Linklaters

Alternative Investment Fund Managers Directive

As amended by AIFMD II

As at: 26 March 2024

Linklaters

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DIRECTIVE 2011/61/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2011

on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010

(Text with EEA relevance)

(OJ L 174, 1.7.2011, p. 1)

Amended by:

	Official Journal		
	No	page	date
Directive 2013/14/EU of the European Parliament and of the Council of 21 May 2013	L 145	1	31.5.2013
Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014	L 173	349	12.6.2014
Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016	L 354	37	23.12.2016
Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017	L 347	35	28.12.2017
Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019	L 188	106	12.7.2019
Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019	L 314	64	5.12.2019

Please note: Amendments to be made by Directive (EU) 2024/927 of the European Parliament and of the Council of 13 March 2024 ("AIFMD II") are shown in track changes.

The original recitals to AIFMD have been included for information, however may not all be relevant as a result of actual and proposed amendments to AIFMD.

The recitals to AIFMD II are included at the end of this document for information.

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of 8 June 2011

on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010

(Text with EEA relevance)

RECITALS

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Central Bank[1],

Having regard to the opinion of the European Economic and Social Committee[2],

Acting in accordance with the ordinary legislative procedure[3],

Whereas:

(1) Managers of alternative investment funds (AIFMs) are responsible for the management of a significant amount of invested assets in the Union, account for significant amounts of trading in markets for financial instruments, and can exercise an important influence on markets and companies in which they invest.

(2) The impact of AIFMs on the markets in which they operate is largely beneficial, but recent financial difficulties have underlined how the activities of AIFMs may also serve to spread or amplify risks through the financial system. Uncoordinated national responses make the efficient management of those risks difficult. This Directive therefore aims at establishing common requirements governing the authorisation and supervision of AIFMs in order to provide a coherent approach to the related risks and their impact on investors and markets in the Union.

(3) Recent difficulties in financial markets have underlined that many AIFM strategies are vulnerable to some or several important risks in relation to investors, other market participants and markets. In order to provide comprehensive and common arrangements for supervision, it is necessary to establish a framework capable of addressing those risks taking into account the diverse range of investment strategies and techniques employed by AIFMs. Consequently, this Directive should

[1] OJ C 272, 13.11.2009, p. 1.

[2] OJ C 18, 19.1.2011, p. 90.

[3] Position of the European Parliament of 11 November 2010 (not yet published in the Official Journal) and decision of the Council of 27 May 2011

apply to AIFMs managing all types of funds that are not covered by Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to the undertakings for collective investment in transferable securities (UCITS)[4], irrespective of the legal or contractual manner in which the AIFMs are entrusted with this responsibility. AIFMs should not be entitled to manage UCITS within the meaning of Directive 2009/65/EC on the basis of an authorisation under this Directive.

(4) This Directive aims to provide for an internal market for AIFMs and a harmonised and stringent regulatory and supervisory framework for the activities within the Union of all AIFMs, including those which have their registered office in a Member State (EU AIFMs) and those which have their registered office in a third country (non-EU AIFMs). As the practical consequences and possible difficulties resulting from a harmonised regulatory framework and an internal market for non-EU AIFMs performing management and/or marketing activities within the Union and EU AIFMs managing non-EU alternative investment funds (AIFs), are uncertain and difficult to predict due to the lack of previous experience in this regard, a review mechanism should be provided for. It is intended that, after a transitional period of 2 years, a harmonised passport regime become applicable to non-EU AIFMs performing management and/or marketing activities within the Union and EU AIFMs managing non-EU AIFs after the entry into force of a delegated act by the Commission in this regard. It is intended that the harmonised regime, during a further transitional period of 3 years, co-exist with the national regimes of the Member States subject to certain minimum harmonised conditions. After that 3-year period of co-existence, it is intended that the national regimes be brought to an end on the entry into force of a further delegated act by the Commission.

(5) 4 years after the deadline for transposition of this Directive, the Commission should review the application and the scope of this Directive taking into account its objectives and should assess whether or not the Union harmonised approach has caused any ongoing major market disruption and whether or not this Directive functions effectively in light of the principles of the internal market and of a level playing field.

(6) The scope of this Directive should be limited to entities managing AIFs as a regular business – regardless of whether the AIF is of an open-ended or a closed-ended type, whatever the legal form of the AIF, and whether or not the AIF is listed – which raise capital from a number of investors with a view to investing that capital for the benefit of those investors in accordance with a defined investment policy.

(7) Investment undertakings, such as family office vehicles which invest the private wealth of investors without raising external capital, should not be considered to be AIFs in accordance with this Directive.

(8) The entities not considered to be AIFMs pursuant to this Directive fall outside its scope. As a consequence, this Directive should not apply to holding companies as defined herein. However, managers of private equity funds or AIFMs managing AIFs whose shares are admitted to trading on a regulated market should not be excluded from its scope. Further, this Directive should not apply to the management of pension funds; employee participation or savings schemes;

[4] OJ L 302, 17.11.2009, p. 32.

supranational institutions; national central banks; national, regional and local governments and bodies or institutions which manage funds supporting social security and pension systems; securitisation special purpose entities; or insurance contracts and joint ventures.

(9) Investment firms authorised under Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments[5] and credit institutions authorised under Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions[6] should not be required to obtain an authorisation under this Directive in order to provide investment services such as individual portfolio management in respect of AIFs. However, investment firms should be able, directly or indirectly, to offer units or shares of an AIF to, or place such units or shares with, investors in the Union only to the extent that the units or shares can be marketed in accordance with this Directive. When transposing this Directive into national law, the Member States should take into account the regulatory purpose of that requirement and should ensure that investment firms established in a third country that, pursuant to the relevant national law, can provide investment services in respect of AIFs also fall within the scope of that requirement. The provision of investment services by those entities in respect of AIFs should never amount to a de facto circumvention of this Directive by means of turning the AIFM into a letter-box entity, irrespective of whether the AIFM is established in the Union or in a third country.

(10) This Directive does not regulate AIFs. AIFs should therefore be able to continue to be regulated and supervised at national level. It would be disproportionate to regulate the structure or composition of the portfolios of AIFs managed by AIFMs at Union level and it would be difficult to provide for such extensive harmonisation due to the very diverse types of AIFs managed by AIFMs. This Directive therefore does not prevent Member States from adopting or from continuing to apply national requirements in respect of AIFs established in their territory. The fact that a Member State may impose requirements additional to those applicable in other Member States on AIFs established in its territory should not prevent the exercise of rights of AIFMs authorised in accordance with this Directive in other Member States to market to professional investors in the Union certain AIFs established outside the Member State imposing additional requirements and which are therefore not subject to and do not need to comply with those additional requirements.

(11) Several provisions of this Directive require AIFMs to ensure compliance with requirements for which, in some fund structures, AIFMs are not responsible. An example of such fund structures is where the responsibility for appointing the depositary rests with the AIF or another entity acting on behalf of the AIF. In such cases, the AIFM has no ultimate control over whether a depositary is in fact appointed unless the AIF is internally managed. Since this Directive does not regulate AIFs, it cannot require an AIF to appoint a depositary. In cases of failure of an AIFM to ensure compliance with the applicable requirements of an AIF or another entity on its behalf, the competent authorities should require the AIFM to take the necessary steps to remedy the situation. If, despite such steps, the non-compliance persists, and in so far as it concerns an EU AIFM or an authorised non-EU AIFM managing an EU AIF, the AIFM should resign as manager

[5] OJ L 145, 30.4.2004, p. 1.

[6] OJ L 177, 30.6.2006, p. 1.

of that AIF. If the AIFM fails to resign, the competent authorities of its home Member State should require such resignation and the marketing in the Union of the AIF concerned should no longer be permitted. The same prohibition should apply to authorised non-EU AIFMs marketing non-EU AIFs in the Union.

(12) Unless specifically provided for otherwise, where this Directive refers to the interests of the investors of an AIF the investors' interests in their specific capacity as investors of the AIF, and not their individual interests, are envisaged.

(13) Subject to the exceptions and restrictions provided for, this Directive should be applicable to all EU AIFMs managing EU AIFs or non-EU AIFs, irrespective of whether or not they are marketed in the Union, to non-EU AIFMs managing EU AIFs, irrespective of whether or not they are marketed in the Union, and to non-EU AIFMs marketing EU AIFs or non-EU AIFs in the Union.

(14) This Directive lays down requirements regarding the manner in which AIFMs should manage AIFs under their responsibility. For non-EU AIFMs this is limited to the management of EU AIFs and other AIFs the units or shares of which are also marketed to professional investors in the Union.

(15) The authorisation of EU AIFMs in accordance with this Directive covers the management of EU AIFs established in the home Member State of the AIFM. Subject to further notification requirements, this also includes the marketing to professional investors within the Union of EU AIFs managed by the EU AIFM and the management of EU AIFs established in Member States other than the home Member State of the AIFM. This Directive also provides for the conditions subject to which authorised EU AIFMs are entitled to market non-EU AIFs to professional investors in the Union and the conditions subject to which a non-EU AIFM can obtain an authorisation to manage EU AIFs and/or to market AIFs to professional investors in the Union with a passport. During a period that is intended to be transitional, Member States should also be able to allow EU AIFMs to market non-EU AIFs in their territory only and/or to allow non-EU AIFMs to manage EU AIFs, and/or market AIFs to professional investors, in their territory only, subject to national law, in so far as certain minimum conditions pursuant to this Directive are met.

(16) This Directive should not apply to AIFMs in so far as they manage AIFs whose only investors are the AIFMs themselves or their parent undertakings, their subsidiaries or other subsidiaries of their parent undertaking and where those investors are not themselves AIFs.

(17) This Directive further provides for a lighter regime for AIFMs where the cumulative AIFs under management fall below a threshold of EUR 100 million and for AIFMs that manage only unleveraged AIFs that do not grant investors redemption rights during a period of 5 years where the cumulative AIFs under management fall below a threshold of EUR 500 million. Although the activities of the AIFMs concerned are unlikely to have individually significant consequences for financial stability, it is possible that aggregation causes their activities to give rise to systemic risks. Consequently, those AIFMs should not be subject to full authorisation but to registration in their home Member States and should, inter alia, provide their competent authorities with relevant information regarding the main instruments in which they are trading and on the principal exposures and most important concentrations of the AIFs they manage. However, in order to be able to benefit from the rights granted under this Directive, those smaller AIFMs should be allowed to be treated as AIFMs subject to the opt-in procedure provided for by this Directive. That

exemption should not limit the ability of Member States to impose stricter requirements on those AIFMs that have not opted in.

(18) No EU AIFM should be able to manage and/or market EU AIFs to professional investors in the Union unless it has been authorised in accordance with this Directive. An AIFM authorised in accordance with this Directive should meet the conditions for authorisation established in this Directive at all times.

(19) As soon as this is permitted under this Directive, a non-EU AIFM intending to manage EU AIFs and/or market AIFs in the Union with a passport or an EU AIFM intending to market non-EU AIFs in the Union with a passport should also be authorised in accordance with this Directive. At least during a transitional period, a Member State should also be able to allow a non-EU AIFM to market AIFs in that Member State and to authorise an EU AIFM to market non-EU AIFs in that Member State in so far as the minimum conditions set out in this Directive are met.

(20) Depending on their legal form, it should be possible for AIFs to be either externally or internally managed. AIFs should be deemed internally managed when the management functions are performed by the governing body or any other internal resource of the AIF. Where the legal form of the AIF permits internal management and where the AIF's governing body chooses not to appoint an external AIFM, the AIF is also AIFM and should therefore comply with all requirements for AIFMs under this Directive and be authorised as such. An AIFM which is an internally managed AIF should however not be authorised as the external manager of other AIFs. An AIF should be deemed externally managed when an external legal person has been appointed as manager by or on behalf of the AIF, which through such appointment is responsible for managing the AIF. Where an external AIFM has been appointed to manage a particular AIF, that AIFM should not be deemed to be providing the investment service of portfolio management as defined in point (9) of Article 4(1) of Directive 2004/39/EC, but, rather, collective portfolio management in accordance with this Directive.

(21) Management of AIFs should mean providing at least investment management services. The single AIFM to be appointed pursuant to this Directive should never be authorised to provide portfolio management without also providing risk management or vice versa. Subject to the conditions set out in this Directive, an authorised AIFM should not, however, be prevented from also engaging in the activities of administration and marketing of an AIF or from engaging in activities related to the assets of the AIF. An external AIFM should not be prevented from also providing the service of management of portfolios of investments with mandates given by investors on a discretionary, client-by-client basis, including portfolios owned by pension funds and institutions for occupational retirement provision which are covered by Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision[7], or from providing the non-core services of investment advice, safe-keeping and administration in relation to units of collective investment undertakings and reception and transmission of orders. Pursuant to authorisation under Directive 2009/65/EC, an external AIFM should be allowed to manage UCITS.

[7] OJ L 235, 23.9.2003, p. 10.

(22) It is necessary to ensure that AIFMs operate subject to robust governance controls. AIFMs should be managed and organised so as to minimise conflicts of interest. The organisational requirements established under this Directive should be without prejudice to systems and controls established by national law for the registration of persons working within or for an AIFM.

(23) It is necessary to provide for the application of minimum capital requirements to ensure the continuity and the regularity of the management of AIFs provided by an AIFM and to cover the potential exposure of AIFMs to professional liability in respect of all their activities, including the management of AIFs under a delegated mandate. AIFMs should be free to choose whether to cover potential risks of professional liability by additional own funds or by an appropriate professional indemnity insurance.

(24) In order to address the potentially detrimental effect of poorly designed remuneration structures on the sound management of risk and control of risk-taking behaviour by individuals, there should be an express obligation for AIFMs to establish and maintain, for those categories of staff whose professional activities have a material impact on the risk profiles of AIFs they manage, remuneration policies and practices that are consistent with sound and effective risk management. Those categories of staff should at least include senior management, risk takers, control functions, and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers.

(25) The principles governing remuneration policies should recognise that AIFMs are able to apply those policies in different ways according to their size and the size of the AIFs they manage, their internal organisation and the nature, the scope and the complexity of their activities.

(26) The principles regarding sound remuneration policies set out in the Commission Recommendation 2009/384/EC of 30 April 2009 on remuneration policies in the financial services sector[8] are consistent with and complement the principles of this Directive.

(27) In order to promote supervisory convergences in the assessment of remuneration policies and practices, the European Supervisory Authority (European Securities and Markets Authority), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council[9] (ESMA) should ensure the existence of guidelines on sound remuneration policies in the AIFM sector. The European Supervisory Authority (European Banking Authority) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council[10] should assist it in the elaboration of such guidelines.

