i) continued with their existing private placement regime (which might mean there is no private placement regime) ii) removed the ability to privately place, iii) made their existing private placement regime more onerous following the introduction of the AIFM passport. They indicated that those jurisdictions which have been historically open to private placement have continued to be flexible (and those that have effectively not permitted private placement continue to do so). They have experience of some Member States making the old system of private placement more onerous since the introduction of the passport, for example by requiring the appointment of a depositary (lite) prior to marketing. They mentioned that this is onerous for existing non-EU AIFs meaning a delayed or decision not to market in such jurisdictions. Generally speaking they were of the view that the lack of uniformity has been an obstacle since in each jurisdiction there is different paperwork and notifications to be made (unlike the regulator to regulator approach under the passport).

248. This respondent further mentioned that costs vary between jurisdictions. They point out three types of costs: i) Registration charges apply in some, but not all, jurisdictions with some charging an ongoing annual fee. ii) Costs triggered by the requirement to appoint a depositary (lite) which can be prohibitive for a non-EU AIF looking to access selective Member States only. iii) Costs associated with the increased administrative burden in relation to additional reporting requirements to each Member State where private placement is undertaken.

249. Another respondent indicates that given it is not scalable and entails legal uncertainty, they do not see any benefits from NPPRs. Rather, they would prefer having the possibility to register AIFs for distribution to retail clients (as e.g. is the case in Germany),

preferably on a passport basis (as is the case for distribution to professional clients), i.e. without the complexity of the heterogeneous local regulations: this respondent indicated that some MS allow registration for distribution to retail investors whereas others don't allow it at all (such as Italy, Spain and France e.g.) and where it is allowed registration takes a long time and, in particular, the additional requirements beyond passporting requirements vary from MS to MS. This respondent mentioned that this is perfectly understandable from a local regulators' point of view given the AIFMD does not foresee distribution to retail clients, however, this heterogeneous 'setup' across MS effectively hampers EU-wide distribution of EU AIFs to EU retail clients.

250. This respondent indicated that the situation is particularly worrisome for investors in times of zero rates and yields as is today and where, in the view of this respondent, not everybody wishes to be pushed into equities but rather might want to consider having some exposure to Hedge Funds (and Real Estate and Infrastructure). This respondent added that these preferably should be structured under AIFMD rather than UCITS because AIFMD is the more appropriate regulation as it allows for less liquid holdings / strategies which is beneficial to investors in terms of higher long-term returns (of course, the degree of liquidity needs to be communicated properly).

251. This respondent further indicated that the biggest cost they experienced were expenses regarding legal/regulatory advice by external consultants / lawyers in order to understand the different local rules applying.

252. This respondent also mentioned that they do not distribute to Austria anymore..

253. Another respondent indicated that in some Member States (for example Denmark, Sweden) their members have experienced prolonged application processes with multiple follow up questions. However they indicated that these barriers have not been insurmountable and the NCAs in question have been clear and fair in their requests. Also they 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).

254. Another respondent indicated that from their perspective of a non-EU AIFM, the NPPR in place create uncertainty, cost and legal risk for us as they consider private placement across EU jurisdictions. This respondent mentions that these outcomes are detrimental to them and to potential investors within the EU Member States.

255. This respondent further indicates that the NPPR ensures that they would be subject to a patchwork of individual regulatory systems in every jurisdiction in which they would market investment products, each of which may be arbitrarily more stringent than the AIFMD, but all of which must be at least as stringent. As noted above, they indicate this introduces unknowable, potentially unlimited, and thus, unjustifiable business risk.

256. This respondent adds that AIFMD Article 42(2) explicitly authorizes Member States to "impose stricter rules on the non-EU AIFM in respect of the marketing of units or shares of AIFs to investors in their territory." In other words, this respondent is of the view that not only are Member States required to implement the AIFMD's requirements into national law, but Member States are authorized, and perhaps even encouraged, to actively discriminate against non-EU AIFMs.

257. However, this respondent acknowledges that they have not yet attempted to register through the NPPR. They indicated that this is because of the burdens imposed by the AIFMD and the uncertainty in NPPR application/implementation across the EU. This respondent adds that there have been therefore substantial opportunity costs for them in terms of forgoing access to the EU market. However, they add that these likely pale in comparison to the more significant opportunity costs imposed on EU investors by the AIFMD's erection of barriers to trade in investment products.

258. Another respondent mentioned that pre AIFMD the applicable NPPRs offered in some important countries for marketing relatively relaxed rules regarding marketing. This respondent indicated that new NPPRs imposing additional AIFMD requirements restrict marketing significantly by adding additional costs (e.g. depository cost in countries like Germany and Denmark) and administrative burden and deterred FT to register for marketing under NPPR.

259. This respondent added that only few countries have implemented AIFMD with minimum requirements regarding disclosure, Art. 42 AIFMD. They mentioned that actual requirements in Member States vary or are interpreted differently and that no standard streamlined regulatory reporting is process available. They were of the view that there was additional burden imposed by reporting to different EU NCAs in Member States in which filing for marketing has been made (regulator in Sweden requested further clarification which caused delay in registration process).

260. This respondent further indicated that costs varied significantly from almost no cost (Netherlands) to 5-10 K EUR per AIF for registration costs and professional legal advice provided.

261. This respondent finally mentioned that they have been deterred from private placement in some markets and has focused on private placement in some key countries because of the costs associated and additional requirements to be complied with at country level. They indicated that the benefit of a passport would be that registration/filings required only in one Member State.

262. Another respondent indicated that the National Private Placement Regimes (NPPR) ensure a certain amount of necessary flexibility and are therefore seen as providing choice to investors. They mentioned that while benefits for NPPRs have shrunk since the introduction of the EU passport, they are strongly in favour of maintaining NPPRs for the time being.

263. This respondent added that the barriers to entry of the NPPR they identified generally manifest themselves as Member States going beyond the requirements of Articles 36 or Article 42 caused by uneven transposition of the Directive. Specifically, they identified the following obstacles or barriers: i) the registration process varies from Member State to Member State ii) there is legal uncertainty in some Member States as to when NPPR will be phased out for existing institutional clients iii) NPPRs are expensive and bear on-going compliance risks, as domestic legislative developments have to be observed in the individual Member States iv) The application of national accounting standards to incoming funds, rather than allowing internationally recognised audit standards.

264. This respondent added that the overall costs related to the Article 42 regulatory reporting and registration costs seem to have increased significantly since the inception of AIFMD. They indicated that these increased costs have a significant impact on the business decisions of AIFMs, as the new overall costs structure borne by the manager and the investor has to be considered in any business case. This respondent added that the initial and on-going registration costs for Article 36 and Article 42 registrations are cumulatively expensive, running to tens of thousands of Euros.

265. This respondent further indicated that for Article 42 registrations, the costs of ongoing compliance with AIFMD are an important consideration. This is particularly the case for Annex IV regulatory reporting, as Article 42 AIFMs are obliged to provide regulatory reporting to NCAs in each Member State where they have registered AIFs for marketing. Any differences between Member State filing and reporting processes or deviation from the ESMA Annex IV template is burdensome and creates additional costs for managers.

