

ESMA advice on the application of the AIFMD passport to non-EU AIFMs and AIFs and ESMA opinion on the functioning of the AIFMD EU passport and of the National Private Placement Regimes of 30 July 2015

Economic and Monetary Affairs Committee
European Parliament

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Chair
European Securities and Markets Authority

Dear Members of the European Parliament,

Ladies and gentlemen,

I am pleased to have been invited by the Chair and Members of ECON to speak to you about ESMA's work in relation to the passport under the Alternative Investment Fund Managers Directive (AIFMD). In my remarks I will speak first about the opinion on the functioning of the EU passport and the national private placement regimes (NPPRs), and then discuss the advice on whether to extend the passport to non-EU countries. I will conclude by providing some details on the next steps. But before going into the details of the opinion and advice, allow me to recall briefly the context in which we carried out our work.

Political agreement was reached on the AIFMD in October 2010. The text of the Directive was published in the Official Journal (OJ) in July

2011, with a transposition deadline of 22 July 2013. At that time it was assumed that the Level 2 measures of the Directive would be finalised well in advance of the transposition deadline, allowing Member States sufficient time to transpose the full package of requirements and giving the relevant stakeholders enough time to prepare for implementation. As it turned out, for a number of reasons the Level 2 measures were in fact not published in the OJ until March 2013, only four months before the transposition deadline. This delay had a number of knock-on effects which are relevant to the advice and opinion that we will discuss today. First, it meant that Member States faced challenges in transposing the Level 1 Directive by the deadline of 22 July 2013. Perhaps more importantly, it led to widespread reliance on the transitional provisions included in the Directive with respect to the deadline by which existing alternative investment fund managers (AIFMs) had to seek authorisation. Taken together, the consequence was that the AIFMD was not fully up and running ‘on the ground’ until the summer of 2014, and even at that stage transposition had still not taken place in a number of Member States. This is important when considering the advice and opinion that we submitted to the institutions in July because the time period of over two years that the co-legislators had originally envisaged for ESMA’s work was in practice reduced to one year.

Nevertheless, we treated the opinion and advice as a high priority and began the preparatory work as soon as possible. The first step was to start gathering an extensive set of information from national competent authorities (NCAs) in relation to the use of the EU passport and the NPPRs. We received the first information in May 2014 and continued to receive quarterly reports right up until the submission of the opinion.

We felt that it was nevertheless important to broaden the set of information on which to base the opinion, so we launched a call for evidence at the end of last year. That initiative led to a substantive amount of feedback being provided by a range of stakeholders from the EU and beyond. We were also pleased to receive a significant amount of input from several non-EU regulators.

Having carefully assessed all of the information and feedback received, ESMA came to the view that it was too early to form a definitive opinion on the functioning of the EU passport and the NPPRs. Nevertheless, we did identify a few issues that we felt merited follow-up work, including some divergent approaches across Member States with respect to marketing rules. In the coming months we will look at how we can promote a common approach on these issues. Overall, we felt that there was insufficient evidence to indicate that the EU passport had raised major issues in terms of the functioning and implementation of the AIFMD framework. We also noted that we would see merit in the preparation of another opinion on the functioning of the NPPRs once the AIFMD has been in place for a longer period. Needless to say, such opinion will take into account the decisions 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.

Turning now to the advice, it is important to recall that we decided to assess non-EU countries individually rather than as a single block. We did so because we felt that was the only way in which to carry out a proper assessment of the various criteria set out in the AIFMD. In

particular, we considered it important to make a distinction between the very different situations of non-EU countries in terms of such factors as the demand for the passport, the access to the market of these non-EU countries for EU funds and managers, and their regulatory framework as compared to the AIFMD.

Having made the decision to look at each non-EU country individually, we then developed a comprehensive assessment methodology that took as a basis the criteria in the AIFMD, namely i) investor protection, ii) market disruption, iii) competition and iv) the monitoring of systemic risk. The Directive itself provides that, where ESMA considers that there are no significant obstacles in relation to these four elements, ESMA should issue positive advice. It is important to mention that ESMA only assessed these jurisdictions from a regulatory standpoint since that is clearly our area of responsibility and expertise. We noted in our advice that other issues, such as fiscal matters or anti-money laundering rules, might be relevant to the decision on whether to extend the passport, but we did not consider ourselves as the appropriate body to look into those aspects.

We applied our assessment methodology to six non-EU countries: Guernsey, Hong Kong, Jersey, Switzerland, Singapore and the United States. It must be said that there is no perfect way to select non-EU countries but we made our selection of jurisdictions taking into account a number of factors including the amount of activity already being carried out by entities from these countries under the NPPRs, the existing knowledge and experience of EU NCAs with respect to their counterparts

in these jurisdictions and the efforts made by stakeholders from these countries to engage with the process.

The advice we submitted to you in July was positive with respect to the extension of the passport to Guernsey and Jersey, while we considered that Switzerland would remove any remaining obstacles with the enactment of pending legislation. We did not reach a definitive view on the other three jurisdictions due to concerns related to competition, regulatory issues and a lack of sufficient evidence to carry out a proper assessment of the relevant criteria.

We are conscious that stakeholders in the non-EU jurisdictions not covered in the July advice may be wondering about the consequences for them of their jurisdiction not having been assessed positively by ESMA yet. However, we also highlighted in our advice that the EU institutions may wish to consider waiting until ESMA has delivered positive advice on a larger number of non-EU countries before triggering the relevant legislative procedures, taking into account such factors as the potential impact on the market that a decision to extend the passport might have.

Looking ahead to the next steps, we see three key areas on which further work by ESMA is required in the short term. First, we will continue our assessment of Hong Kong, Singapore and the US with a view to reaching a definitive conclusion on whether to extend the passport to those countries. Secondly, we will start to assess a second group of non-EU countries, namely Australia, Canada, Japan, the Cayman Islands, the Isle of Man and Bermuda. These countries were selected using the same criteria as for the first set of advice. Thirdly, we will focus on putting in



place the extensive framework foreseen by the co-legislators in case the passport is indeed extended to one or more non-EU countries. This last element includes making preparations for the significant role for ESMA in the functioning of the passporting system and the strengthened supervisory cooperation that will be crucial to its success.

I hope that these introductory remarks have been helpful and I look forward to hearing your views on our advice and opinion on the AIFMD passport.

Thank you for your attention.