(28) The provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by the Treaties, in particular Article 153(5) TFEU, general principles of national contract and labour law, applicable legislation regarding shareholders' rights and involvement and the general responsibilities of the administrative and supervisory bodies of the institution concerned, as well as the right, where applicable, of social partners to conclude and enforce collective agreements, in accordance with national laws and traditions.

[8] OJ L 120, 15.5.2009, p. 22.

[9] OJ L 331, 15.12.2010, p. 84.

[10] OJ L 331, 15.12.2010, p. 12.

(29) Reliable and objective asset valuation is crucial for the protection of investor interests. AIFMs employ different methodologies and systems for valuing assets, depending on the assets and markets in which they predominantly invest. It is appropriate to recognise those differences but, nevertheless, to require in all cases AIFMs to implement valuation procedures resulting in the proper valuation of assets of AIFs. The process for valuation of assets and calculation of the net asset value should be functionally independent from the portfolio management and the remuneration policy of the AIFM and other measures should ensure that conflicts of interest are prevented and that undue influence on the employees is prevented. Subject to certain conditions, AIFMs should be able to appoint an external valuer to perform the valuation function.

(30) Subject to strict limitations and requirements, including the existence of objective reasons, an AIFM should be able to delegate the carrying out of some of its functions on its behalf in accordance with this Directive so as to increase the efficiency of the conduct of its business. Subject to the same conditions, sub-delegation should also be allowed. AIFMs should, however, remain responsible for the proper performance of the delegated functions and compliance with this Directive at all times.

(31) The strict limitations and requirements set out on the delegation of tasks by AIFMs should apply to the delegation of management functions set out in Annex I. Delegation of supporting tasks, such as administrative or technical functions performed by the AIFM as a part of its management tasks, should not be subject to the specific limitations and requirements set out in this Directive.

(32) Recent developments underline the crucial need to separate asset safe-keeping and management functions, and to segregate investor assets from those of the manager. Although AIFMs manage AIFs with different business models and arrangements for, inter alia, asset safe-keeping, it is essential that a depositary separate from the AIFM is appointed to exercise depositary functions with respect to AIFs.

(33) The provisions of this Directive relating to the appointment and the tasks of a depositary should apply to all AIFs managed by an AIFM subject to this Directive and therefore to all AIF business models. They should, however, be adapted to the specificities of different business models. For some business models certain depositary tasks are more relevant than for others, depending on the type of assets the AIFs are investing in and the tasks related to those assets.

(34) For AIFs that have no redemption rights exercisable during the period of 5 years from the date of the initial investments and that, in accordance with their core investment policy, generally do not invest in assets that must be held in custody in accordance with this Directive or generally invest in issuers or non-listed companies in order potentially to acquire control over such companies in accordance with this Directive, such as private equity, venture capital funds and real estate funds, Member States should be able to allow a notary, a lawyer, a registrar or another entity to be appointed to carry out depositary functions. In such cases the depositary functions should be part of professional or business activities in respect of which the appointed entity is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct and can provide sufficient financial and professional guarantees to enable it to perform effectively the relevant depositary functions and meet the commitments inherent in those functions. This takes account of current practice for certain types of closed-ended funds. However, for all other AIFs, the depositary should be a credit institution, an investment firm or

another entity permitted under Directive 2009/65/EC, given the importance of the custody function. For non-EU AIFs only, it should also be possible for the depositary to be a credit institution or any other entity of the same nature as the entities referred to in this recital as long as it is subject to effective prudential regulation and supervision which have the same effect as Union law and are effectively enforced.

(35) The depositary should have its registered office or a branch in the same country as the AIF. It should be possible for a non-EU AIF to have a depositary established in the relevant third country only if certain additional conditions are met. On the basis of the criteria set out in delegated acts, the Commission should be empowered to adopt implementing measures, stating that prudential regulation and supervision of a third country have the same effect as Union law and are effectively enforced. Further, the mediation procedure set out in Article 19 of Regulation (EU) No 1095/2010 should apply in the event that competent authorities disagree on the correct application of the other additional conditions. Alternatively, for non-EU AIFs, the depositary should also be able to be established in the home Member State or in the Member State of reference of the AIFM managing the AIF.

(36) The Commission is invited to examine the possibilities of putting forward an appropriate horizontal legislative proposal that clarifies the responsibilities and liabilities of a depositary and governs the right of a depositary in one Member State to provide its services in another Member State.

(37) The depositary should be responsible for the proper monitoring of the AIF's cash flows, and, in particular, for ensuring that investor money and cash belonging to the AIF, or to the AIFM acting on behalf of the AIF, is booked correctly on accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF or in the name of the depositary acting on behalf of the AIF for the safe-keeping of the assets of the AIF, including the holding in custody of financial instruments that can be registered in a financial instruments account opened in the depositary's books and all financial instruments that can be physically delivered to the depositary, and for the verification of ownership of all other assets by the AIF or the AIFM on behalf of the AIF. When ensuring investor money is booked in cash accounts, the depositary should take into account the principles set out in Article 16 of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive[11].

(38) A depositary should act honestly, fairly, professionally, independently and in the interest of the AIF or of the investors of the AIF.

(39) It should be possible for a depositary to delegate the safe-keeping of assets to a third party which, in its turn, should be able to delegate that function. However, delegation and sub-delegation should be objectively justified and subject to strict requirements in relation to the suitability of the third party entrusted with the delegated function, and in relation to the due skill, care and diligence that the depositary should employ to select, appoint and review that third party.

(40) A third party to whom the safe-keeping of assets is delegated should be able to maintain a common segregated account for multiple AIFs, a so-called 'omnibus account'.

[11] OJ L 241, 2.9.2006, p. 26.

(41) Entrusting the custody of assets to the operator of a securities settlement system as designated for the purposes of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems[12] or entrusting the provision of similar services to third-country securities settlement systems should not be considered to be a delegation of custody functions.

(42) The strict limitations and requirements to which the delegation of tasks by the depositary is subject should apply to the delegation of its specific functions as a depositary, namely the monitoring of the cash flow, the safe-keeping of assets and the oversight functions. Delegation of supporting tasks that are linked to its depositary tasks, such as administrative or technical functions performed by the depositary as a part of its depositary tasks, is not subject to the specific limitations and requirements set out in this Directive.

(43) This Directive also takes account of the fact that many AIFs, and in particular hedge funds, currently make use of a prime broker. This Directive ensures that AIFs may continue to use the function of prime brokers. However, unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as prime broker and the potential conflicts of interest are properly identified, managed and disclosed to the investors of the AIF, no prime broker should be appointed as a depositary, since prime brokers act as counterparties to AIFs and therefore cannot at the same time act in the best interest of the AIF as is required of a depositary. Depositaries should be able to delegate custody tasks to one or more prime brokers or other third parties. In addition to the delegated custody tasks prime brokers should be allowed to provide prime brokerage services to the AIF. Those prime brokerage services should not form part of the delegation arrangement.

(44) The depositary should be liable for the losses suffered by the AIFM, the AIF and the investors. This Directive distinguishes between the loss of financial instruments held in custody, and any other losses. In the case of a loss other than of financial instruments held in custody, the depositary should be liable in the case of intent or negligence. Where the depositary holds assets in custody and those assets are lost, the depositary should be liable, unless it can prove that the loss is the result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary. In this context, a depositary should not, for example, be able to rely on internal situations such as a fraudulent act by an employee to discharge itself of liability.

(45) Where the depositary delegates custody tasks and the financial instruments held in custody by a third party are lost, the depositary should be liable. However, provided that the depositary is expressly allowed to discharge itself of liability subject to a contractual transfer of such liability to that third party, pursuant to a written contract between the depositary and the AIF or the AIFM acting on behalf of the AIF, in which such a discharge is objectively justified, and that the third party can be held liable for the loss based on a contract between the depositary and the third party, the depositary should be able to discharge itself of liability if it can prove that it has exercised due skill, care and diligence and that the specific requirements for delegation are met. By imposing the requirement of a contractual transfer of liability to the third party, this Directive

[12] OJ L 166, 11.6.1998, p. 45.

intends to attach external effects to such contract, making the third party directly liable to the AIF, or to the investors of the AIF, for the loss of the financial instruments held in custody.

(46) Further, where the law of a third country requires that certain financial instruments be held in custody by a local entity and there are no local entities that satisfy all depositary delegation requirements, the depositary should be able to discharge itself of liability provided that: the rules or instruments of incorporation of the AIF concerned expressly allow for such a discharge; the investors have been duly informed of that discharge and the circumstances justifying the discharge prior to their investment; the AIF or the AIFM on behalf of the AIF instructed the depositary to delegate the custody of such financial instruments to a local entity; there is a written contract between the depositary and the AIF or the AIFM acting on behalf of the AIF, which expressly allows such a discharge; and there is a written contract between the depositary and the third party which expressly transfers the liability of the depositary to that third party and makes it possible for the AIF, or the AIFM acting on behalf of the AIF, to make a claim against the third party in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf.

(47) This Directive should be without prejudice to any future legislative measures with respect to the depositary in Directive 2009/65/EC, because UCITS and AIFs are different both in the investment strategies they follow and in the type of investors for which they are intended.

(48) An AIFM should, for each of the EU AIFs it manages and for each of the AIFs it markets in the Union, make available an annual report for each financial year no later than 6 months following the end of the financial year in accordance with this Directive. That 6-month period should be without prejudice to the right of the Member States to impose a shorter period.

(49) Given that it is possible for an AIFM to employ leverage and, under certain conditions, to contribute to the build up of systemic risk or disorderly markets, special requirements should be imposed on AIFMs employing leverage. The information needed to detect, monitor and respond to those risks has not been collected in a consistent way throughout the Union, and shared across Member States so as to identify potential sources of risk to the stability of financial markets in the Union. To remedy that situation, special requirements should apply to AIFMs which employ leverage on a substantial basis at the level of the AIF. Such AIFMs should be required to disclose information regarding the overall level of leverage employed, the leverage arising from borrowing of cash or securities and the leverage arising from positions held in derivatives, the reuse of assets and the main sources of leverage in their AIFs. Information gathered by competent authorities should be shared with other authorities in the Union, with ESMA and with the European Systemic Risk Board (ESRB) established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board[13] so as to facilitate a collective analysis of the impact of the leverage of AIFs managed by AIFMs on the financial system in the Union, as well as a common response. If one or more AIFs managed by an AIFM could potentially constitute an important source of counterparty risk to a credit institution

[13] OJ L 331, 15.12.2010, p. 1.

or other systemically relevant institutions in other Member States, such information should also be shared with the relevant authorities.

(50) In order to ensure a proper assessment of the risks induced by the use of leverage by an AIFM with respect to the AIFs it manages, the AIFM should demonstrate that the leverage limits for each AIF it manages are reasonable and that it complies with those limits at all times. Where the stability and integrity of the financial system may be threatened, the competent authorities of the home Member State of the AIFM should be able to impose limits to the level of leverage that an AIFM can employ in AIFs under its management. ESMA and the ESRB should be informed about any actions taken in this respect.

(51) It is also considered necessary to allow ESMA, after taking into account the advice of the ESRB, to determine that the leverage used by an AIFM or by a group of AIFMs poses a substantial risk to the stability and the integrity of the financial system and to issue advice to competent authorities specifying the remedial measures to be taken.

(52) It is necessary to ensure that the competent authorities of the home Member State of the AIFM, the companies over which AIFs managed by an AIFM exercise control and the employees of such companies receive certain information necessary for those companies to assess how that control will impact their situation.

(53) Where AIFMs manage AIFs which exercise control over an issuer whose shares are admitted to trading on a regulated market, information should generally be disclosed in accordance with Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids[14] and Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market[15]. Specific requirements should apply to AIFMs managing AIFs which exercise control over a non-listed company. In order to ensure transparency regarding the controlled company, enhanced transparency, disclosure and reporting requirements should apply. Further, the annual reports of the relevant AIF should be supplemented with regard to the controlled company or such additional information should be included in the annual report of the controlled company. Such information should be made available to the employees' representatives or, where there are none, the employees themselves, and to the investors of the relevant AIF.

(54) Specific information requirements towards employees of certain companies apply in cases where AIFs acquire control over such companies in accordance with this Directive. However, in most cases the AIFM has no control over the AIF, unless it is an internally managed AIF. Furthermore, there is, in accordance with the general principles of company law, no direct relationship between the shareholders and the employees' representatives or, where there are none, the employees themselves. For those reasons, no direct information requirements towards the employees' representatives or, where there are none, the employees themselves, can be imposed pursuant to this Directive on a shareholder or its manager, namely the AIF and the AIFM. As regards the information requirements towards such employees' representatives or, where there are none, the employees themselves, this Directive should provide for an obligation on the AIFM concerned to

[14] OJ L 142, 30.4.2004, p. 12.

[15] OJ L 390, 31.12.2004, p. 38.

use its best efforts to ensure that the board of directors of the company concerned discloses the relevant information to the employees' representatives or, where there are none, the employees themselves.

(55) The Commission is invited to examine the need and the possibilities to amend the information and disclosure requirements applicable in cases of control over non-listed companies or issuers set out in this Directive on a general level, regardless of the type of investor.

(56) Where an AIFM manages one or more AIFs which acquire control over a non-listed company, the AIFM should provide the competent authorities of its home Member State with information on the financing of the acquisition. That obligation to provide information on financing should also apply when an AIFM manages AIFs which acquire control over an issuer of shares admitted to trading on a regulated market.

(57) Where an AIFM manages one or more AIFs which acquire control over a non-listed company or an issuer, the AIFM should, for a period of 24 months following the acquisition of control of the company by the AIFs, first, not be allowed to facilitate, support or instruct any distribution, capital reduction, share redemption and/or acquisition of own shares by the company in accordance with this Directive; second, in so far as the AIFM is authorised to vote on behalf of the AIFs at the meetings of governing bodies of the company, not vote in favour of a distribution, capital reduction, share redemption and/or acquisition of own shares by the company in accordance with this Directive; and third, in any event, use its best efforts to prevent distributions, capital reductions, share redemptions and/or the acquisition of own shares by the company in accordance with this Directive. When transposing this Directive into national law, the Member States should take into account the regulatory purpose of the provisions of Section 2 of Chapter V of this Directive and take due account in this context of the need for a level playing field between EU AIFs and non-EU AIFs when acquiring control in companies established in the Union.