266. Another respondent indicated that Article 42 of AIFMD permits Member States to impose stricter rules on Non-EU AIFMs; however, they mentioned that this provision has presented significant difficulties to EU AIFMs managing and marketing non-EU AIFs and non-EU AIFMs marketing non-EU AIFs into the EU. The following observations are based on notification of marketing by Guernsey AIFMs and generic feedback provided to this respondent by the Bailiwick's investment fund industry.

- Marketing by Guernsey AIFMs. This respondent has been advised that Guernsey AIFMs have successfully used the NPPR in 16 of the 27 Member States that Guernsey signed bilateral co-operation agreements with in July 2013. However, Guernsey AIFs have mainly been marketed into 5-6 Member States predominantly located in Northern Europe. This is principally because these Member States have decided to impose only the minimum AIFMD NPPR requirements (that is, disclosure to investors, regular reporting to EU Competent Authorities, the preparation of an annual report and certain asset stripping and notification requirements).

- Nil implementation of NPPR. Although the Commission (the Guernsey financial services Commission) signed bilateral co-operation agreements with 27 EU Competent Authorities in the European Economic Area, they mentioned it is disappointing to note that several Member States have failed to

fully implement AIFMD or decided not to implement a NPPR in their jurisdiction. They indicated that this has put non-EU jurisdictions such as the Bailiwick at a significant disadvantage. They believed it is also serving to act as a barrier in attracting international investment into the EU.

- Depositary-Lite. This respondent was aware that some Member States have imposed a "depositary-lite" requirement. This in effect means that the non-EU AIFM must appoint one or more entities to carry out the following functions in respect of the AIF being marketed: (i) custody of assets; (ii) cash monitoring; and (iii) general oversight. They indicated that appointment of one or more entities to carry out depositary functions is not a problem in itself, it is the fact that this requirement has not been imposed consistently across the EU, and therefore, has created uncertainty.

- Reporting. This respondent indicated that non-EU AIFMs are required to file an Annex IV report on a regular basis to the regulator of each EU Member State in which its AIF is being marketed. The Annex IV report is in the format specified by ESMA and appears to be consistently applied in EU Member States; however, they added that it would be preferential if Non-EU AIFMs only had to report to one EU Competent Authority.

- Definition of Marketing. This respondent indicated that the definition of marketing has also been interpreted and implemented differently across EU Member States. The Commission is aware that a Member State has taken the view that marketing takes place when a person makes AIF units or shares available for purchase by a potential investor; this implies that preliminary marketing material may not constitute marketing in that Member State. However, they indicated that other Member States appear to have taken a far broader interpretation of that term. They mention that differing interpretations have caused difficulties for non-EU AIFMs who are conducting pre-marketing because this not always clear if this activity is captured by a Member State's NPPR.

267. As Article 42 of AIFMD permits Member States to impose stricter rules on Non-EU AIFMs, tis respondent indicated that NPPR only operates effectively in 5-6 Member States, which are predominantly located in Northern Europe. This is principally because these Member States have decided to impose only the minimum AIFMD NPPR requirements. They indicated that Non-EU AIFMs are unable to access a large proportion of the EU market because some Member States have: 1) not implemented AIFMD; 2) not created a NPPR regime and 3) over complicated the NPPR registration process. They believed these issues serve to act as barriers in attracting international investment into the EU to the detriment of the EU economy's access to the international capital and investor base – an outcome contrary to the EU's growth agenda. Accordingly, in order to create a level playing field, and improve the EU's efficient and effective access to international capital, they indicated they are trusting that ESMA will be in a position to recommend that the passporting provisions be extended to third-country AIFMs.

268. Another respondent indicated that the split of investors in AIFs they work with is roughly 55% EU and 45% non-EU and this has for the most part been generated through NPPR. They indicated that NPPRs have allowed EU investors the ability to maintain diversification within their investment allocations in appropriately regulated jurisdictions and expose AIFMs to global competition, allowing investors to choose those AIFMs offering best possible terms of investment. This respondent was of the view that the NPPRs worked well as a stable method of achieving transparency and reporting (as per the AIFMD) through international best practice.

269. This same respondent indicated that as part of the introduction of AIFMD certain Member States have added new and more onerous requirements to their NPPRs, while others (notably France and Italy), have chosen effectively not to operate an NPPR. They indicated thattis has an impact both for managers and investors as it restricts the amount of capital that can be raised by the manager (AIFM) and it also restricts the investment opportunities and diversification available to investors.

270. This respondent further mentioned that the lack of harmonisation of NPPR across Member States has proved problematic and costly. They mentioned that these costs are ultimately borne by the investors. They indicated that increased regulatory barriers, costs, timing and uncertainty have lead to AIFMs to consider avoiding such jurisdictions and therefore restricting investor's opportunities.

271. This respondent added that the costs vary significantly depending on the number and which of the Member States the AIFM wishes to market its AIF into. There is also the additional cost of advice associated with such applications. They indicated that these material costs are borne by the investors, who are often EU pension holders, impacting their returns.

272. Another respondent indicated that they consider that NPPRs are very important for a number of reasons:

- This respondent indicated that they enable non-EU AIFMs and EU AIFMs of non-EU AIFs to market their funds to EU investors, competition is increased and EU investors have access to a wider-range of investment funds which is beneficial to EU investors in terms of performance and the reduction of investment risk through diversification. These benefits are passed on to EU citizens, in particular through their participation in EU pension funds, which make up a significant proportion of the EU investor base;

- This respondent indicated that funds managed by non-EU AIFMs provide significant amounts of capital to EU companies. Enabling such funds to raise capital for investment from EU investors assists in contributing to this cross-border flow of investment;

- This respondent indicated that NPPRs benefit EU AIFMs by enabling them to maintain greater flexibility in structuring funds which they raise by using funds established outside Europe and marketing those funds to EU investors. This

provides greater investment choice for EU investors and ensures that EU AIFMs are able to access a wider investor base, which ultimately translates into increasing the amount of monies which can be invested into the EU economy;

- This respondent indicated that NPPRs are the only way in which funds managed by smaller, 'sub-threshold' AIFMs which have not opted in to the Directive (and which are not able to qualify, or which have not qualified, as European venture capital funds) can access EU investors outside their home jurisdiction and are, thus, important in ensuring that such funds have access to a wider investment base than would otherwise be the case and are not disadvantaged;

- This respondent indicated that NPPRs may act as a disincentive for non-EU countries to act to restrict the ability of EU AIFMs to market their funds into such non-EU countries. Without the existence of NPPRs, third countries may be more inclined to reciprocate by imposing restrictions or prohibitions on marketing by EU AIFMs, which would be disadvantageous to EU fund managers and to the EU economy more generally.

