

**BVI's response to ESMA's call for evidence on AIFMD passport and third country AIFMs
(ESMA/2014/1340)**

Q1: Please describe your experience using the AIFMD passport:

- Indicate your home Member State

BVI¹ gladly takes part in the call for evidence on the functioning of the AIFM passports and third country AIFMs initiated by ESMA. In this regard, we focus our input on the questions to which BVI as the German association of fund and asset managers can make a relevant contribution.

Q2: How have you found the passport application process?

- Very satisfactory

- Satisfactory

- Problems encountered. Please explain

In general, BVI members using the AIFMD passports find the passport application process satisfactory. There are some practical difficulties with the use of the distribution passport to which we refer under Q4 below.

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

BVI members' experience with the use of the AIFMD passport is quite diverging. A few bigger members have taken the AIFMD as an opportunity of creating economies of scale by merging all management activities relating to AIFs onto one or a few AIFM 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 BVI members have been granted their AIFM licenses only a few months ago.

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

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, our 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

¹ BVI represents the interests of the German investment fund and asset management industry. Its 84 members manage assets in excess of EUR 2.3 trillion in retail funds, Spezialfonds and assets outside investment funds. As such, BVI is committed to improving the overall conditions for investors, while at the same time promoting a level playing field for all investors across all financial markets. BVI members manage, directly or indirectly, the assets of 50 million private clients over 21 million households. (BVI's ID number in the EU Transparency Register is 96816064173-47). For more information, please visit www.bvi.de.



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 in as far this additional scrutiny (which is not foreseen in the AIFMD) may retard 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 ten thousands of Euros only for handling/storing the notification files processed by other EU authorities.

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

In Germany the inbound use of the AIFM passport under Article 33 AIFMD is not possible for the purpose of cross-border management of retail AIFs. This outcome is due to the implementing provision in § 54 para. 1 KAGB which allows only for the management of “Spezial-AIF” being professional investment vehicles in Germany. Consequently, EU AIFM domiciled in other Member States are being deterred from exploiting the AIFM passport to the full and offering their management services to the German retail market. Given that Article 33 AIFMD does not provide for a corresponding limitation, but applies generally to “EU AIFs”, we believe that the German implementation represents an undue restriction of the passporting opportunities available to EU AIFM.

Apart from that aspect, we deem it important that the administrative fees charged for the processing of marketing notifications are not excessive and thus do not render the use of the AIFM passport unattractive from the economic perspective (cf. our remarks to Q4 above).

Q6: *Have you experienced issues of investor protection in relation to AIFs marketed or managed from another Member State, including AIFs marketed to retail investors under Article 43? If so, please provide details (e.g. number of complaints from investors, the reasons for those complaints etc).*

We have no evidence of specific issues of investor protection relating to the cross-border marketing of EU AIFs.

Q7-Q20: No relevant contributions from BVI.



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

In our view, the extension of the AIFM passport should be contingent upon the existence of a regulatory environment in the relevant non-EU jurisdiction which is broadly equivalent to the AIFM framework. Moreover, access to the EU Single Market on the passport basis should be granted only if the relevant third country allows marketing of EU AIFs into the national market subject to broadly equivalent conditions. These elements of reciprocity should be deemed requisite because the eventual extension of the AIFM passport to non-EU AIFM will have significant implications on the competitive landscape of investment funds within Europe. Thus, an unconditional opening of the EU Single Market to third country providers should be avoided, since it could put EU AIFMs at a competitive disadvantage, particularly in case of lighter regulatory regimes outside the EU.

Against this background, we greatly welcome the announcement made by ESMA not to treat all non-EU countries as a single block. Indeed, we believe that ESMA should conduct individual assessments of non-EU jurisdictions and issue advice to the Commission on a country-by-country basis. Moreover, we would encourage ESMA and the Commission to perceive the upcoming review of the AIFMD passporting regime as an important opportunity to create or widen market access of EU AIFMs into non-EU countries that are yet not fully accessible from the European perspective.

In this context, it is important that the national private placement regimes do not automatically cease to exist once the AIFM passport is put into force in relation to certain third countries. We believe that the evaluation procedure foreseen in Article 68 AIFMD should allow for sufficient flexibility to terminate the existing private placement regimes only in case these are being replaced by the passport rules for a specific non-EU jurisdiction. In other instances, the national frameworks for private placement should be allowed to remain in place for an indefinite time.

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

As stated in our reply to Q21 above, we are of the view that an extension of the AIFM passport should require the existence of a broadly equivalent regulatory environment in the relevant third country. In this context, equivalence of regulation should mean equivalence of outcomes, in particular regarding investor protection and market integrity/stability. Another aspect to be considered in terms of equivalence is the effective enforcement of the legal framework in the non-EU jurisdiction.

The current Level 1 text of AIFMD already encompasses provisions which aim at safeguarding the EU standards of investor protection in relation to the provision of services by non-EU AIFMs. This pertains in particular to Article 37 AIFMD (authorisation in the Member State of Reference) which requires general compliance with the AIFMD in para. 2 and imposes further conditions on the authorisation in para. 7. These conditions include the existence of appropriate cooperation arrangements between the involved EU and non-EU authorities which ensure at least an efficient exchange of relevant information. Such mechanisms for closer cooperation between EU and non-EU authorities are essential for warranting effective supervision and thus ensuring augmented investor protection.



In addition, we believe that the possibility of investors to initiate proceedings before EU courts in order to obtain compensation for damages which have occurred at the fund level represents an important element of investor protection and should be duly accounted for in the passporting conditions for non-EU AIFM.

Q23: *Is there any particular non-EU country where, as a consequence of the regulatory environment (financial regulation, supervision, tax and anti-money laundering provisions), an eventual extension of the passport would put EU AIFMs and UCITS management companies at a disadvantage vis-a-vis the AIFMs from that country? Please specify and explain.*

Some BVI members have reported on their experience in several non-EU countries where the regulatory and tax environment present obstacles such as lengthy processes for authorisation, tax barriers, limited possibilities for direct distribution or other operational hindrances. These obstacles may result in a disadvantageous treatment of EU AIFM and UCITS managers compared to the AIFM from those countries in case the AIFM passport rules were to be extended.

Q24-Q29: No relevant contributions from BVI.