(58) The notification and disclosure requirements and the specific safeguards against asset stripping in the case of control over a non-listed company or an issuer should be subject to a general exception for control over small and medium-sized enterprises and special purpose vehicles with the purpose of purchasing, holding or administrating real estate. Further, those requirements do not aim at making public proprietary information which would put the AIFM at a disadvantage vis-à-vis potential competitors such as sovereign wealth funds or competitors that may want to put the target company out of business by using the information to their advantage. The obligations to notify and disclose information should therefore apply subject to the conditions and restrictions relating to confidential information set out in Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community[16] and without prejudice to Directives 2004/25/EC and 2004/109/EC. This means that Member States should provide that within the limits and conditions laid down by national law the employees' representatives, and anyone assisting them, are not authorised to reveal to employees and to third parties any information affecting the legitimate interests of the company that has expressly been provided to them in confidence. Member States should, however, be able to authorise the employees' representatives and anyone assisting them to pass on confidential information to employees and

[16] OJ L 80, 23.3.2002, p. 29.

to third parties bound by an obligation of confidentiality. Member States should provide that the relevant AIFMs do not request the communication of information by the board of directors to the employees' representatives or, where there are none, the employees themselves, when the nature of that information is such that, according to objective criteria, it would seriously harm the functioning of the company concerned or would be prejudicial to it. The notification and disclosure requirements and the specific safeguards against asset stripping should also apply without prejudice to any stricter rules adopted by Member States.

(59) This Directive also lays down the conditions subject to which EU AIFMs may market the units or shares of EU AIFs to professional investors in the Union. Such marketing by EU AIFMs should be allowed only in so far as the AIFM complies with this Directive and the marketing occurs with a passport, without prejudice to the marketing of AIFs by AIFMs falling below the thresholds provided for in this Directive. It should be possible for Member States to allow marketing of AIFs by AIFMs falling below those thresholds subject to national provisions.

(60) It should be possible for units or shares of an AIF to be listed on a regulated market in the Union, or offered or placed by third parties acting on behalf of the AIFM, in a particular Member State only if the AIFM which manages the AIF is itself permitted to market the units or shares of the AIF in that Member State. In addition, other national and Union law, such as Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading[17] and Directive 2004/39/EC, may also regulate the distribution of AIFs to investors in the Union.

(61) Many EU AIFMs currently manage non-EU AIFs. It is appropriate to allow authorised EU AIFMs to manage non-EU AIFs without marketing them in the Union without imposing on them the strict depositary requirements and the requirements relating to the annual report provided for in this Directive, as those requirements have been included for the protection of Union investors.

(62) After the entry into force of a delegated act adopted by the Commission in this regard, which will, in principle, taking into account the advice provided by ESMA, occur 2 years after the deadline for transposition of this Directive, authorised EU AIFMs intending to market non-EU AIFs to professional investors in their home Member State and/or in other Member States should be allowed to do so with a passport in so far as they comply with this Directive. That right should be subject to notification procedures and conditions in relation to the third country of the non-EU AIF.

(63) During a transitional period, which will, in principle, taking into account ESMA's advice, be brought to an end by means of a delegated act 3 years after the establishment of the passport for non-EU AIFMs, EU AIFMs intending to market non-EU AIFs in certain Member States, but without a passport, should also be permitted to do so by the relevant Member States, but only in so far as they comply with this Directive with the exception of the depositary requirements. Such EU AIFMs should, however, ensure that one or more entities are appointed to carry out the duties of the depositary. In addition, appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards should be in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of

[17] OJ L 345, 31.12.2003, p. 64.

information that allows the competent authorities of the home Member State of the AIFM to carry out their duties in accordance with this Directive. The cooperation arrangements should not be used as a barrier to impede non-EU AIFs from being marketed in a Member State. Further, the third country where the non-EU AIF is established should not be listed as a Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing (FATF).

(64) After the entry into force of a delegated act adopted by the Commission in that regard, which will, in principle, taking into account advice given by ESMA, occur 2 years after the deadline for transposition of this Directive, a basic principle of this Directive should be that a non-EU AIFM is to benefit from the rights conferred under this Directive, such as to market units or shares of AIFs throughout the Union with a passport, subject to its compliance with this Directive. This should ensure a level playing field between EU and non-EU AIFMs. This Directive therefore provides for an authorisation applicable to non-EU AIFMs which will become applicable after the entry into force of the delegated act adopted by the Commission in this regard. To ensure that such compliance is enforced, the competent authorities of a Member State should enforce compliance with this Directive. For such non-EU AIFMs the competent supervisory authorities should be the competent authorities of the Member State of reference, as defined in this Directive.

(65) Therefore, where a non-EU AIFM intends to manage EU AIFs and/or market AIFs in the Union with a passport, it should also be required to comply with this Directive, so that it is subject to the same obligations as EU AIFMs. In very exceptional circumstances, if and to the extent compliance with a provision of this Directive is incompatible with compliance with the law to which the non-EU AIFM or the non-EU AIF marketed in the Union is subject, it should be possible for the non-EU AIFM to be exempted from compliance with the relevant provision of this Directive if it can demonstrate that: it is impossible to combine compliance with a provision of this Directive with compliance with a mandatory provision in the law to which the non-EU AIFM or the non- EU AIF marketed in the Union is subject; the law to which the non-EU AIFM or the non-EU AIF is subject provides for an equivalent rule having the same regulatory purpose and offering the same level of protection to the investors of the relevant AIF; and the non-EU AIFM or the non-EU AIF complies with that equivalent rule.

(66) Further, a non-EU AIFM intending to manage EU AIFs and/or market AIFs in the Union with a passport should comply with a specific authorisation procedure and certain specific requirements concerning the third country of the non-EU AIFM and, as appropriate, the third country of the non-EU AIF should be satisfied.

(67) ESMA should provide advice on the determination of the Member State of reference, and, where relevant, the exemption as regards compatibility with an equivalent rule. Specific requirements for the exchange of information between the competent authorities of the Member State of reference and the competent authorities of the host Member States of the AIFM should apply. Further, the mediation procedure provided for in Article 19 of Regulation (EU) No 1095/2010 should apply in case of disagreement between competent authorities of Member States on the determination of the Member State of reference, the application of the exemption in case of incompatibility between compliance with this Directive and compliance with equivalent rules of a

third country, and the assessment regarding the fulfilment of the specific requirements concerning the third country of the non-EU AIFM and, as appropriate, the third country of the non-EU AIF.

(68) ESMA should, on an annual basis, conduct a peer review analysis of the supervisory activities of the competent authorities in relation to the authorisation and the supervision of non-EU AIFMs, to further enhance consistency in supervisory outcomes, in accordance with Article 30 of Regulation (EU) No 1095/2010.

(69) During a transitional period which will, in principle, taking into account ESMA's advice, be brought to an end by means of a delegated act 3 years after the establishment of the passport for non-EU AIFMs, a non-EU AIFM intending to market AIFs in certain Member States only and without such a passport should also be permitted to do so by the relevant Member States, but only in so far as certain minimum conditions are met. Those non-EU AIFMs should be subject at least to rules similar to those applicable to EU AIFMs managing EU AIFs with respect to the disclosure to investors. In order to facilitate the monitoring of systemic risk those non-EU AIFMs should also be subject to reporting obligations vis-à-vis the competent authorities of the Member State in which AIFs are marketed. Such AIFMs should therefore comply with the transparency requirements laid down in this Directive and the obligations on AIFMs managing AIFs which acquire control of non-listed companies and issuers. Further, appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards should be in place between the competent authorities of the Member States where the AIFs are marketed, if applicable, the competent authorities of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, if applicable, the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows competent authorities of the relevant Member States to carry out their duties in accordance with this Directive. The cooperation arrangements should not be used as a barrier to impede third country funds from being marketed in a Member State. Finally, the third country where the non-EU AIFM or the non-EU AIF is established should not be listed as a Non-Cooperative Country and Territory by FATF.

(70) This Directive should not affect the current situation, whereby a professional investor established in the Union may invest in AIFs on its own initiative, irrespective of where the AIFM and/or the AIF is established.

(71) Member States should be able to allow the marketing of all or certain types of AIFs managed by AIFMs to retail investors in their territory. If a Member State allows the marketing of certain types of AIF, the Member State should make an assessment on a case-by-case basis to determine whether a specific AIF should be considered as a type of AIF which may be marketed to retail investors in its territory. Without prejudice to the application of other instruments of Union law, Member States should in such cases be able to impose stricter requirements on AIFs and AIFMs as a precondition for marketing to retail investors than is the case for AIFs marketed to professional investors in their territory, irrespective of whether such AIFs are marketed on a domestic or cross-border basis. Where a Member State allows the marketing of AIFs to retail investors in its territory, this possibility should be available regardless of the Member State where the AIFM managing the AIFs is established, and Member States should not impose stricter or additional requirements on EU AIFs established in another Member State and marketed on a

cross-border basis than on AIFs marketed domestically. In addition, AIFMs, investment firms authorised under Directive 2004/39/EC and credit institutions authorised under Directive 2006/48/EC which provide investment services to retail clients should take into account any additional requirements when assessing whether a certain AIF is suitable or appropriate for an individual retail client or whether it is a complex or non-complex financial instrument.

(72) It is necessary to clarify the powers and duties of the competent authorities responsible for implementing this Directive, and to strengthen the mechanisms necessary to ensure effective cross-border supervisory cooperation. Under certain circumstances it should be possible for the competent authorities of the host Member States of an AIFM to take direct action to supervise compliance with provisions for which they are responsible. For other provisions the competent authorities of the host Member States should under certain circumstances be allowed to request action from the competent authorities of the home Member State and to intervene if no such action is undertaken.

(73) This Directive provides for a general coordinating role for ESMA, and the possibility of binding mediation procedures, chaired by ESMA, to resolve disputes between competent authorities.

(74) ESMA should develop draft regulatory technical standards on the contents of the cooperation arrangements that must be concluded by the home Member State or by the Member State of reference of the AIFM and the relevant third-country supervisory authorities and on the procedures for the exchange of information. The draft regulatory technical standards should ensure that pursuant to those cooperation arrangements all necessary information is to be provided to enable the competent authorities of both the home and the host Member States to exercise their supervisory and investigatory powers under this Directive. ESMA should also have a facilitating role in the negotiation and conclusion of the cooperation arrangements. For example, ESMA should be able to use its facilitating role by providing for a standard format for such cooperation arrangements.

(75) Member States should lay down rules on penalties applicable to infringements of this Directive and ensure that they are implemented. The penalties should be effective, proportionate and dissuasive.

(76) This Directive respects the fundamental rights and observes the principles recognised, in particular, in the TFEU and in the Charter of Fundamental Rights of the European Union (Charter), in particular the right to the protection of personal data recognised in Article 16 TFEU and in Article 8 of the Charter. Any exchange or transmission of information by competent authorities should be in accordance with the rules on the transfer of personal data as laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[18]. Any exchange or transmission of information by ESMA should be in accordance with the rules on the transfer of personal data as laid down in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on

[18] OJ L 281, 23.11.1995, p. 31.

the free movement of such data[19], which should be fully applicable to the processing of personal data for the purposes of this Directive.

(77) In order to ensure uniform conditions for the implementation of this Directive, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers[20].

(78) The Commission should be empowered to adopt delegated acts in accordance with Article 290 TFEU where expressly provided for in this Directive. In particular, the Commission should be empowered to adopt delegated acts to specify the methods of leverage as defined in this Directive, including any financial and/or legal structures involving third parties controlled by the relevant AIF where those structures are specifically set up to directly or indirectly create leverage at the level of the AIF. In particular for private equity and venture capital funds this means that leverage that exists at the level of a portfolio company is not intended to be included when referring to such financial or legal structures.

(79) Delegated acts should also be adopted to specify how to calculate the thresholds for the lighter regime and how to treat AIFMs whose assets under management, including any assets acquired through use of leverage, in one and the same calendar year occasionally exceed and/or fall below the relevant threshold; to specify the obligations to register for the AIFMs falling below the thresholds and to provide information in order to effectively monitor systemic risk and the obligation for such AIFMs to notify the relevant competent authorities where they no longer fulfil the conditions for application of the lighter regime.

(80) Delegated acts should also be adopted to clarify the methods of leverage, including any financial and/or legal structures involving third parties controlled by the relevant AIF and how leverage is to be calculated; to specify the risks the additional own funds or the professional indemnity insurance must cover, the conditions for determining the appropriateness of additional own funds or the coverage of the professional indemnity insurance, and the manner of determining ongoing adjustments of the additional own funds or of the coverage of the professional indemnity insurance. Delegated acts should also be adopted to specify the criteria to be used by competent authorities to assess whether AIFMs comply with their obligations as regards their conduct of business, their obligation to act in the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market; to have and employ effectively the resources and procedures that are necessary for the proper performance of their business activities; to take all reasonable steps to avoid conflicts of interest and, where such conflicts cannot be avoided, to identify, manage and monitor, and where applicable, disclose, those conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors and to ensure that the AIFs they manage are fairly treated; to comply with all regulatory requirements applicable to the conduct of their business activities so as to promote the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market; and to treat all AIF investors fairly.

[19] OJ L 8, 12.1.2001, p. 1.

[20] OJ L 55, 28.2.2011, p. 13.

(81) Delegated acts should also be adopted to specify the type of conflicts of interest AIFMs have to identify, as well as the reasonable steps AIFMs are expected to take in terms of structures and organisational and administrative procedures in order to identify, prevent, manage, monitor and disclose conflicts of interest. Delegated acts should also be adopted to specify the risk management functions to be employed; the appropriate frequency for review of the risk management system; how the risk management function should be functionally and hierarchically separated from the operating units, including the portfolio management function; the specific safeguards against conflicts of interest; and the risk management requirements to be employed by AIFMs. Delegated acts should also be adopted to specify the liquidity management systems and procedures that AIFMs should employ and the alignment of the investment strategy, liquidity profile and redemption policy. Delegated acts should also be adopted to specify the requirements that the originators, the sponsors or the original lenders of securitisation instruments have to meet in order for an AIFM to be allowed to invest in such instruments issued after 1 January 2011.

(82) Delegated acts should also be adopted to specify the requirements that AIFMs have to comply with when investing in such securitisation instruments; to specify administrative and accounting procedures, control and safeguard arrangements for electronic data processing and adequate internal control mechanisms; to specify the procedures for the proper valuation of the assets and the calculation of the net asset value per unit or share of the AIF, the professional guarantees the external valuer must be able to provide, and the frequency for valuation appropriate for open-ended AIFs.