273. This respondent indicated that their view is that, where they exist (and with a few notable exceptions), NPPRs have been largely practicable and beneficial and have been widely used. They understand, for example, that there has been very significant usage of the NPPR in the UK with more than 500 Article 36 and Article 42 notifications being made to the Financial Conduct Authority. They believed that NPPR usage has also been significant in Sweden, with over 180 AIFMs having obtained approval from the Swedish FSA to market AIFs in Sweden, and that there has also been notable usage of NPPRs (albeit with much lower numbers of AIFs) in a small number of other EU/EEA jurisdictions such as the Netherlands, Finland and Norway.

274. This respondent indicated that a variety of different approaches have been taken by Member States to the process of using NPPRs, some requiring only a simple notice filing (such as the UK, Malta, Luxembourg and the Netherlands), some requiring prior approval from the Member State regulator (such as Finland, Norway and Sweden) and others requiring a more onerous process of registration of the AIF with the Member State regulator (such Denmark and Germany). Additionally, a number of Member States have imposed conditions which are not contemplated by Article 42 of the Directive, for instance, a requirement to appoint a depositary (Germany and Denmark) and a requirement to provide confirmation of marketing reciprocity for equivalent EU funds in the country of the AIFM (Denmark). Further, some Member States (France, Italy and others) have not provided a NPPR. Thus, this respondent indicated that there is a patchwork of individual approaches but, nonetheless, their experience with using NPPRs overall has been a positive one. This is particularly the case since third country AIFMs tend to raise capital from EU investors in a small number of selected jurisdictions where meeting the NPPR requirements is not overly burdensome.

275. This respondent indicated that although, as indicated above, they consider that NPPRs are important and generally workable, there are a number of issues for third country AIFMs (which, if it were to be possible, would benefit from a more harmonised approach):

- This respondent indicated that coordination of the notification/registration process - as noted above, individual countries adopt a range of different processes in connection with the use of NPPRs, with different forms and different information needing to be filed in different members states. This respondent indicated that the absence of a more harmonised approach means that AIFMs incur more costs and time than would otherwise be the case in marketing across multiple jurisdictions;

- This respondent further indicated that the diverging approach to the concept of 'marketing' , individual members states take differing approaches to the interpretation of 'marketing' for the purposes of the Directive, which means that the requirement to complete the notification/registration process in order to use NPPRs differs across Member States which creates practical issues for AIFMs and increases the cost burden of marketing as it is necessary to take advice in each Member State as to when the obligation to notify/register arises and what activities may be permitted prior to that point;

- This respondent also indicated that duplication of filing/reporting obligations - non-EU AIFMs using NPPR are subject to periodic reporting and filing obligations (for instance, periodic 'Annex IV' reporting under Article 24 and the notification of major holdings and control in EU companies under Articles 27 and 28) in each Member State in which a fund is marketed using NPPRs. This results in duplication of effort and complexity (and, this additional costs), particularly since individual members states may have differing interpretations as to the detailed requirements necessary to comply with these obligations and different forms and processes for doing so.

276. This respondent finally indicated that although in our experience some third country AIFMs have been deterred from undertaking private placements in the EU, this is often the case in situations where the capital proposed to be raised from EU investors is not significant. This respondent indicated that third country AIFMs will generally only undertake private placements in the EU if the benefit of doing so outweighs the costs. This respondent indicated that with the advent of the AIFMD, the relevant compliance costs are more significant and the marketing regimes are more complex. Additionally, they have heard anecdotal reports of non-EU AIFMs choosing not to market their AIFs in the EU unless they can use passive marketing (or 'reverse solicitation') i.e. where the AIFM receives an approach from a potential investor at the potential investor's own initiative. This respondent indicated that this is potentially restricting opportunities in the EU investment market. Further, this respondent indicated that the lack of NPPRs in some members states is an obvious bar to third country AIFMs in undertaking private placements in those countries, which is not beneficial to EU pension funds and other

investors in those countries and is detrimental to sub-threshold EU AIFMs and EU AIFMs seeking to utilise non-EU AIFs. However, for the reasons noted above, they considered that NPPRs have generally been very important in ensuring that third country AIFMs can continue to undertake private placements in the EU and that this will remain the case, even if the option under the Directive to extend the passport to third country AIFMs is exercised.

277. Another respondent indicated that they would highlight 3 key benefits of the NPPR over a passporting regime.

- This respondent indicated that the NPPR has been beneficial in allowing managers who, for whatever reason, do not wish to expend time and financial resources on becoming AIFMD compliant and maintaining that status, to market on a targeted basis within the EU. This respondent indicated that this is especially relevant in a private equity funds' context where there is only very limited 'marketing' (if any) and the AIFM is often a newly established SPV (that does not conduct substantive business save taking periodic investment management decisions). This respondent indicated that the use of SPV's is important in a private equity context (i.e. where funds acquire controlling participations in real businesses attaching real risks) in order to manage well-known systemic and cross-contamination risks that would otherwise prejudice investors and sector stability.

- This respondent indicated that in contrast to reverse solicitation and passport rights, the rules relating to private placement are quite clear and allow greater contractual certainty in relation to the binding nature of investor commitments. This is particularly important in a private equity context given the size and long term nature of these commitments and the need for investors (or better, partners) to rely upon one another to make co-investments.

- This respondent also indicated that NPPR are an important means for EU investors to access to non-EU AIFM. In a private equity context, many of the best performing managers are international (US based) and are unlikely to (and should not be required to) establish an EU-domiciled AIFM / AIF. This respondent indicated that to the extent that certain Member States have imposed additional restrictions on investing with the best performing AIFM, the NCA have prejudiced the returns that will be achieved by these local investors (predominantly public bodies, pension funds, insurance companies and banks etc.).

- In general, they would argue that NPPR have a beneficial effect on investor choice, on the internal movement of capital and on competition in line with agreed G20/OECD Principles.

278. Notwithstanding the advantages of NPPR, this respondent believed the passport should be extended to non-EU AIFM in jurisdictions with equivalent regimes. This respondent indicated that a simplified NPPR should continue to be available, however, to

these non-EU managers if they fall below the threshold criteria on the same terms as Article 3. This respondent indicated that this is important in creating a truly level playing field. 'Non-marketing' or 'reverse solicitation' should be unaffected by any changes.

279. However, this respondent indicated that the concept of NPPR is not well defined by Article 42 or in relation to sub-threshold managers operating across border in the EU. This respondent indicated that the term 'private placement' is not a harmonised term. In a call for evidence in April 2007, the European Commission characterised private placement as a set of exemptions from rules that would otherwise normally apply in the event of the public offer/sale of financial instruments. This characterisation was reiterated in the Commission's final Impact Assessment Report on Private Placement in 2008. This characterisation is important because it directly connects the term with an offering of 'transferable securities' under the Prospectus Directive (2003/71/EC), which must always be in 'negotiable form': *"The concept of negotiability contains the notion that the instrument is tradable. If restrictions on transfer prevent an instrument from being tradable in such contexts, it is not a transferable security."*

280. This respondent indicated that participation (as opposed to a unit subscription) in a co-investment arrangement (i.e. a simple société de personnes without separate capital), however, is in a non-negotiable form (i.e. it is an intuitu personae relationship) and therefore falls outside private placement rules entirely (whatever they may have been or are now). This respondent indicated that this would capture most private equity funds in an industry context and this point ought to be clarified to ensure a proper legal construction of NPPR by Member States.