(83) Delegated acts should also be adopted to specify the conditions subject to which the delegation of AIFM functions should be approved and the conditions subject to which the AIFM has delegated its functions to the extent that it becomes a letter-box entity and can no longer be considered to be the manager of the AIF; as regards depositaries, to specify the criteria for assessing that the prudential regulation and supervision of third countries where the depositaries are established have the same effect as Union law and are effectively enforced, the particulars that need to be included in the standard agreement, the conditions for performing the depositary functions, including the type of financial instruments that should be included in the scope of the depositary's custody duties, the conditions subject to which the depositary may exercise its custody duties over financial instruments registered with a central depositary and the conditions subject to which the depositary should safekeep the financial instruments issued in a nominative form and registered with an issuer or a registrar, the due diligence duties of depositaries, the segregation obligation, the conditions subject to and circumstances in which financial instruments held in custody should be considered as lost, what is to be understood by external events beyond reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary, and the conditions subject to and circumstances in which there is an objective reason to contract a discharge of liability. Delegated acts should also be adopted to specify the content and format of the annual report that AIFMs have to make available for each AIF they manage and to specify the disclosure obligations of AIFMs to investors and reporting requirements to competent authorities as well as their frequency.

(84) Delegated acts should also be adopted to specify when leverage is considered to be employed on a substantial basis and the principles competent authorities should use when considering imposing limits to the level of leverage that an AIFM can apply. Delegated acts should also be

adopted to specify the cooperation arrangements in relation to non-EU AIFMs and/or non-EU AIFs in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries. Delegated acts should also be adopted to specify the content of exchange of information regarding AIFMs between competent authorities and the provision of certain information to ESMA.

(85) Depending on the advice of ESMA in this regard and the criteria set out in this Directive, a delegated act should also be adopted in order to extend the passport to EU AIFMs marketing non-EU AIFs in the Union and to non-EU AIFMs managing and/or marketing AIFs in the Union, and another delegated act should be adopted to terminate the application of national private placement regimes in this regard.

(86) The European Parliament and the Council should have 3 months from the date of notification to object to a delegated act. At the initiative of the European Parliament or the Council, it should be possible to prolong that period by 3 months in regard to significant areas of concern. It should also be possible for the European Parliament and the Council to inform the other institutions of their intention not to raise objections. Such early approval of delegated acts is particularly important where deadlines need to be met, for example to allow Member States to transpose delegated acts within the transposition period laid down in this Directive, where relevant.

(87) In the Declaration on Article 290 of the Treaty on the Functioning of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, the Conference took note of the Commission's intention to consult experts appointed by the Member States in the preparation of draft delegated acts in the financial services area, in accordance with its established practice.

(88) 2 years after the deadline for transposition of this Directive, ESMA should issue an opinion on the functioning of the passport then in force and on the functioning of national private placement regimes. It should also issue advice on the extension of the passport to EU AIFMs marketing non-EU AIFs in the Union and to non-EU AIFMs managing and/or marketing AIFs in the Union. The Commission should adopt a delegated act within 3 months after having received that opinion and advice from ESMA and taking into account the criteria listed in, and the objectives of, this Directive, inter alia, regarding the internal market, investor protection and the effective monitoring of systemic risk, specifying the date when the rules relating to the extension of the passport provided for in this Directive should become applicable in all Member States.

(89) At the April 2009 summit in London, G20 Leaders agreed that hedge funds or their managers should be registered and should be required to disclose appropriate information on an ongoing basis to supervisors or regulators. They should be subject to oversight to ensure that they have adequate risk management. In June 2010, G20 Leaders in Toronto reaffirmed their commitment and also committed to accelerate the implementation of strong measures to improve transparency and regulatory oversight of hedge funds in an internationally consistent and non-discriminatory way. In order to support the G20 objectives, the International Organization of Securities Commissions issued high level principles of hedge fund oversight in June 2009 to guide the development of internationally consistent regulation in this area. On 16 September 2010 the European Council agreed on the need for Europe to promote its interest and values more assertively and in a spirit of reciprocity and mutual benefit in the context of the Union's external

relations and to take steps to, inter alia, secure greater market access for European business and deepen regulatory cooperation with major trade partners. The Commission will endeavour to ensure that these commitments are implemented in a similar way by the Union's international partners.

(90) 3 years after the entry into force of the delegated act pursuant to which the passport is to apply to all AIFMs, ESMA should issue an opinion on the functioning of the passport then in force and on the functioning of national private placement regimes. It should also issue advice on the termination of those national regimes. The Commission should adopt a delegated act within 3 months of receipt of the opinion and advice from ESMA, taking into account the criteria listed in, and the objectives of, this Directive, inter alia, relating to the internal market, investor protection and the effective monitoring of systemic risk, specifying the date when the national regimes referred to in this Directive should be brought to an end in all Member States.

(91) 4 years after the deadline for transposition of this Directive, the Commission should, on the basis of public consultation and in the light of the discussions with competent authorities, commence a review of the application and the scope of this Directive. That review should analyse the experience acquired in applying this Directive, its impact on investors, AIFs or AIFMs, in the Union and in third countries, and the extent to which the objectives of this Directive have been achieved, if necessary proposing appropriate amendments. That review should include a general survey of the functioning of the rules laid down in this Directive and the experience acquired in applying them. The Commission should in its review examine the functions of ESMA and the Union competent authorities in ensuring effective supervision of all AIFMs operating in the Union markets in the context of this Directive, including, inter alia – in accordance with Regulation (EU) No 1095/2010 – entrusting ESMA with further supervisory responsibilities in the field of authorisation and supervision of non-EU AIFMs. In this context the Commission should assess the costs and benefits of entrusting ESMA with such tasks.

(92) This Directive aims at establishing a framework capable of addressing the potential risks which might arise from the activities of AIFMs and ensuring the effective monitoring of those risks by the competent authorities within the Union. It is necessary to provide for a stringent regulatory and supervisory framework which leaves no gaps in financial regulation. In that regard reference is made to the existing due diligence requirements applicable to professional investors pursuant to the relevant regulation applicable to such investors. The Commission is invited to review the relevant legislation with respect to professional investors in order to assess the need for tighter requirements regarding the due diligence process to be undertaken by Union professional investors investing on their own initiative in non-EU financial products, such as non-EU AIFs.

(93) At the end of its review, the Commission should present a report to the European Parliament and the Council including, if appropriate, proposed amendments taking into account the objectives of this Directive and potential impacts on investors, AIFs or AIFMs, in the Union and in third countries.

(94) Since the objective of this Directive, namely to ensure a high level of investor protection by laying down a common framework for the authorisation and supervision of AIFMs, cannot be sufficiently achieved by the Member States, as evidenced by the deficiencies of existing nationally based regulation and oversight of those actors, and can therefore be better achieved at Union level, the

Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(95) Directives 2003/41/EC and 2009/65/EC, Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies[21] and Regulation (EU) No 1095/2010 should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Directive lays down the rules for the authorisation, ongoing operation and transparency of the managers of alternative investment funds (AIFMs) which manage and/or market alternative investment funds (AIFs) in the Union.

Article 2

Scope

1. Subject to paragraph 3 of this Article and to Article 3, this Directive shall apply to:

   (a) EU AIFMs which manage one or more AIFs irrespective of whether such AIFs are EU AIFs or non-EU AIFs;

   (b) non-EU AIFMs which manage one or more EU AIFs; and

   (c) non-EU AIFMs which market one or more AIFs in the Union irrespective of whether such AIFs are EU AIFs or non-EU AIFs.

2. For the purposes of paragraph 1, the following shall be of no significance:

   (a) whether the AIF belongs to the open-ended or closed-ended type;

   (b) whether the AIF is constituted under the law of contract, under trust law, under statute, or has any other legal form;

   (c) the legal structure of the AIFM.

3. This Directive shall not apply to the following entities:

   (a) holding companies;

   (b) institutions for occupational retirement provision which are covered by Directive 2003/41/EC, including, where applicable, the authorised entities responsible for managing such institutions and acting on their behalf referred to in Article 2(1)

[21] OJ L 302, 17.11.2009, p. 1

of that Directive or the investment managers appointed pursuant to Article 19(1) of that Directive, in so far as they do not manage AIFs;

(c) supranational institutions, such as the European Central Bank, the European Investment Bank, the European Investment Fund, the European Development Finance Institutions and bilateral development banks, the World Bank, the International Monetary Fund, and other supranational institutions and similar international organisations, in the event that such institutions or organisations manage AIFs and in so far as those AIFs act in the public interest;

(d) national central banks;

(e) national, regional and local governments and bodies or other institutions which manage funds supporting social security and pension systems;

(f) employee participation schemes or employee savings schemes;

(g) securitisation special purpose entities.

4. Member States shall take the necessary steps to ensure that AIFMs referred to in paragraph 1 comply with this Directive at all times.

Article 3

Exemptions

1. This Directive shall not apply to AIFMs in so far as they manage one or more AIFs whose only investors are the AIFM or the parent undertakings or the subsidiaries of the AIFM or other subsidiaries of those parent undertakings, provided that none of those investors is itself an AIF.

2. Without prejudice to the application of Article 46, only paragraphs 3 and 4 of this Article shall apply to the following AIFMs:

(a) AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of EUR 100 million; or

(b) AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management in total do not exceed a threshold of EUR 500 million when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF.

3. Member States shall ensure that AIFMs referred to in paragraph 2 at least:

(a) are subject to registration with the competent authorities of their home Member State;

(b) identify themselves and the AIFs that they manage to the competent authorities of their home Member State at the time of registration;

(c) provide information on the investment strategies of the AIFs that they manage to the competent authorities of their home Member State at the time of registration;

(d) regularly provide the competent authorities of their home Member State with information on the main instruments in which they are trading and on the

principal exposures and most important concentrations of the AIFs that they manage in order to enable the competent authorities to monitor systemic risk effectively; and

(e) notify the competent authorities of their home Member State in the event that they no longer meet the conditions referred to in paragraph 2.

This paragraph and paragraph 2 shall apply without prejudice to any stricter rules adopted by Member States with respect to AIFMs referred to in paragraph 2.

Member States shall take the necessary steps to ensure that where the conditions set out in paragraph 2 are no longer met, the AIFM concerned applies for authorisation within 30 calendar days in accordance with the relevant procedures laid down in this Directive.

4. AIFMs referred to in paragraph 2 shall not benefit from any of the rights granted under this Directive unless they choose to opt in under this Directive. Where AIFMs opt in, this Directive shall become applicable in its entirety.

5. The Commission shall adopt implementing acts with a view to specifying the procedures for AIFMs which choose to opt in under this Directive in accordance with paragraph 4. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 59(2).

6. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying:

(a) how the thresholds referred to in paragraph 2 are to be calculated and the treatment of AIFMs which manage AIFs whose assets under management, including any assets acquired through the use of leverage, occasionally exceed and/or fall below the relevant threshold in the same calendar year;

(b) the obligation to register and to provide information in order to allow effective monitoring of systemic risk as set out in paragraph 3; and

(c) the obligation to notify competent authorities as set out in paragraph 3.

Article 4

Definitions

1. For the purpose of this Directive, the following definitions shall apply:

(a) 'AIFs' means collective investment undertakings, including investment compartments thereof, which:

(i) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and

(ii) do not require authorisation pursuant to Article 5 of Directive 2009/65/EC;

(b) 'AIFMs' means legal persons whose regular business is managing one or more AIFs;

(c) 'branch' when relating to an AIFM means a place of business which is a part of an AIFM, which has no legal personality and which provides the services for which the AIFM has been authorised; all the places of business established in the same Member State by an AIFM with its registered office in another Member State or in a third country shall be regarded as a single branch;

(d) 'carried interest' means a share in the profits of the AIF accrued to the AIFM as compensation for the management of the AIF and excluding any share in the profits of the AIF accrued to the AIFM as a return on any investment by the AIFM into the AIF;

(e) 'close links' means a situation in which two or more natural or legal persons are linked by:

(i) participation, namely ownership, directly or by way of control, of 20 % or more of the voting rights or capital of an undertaking;

(ii) control, namely the relationship between a parent undertaking and a subsidiary, as referred to in Article 1 of the Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts[22], or a similar relationship between a natural or legal person and an undertaking; for the purposes of this point a subsidiary undertaking of a subsidiary undertaking shall also be considered to be a subsidiary of the parent undertaking of those subsidiaries.

A situation in which two or more natural or legal persons are permanently linked to the same person by a control relationship shall also be regarded as constituting a 'close link' between such persons;

(f) 'competent authorities' means the national authorities of Member States which are empowered by law or regulation to supervise AIFMs;

(g) 'competent authorities' in relation to a depositary means:

(i) if the depositary is a credit institution authorised under Directive 2006/48/EC, the competent authorities as defined in point (4) of Article 4 thereof;

(ii) if the depositary is an investment firm authorised under Directive 2004/39/EC, the competent authorities as defined in point (22) of Article 4(1) thereof;

(iii) if the depositary falls within a category of institution referred to in point (c) of the first subparagraph of Article 21(3) of this Directive, the national authorities of its home Member State which are empowered by law or regulation to supervise such categories of institution;

(iv) if the depositary is an entity referred to in the third subparagraph of Article 21(3) of this Directive, the national authorities of the Member State in which that entity has its registered office and which are empowered by law or regulation to supervise such entity or the official body competent to register or supervise such entity pursuant to the rules of professional conduct applicable thereto;

(v) if the depositary is appointed as depositary for a non-EU AIF in accordance with point (b) of Article 21(5) of this Directive and does not fall within the scope of points (i) to (iv) of this point, the relevant national authorities of the third country where the depositary has its registered office;

[22] OJ L 193, 18.7.1983, p. 1.