281. This respondent also indicated that private equity funds do not raise capital by way of: *"a direct or indirect offering or placement at the initiative of the AIFM, or on behalf of the AIFM, of units or shares [or other interest] of an AIF it manages…"*on a private (as opposed to a public) basis. Rather, potential partners, their sponsors and advisers negotiate the terms of individual participation in a private equity partnership with each other directly, before: i) the AIFM is incorporated; ii) the limited partnership is established; or iii) an 'offering document' is drafted and issued, iv) remembering that common law partnerships do not have legal capital / personality and the interests of partners are not pooled legally. The only actual pooling occurs in the joint bank account of the partnership.

282. This respondent also indicated that a partnership agreement is a simple commercial contract specific to the parties and is not a general offering document. 'Closing' is simply when specifically pre-agreed documents are signed-up. Participation after first closing is limited and is similarly undertaken on a negotiated basis. In this context, it is worth noting that the use of 'PPM's' by private equity funds is misleading as these are not detailed contractual offering documents in the form commonly published by UCI's where securities are being issued. PPM's are summary documents that focus on the key commercial features of the business proposal rather than the detailed contractual terms of an AIF. PPM's are not even remotely capable of contractual 'acceptance'.

283. This respondent indicated that a credible European rulebook has to be constructed on precise concepts and jurisprudence and this seems to be missing with NPPR.

284. This same respondent mentioned that the conceptual uncertainty surrounding NPPR has resulted in significantly different requirements being imposed across Europe. This respondent indicated that in the case of certain Member States, NPPR are deliberately restrictive. This respondent indicated that Germany, France, Austria and Italy are perhaps examples of this. Less restrictive rules apply within the Netherlands and the UK, where only the basic requirements set out in Article 42 apply. This respondent indicated that the introduction of the AIFMD-inspired NPPR has, therefore, resulted in a fragmentation of the European market with AIF-related activity increasingly concentrating in less restricted markets.

285. They would argue that the restrictive approach adopted by some Member States (together with the delay extending the possibility of a passport to non-EU managers more generally) is clearly contrary to Principle 6.2 of the G20/OECD High-Level Principles of Long-term Investment Financing by Institutional Investors in 2013, which states that: *"governments should avoid introducing or maintaining unnecessarily barriers to international investment – inward and outward – by institutional investors, especially when targeted to long-term investment. They should cooperate to remove, whenever possible, any related international impediments."* Indeed Principle 4.5 further suggests that: "*Governments should collaborate to promote greater consistency and strengthen the regulatory and supervisory frameworks for institutional investors, which may facilitate open, free and orderly capital flows and long-term cross-border investment by institutional investors".*

286. This respondent also mentioned that the costs of making use of NPPR, like the passport, are significant. This respondent indicated that the differences referred to above necessitate taking relatively expensive and uncertain advice whenever 'marketing' may be deemed to take place within a particular Member State; the term not being well understood and, they understand, generally mis-applied by different NCA.

287. This respondent indicated that NPPR themselves are not always 'free' to make use of and compliance is not straightforward in a private equity context; the application of Chapters IV and V to non-EU AIFM is binary in reality and, therefore, not even effective. This respondent also indicated that problems further increase where Member States have gold-plated NPPR requiring the pre-approval of a formal offering document (which is problematic for the same reasons as those given in the answer to question 2) and the appointment of a depositary. This respondent indicated that all these unnecessary costs are borne by investors; predominantly public bodies, pension funds, insurance companies and banks.

288. Another respondent indicated indicated that the NPPRs are essentially a continuation of well-established market practice. This respondent indicated that these therefore represent a stable, familiar and non-disruptive method of achieving compliance with relevant parts of the AIFMD (transparency and reporting) while providing the benefits of

utilising international best practice. This respondent also indicated that the use of NPPRs in those EU Member States which have provided for them has accordingly allowed a continuing flow of capital into, out of and within the EU, albeit with consistency of AIFMD disclosure and reporting standards with passported funds and where the relevant third countries meet the required co-operation standards. In the view of this respondent, this provides the benefit of their members of continued business flows with investors in EEA states.

289. This respondent added that NPPRs also facilitate access by EU professional investors to AIFMs and advisors in well-regulated third countries with non-EU investment strategies, or by virtue of having a mainly non-EU geographical footprint or investor base (e.g. where headquartered in the U.S., Asia or other third countries or regions). This respondent indicated that providing this NPPR access to a wider variety of global asset managers and advisors and their strategies provides EU professional investors with greater risk diversification opportunities and assists the globalisation of asset management, within the parameters of the AIFMD's disclosure, reporting and regulatory co-operation framework. In particular, this greatly reduces systemic risk in the EU's financial system through reduced concentration of assets and wider investor choices for investors in EU Member States.

290. This respondent indicated that as a corollary to this position, the ability of AIFMs established in well-regulated and co-operative third country jurisdictions to market to EU investors will typically provide those EU investors with an opportunity to co-invest alongside other global investors. This respondent indicated that this tends to spread benefits of industry best practice in such areas as commercial terms for managers and investors, maximum efficiency in scale and expertise and an ability to choose "best of breed" strategies from the global market place.

291. This respondent indicated that to the extent that there is an imposed restriction on investing with a wide range of AIFMs then there will tend to be a limit on the ability of EU investors to benefit from the advantages of this global market.

292. This respondent indicated that it is acknowledged that ESMA is currently considering whether the AIFMD passport should be extended to non-EU AIFMs in selected third countries as well as in relation to non-EU AIFs managed by EU AIFMs. This respondent supports this extension, provided it can be achieved on a workable and efficient basis. Nevertheless, this respondent considers the continuation of the NPPRs to be an important and effective measure to ensure market continuity alongside the proposed extension of the passport mechanism. Increased harmonisation of the marketing and disclosure requirements relating to NPPRs across all EU Member States would further increase the effectiveness of this approach.

293. However, this same respondent indicated that whilst the use of relevant NPPRs is an essential tool for investors in certain EU jurisdictions, the inconsistent imposition of increased marketing requirements in EU Member States has tended to raise barriers for investors in those markets. Jersey has adopted a supervisory regime that complies with

AIFMD requirements. Accordingly, in the case of the JFA funds, obstacles or barriers have not arisen through any shortcomings in the Jersey regulatory position but rather have tended to arise through factors such as the following:

- additional requirements being imposed by EU NCAs that have led to a lack of harmonisation of requirements, such as the requirement to have a depositary where there is a non-EU AIFM;

- the NPPR of certain EEA States requiring confirmation of compliance by the third country regulator of the non-EEA AIFM and non-EEA AIF with the national law of those EEA States in relation to AIFMD;

- non-implementation or limited implementation of AIFMD by certain Member States. This has included in some cases NCAs not entering into regulatory cooperation agreements (as required by the AIFMD) with any third country;

- significant differences in interpretation by different NCAs of certain key terms used in the AIFMD such as “marketing” including when a marketing process is deemed to actually begin (as opposed to previously accepted forms of pre-marketing activity).