(h) 'competent authorities of the EU AIF' means the national authorities of a Member State which are empowered by law or regulation to supervise AIFs;

(i) 'control' means control as defined in Article 1 of Directive 83/349/EEC;

(j) 'established' means:

(i) for AIFMs, 'having its registered office in';

(ii) for AIFs, 'being authorised or registered in', or, if the AIF is not authorised or registered, 'having its registered office in';

(iii) for depositaries, 'having its registered office or branch in';

(iv) for legal representatives that are legal persons, 'having its registered office or branch in';

(v) for legal representatives that are natural persons, 'domiciled in';

(k) 'EU AIF' means:

(i) an AIF which is authorised or registered in a Member State under the applicable national law; or

(ii) an AIF which is not authorised or registered in a Member State, but has its registered office and/or head office in a Member State;

(l) 'EU AIFM' means an AIFM which has its registered office in a Member State;

(m) 'feeder AIF' means an AIF which:

(i) invests at least 85 % of its assets in units or shares of another AIF (the 'master AIF');

(ii) invests at least 85 % of its assets in more than one master AIFs where those master AIFs have identical investment strategies; or

(iii) has otherwise an exposure of at least 85 % of its assets to such a master AIF;

(n) 'financial instrument' means an instrument as specified in Section C of Annex I to Directive 2004/39/EC;

(o) 'holding company' means a company with shareholdings in one or more other companies, the commercial purpose of which is to carry out a business strategy or strategies through its subsidiaries, associated companies or participations in order to contribute to their long-term value, and which is either a company:

(i) operating on its own account and whose shares are admitted to trading on a regulated market in the Union; or

(ii) not established for the main purpose of generating returns for its investors by means of divestment of its subsidiaries or associated companies, as evidenced in its annual report or other official documents;

(p) 'home Member State of the AIF' means:

(i) the Member State in which the AIF is authorised or registered under applicable national law, or in case of multiple authorisations or registrations, the Member State in which the AIF has been authorised or registered for the first time; or

(ii) if the AIF is neither authorised nor registered in a Member State, the Member State in which the AIF has its registered office and/or head office;

(q) 'home Member State of the AIFM' means the Member State in which the AIFM has its registered office; for non-EU AIFMs, all references to 'home Member State of the AIFM' in this Directive shall be read as the 'Member State of reference', as provided for in Chapter VII;

(r) 'host Member State of the AIFM' means any of the following:

(i) a Member State, other than the home Member State, in which an EU AIFM manages EU AIFs;

(ii) a Member State, other than the home Member State, in which an EU AIFM markets units or shares of an EU AIF;

(iii) a Member State, other than the home Member State, in which an EU AIFM markets units or shares of a non-EU AIF;

(iv) a Member State, other than the Member State of reference, in which a non-EU AIFM manages EU AIFs;

(v) a Member State, other than the Member State of reference, in which a non-EU AIFM markets units or shares of an EU AIF;

(vi) a Member State, other than the Member State of reference, in which a non-EU AIFM markets units or shares of a non-EU AIF; or

(vii) a Member State, other than the home Member State, in which an EU AIFM provides the services referred to in Article 6(4);

(s) 'initial capital' means funds as referred to in points (a) and (b) of the first paragraph of Article 57 of Directive 2006/48/EC;

(t) 'issuer' means an issuer within the meaning of point (d) of Article 2(1) of Directive 2004/109/EC where that issuer has its registered office in the Union, and where its shares are admitted to trading on a regulated market within the meaning of point (14) of Article 4(1) of Directive 2004/39/EC;

(u) 'legal representative' means a natural person domiciled in the Union or a legal person with its registered office in the Union, and which, expressly designated by a non-EU AIFM, acts on behalf of such non-EU AIFM vis-à-vis the authorities, clients, bodies and counterparties to the non-EU AIFM in the Union with regard to the non-EU AIFM's obligations under this Directive;

(v) 'leverage' means any method by which the AIFM increases the exposure of an AIF it manages whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means;

(w) 'managing AIFs' means performing at least investment management functions referred to in point 1(a) or (b) of Annex I for one or more AIFs;

(x) '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 Union;

(y) 'master AIF' means an AIF in which another AIF invests or has an exposure in accordance with point (m);

(z) 'Member State of reference' means the Member State determined in accordance with Article 37(4);

(aa) 'non-EU AIF' means an AIF which is not an EU AIF;

(ab) 'non-EU AIFM' means an AIFM which is not an EU AIFM;

(ac) 'non-listed company' means a company which has its registered office in the Union and the shares of which are not admitted to trading on a regulated market within the meaning of point (14) of Article 4(1) of Directive 2004/39/EC;

(ad) 'own funds' means own funds as referred to in Articles 56 to 67 of Directive 2006/48/EC;

(ae) 'parent undertaking' means a parent undertaking within the meaning of Articles 1 and 2 of Directive 83/349/EEC;

(aea) 'pre-marketing' means provision of information or communication, direct or indirect, on investment strategies or investment ideas by an EU AIFM or on its behalf, to potential professional investors domiciled or with a registered office in the Union in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with Article 31 or 32, in that Member State where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the potential investor to invest in the units or shares of that AIF or compartment;

(af) 'prime broker' means a credit institution, a regulated investment firm or another entity subject to prudential regulation and ongoing supervision, offering services to professional investors primarily to finance or execute transactions in financial instruments as counterparty and which may also provide other services such as clearing and settlement of trades, custodial services, securities lending, customised technology and operational support facilities;

(ag) 'professional investor' means an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II to Directive 2014/65/EU of the European Parliament and of the Council[23] ~~2004/39/EC~~;

(ah) 'qualifying holding' means a direct or indirect holding in an AIFM which represents 10 % or more of the capital or of the voting rights, in accordance with Articles 9 and 10 of Directive 2004/109/EC, taking into account the conditions regarding aggregation of the holding laid down in Article 12(4) and (5) thereof, or which makes it possible to exercise a significant influence over the management of the AIFM in which that holding subsists;

(ai) 'employees' representatives' means employees' representatives as defined in point (e) of Article 2 of Directive 2002/14/EC;

(aj) 'retail investor' means an investor who is not a professional investor;

(ak) 'subsidiary' means a subsidiary undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC;

[23] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

(al) 'supervisory authorities' in relation to non-EU AIFs means the national authorities of a third country which are empowered by law or regulation to supervise AIFs;

(am) 'supervisory authorities' in relation to non-EU AIFMs means the national authorities of a third country which are empowered by law or regulation to supervise AIFMs;

(an) 'securitisation special purpose entities' means entities whose sole purpose is to carry on a securitisation or securitisations within the meaning of Article 1(2) of Regulation (EC) No 24/2009 of the European Central Bank of 19 December 2008 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions[24] and other activities which are appropriate to accomplish that purpose;

(ao) 'UCITS' means an undertaking for collective investment in transferable securities authorised in accordance with Article 5 of Directive 2009/65/EC;

(ap) 'central securities depository' means a central securities depository as defined in Article 2(1), point (1), of Regulation (EU) No 909/2014 of the European Parliament and of the Council;[25]

(aq) 'capital of the AIF' means aggregate capital contributions and uncalled capital committed to an AIF, calculated on the basis of amounts investible after the deduction of all fees, charges and expenses that are directly or indirectly borne by investors;

(ar) 'loan origination' or 'originating a loan' means the granting of a loan:

(i) directly by an AIF as the original lender; or

(ii) indirectly through a third party or special purpose vehicle which originates a loan for or on behalf of the AIF, or for or on behalf of an AIFM in respect of the AIF, where the AIFM or AIF is involved in structuring the loan, or defining or pre-agreeing its characteristics, prior to gaining exposure to the loan;

(as) 'shareholder loan' means a loan which is granted by an AIF to an undertaking in which it holds directly or indirectly at least 5 % of the capital or voting rights, and which cannot be sold to third parties independently of the capital instruments held by the AIF in the same undertaking;

(at) 'loan-originating AIF' means an AIF:

(i) whose investment strategy is mainly to originate loans; or

(ii) whose originated loans have a notional value that represents at least 50% of its net asset value;

(au) 'leveraged AIF' means an AIF whose exposures are increased by the AIFM that manages it, whether through borrowing of cash or securities, leverage embedded in derivative positions or any other means.

[24] OJ L 15, 20.1.2009, p. 1.

[25] Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).

2. For the purposes of point (ad) of paragraph 1 of this Article, Articles 13 to 16 of Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions[26] shall apply *mutatis mutandis*.

3. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying:

(a) the methods of leverage, as defined in point (v) of paragraph 1, including any financial and/or legal structures involving third parties controlled by the relevant AIF; and

(b) how leverage is to be calculated.

4. The European Supervisory Authority (European Securities and Markets Authority) (ESMA) shall develop draft regulatory technical standards to determine types of AIFMs, where relevant in the application of this Directive, and to ensure uniform conditions of application of this Directive.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 5

Determination of the AIFM

1. Member States shall ensure that each AIF managed within the scope of this Directive shall have a single AIFM, which shall be responsible for ensuring compliance with this Directive. The AIFM shall be either:

(a) an external manager, which is the legal person appointed by the AIF or on behalf of the AIF and which through this appointment is responsible for managing the AIF (external AIFM); or

(b) where the legal form of the AIF permits an internal management and where the AIF's governing body chooses not to appoint an external AIFM, the AIF itself, which shall then be authorised as AIFM.

2. In cases where an external AIFM is unable to ensure compliance with requirements of this Directive for which an AIF or another entity on its behalf is responsible, it shall immediately inform the competent authorities of its home Member State and, if applicable, the competent authorities of the EU AIF concerned. The competent authorities of the home Member State of the AIFM shall require the AIFM to take the necessary steps to remedy the situation.

3. If, notwithstanding the steps referred to in paragraph 2 being taken, the non-compliance persists, and in so far as it concerns an EU AIFM or an EU AIF, the competent authorities of the home Member State of the AIFM shall require that it resign as AIFM of that AIF. In that case the AIF shall no longer be marketed in the Union. If it concerns a non-EU AIFM managing a non-EU AIF, the AIF shall no longer be marketed in the Union. The competent authorities of the home Member State of the AIFM shall immediately inform the competent authorities of the host Member States of the AIFM.

[26] OJ L 177, 30.6.2006, p. 201.

CHAPTER II

AUTHORISATION OF AIFMs

Article 6

Conditions for taking up activities as AIFM

1. Member States shall ensure that no AIFMs manage AIFs unless they are authorised in accordance with this Directive.

AIFMs authorised in accordance with this Directive shall meet the conditions for authorisation established in this Directive at all times.

2. Member States shall require that no external AIFM engage in activities other than those referred to in Annex I to this Directive and the additional management of UCITS subject to authorisation under Directive 2009/65/EC.

3. Member States shall require that no internally managed AIF shall engage in activities other than the internal management of that AIF in accordance with Annex I.

4. By way of derogation from paragraph 2, Member States may authorise an external AIFM to provide the following services:

(a) management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement provision in accordance with Article 19(1) of Directive 2003/41/EC, in accordance with mandates given by investors on a discretionary, client-by-client basis;

(b) non-core services comprising:

(i) investment advice;

(ii) safe-keeping and administration in relation to shares or units of collective investment undertakings;

(iii) reception and transmission of orders in relation to financial instruments; ~~.~~

(iv) any other function or activity which is already provided by the AIFM in relation to an AIF that it manages in accordance with this Article, or in relation to services that it provides in accordance with this paragraph, provided that any potential conflict of interest created by the provision of that function or activity to other parties is appropriately managed.

(c) administration of benchmarks in accordance with Regulation (EU) 2016/1011;

(d) credit servicing activities in accordance with Directive (EU) 2021/2167 of the European Parliament and of the Council[27].

5. AIFMs shall not be authorised under this Directive to provide:

(a) only the services referred to in paragraph 4;

(b) ~~non-core services referred to in point (b) of paragraph 4 without also being authorised to provide the services referred to in point (a) of paragraph 4;~~[*deleted*]

[27] Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU (OJ L 438, 8.12.2021, p. 1).

(c) only the activities referred to in point 2 of Annex I; ~~or~~

(d) the services referred to in point 1(a) of Annex I without also providing the services referred to in point 1(b) of Annex I or vice versa; or~~.~~

~~(d)~~(e) administration of benchmarks in accordance with Regulation (EU) 2016/1011 which are used in the AIFs that they manage.

6. Article 15, Article 16 except for paragraph 5, first subparagraph, and Articles 23, 24 and 25 of Directive 2014/65/EU shall apply where the services referred to in paragraph 4, points (a) and (b), of this Article, concerning one or more of the instruments listed in Annex I, Section C, to Directive 2014/65/EU, are provided by AIFMs. ~~Article 2(2) and Articles 12, 13 and 19 of Directive 2004/39/EC shall apply to the provision of the services referred to in paragraph 4 of this Article by AIFMs.~~

7. Member States shall require that the AIFMs provide the competent authorities of their home Member State with the information they require to monitor compliance with the conditions referred to in this Directive at all times.

8. Investment firms authorised under Directive 2004/39/EC and credit institutions authorised under Directive 2006/48/EC shall not be required to obtain an authorisation under this Directive in order to provide investment services such as individual portfolio management in respect of AIFs. However, investment firms shall, directly or indirectly, offer units or shares of AIFs to, or place such units or shares with, investors in the Union, only to the extent the units or shares can be marketed in accordance with this Directive.

Article 7

Application for authorisation

1. Member States shall require that AIFMs apply for authorisation from the competent authorities of their home Member State.

2. Member States shall require that an AIFM applying for an authorisation ~~shall~~ provides the following information relating to the AIFM to the competent authorities of its home Member State:

(a) information ~~on~~about the persons effectively conducting the business of the AIFM, in particular with regard to the functions referred to in Annex I, including:

(i) a description of the role, title and level of seniority of those persons;

(ii) a description of the reporting lines and responsibilities of those persons within and outside the AIFM;

(iii) an overview of the amount of time that each of those persons allocates to each responsibility;

(iv) a description of the human and technical resources that support the activities of those persons;

(aa) the legal name and relevant identifier of the AIFM;

(b) information on the identities of the AIFM's shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and on the amounts of those holdings;

(c) a programme of activity setting out the organisational structure of the AIFM, including information on how the AIFM intends to comply with its obligations under Chapters II, III, IV, and, where applicable, Chapters V~~, VI, VII and~~ to VIII of this Directive, and with its obligations under Article 3(1), Article 6(1), point (a)

and Article 13 of Regulation (EU) 2019/2088 of the European Parliament and of the Council[28] and a detailed description of the appropriate human and technical resources to be used by the AIFM to that effect;

(d) information on the AIFM's remuneration policies and practices pursuant to Article 13;

(e) information on arrangements made for the delegation and sub-delegation to third parties of functions ~~as referred to in~~in accordance with Article 20, comprising at least the following:

(i) for each delegate:

- its legal name and relevant identifier,
- its jurisdiction of establishment, and
- where relevant, its supervisory authority;

(ii) a detailed description of the human and technical resources employed by the AIFM for:

- performing day-to-day portfolio management or risk management tasks within the AIFM, and
- monitoring the delegated activity;

(iii) in respect of each of the AIFs that the AIFM manages or intends to manage:

- a brief description of the delegated portfolio management function, including whether such delegation amounts to a partial or full delegation, and
- a brief description of the delegated risk management function, including whether such delegation amounts to a partial or full delegation;

(iv) a description of the periodic due diligence measures to be carried out by the AIFM to monitor the delegated activity.

3. Member States shall require that an AIFM applying for authorisation further provide the following information on the AIFs it intends to manage to the competent authorities of its home Member State:

(a) information about the investment strategies including the types of underlying funds if the AIF is a fund of funds, and the AIFM's policy as regards the use of leverage, and the risk profiles and other characteristics of the AIFs it manages or intends to manage, including information about the Member States or third countries in which such AIFs are established or are expected to be established;

(b) information on where the master AIF is established if the AIF is a feeder AIF;

(c) the rules or instruments of incorporation of each AIF the AIFM intends to manage;

(d) information on the arrangements made for the appointment of the depositary in accordance with Article 21 for each AIF the AIFM intends to manage;

[28] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (OJ L 317, 9.12.2019, p. 1).

(e) any additional information referred to in Article 23(1) for each AIF the AIFM manages or intends to manage.

4. Where a management company is authorised pursuant to Directive 2009/65/EC (UCITS management company) and applies for authorisation as an AIFM under this Directive, the competent authorities shall not require the UCITS management company to provide information or documents which the UCITS management company has already provided when applying for authorisation under Directive 2009/65/EC, provided that such information or documents remain up-to-date.

5. The competent authorities shall, on a quarterly basis, inform ESMA of authorisations granted or withdrawn in accordance with this Chapter, and of any changes to the list of AIFs managed or marketed in the Union by authorised AIFMs.

ESMA shall keep a central public register identifying each AIFM authorised under this Directive, the competent authorities of each such AIFM and a list of the AIFs managed ~~and/~~or marketed in the Union by such AIFMs ~~and the competent authority for each such AIFM~~. The register shall be made publicly available in an electronic format.

~~In order to ensure consistent harmonisation of this Article, ESMA may develop draft regulatory technical standards to specify the information to be provided to the competent authorities in the application for the authorisation of the AIFM, including the programme of activity.~~

6. [*deleted*]~~Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.~~

7. [*deleted*]~~In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine standard forms, templates and procedures for the provision of information provided for in the first subparagraph of paragraph 6.~~

~~Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.~~

8. By 16 April 2029, ESMA shall provide the European Parliament, the Council and the Commission with a report analysing market practices regarding delegation and compliance with paragraphs 1 to 5 of this Article and with Article 20, based, inter alia, on the data reported to the competent authorities in accordance with Article 24(2), point (d), and on the exercise of ESMA's supervisory convergence powers. That report shall also analyse compliance with the substance requirements of this Directive.

Article 8

Conditions for granting authorisation

1. The competent authorities of the home Member State of the AIFM shall not grant authorisation unless:

(a) they are satisfied that the AIFM will be able to meet the conditions of this Directive;

(b) the AIFM has sufficient initial capital and own funds in accordance with Article 9;

(c) the persons who effectively conduct the business of the AIFM are of sufficiently good repute and are sufficiently experienced also in relation to the investment strategies pursued by the AIF~~s~~ managed by the AIFM, the names of those persons and of every person succeeding them in office ~~being~~ are communicated forthwith to the competent authorities of the home Member State~~s~~ of the AIFM and the conduct of the business of the AIFM ~~being~~ is decided by at least two natural persons meeting such conditions who either are employed full-time by

that AIFM or are executive members or members of the governing body of the AIFM committed full-time to conducting the business of that AIFM, and who are domiciled in the Union;

(d) the shareholders or members of the AIFM that have qualifying holdings are suitable taking into account the need to ensure the sound and prudent management of the AIFM; and

(e) the head office and the registered office of the AIFM are located in the same Member State.

Authorisation shall be valid for all Member States.

2. The relevant competent authorities of the other Member States involved shall be consulted before authorisation is granted to the following AIFMs:

(a) a subsidiary of another AIFM, of a UCITS management company, of an investment firm, of a credit institution or of an insurance undertaking authorised in another Member State;

(b) a subsidiary of the parent undertaking of another AIFM, of a UCITS management company, of an investment firm, of a credit institution or of an insurance undertaking authorised in another Member State; and

(c) a company controlled by the same natural or legal persons as those that control another AIFM, a UCITS management company, an investment firm, a credit institution or an insurance undertaking authorised in another Member State.

3. The competent authorities of the home Member State of the AIFM shall refuse authorisation where the effective exercise of their supervisory functions is prevented by any of the following:

(a) close links between the AIFM and other natural or legal persons;

(b) the laws, regulations or administrative provisions of a third country governing natural or legal persons with which the AIFM has close links;

(c) difficulties involved in the enforcement of those laws, regulations and administrative provisions.

4. The competent authorities of the home Member State of the AIFM may restrict the scope of the authorisation, in particular as regards the investment strategies of AIFs the AIFM is allowed to manage.

5. The competent authorities of the home Member State of the AIFM shall inform the applicant in writing within 3 months of the submission of a complete application, whether or not authorisation has been granted. The competent authorities may prolong this period for up to three additional months, where they consider it necessary due to the specific circumstances of the case and after having notified the AIFM accordingly.

For the purpose of this paragraph an application is deemed complete if the AIFM has at least submitted the information referred to in points (a) to (d) of Article 7(2) and points (a) and (b) of Article 7(3).

AIFMs may start managing AIFs with investment strategies described in the application in accordance with point (a) of Article 7(3) in their home Member State as soon as the authorisation is granted, but not earlier than 1 month after having submitted any missing information referred to in point (e) of Article 7(2) and points (c), (d) and (e) of Article 7(3).

6. In order to ensure consistent harmonisation of this Article, ESMA may develop draft regulatory technical standards to specify the:

(a) requirements applicable to the AIFMs under paragraph 3;

(b) requirements applicable to shareholders and members with qualifying holdings referred to in point (d) of paragraph 1;

(c) obstacles which may prevent effective exercise of the supervisory functions of the competent authorities.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 9

Initial capital and own funds

1. Member States shall require that an AIFM which is an internally managed AIF has an initial capital of at least EUR 300 000.

2. Where an AIFM is appointed as external manager of AIFs, the AIFM shall have an initial capital of at least EUR 125 000.

3. Where the value of the portfolios of AIFs managed by the AIFM exceeds EUR 250 million, the AIFM shall provide an additional amount of own funds. That additional amount of own funds shall be equal to 0,02 % of the amount by which the value of the portfolios of the AIFM exceeds EUR 250 million but the required total of the initial capital and the additional amount shall not, however, exceed EUR 10 million.

4. For the purpose of paragraph 3, AIFs managed by the AIFM, including AIFs for which the AIFM has delegated functions in accordance with Article 20 but excluding AIF portfolios that the AIFM is managing under delegation, shall be deemed to be the portfolios of the AIFM.

5. Irrespective of paragraph 3, the own funds of the AIFM shall never be less than the amount required under Article 13 of Regulation (EU) 2019/2033 of the European Parliament and of the Council[29].

6. Member States may authorise AIFMs not to provide up to 50 % of the additional amount of own funds referred to in paragraph 3 if they benefit from a guarantee of the same amount given by a credit institution or an insurance undertaking which has its registered office in a Member State, or in a third country where it is subject to prudential rules considered by the competent authorities as equivalent to those laid down in Union law.

7. To cover potential professional liability risks resulting from activities AIFMs may carry out pursuant to this Directive, both internally managed AIFs and external AIFMs shall either:

(a) have additional own funds which are appropriate to cover potential liability risks arising from professional negligence; or

(b) hold a professional indemnity insurance against liability arising from professional negligence which is appropriate to the risks covered.

8. Own funds, including any additional own funds as referred to in point (a) of paragraph 7, shall be invested in liquid assets or assets readily convertible to cash in the short term and shall not include speculative positions.

9. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures in relation to paragraph 7 of this Article specifying:

[29] Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014 (OJ L 314, 5.12.2019, p. 1).

(a) the risks the additional own funds or the professional indemnity insurance must cover;

(b) the conditions for determining the appropriateness of additional own funds or the coverage of the professional indemnity insurance; and

(c) the manner of determining ongoing adjustments of the additional own funds or of the coverage of the professional indemnity insurance.

10. With the exception of paragraphs 7 and 8 and of the delegated acts adopted pursuant to paragraph 9, this Article shall not apply to AIFMs which are also UCITS management companies.

Article 10

Changes in the scope of the authorisation

1. Member States shall require that AIFMs, before implementation, notify the competent authorities of their home Member State of any material changes to the conditions for initial authorisation, in particular material changes to the information provided in accordance with Article 7.

2. If the competent authorities of the home Member State decide to impose restrictions or reject those changes, they shall, within 1 month of receipt of that notification, inform the AIFM. The competent authorities may prolong that period for up to 1 month where they consider this to be necessary because of the specific circumstances of the case and after having notified the AIFM accordingly. The changes shall be implemented if the relevant competent authorities do not oppose the changes within the relevant assessment period.

Article 11

Withdrawal of the authorisation

The competent authorities of the home Member State of the AIFM may withdraw the authorisation issued to an AIFM where that AIFM:

(a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has ceased the activity covered by this Directive for the preceding 6 months, unless the Member State concerned has provided for authorisation to lapse in such cases;

(b) obtained the authorisation by making false statements or by any other irregular means;

(c) no longer meets the conditions under which authorisation was granted;

(d) no longer complies with Directive 2006/49/EC if its authorisation also covers the discretionary portfolio management service referred to in point (a) of Article 6(4) of this Directive;

(e) has seriously or systematically infringed the provisions adopted pursuant to this Directive; or

(f) falls within any of the cases where national law, in respect of matters outside the scope of this Directive, provides for withdrawal.

CHAPTER III

OPERATING CONDITIONS FOR AIFMs

SECTION 1

General requirements

Article 12

General principles

1. Member States shall ensure that, at all times, AIFMs:

(a) act honestly, with due skill, care and diligence and fairly in conducting their activities;

(b) act in the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market;

(c) have and employ effectively the resources and procedures that are necessary for the proper performance of their business activities;

(d) take all reasonable steps to avoid conflicts of interest and, when they cannot be avoided, to identify, manage and monitor and, where applicable, disclose, those conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors and to ensure that the AIFs they manage are fairly treated;

(e) comply with all regulatory requirements applicable to the conduct of their business activities so as to promote the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market;

(f) treat all AIF investors fairly.

No investor in an AIF shall obtain preferential treatment, unless such preferential treatment is disclosed in the relevant AIF's rules or instruments of incorporation.

2. Each AIFM the authorisation of which also covers the discretionary portfolio management service referred to in point (a) of Article 6(4) shall:

(a) not be permitted to invest all or part of the client's portfolio in units or shares of the AIFs it manages, unless it receives prior general approval from the client;

(b) with regard to the services referred to in Article 6(4), be subject to Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes[30].

3. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying the criteria to be used by the relevant competent authorities to assess whether AIFMs comply with their obligations under paragraph 1.

4. For the purposes of paragraph 1, first subparagraph, point (f), ESMA shall by 16 October 2025 submit a report to the European Parliament, the Council and the Commission assessing the costs charged by AIFMs to the investors of the AIFs that they manage and explaining the reasons for the level of those costs and for any differences between them, including differences resulting from the nature of the AIFs concerned. As part of that assessment, ESMA shall analyse, within the framework of Article 29 of

[30] OJ L 84, 26.3.1997, p. 22.

Regulation (EU) No 1095/2010, the appropriateness and effectiveness of the criteria set out in the ESMA convergence tools on the supervision of costs.

For the purposes of that report, and in accordance with Article 35 of Regulation (EU) No 1095/2010, the competent authorities shall provide ESMA on a one-time basis with data on costs including all fees, charges and expenses which are directly or indirectly borne by the investors, or by the AIFM in connection with the operations of the AIF, and that are to be directly or indirectly allocated to the AIF. The competent authorities shall make those data available to ESMA within their powers, which include the power to require AIFMs to provide information as laid down in Article 46(2) of this Directive.

Article 13

Remuneration

1. Member States shall require AIFMs to have remuneration policies and practices for those categories of staff, including senior management, risk takers, control functions, and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profiles of the AIFMs or of the AIFs they manage, that are consistent with and promote sound and effective risk management and do not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the AIFs they manage.

The AIFMs shall determine the remuneration policies and practices in accordance with Annex II.

2. ESMA shall ensure the existence of guidelines on sound remuneration policies which comply with Annex II. The guidelines shall take into account the principles on sound remuneration policies set out in Recommendation 2009/384/EC, the size of the AIFMs and the size of AIFs they manage, their internal organisation and the nature, the scope and the complexity of their activities. ESMA shall cooperate closely with the European Supervisory Authority (European Banking Authority) (EBA).

Article 14

Conflicts of interest

1. Member States shall require AIFMs to take all reasonable steps to identify conflicts of interest that arise in the course of managing AIFs between:

(a) the AIFM, including its managers, employees or any person directly or indirectly linked to the AIFM by control, and the AIF managed by the AIFM or the investors in that AIF;

(b) the AIF or the investors in that AIF, and another AIF or the investors in that AIF;

(c) the AIF or the investors in that AIF, and another client of the AIFM;

(d) the AIF or the investors in that AIF, and a UCITS managed by the AIFM or the investors in that UCITS; or

(e) two clients of the AIFM.

AIFMs shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to identify, prevent, manage and monitor conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors.

AIFMs shall segregate, within their own operating environment, tasks and responsibilities which may be regarded as incompatible with each other or which may potentially generate systematic conflicts of interest. AIFMs shall assess whether their operating conditions may involve any other material conflicts of interest and disclose them to the investors of the AIFs.

2. Where organisational arrangements made by the AIFM to identify, prevent, manage and monitor conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to investors' interests will be prevented, the AIFM shall clearly disclose the general nature or sources of conflicts of interest to the investors before undertaking business on their behalf, and develop appropriate policies and procedures.

2a. Where an AIFM manages or intends to manage an AIF at the initiative of a third party, including cases where that AIF uses the name of a third-party initiator or where an AIFM appoints a third-party initiator as a delegate pursuant to Article 20, the AIFM shall, taking account of any conflicts of interest, submit detailed explanations and evidence of its compliance with paragraphs 1 and 2 of this Article to the competent authorities of its home Member State. In particular, the AIFM shall specify the reasonable steps it has taken to prevent conflicts of interest arising from the relationship with the third party or, where those conflicts of interest cannot be prevented, how it identifies, manages, monitors and, where applicable, discloses those conflicts of interest in order to prevent them from adversely affecting the interests of the AIF and its investors.