294. To the extent to which such matters create real obstacles or barriers to entry, this respondent queried their enforceability by EU Member States, particularly in view of the need to comply with the provisions of Article 63 of the Treaty on the Functioning of the European Union, confirming free movement of capital between EU Member States and the rest of the world.

295. This respondent further mentioned that there have been some obstacles for Jersey AIFMs when trying to register through the NPPR in Member States where a more restrictive regime has been imposed. This respondent indicated that it should however be noted that there has been a wide disparity in levels of preparation by different NCAs (in some cases including Member States which have not yet entered into co-operation agreements with any third country) which has led to inconsistencies in the ability of EU investors to continue to be able to access opportunities. This respondent indicated that in some Member States (eg Italy) we understand that no NPPR actually exists.

296. This respondent indicated that significant issues have arisen in those Member States with more burdensome requirements including timing in respect of the registration process and providing final documentation to regulators, versus investors having the ability to negotiate the documentation, particularly in the context of private investment funds such as private equity and hedge funds where investment terms are open to negotiation by investors. Once negotiated, a close of the fund would ideally follow very swiftly and not depend on further review/waiting period. This respondent indicated that registration periods also vary between members states.

297. This respondent added that the costs of operating under NPPR under the AIFMD have been proportionate to regulatory costs under existing regimes in respect of those

Member States with baseline AIFMD requirements, but have been significant in others. For example, managers who have sought to market in those Member States which have required the appointment of a depositary where there is a non EU AIFM have found their investors incurring additional depositary-related costs simply to provide access to investors in those jurisdictions without obtaining the benefit of the wider passport.

298. As reporting obligations and filing forms and requirements differ between different Member States, this respondent added that non-EU AIFMs have also found themselves subject to varying additional compliance costs, depending on where and how they are required to file. This respondent indicated that the need for non-EU AIFMs to seek and pay for advice in different Member States in a non-harmonised post-AIFMD NPPR registration and reporting environment can also prove a relatively significant additional, one-off, marketing cost.

299. Another respondent indicated that NPPR has enabled investors in some Member states to continue to get access to funds to which they had always had access before AIFMD came into effect. This respondent added that prior to the introduction of the AIFMD, European professional investors had extensive opportunities to invest in funds managed by third country managers, where permitted by their NPPRs. EU managers were also able to rely on third country investors in their funds to support their investment into European companies. This respondent added that this is, inherently a global industry. This respondent indicated that the AIFMD permits Member states to keep in place their NPPRs until at least Q4 2018 and so there seems limited risk in EEA based investors having restricted access to non-EEA managers. However, this respondent mentioned that some Member states have chosen to tighten their NPPRs making it more difficult for many EEA based investors to access non-EEA managers and funds. The imposition of these additional restrictions by some Member states following the introduction of the AIFMD is limiting the ability of some EEA investors to invest in non-EEA funds. This respondent added that GIFA maintains that the continuation of NPPRs alongside a third country passport regime is preferable to allow EEA investors continued access to non-EEA managers and funds.

300. This same respondent indicated that some Member States have made it more difficult to access investors under NPPR by exceeding (‘gold plating’) the suggested minimum requirements under AIFMD, i.e. raising the barriers to entry. There has also been either non-implementation or limited implementation of AIFMD in some Member states making it impossible for regulatory co-operation. This respondent indicated that obstacles include a requirement for a paying agent (for French managers) and depositary lite provision and additional regulatory confirmations. This respondent indicated that as NPPR has been transposed differently in Member states the costs of accessing investors in some Member states have risen and in some cases investors in Member states have been effectively excluded from getting access to Guernsey funds. This respondent indicated that the registration costs payable to NCA’s have not been material. This respondent further indicated that the cost of advice in relation to NPPR in each Member state has been a more significant cost than the registration cost, particularly when reflected across multiple jurisdictions. The addition of depositaries and depositary lite service providers

has added significantly to the costs of compliance. This respondent indicated that this is additional cost is ultimately borne by investors.

301. This same respondent added that Germany's current NPPR regime exceeds the regime pre-AIFMD and they are aware some managers have chosen not to market to German investors as a result.

302. Another respondent indicated that they have consistently supported the policy goals underlying the AIFMD and strongly support regulatory oversight for hedge fund managers. They remained concerned, however, with several specific provisions in the AIFMD, as well as varying Member State regulations applicable to the marketing of hedge funds. This respondent indicated that as a result of the compliance costs and legal uncertainty associated with the AIFMD, many non-EU managers have decided not to market their funds to EU investors under the private placement framework. This respondent indicated that based on industry surveys and feedback from their members, they believe that many non-EU managers also would be unlikely to market funds to EU investors under a passport regime.

303. This respondent further indicated that given the very short time between the AIFMD becoming fully implemented (22 July 2014) and the ESMA having to deliver its opinion and advice (by 22 July 2015) (and the Commission adopting a delegated act within 3 months thereafter), they believe that regulators and policy makers should consider a longer review period before making any recommendations on the functioning of the private placement and passport regimes, to better ensure there is sufficient information on which to base such recommendations.

304. In relation to the marketing by non-EU managers, this same respondent indicated that in July 2014, Preqin conducted a study3 of how non-EU managers are responding to the AIFMD (The full text of the Preqin report is available at: https://www.preqin.com/docs/reports/Preqin-Special-Report-Hedge-Fund-Managers-Respond-to-AIFMD-July-14.pdf). This respondent indicated that the study found that the vast majority of non-EU managers, with the exception of managers in Switzerland (which has adopted legislation similar to the AIFMD), do not plan to market their funds to EU investors, either through national private placement regimes or through the AIFMD passport (should it become available) over the next 12-18 months.

305. This respondent indicated that the with respect to U.S. managers, only 12% of managers indicated that they plan to market under national private placement regimes, and only 4% plan to establish an EU AIFM to take advantage of the AIFMD passport. Based on their anecdotal experience, this respondent does not believe that there would be substantially more interest from U.S. managers in becoming fully authorised AIFMs to be able to market under the AIFMD passport if it were expanded to non-EU AIFMs. Similarly, the Preqin study found that only 9% of non-EU managers outside of Switzerland and the U.S. plan to market under national private placement regimes, and only 9% plan to establish an EU AIFM to take advantage of the AIFMD passport. The Preqin study found that 78% of U.S. managers cited compliance costs or uncertainty

about the AIFMD as the reason why U.S. managers do not plan to market their funds to EU investors. The study found that 42% of non-EU managers outside of Switzerland and the U.S. cited compliance costs or uncertainty about the AIFMD as the reason that they do not plan to market to EU investors. Similarly, this respondent indicated that the a June 2014 survey by Aksia found that a majority of hedge fund managers do not plan to market to EU investors and 87% of managers responded that they have faced significant challenges regarding the AIFMD (The full text of the Aksia report is available at: http://www.aksia.com/media/2015_HF_Manager_Survey.pdf).