3. Where the AIFM on behalf of an AIF uses the services of a prime broker, the terms shall be set out in a written contract. In particular any possibility of transfer and reuse of AIF assets shall be provided for in that contract and shall comply with the AIF rules or instruments of incorporation. The contract shall provide that the depositary be informed of the contract.

AIFMs shall exercise due skill, care and diligence in the selection and appointment of prime brokers with whom a contract is to be concluded.

4. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying:

(a) the types of conflicts of interest as referred to in paragraph 1;

(b) the reasonable steps AIFMs are expected to take in terms of structures and organisational and administrative procedures in order to identify, prevent, manage, monitor and disclose conflicts of interest.

Article 15

Risk management

1. AIFMs shall functionally and hierarchically separate the functions of risk management from the operating units, including from the functions of portfolio management.

The functional and hierarchical separation of the functions of risk management in accordance with the first subparagraph shall be reviewed by the competent authorities of the home Member State of the AIFM in accordance with the principle of proportionality, on the understanding that the AIFM shall, in any event, be able to demonstrate that specific safeguards against conflicts of interest allow for the independent performance of risk management activities and that the risk management process satisfies the requirements of this Article and is consistently effective.

2. AIFMs shall implement adequate risk-management systems in order to identify, measure, manage and monitor appropriately all risks relevant to each AIF investment strategy and to which each AIF is or may be exposed. In particular, AIFMs shall not solely or mechanistically rely on credit ratings issued by credit rating agencies as defined in Article 3(1)(b) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies[31], for assessing the creditworthiness of the AIFs' assets.

[31] OJ L 302, 17.11.2009, p. 1.

AIFMs shall review the risk management systems with appropriate frequency at least once a year and adapt them whenever necessary.

3. AIFMs shall at least:

(a) implement an appropriate, documented and regularly updated due diligence process when investing on behalf of the AIF, according to the investment strategy, the objectives and risk profile of the AIF;

(b) ensure that the risks associated with each investment position of the AIF and their overall effect on the AIF's portfolio can be properly identified, measured, managed and monitored on an ongoing basis, including through the use of appropriate stress testing procedures;

(c) ensure that the risk profile of the AIF shall correspond to the size, portfolio structure and investment strategies and objectives of the AIF as laid down in the AIF rules or instruments of incorporation, prospectus and offering documents;

(d) for loan originating activities, implement effective policies, procedures and processes for the granting of loans.

For the purposes of the first subparagraph, point (d), where AIFMs manage AIFs that engage in loan origination, including when those AIFs gain exposure to loans through third parties, they shall also implement effective policies, procedures and processes for assessing the credit risk and for administering and monitoring their credit portfolio, keep those policies, procedures and processes up to date and effective, and review them regularly and at least once a year.

Without prejudice to Article 12(1), point (b), the requirements set out in the first subparagraph, point (d), and in the second subparagraph of this paragraph shall not apply to the origination of shareholder loans where the notional value of such loans does not exceed in aggregate 150 % of the capital of the AIF.

3a. Taking into account the nature, scale and complexity of the AIFs' activities, the competent authorities shall monitor the adequacy of the credit assessment processes of AIFMs, assess the use of references to credit ratings, as referred to in the first subparagraph of paragraph 2, in the AIFs' investment policies and, where appropriate, encourage mitigation of the impact of such references, with a view to reducing sole and mechanistic reliance on such credit ratings.

4. AIFMs shall set a maximum level of leverage which they may employ on behalf of each AIF they manage as well as the extent of the right to reuse collateral or guarantee that could be granted under the leveraging arrangement, taking into account, inter alia:

(a) the type of the AIF;

(b) the investment strategy of the AIF;

(c) the sources of leverage of the AIF;

(d) any other interlinkage or relevant relationships with other financial services institutions, which could pose systemic risk;

(e) the need to limit the exposure to any single counterparty;

(f) the extent to which the leverage is collateralised;

(g) the asset-liability ratio;

(h) the scale, nature and extent of the activity of the AIFM on the markets concerned.

4a. An AIFM shall ensure that, where an AIF it manages originates loans, the notional value of the loans originated to any single borrower by that AIF does not exceed in aggregate 20% of the capital of the AIF where the borrower is one of the following:

(a) a financial undertaking as defined in Article 13, point (25), of Directive 2009/138/EC of the European Parliament and of the Council[32];

(b) an AIF; or

(c) a UCITS.

The restriction set out in the first subparagraph of this paragraph shall be without prejudice to the thresholds, restrictions and conditions set out in Regulations (EU) No 345/2013[33], (EU) No 346/2013[34] and (EU) 2015/760[35] of the European Parliament and of the Council.

4b. An AIFM shall ensure that the leverage of a loan-originating AIF it manages represents no more than:

(a) 175%, where that AIF is open-ended;

(b) 300%, where that AIF is closed-ended.

The leverage of a loan-originating AIF shall be expressed as the ratio between the exposure of that AIF, calculated according to the commitment method as defined in the delegated acts adopted pursuant to Article 4(3), and its net asset value.

Borrowing arrangements which are fully covered by contractual capital commitments from investors in the loan-originating AIF shall not be considered to constitute exposure for the purpose of calculating the ratio referred to in the second subparagraph.

In the event that a loan-originating AIF infringes the requirements laid down in this paragraph and the infringement is beyond the control of the AIFM that manages it, the AIFM shall, within an appropriate period, take such measures as are necessary to rectify the position, taking due account of the interests of the investors in the loan-originating AIF.

Without prejudice to the powers of the competent authorities referred to in Article 25(3), the requirements set out in the first subparagraph of this paragraph shall not apply to a loan-originating AIF whose lending activities consist solely of originating shareholder loans, provided that the notional value of those loans does not exceed in aggregate 150% of the capital of the AIF.

4c. The investment limit of 20% laid down in paragraph 4a shall:

(a) apply by the date specified in the AIF rules, instruments of incorporation or prospectus, which shall be no later than 24 months from the date of the first subscription for units or shares of the AIF;

(b) cease to apply once the AIFM starts to sell assets of the AIF in order to redeem units or shares as part of the liquidation of the AIF; and

(c) be temporarily suspended where the capital of the AIF is increased or reduced.

[32] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

[33] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1).

[34] Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18).

[35] Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98).

The suspension referred to in the first subparagraph, point (c), shall be limited in time to the period that is strictly necessary, taking due account of the interests of the investors in the AIF, and, in any case, shall last no longer than 12 months.

4d. The application date referred to in paragraph 4c, first subparagraph, point (a), shall take account of the particular features and characteristics of the assets to be invested by the AIF. In exceptional circumstances, the competent authorities of the AIFM, upon submission of a duly justified investment plan, may approve an extension of that time limit of no more than 12 additional months.

4e. The AIFM shall ensure that an AIF it manages does not grant loans to the following entities:

(a) the AIFM or the staff of that AIFM;

(b) the AIF's depositary or the entities to which the depositary has delegated functions in respect of the AIF in accordance with Article 21;

(c) an entity to which the AIFM has delegated functions in accordance with Article 20 or the staff of that entity;

(d) an entity within the same group, as defined in Article 2, point (11), of Directive 2013/34/EU of the European Parliament and the Council[36], as the AIFM, except where that entity is a financial undertaking that exclusively finances borrowers that are not referred to in points (a), (b) and (c) of this paragraph.

4f. Where an AIF originates loans, the proceeds of the loans, minus any allowable fees for their administration, shall be attributed to that AIF in full. All costs and expenses linked to the administration of the loans shall be disclosed in accordance with Article 23.

4g. Without prejudice to other instruments of Union law, a Member State may prohibit AIFs that originate loans from granting loans to consumers as defined in Article 3, point (a), of Directive 2008/48/EC of the European Parliament and of the Council[37] in its territory, and may prohibit AIFs from servicing credits granted to such consumers in its territory. Such prohibition shall not affect the marketing in the Union of AIFs granting loans to consumers or servicing credits granted to consumers.

4h. Member States shall prohibit AIFMs from managing AIFs that engage in loan origination where the whole or part of the investment strategy of those AIFs is to originate loans with the sole purpose of transferring those loans or exposures to third parties.

4i. An AIFM shall ensure that the AIF it manages retains 5% of the notional value of each loan that the AIF has originated and subsequently transferred to third parties. That percentage of each loan shall be retained:

(a) until maturity, for loans whose maturity is a period of up to eight years, or for loans granted to consumers regardless of their maturity; and

(b) for a period of at least eight years for other loans.

By way of derogation from the first subparagraph, the requirement set out therein shall not apply where:

(a) the AIFM starts to sell assets of the AIF in order to redeem units or shares as part of the liquidation of the AIF;

[36] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

[37] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p.66).

(b) the disposal is necessary for the purposes of compliance with restrictive measures adopted under Article 215 TFEU, or with product requirements;

(c) the sale of the loan is necessary to enable the AIFM to implement the investment strategy of the AIF it manages in the best interests of the AIF's investors; or

(d) the sale of the loan is due to a deterioration in the risk associated with the loan, detected by the AIFM as part of its due diligence and risk management process referred to in Article 15(3), and the purchaser is informed of that deterioration when buying the loan.

Upon the request of the competent authorities of its home Member State, the AIFM shall demonstrate that it meets the conditions for the application of the relevant derogation set out in the second subparagraph.

5. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying:

(a) the risk management systems to be employed by AIFMs in relation to the risks which they incur on behalf of the AIFs that they manage;

(b) the appropriate frequency of review of the risk management system;

(c) how the risk management function is to be functionally and hierarchically separated from the operating units, including the portfolio management function;

(d) specific safeguards against conflicts of interest referred to in the second subparagraph of paragraph 1;

(e) the requirements referred to in paragraph 3.

The measures specifying the risk-management systems referred to in point (a) of the first subparagraph shall ensure that the AIFMs are prevented from relying solely or mechanistically on credit ratings, as referred to in the first subparagraph of paragraph 2, for assessing the creditworthiness of the AIFs' assets.

Article 16

Liquidity management

1. AIFMs shall, for each AIF that they manage which is not an unleveraged closed-ended AIF, employ an appropriate liquidity management system and adopt procedures which enable them to monitor the liquidity risk of the AIF and to ensure that the liquidity profile of the investments of the AIF complies with its underlying obligations.

AIFMs shall regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable them to assess the liquidity risk of the AIFs and monitor the liquidity risk of the AIFs accordingly.

2. AIFMs shall ensure that, for each AIF that they manage, the investment strategy, the liquidity profile and the redemption policy are consistent.

2a. An AIFM shall ensure that the loan-originating AIF it manages is closed-ended.

By way of derogation from the first subparagraph, a loan-originating AIF may be open-ended provided that the AIFM that manages it is able to demonstrate to the competent authorities of the home Member State of the AIFM that the AIF's liquidity risk management system is compatible with its investment strategy and redemption policy.

The requirement set out in the first subparagraph of this paragraph shall be without prejudice to the thresholds, restrictions and conditions set out in Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) 2015/760.

2b. With a view to ensuring that it complies with paragraphs 1 and 2 of this Article, an AIFM that manages an open-ended AIF shall select at least two appropriate liquidity management tools from those referred to in Annex V, points 2 to 8, after assessing the suitability of those tools in relation to the pursued investment strategy, the liquidity profile and the redemption policy of the AIF. The AIFM shall include those tools in the AIF's rules or instruments of incorporation for possible use in the interest of the AIF's investors. It shall not be possible for that selection to include only the tools referred to in Annex V, points 5 and 6.

By way of derogation from the first subparagraph, an AIFM may decide to select only one liquidity management tool from those referred to in Annex V, points 2 to 8, for an AIF it manages if that AIF is authorised as a money market fund in accordance with Regulation (EU) 2017/1131 of the European Parliament and of the Council[38].

The AIFM shall implement detailed policies and procedures for the activation and deactivation of any selected liquidity management tool and the operational and administrative arrangements for the use of such tool. The selection referred to in the first and second subparagraphs and the detailed policies and procedures for the activation and deactivation shall be communicated to the competent authorities of the home Member State of the AIFM.

Redemption in kind as referred to in Annex V, point 8, shall only be activated to meet redemptions requested by professional investors and if the redemption in kind corresponds to a pro rata share of the assets held by the AIF.

By way of derogation from the fourth subparagraph of this paragraph, the redemption in kind need not correspond to a pro rata share of the assets held by the AIF if that AIF is solely marketed to professional investors, or if the aim of that AIF's investment policy is to replicate the composition of a certain stock or debt securities index and that AIF is an exchange-traded fund as defined in Article 4(1), point (46), of Directive 2014/65/EU.

2c. An AIFM that manages an open-ended AIF may, in the interest of AIF investors, temporarily suspend the subscription, repurchase and redemption of the AIF units or shares as referred to in Annex V, point 1, or, where those tools are included in the AIF's rules or instruments of incorporation, activate or deactivate other liquidity management tools selected from Annex V, points 2 to 8, in accordance with paragraph 2b of this Article. The AIFM may also, in the interest of the AIF investors, activate side pockets as referred to in Annex V, point 9.

An AIFM shall only use a suspension of subscriptions, repurchases and redemptions or side pockets as referred to in the first subparagraph in exceptional cases where circumstances so require and where justified having regard to the interests of the AIF investors.

2d. An AIFM shall, without delay, notify the competent authorities of its home Member State of the following:

(a) where the AIFM activates or deactivates the liquidity management tool referred to in Annex V, point 1;

(b) where the AIFM activates or deactivates any of the liquidity management tools referred to in Annex V, points 2 to 8, in a manner that is not in the ordinary course of business as envisaged in the AIF rules or instruments of incorporation.

An AIFM shall, within a reasonable timeframe before it activates or deactivates the liquidity management tool referred to in Annex V, point 9, notify the competent authorities of its home Member State of such activation or deactivation.

[38] Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14June 2017 on money market funds (OJ L 169, 30.6.2017, p. 8).

The competent authorities of the home Member State of the AIFM shall inform, without delay, the competent authorities of a host Member State of the AIFM, ESMA and, if there are potential risks to the stability and integrity of the financial system, the European Systemic Risk Board (ESRB) established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council[39] of any notifications received in accordance with this paragraph. ESMA shall have the power to share the information received pursuant to this paragraph with the competent authorities.

2e. Member States shall ensure that at least the liquidity management tools set out in Annex V are available to AIFMs managing open-ended AIFs.

2f. ESMA shall develop draft regulatory technical standards to determine the requirements with which loan-originating AIFs are to comply in order to maintain an open-ended structure. Those requirements shall include a sound liquidity management system, the availability of liquid assets and stress testing, as well as an appropriate redemption policy having regard to the liquidity profile of loan-originating AIFs. Those requirements shall also take due account of the underlying loan exposures, the average repayment time of the loans and the overall granularity and composition of the portfolios of loan-originating AIFs.