306. This respondent indicated that taken together, the Preqin and Aksia studies confirm what they have heard anecdotally from their members; that compliance costs and legal uncertainty under the AIFMD are providing a significant disincentive to non-EU managers to operate in or market to EU investors. This respondent added that this is particularly true because non-EU managers must make a decision on whether to undertake the legal and compliance costs of complying with the AIFMD prior to knowing whether they will receive any investor subscriptions as a result of marketing efforts that bring the manager within the scope of the AIFMD.

307. More especially in relation to NPPRs, this same respondent indicated that while their members appreciate the ability for non-EU AIFMs to market their funds in the EU without being subject to full authorisation under the AFIMD, the resulting national private placement regimes have led to duplication, inconsistencies and potential conflicts. Moreover, this same respondent indicated that there remain a number of Member States that do not have private placement regimes for hedge funds, creating further inconsistency for marketing of hedge funds and other alternative investment funds. This respondent indicated that the significant uncertainty resulting from a lack of guidance and clarity regarding the rules in different Member States is complicated and costly, which they believe has acted as a disincentive to U.S. managers wishing to raise capital from EU investors thus inhibiting cross border capital flows and limiting investor choice.

308. This respondent indicated that one of the specific concerns for U.S. managers relates to the reporting forms under the AIFMD (Annex IV) (they indicated they have raised similar concerns with U.S. regulators about the reporting forms for private fund managers). This respondent indicated that the reporting requirements in individual Member States, combined with a lack of guidance, create additional burdens for managers who want to market in more than a single Member State. This respondent indicated that these disparities also inhibit the ability of regulators to compare the reported information. In this regard, they noted that ESMA's Opinion to Member States, which encouraged Member State regulators to require reporting of certain information beyond what is required in the template form (*e.g.*, VaR reporting, reporting on HFT, reporting of non-EU master AIFs that are not marketed into the EU), is one example of how the implementation of the reporting requirements under the AIFMD has created uncertainty and complexity for managers.

309. They encourage ESMA and Member State regulators to continue to consider the best framework for reporting by hedge fund managers, including the timeframes for reporting

(they note, for example, that managers have 60 days after the reporting period in the U.S. compared to 30 days after the reporting period in the EU), to achieve a balance between ensuring regulators have access to the information they need for oversight purposes, on a non-public and confidential basis, and avoiding unnecessary burdens on managers. They believed that such an approach not only reduces unnecessary burdens on the industry; it increases the ability of regulators to use and analyze the information they are collecting.

310. Another respondent indicated that the NPPRs have made it possible for European professional investors to continue to access certain non-EU AIFs. They 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.

311. They considered 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. They indicated they 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.

312. This respondent indicated that 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, this respondent indicated that 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. This respondent indicated that 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 this respondent indicated that 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. This respondent indicated that 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. This respondent indicated that a key issue has been the lack of clarity from EU Member States as to where the line between marketing and reverse solicitation is. They have been advised of several instances where their 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, this respondent indicated that 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.

313. This respondent indicated that 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 respondent indicated that this is not the case. This respondent indicated that 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). This respondent indicated that 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.

314. Another respondent indicated that the marketing passport is changing the model of AIF marketing. Nevertheless, this respondent indicated that the National Private Placement Regime continues to be an attractive option for marketing. This respondent indicated that for closed-ended AIF, the NPPR is more adapted. For example, the NPPR is still an option for private equity AIFM under threshold and seems to be the only way to market AIF in few countries. They believed that we should keep the NPPR. This is one of the reason why they regret that some countries' legislation have abolished the NPPR before the end of the delay provided by the AIFMD.

315. They draw to the attention of ESMA that the investors covered by venture capital and private equity are only professional investors. According to MiFid, family office or ultra-high net worth individuals are non-professional by nature (even if some can ask to be treated as professional investors if they meet the opt in criteria). In addition, this respondent indicated that it shall be reminded that the marketing passport is only open to professional investors whereas NPPR allows marketing to non-professional investors by nature (small enterprises, family office and ultra-high net worth individual). If the NPPR was to disappear, it would be useful in return to open the marketing passport to non-professional investors (with certain conditions, as for instance, by determining a threshold of subscription of at least € 100 000).

316. This respondent indicated that it could be added that while UCITS marketing passport is open to retail investors, an AIF cannot be marketed on a cross border basis through the AIFM passport to investors such as family offices, small enterprises, qualified, experienced or high net worth individuals which are not professional investors despite the fact that they are not retail investors.

317. Another respondent indicated that the private equity industry in the Channel Islands is international in the raising of funds from investors through to the investment of that capital in portfolio companies and the subsequent distribution of the returns generated. As such this respondent deemed the Channel Islands to be a facilitator in the international free

movement of capital. The National Private Placement Regimes ("NPPRs") existed (to varying degrees) prior to the introduction of AIFMD and the current status of the NPPRs have been seen as an evolution of the previous marketing and fund raising mechanisms. The NPPRs have enabled the industry to continue with a similar regulatory process, subject to the appropriate enhancements, for marketing funds within the EU and the regime has allowed for the continued capital flows both in to and out of the EU.

318. This respondent indicated that NPPRs have also continued to allow EU investors the ability to maintain diversification within their investment allocations to a variety of AIFMs and advisors in appropriately regulated jurisdictions enabling institutional investors to continue to provide greater investor protection and reduce their exposure to systemic risk appropriately.

319. This respondent also indicated that the NPPRs have continued to expose AIFMs to global competition, and therefore AIFMs have had to provide their investors with the best possible terms as the international competition that has developed between AIFMs allows investors to choose those AIFMs offering best possible terms of investment.

320. This respondent indicated that the differing interpretation and the different approaches taken by certain EU Member States have, as part of the AIFMD implementation process, added new and more onerous requirements to their NPPRs. This respondent indicated that others, notably France and Italy, have chosen in effect not to operate a NPPR, which creates significant restrictions for a non-EU Manager to raise funds from these jurisdictions. This has an impact both for managers and investors as it restricts the amount of capital that can be raised by the manager and it also restricts the investment opportunities and diversification available to investors.

321. This respondent indicated the differing interpretations across EU Member States have created a number of obstacles. The definition of marketing under the AIFMD varies from state to state and therefore the point at which a manager may have to register with an EU NCA is unclear. This respondent indicated this has forced managers to allocate significant resources to monitoring when a registration may be required in a particular state as opposed to establishing a common basis of approach. This respondent indicated these costs are often ultimately borne by investors.

322. This respondent further indicated that a number of AIFMs have filled NPPR registrations with multiple EU NCAs, each with their own respective requirements for reporting. For some AIFMs they are required to provide regulatory reporting, in similar but different formats, to multiple NCAs. This respondent indicated that this has created significant operational and resourcing costs in the preparation and submission of reporting information. This respondent indicated a central reporting system would provide consistency across NCAs and ensure efficiency for AIFMs.

323. This respondent finally indicated that the costs of operating under the NPPRs have varied significantly depending on the number of jurisdictions an AIFM has/or is potentially planning on marketing to. In particular, this respondent further indicated that the inconsistent approach to NPPRs and AIFMD more generally adopted by different EU

Member States has led to a substantial increase in legal and other professional advisory costs.

324. Another respondent first indicated that the private equity and venture capital industry is inherently global. Private equity raises money worldwide to invest locally and/or regionally. This respondent indicated that cross-border structures and cross-border marketing are key elements of the industry, and the continued free movement of capital on a global basis (both in to and out of the EU) is important both for European companies, which are the recipients of significant third country private equity investment and European investors, who invest in third country private equity funds as part of their asset allocation and risk diversification strategies. Between 2009 and 2013, this respondent indicated that private equity firms located outside the EEA invested EUR 6bn in the EEA economy; over the same period of time, private equity firms located in the EEA invested EUR 15bn in non-EEA economies.

325. This respondent further indicated that prior to the introduction of the AIFMD, European professional investors had extensive opportunities to invest in funds managed by third country managers where permitted by their NPPRs. Similarly, this respondent further indicated that EU managers relied heavily on third country investors in their funds in order to support their investment into European companies. Indeed, 42% of the total funds raised by EEA private equity houses between 2009 and 2013 was sourced from non-EEA investors. In actual numbers, this boils down to an amount of EUR 66bn that was invested by non-EEA investors in EEA based funds.

326. This respondent further indicated that private equity fund managers raise funds from professional investors which are then invested into the real economy. As a commercial matter, the location of the manager does not limit where funds are raised or where funds are invested. For instance, this respondent indicated that provided the relevant laws permit this, a US manager can raise funds from European investors for investment in Europe. Similarly an African manager can raise money from European investors for investment into Africa. Under the current AIFMD regime, this respondent mentioned that the only avenue for a non-EEA AIFM to market an AIF to EEA investors is the NPPR regime. Absent the possibility of registering under the AIFMD and benefitting from the passport, the NPPRs offer the only possibility for non-EEA AIFMs to market interests in the AIFs they manage to EEA investors.

327. This respondent further indicated that related benefits are that non-protectionist NPPRs benefit Member States' investors by increasing their ability (compared to the absence of any NPPR regime) to access non-EEA AIFMs and their funds. This respondent further indicated that such access facilitates diversification of investment by asset class and geography and is a critical component of the risk diversification strategies pursued by many European-based institutional investors for the benefit of their ultimate investors (mainly pension and insurance savers across Europe).

328. This respondent further indicated that access to third country investment opportunities also helps reduce the build-up of systemic risk in the EU by spreading investment more

widely. Many EU private equity investors are pension funds. This respondent further indicated that the ability to pick the best in class investment manager from a global range of managers (rather than being restricted only to EU managers) means an EU pension scheme has a better chance of making returns to satisfy its obligations to pay European pensioners. It also gives investors the chance to invest in non-EEA funds which invest into the EU or into emerging markets.

329. This respondent was of the view that the maintenance of many NPPRs post-AIFMD has also limited the scope for third countries to restrict the ability of EU managers to market their funds to potential investors in their jurisdictions for reasons of non-reciprocity. This is clearly beneficial to the EU fund management industry and the European real economy as a whole.

330. This respondent indicated that on the other hand, the NPPRs, where they exist, are onerous and discriminatory, in that non-EEA AIFMs need to register with multiple authorities and to comply with very different obligations imposed by the national legislators (which in some cases go beyond the AIFMD requirements for third country fund managers) in order to be able to market to EEA investors, who will normally represent a small proportion of an AIF's global investor base.

331. This respondent indicated that whilst the flow of capital has not in practice been stopped entirely across the EEA, experience on the ground suggests that AIFMs are being much more selective about which EEA Member State regimes they are willing to navigate in order to reach prospective investors in those markets. As such, this respondent further indicated that the NPPR regime without a passport regime in place in parallel is very unsatisfactory and has tended to result in only larger non-EEA AIFMs marketing in the EEA, and in those cases only in the largest Member States, thus limiting investors' risk diversification and their access to return opportunities. (they note in passing that such "third country funds" include funds dedicated to investment in the EEA but which are established outside the EEA such as in the Channel Islands and Switzerland.) In addition, due to the fact that some Member States have all but removed/made it impossible for a non-EEA AIFM to register under their NPPRs, this respondent indicated that the consequence has been that, even if a non-EEA AIFM was willing to negotiate the regulatory requirements and incur the costs necessary to market in a Member State in order to reach potential investors therein, they are unable to do so. This respondent further indicated that this is to the potential detriment of the investors in that Member State.

332. Accordingly, this respondent believed strongly that a passport regime is needed to give third country fund managers the opportunity to market in all EEA countries under the same conditions as EEA managers, whilst the NPPRs should be maintained alongside the third country passport to continue to enable third country fund managers who only wish to approach a select number of investors in the EEA to continue to be able to do so without being forced to use the passport.

333. This respondent further indicated that finally, they would note that the NPPRs remain the only way in which 'sub-threshold' EU AIFMs of EU AIFs who do not 'opt in' to the Directive (and are therefore unable to benefit from the marketing passport) can market on a cross-border basis within the EU. This respondent further indicated that the NPPRs are therefore important also to avoid discrimination against smaller EU fund managers.

334. Separately, this respondent further indicated that certain Member States have, as part of the AIFMD implementation process, added new and more onerous requirements to their NPPRs; others, notably France and Italy, have chosen in effect not to operate an NPPR. This respondent further indicated that this means that it is all but impossible for a non-EEA AIFM to market in those jurisdictions. In the absence of an NPPR, the only way in which an investor could invest in a fund managed by a non-EEA manager is if it happened to know about the existence of that fund (perhaps because it had invested in previous funds managed by the same manager) and approached the manager on its own initiative.

335. This respondent summarised below the key issues faced by third country managers/managers of third country funds when seeking to register under Member States' NPPRs they identified.

Absence of a harmonised registration process

336. This respondent indicated that one of the key issues facing AIFMs seeking to use NPPRs is the absence of a harmonised registration process across the EU. There is a different form which must be filed with each Member State regulator and differences also between:

- the supporting information which must be supplied with the form (some Member State regulators require significant amounts of supporting information and documentation whilst others do not);
- whether contractual agreements need to be established between an AIF and a service provider (e.g. depositary) prior to the form being filed;
- the way in which the form must be filed;
- fees/charges imposed on the AIFM when filing the form; and
- the timing for regulators to consider the form/material submitted.

337. This respondent indicated that in Austria and Germany, for instance, it can take up to four months for the national competent authority (FMA or BaFin) to review the AIFM's notification application, whilst in other Member States a manager may market immediately following filing. Furthermore, this respondent indicated that regulators in certain key jurisdictions for fundraising are not appropriately resourced to deal with the volume of NPPR registration applications. In many cases, this respondent indicated that regulators seem to be giving priority to AIFM authorisation applications from domestic

managers. In addition to creating an unequal market for EEA and non-EEA AIFMs, this respondent indicated that this has resulted in the regulators being unable to meet their own deadlines for processing NPPR registration applications from non-EEA AIFMs. This respondent indicated that these uncertainties make it difficult for non-EEA AIFMs to draw up and adhere to fund formation and closing timetables.

338. In addition, this respondent indicated that the requirements as such vary from one Member State to the other. The absence of a harmonised registration process means that AIFMs incur considerable duplication of costs for any non-EU fund which needs to be marketed across the EU as advice must be taken in each relevant jurisdiction and charges are incurred on a per-jurisdiction basis. This respondent indicated that it also imposes an unnecessarily onerous compliance burden on managers who, at a time when resources should be focused on raising funds for investment into the real economy, must instead divert certain of those resources towards ensuring that they meet their regulatory notification obligations across the EU.

Ongoing compliance and operational costs

339. This respondent indicated that as ESMA will be aware, AIFMs which have registered under an NPPR must comply with certain ongoing obligations following registration. For above-threshold managers these obligations include making available to investors in the relevant AIF an AIFMD-compliant annual report, filing periodic reports with the regulator and complying with Articles 26 to 30 of the Directive (which set out the asset stripping and notification/disclosure obligations which apply to AIFMs when their funds acquire control of/holdings in certain EU companies). Where the non-EEA AIFM has registered under multiple NPPRs it must comply with these requirements in each jurisdiction. The AIFM must, for instance, file 'Annex IV' periodic reports and notifications required under Articles 27 and 28 of the Directive with each Member State regulator and must comply with each Member State's interpretation of the applicable requirements. As a result, this respondent indicated that AIFMs incur significant costs and suffer an onerous administrative burden in order to ensure that they satisfy their regulatory obligations across the EU. EU AIFMs by contrast only need to file materials with a single regulator.

340. Indeed, this respondent indicated that there is no harmonisation on the procedures for submitting Annex IV reports, which means that non-EEA AIFMs have to use different reporting forms and online submission platforms to submit reports in different EEA jurisdictions, resulting in a significant and unnecessary increase in ongoing compliance costs. This respondent indicated that this has also resulted in the rather unusual result that non-EEA AIFMs (not subject to the full Directive) are subject to higher compliance burden than EEA AIFMs (subject to the full Directive) in this respect.

341. This respondent indicated that it is time-consuming and costly for firms to comply with a patchwork of local implementing laws, which often differ in their detailed requirements. A single registration/filing hub, managed by ESMA and to which Member State regulators would have access, would resolve many of the issues described above and is something which they, and their members, would strongly support. This respondent indicated that

such a hub would be most effective if it permitted AIFMs to file a single NPPR registration and submit only one version of any Annex IV report or notification required to be made under Articles 27 or 28 of the Directive. Whilst we acknowledge that the implementation of such a hub would require Member State regulators to agree (perhaps through ESMA's Investment Management Standing Committee) on the interpretation of applicable parts of the Directive, they would strongly encourage regulators to seek to reach common views even prior to the implementation of any such hub in order to increase legal and regulatory certainty for third country managers and funds. (Such agreement, particularly on the scope and application of Articles 26 to 30 of the Directive, would also benefit EU managers and funds.).

Divergent local requirements

342. This respondent indicated that amongst the divergent requirements in certain Member States are:

- A requirement, in effect, to comply with the whole of the AIFMD in respect of the third country fund and its manager.
- A requirement for staff of the manager to pass examinations which can be undertaken only in the local language.
- A requirement to appoint a depositary in respect of a third country fund. In some cases, this can be inconsistent with the custody rules applicable to the fund under its local laws or rules.
- A requirement to provide confirmation from the regulator in the jurisdiction of the third country fund that there is reciprocal market access. Few regulators in significant markets are willing to make the requisite assessment, let alone provide such confirmation.
- Local elaboration on the transparency requirements concerning remuneration of the staff of the AIFM, going beyond Article 42 AIFMD.

343. Finally, this respondent would like to note that while the ESMA questions focus on the obstacles encountered by third country managers (or managers of third country funds) when trying to register under Member States' NPPRs, sub-threshold EEA AIFMs too are adversely affected by the new requirements to meet when marketing EEA AIFs under other Member States' NPPRs as compared to a pre-AIFMD scenario.

344. As a result, based on feedback from their members, this respondent indicated that a number of third country managers have ceased to market at all in the EEA, with the effect that EEA investors will have been denied access to them and the investment opportunities they might provide. A second significant group, for whom EEA investors represent a more significant part of their investor base, have chosen to register for marketing only in a handful of jurisdictions in which (a) the NPPRs are most accessible such as Finland, The Netherlands, Sweden and the UK; and (b) they have a significant

number of prospective investors likely to make sizeable commitments. A third group, notably including the very largest global multi-strategy asset management firms and some Channel Islands headquartered managers have chosen to go through the trouble and expense of complying with a somewhat larger number of NPPRs, perhaps up to ten.

345. Another respondent indicated that National Private Placement Regimes (NPPR) ensure some flexibility and work rather well when now compared to the passport. Therefore, for the time being, this respondent was of the view that such NPPR should be maintained. Their members suggest that this dual regime of NPPR and passports for EU AIFs and EU AIFMs should be maintained for 10 years, before envisaging an extension of the passport to non-EU AIFs and non-EU AIFMs and the repeal of NPPR. In particular, ensuring a really smooth functioning of the EU AIF and EU AIFM passports should be considered as a pre-requisite before enlarging the passports to non-EU AIFs and non-EU AIFMs.

346. Another respondent indicated that they agree that National Private Placement Regimes (NPPR) ensure a certain amount of necessary flexibility and are therefore seen as providing further choice to investors. They mentioned that while costs benefits for NPPRs have shrunk since the introduction of the EU passport, they are strongly in favour of maintaining NPPR for the time being.

347. This respondent indicated that some of its members consider that there clearly are obstacles and barriers to entry for using NPPRs, which, generally speaking, manifest themselves not as requirements within AIFMD Level 1 itself, but as national-level NPPR requirements that, in some Member States, go beyond the requirements of Articles 36 or Article 42 and are caused by an inhomogeneous transposition of the Directive. Speaking in more concrete terms, they could identify the following obstacles or barriers: i) Firstly, the registration process and reporting requirements varies from Member State to Member State ii) Secondly there is legal uncertainty in certain Member States as to whether NPPR will be phased-out in these individual Member States with existing institutional clients iii) Thirdly, NPPR are expensive and bear on-going compliance risks, as domestic legislative developments have to be observed in the individual Member States.