2g. ESMA shall develop draft regulatory technical standards to specify the characteristics of the liquidity management tools set out in Annex V.

When developing those draft regulatory technical standards, ESMA shall take account of the diversity of investment strategies and underlying assets of AIFs. Those standards shall not restrict the ability of AIFMs to use any appropriate liquidity management tool for all asset classes, jurisdictions and market conditions.

2h. By 16 April 2025, ESMA shall develop guidelines on the selection and calibration of liquidity management tools by AIFMs for liquidity risk management and for mitigating financial stability risks. Those guidelines shall recognise that the primary responsibility for liquidity risk management remains with AIFMs. They shall include indications as to the circumstances in which side pockets, as referred to in Annex V, point 9, can be activated. They shall allow adequate time for adaptation before they apply, in particular for existing AIFs.

2i. ESMA shall submit the draft regulatory technical standards referred to in paragraphs 2f and 2g of this Article to the Commission by 16 April 2025.

Power is delegated to the Commission to supplement this Directive by adopting the regulatory technical standards referred to in paragraphs 2f and 2g in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

3. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying:

(a) the liquidity management systems and procedures; and

(b) the alignment of the investment strategy, liquidity profile and redemption policy set out in paragraph 2.

[39] Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1).

Article 17

Investment in securitisation positions

Where AIFMs are exposed to a securitisation that no longer meets the requirements provided for in Regulation (EU) 2017/2402 of the European Parliament and of the Council[40], they shall, in the best interest of the investors in the relevant AIFs, act and take corrective action, if appropriate.

SECTION 2

Organisational requirements

Article 18

General principles

1. Member States shall require that AIFMs use, at all times, adequate and appropriate human and technical resources that are necessary for the proper management of AIFs.

In particular, the competent authorities of the home Member State of the AIFM, having regard also to the nature of the AIFs managed by the AIFM, shall require that the AIFM has sound administrative and accounting procedures, control and safeguard arrangements for electronic data processing and adequate internal control mechanisms including, in particular, rules for personal transactions by its employees or for the holding or management of investments in order to invest on its own account and ensuring, at least, that each transaction involving the AIFs may be reconstructed according to its origin, the parties to it, its nature, and the time and place at which it was effected and that the assets of the AIFs managed by the AIFM are invested in accordance with the AIF rules or instruments of incorporation and the legal provisions in force.

2. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying the procedures and arrangements as referred to in paragraph 1.

Article 19

Valuation

1. AIFMs shall ensure that, for each AIF that they manage, appropriate and consistent procedures are established so that a proper and independent valuation of the assets of the AIF can be performed in accordance with this Article, the applicable national law and the AIF rules or instruments of incorporation.

2. The rules applicable to the valuation of assets and the calculation of the net asset value per unit or share of the AIF shall be laid down in the law of the country where the AIF is established and/or in the AIF rules or instruments of incorporation.

3. AIFMs shall also ensure that the net asset value per unit or share of AIFs is calculated and disclosed to the investors in accordance with this Article, the applicable national law and the AIF rules or instruments of incorporation.

The valuation procedures used shall ensure that the assets are valued and the net asset value per unit or share is calculated at least once a year.

[40] Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised secu-ritisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 (OJ L 347, 28.12.2017, p. 35).

If the AIF is of the open-ended type, such valuations and calculations shall also be carried out at a frequency which is both appropriate to the assets held by the AIF and its issuance and redemption frequency.

If the AIF is of the closed-ended type, such valuations and calculations shall also be carried out in case of an increase or decrease of the capital by the relevant AIF.

The investors shall be informed of the valuations and calculations as set out in the relevant AIF rules or instruments of incorporation.

4. AIFMs shall ensure that the valuation function is either performed by:

(a) an external valuer, being a legal or natural person independent from the AIF, the AIFM and any other persons with close links to the AIF or the AIFM; or

(b) the AIFM itself, provided that the valuation task is functionally independent from the portfolio management and the remuneration policy and other measures ensure that conflicts of interest are mitigated and that undue influence upon the employees is prevented.

The depositary appointed for an AIF shall not be appointed as external valuer of that AIF, unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as external valuer and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

5. Where an external valuer performs the valuation function, the AIFM shall demonstrate that:

(a) the external valuer is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct;

(b) the external valuer can provide sufficient professional guarantees to be able to perform effectively the relevant valuation function in accordance with paragraphs 1, 2 and 3; and

(c) the appointment of the external valuer complies with the requirements of Article 20(1) and (2) and the delegated acts adopted pursuant to Article 20(7).

6. The appointed external valuer shall not delegate the valuation function to a third party.

7. AIFMs shall notify the appointment of the external valuer to the competent authorities of their home Member State which may require that another external valuer be appointed instead, where the conditions laid down in paragraph 5 are not met.

8. The valuation shall be performed impartially and with all due skill, care and diligence.

9. Where the valuation function is not performed by an independent external valuer, the competent authorities of the home Member State of the AIFM may require the AIFM to have its valuation procedures and/or valuations verified by an external valuer or, where appropriate, by an auditor.

10. AIFMs are responsible for the proper valuation of AIF assets, the calculation of the net asset value and the publication of that net asset value. The AIFM's liability towards the AIF and its investors shall, therefore, not be affected by the fact that the AIFM has appointed an external valuer.

Notwithstanding the first subparagraph and irrespective of any contractual arrangements providing otherwise, the external valuer shall be liable to the AIFM for any losses suffered by the AIFM as a result of the external valuer's negligence or intentional failure to perform its tasks.

11. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying:

(a) the criteria concerning the procedures for the proper valuation of the assets and the calculation of the net asset value per unit or share;

(b) the professional guarantees the external valuer must be able to provide to effectively perform the valuation function;

(c) the frequency of valuation carried out by open-ended AIFs which is both appropriate to the assets held by the AIF and its issuance and redemption policy.

SECTION 3

Delegation of AIFM functions

Article 20

Delegation

1. AIFMs which intend to delegate to third parties the task of carrying out, on their behalf, one or more of the functions referred to in Annex I or of the services referred to in Article 6(4) ~~on their behalf~~ shall notify the competent authorities of their home Member State before the delegation arrangements become effective. The following conditions shall be met:

(a) the AIFM must be able to justify its entire delegation structure on objective reasons;

(b) the delegate must dispose of sufficient resources to perform the respective tasks and the persons who effectively conduct the business of the delegate must be of sufficiently good repute and sufficiently experienced;

(c) where the delegation concerns portfolio management or risk management, it must be conferred only on undertakings which are authorised or registered for the purpose of asset management and subject to supervision or, where that condition cannot be met, only subject to prior approval by the competent authorities of the home Member State of the AIFM;

(d) where the delegation concerns portfolio management or risk management and is conferred on a third-country undertaking, in addition to the requirements in point (c), cooperation between the competent authorities of the home Member State of the AIFM and the supervisory authority of the undertaking must be ensured;

(e) the delegation must not prevent the effectiveness of supervision of the AIFM, and, in particular, must not prevent the AIFM from acting, or the AIF from being managed, in the best interests of its investors;

(f) the AIFM must be able to demonstrate that the delegate is qualified and capable of undertaking the functions and providing the services in question, that it was selected with all due care and that the AIFM is in a position to monitor effectively at any time the delegated activity, to give at any time further instructions to the delegate and to withdraw the delegation with immediate effect ~~when this is~~where to do so is in the interest of investors.

The AIFM shall review the services provided by each delegate on an ongoing basis.

2. No delegation of portfolio management or risk management shall be conferred on:

(a) the depositary or a delegate of the depositary; or

(b) any other entity whose interests may conflict with those of the AIFM or the investors of the AIF, unless such entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

3. The AIFM's liability towards its clients, the AIF and its investors shall not be affected by the fact that the AIFM has delegated functions or services to a third party, or by any further sub-delegation., ~~nor shall~~ T~~t~~he AIFM shall not delegate the~~its~~ functions or services to the extent that, in essence, it can no longer be considered to be the manager of the AIF or the provider of the services referred to in Article 6(4) and to the extent that it becomes a letter-box entity.

3a. The AIFM shall ensure that the performance of the functions referred to in Annex I and the provision of the services referred to in Article 6(4) comply with this Directive. That obligation shall apply irrespective of the regulatory status or location of any delegate or sub-delegate.

4. The third party may sub-delegate any of the functions or services delegated to it provided that the following conditions are met:

(a) the AIFM consented prior to the sub-delegation;

(b) the AIFM notified the competent authorities of its home Member State before the sub-delegation arrangements become effective;

(c) the conditions set out in paragraph 1, on the understanding that all references to the 'delegate' are read as references to the 'sub-delegate'.

5. No sub-delegation of portfolio management or risk management shall be conferred on:

(a) the depositary or a delegate of the depositary; or

(b) any other entity whose interests may conflict with those of the AIFM or the investors of the AIF, unless such entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

The relevant delegate shall review the services provided by each sub-delegate on an ongoing basis.

6. Where the sub-delegate further delegates any of the functions or services delegated to it, the conditions set out in paragraph 4 shall apply *mutatis mutandis*.

6a. By way of derogation from paragraphs 1 to 6 of this Article, where the marketing function referred to in Annex I, point 2(b), is performed by one or several distributors which are acting on their own behalf and which market the AIF in accordance with Directive 2014/65/EU or through insurance-based investment products in accordance with Directive (EU) 2016/97 of the European Parliament and of the Council[41], such function shall not be considered to be a delegation subject to the requirements of paragraphs 1 to 6 of this Article irrespective of any distribution agreement between the AIFM and the distributor.

7. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying:

[41] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (OJ L 26, 2.2.2016, p. 19).

(a) the conditions for fulfilling the requirements set out in paragraphs 1, 2, 4 and 5;

(b) the conditions under which the AIFM shall be deemed to have delegated its functions to the extent that it becomes a letter-box entity and can no longer be considered to be the manager of the AIF as set out in paragraph 3.

SECTION 4

Depositary

Article 21

Depositary

1. For each AIF it manages, the AIFM shall ensure that a single depositary is appointed in accordance with this Article.

2. The appointment of the depositary shall be evidenced by written contract. The contract shall, inter alia, regulate the flow of information deemed necessary to allow the depositary to perform its functions for the AIF for which it has been appointed as depositary, as set out in this Directive and in other relevant laws, regulations or administrative provisions.

3. The depositary shall be:

(a) a credit institution having its registered office in the Union and authorised in accordance with Directive 2006/48/EC;

(b) an investment firm having its registered office in the Union, subject to capital adequacy requirements in accordance with Article 20(1) of Directive 2006/49/EC including capital requirements for operational risks and authorised in accordance with Directive 2004/39/EC and which also provides the ancillary service of safe-keeping and administration of financial instruments for the account of clients in accordance with point (1) of Section B of Annex I to Directive 2004/39/EC; such investment firms shall in any case have own funds not less than the amount of initial capital referred to in Article 9 of Directive 2006/49/EC; or

(c) another category of institution that is subject to prudential regulation and ongoing supervision and which, on 21 July 2011, falls within the categories of institution determined by Member States to be eligible to be a depositary under Article 23(3) of Directive 2009/65/EC.

For non-EU AIFs only, and without prejudice to point (b) of paragraph 5, the depositary may also be a credit institution or any other entity of the same nature as the entities referred to in points (a) and (b) of the first subparagraph of this paragraph provided that the conditions in point (b) of paragraph 6 are met.

In addition, Member States may allow that in relation to AIFs which have no redemption rights exercisable during the period of 5 years from the date of the initial investments and which, in accordance with their core investment policy, generally do not invest in assets that must be held in custody in accordance with point (a) of paragraph 8 or generally invest in issuers or non-listed companies in order to potentially acquire control over such companies in accordance with Article 26, the depositary may be an entity which carries out depositary functions as part of its professional or business activities in respect of which such entity is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct and which can provide sufficient financial and professional guarantees to enable it to perform effectively the relevant depositary functions and meet the commitments inherent in those functions.

4. In order to avoid conflicts of interest between the depositary, the AIFM and/or the AIF and/or its investors:

(a) an AIFM shall not act as depositary;

(b) a prime broker acting as counterparty to an AIF shall not act as depositary for that AIF, unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as prime broker and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF. Delegation by the depositary to such prime broker of its custody tasks in accordance with paragraph 11 is allowed if the relevant conditions are met.

5. The depositary shall be established in one of the following locations:

(a) for EU AIFs, in the home Member State of the AIF;

(b) for non-EU AIFs, in the third country where the AIF is established or in the home Member State of the AIFM managing the AIF or in the Member State of reference of the AIFM managing the AIF.

5a. By way of derogation from paragraph 5, point (a), the home Member State of an EU AIF may permit its competent authorities to allow an institution referred to in paragraph 3, first subparagraph, point (a), and established in another Member State to be appointed as a depositary provided that the following conditions are fulfilled:

(a) the competent authorities have received a reasoned request from the AIFM to allow the appointment of a depositary established in another Member State and that request demonstrates the lack of depositary services in the home Member State of the AIF that are able to meet effectively the needs of the AIF having regard to its investment strategy; and

(b) the aggregate amount in the national depositary market of the home Member State of the AIF of assets entrusted for safe-keeping, as referred to in paragraph 8 of this Article, on behalf of EU AIFs authorised or registered under the applicable national law in accordance with Article 4(1), point (k)(i), and managed by an EU AIFM does not exceed EUR 50 billion or the equivalent in any other currency.

Assets entrusted for safe-keeping by depositaries acting under Article 36(1), point (a), and the own assets of depositaries shall not be taken into account for the purpose of determining whether the condition laid down in the first subparagraph, point (b), of this paragraph is met.

Notwithstanding the conditions laid down in the first and second subparagraphs being met, the competent authorities shall allow the appointment of a depositary established in another Member State only after carrying out a case-by-case assessment of the lack of relevant depositary services in the home Member State of the AIF having regard to the investment strategy of the AIF.

Where the competent authorities allow the appointment of a depositary established in another Member State, they shall inform ESMA thereof.

This paragraph shall be without prejudice to the application of the other paragraphs of this Article, with the exception of paragraph 5, point (a).

6. Without prejudice to the requirements set out in paragraph 3, the appointment of a depositary established in a third country shall, at all times, be subject to the following conditions:

(a) the competent authorities of the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and, in so far as different, of the

home Member State of the AIFM, have signed cooperation and exchange of information arrangements with the competent authorities of the depositary;

(b) the depositary is subject to effective prudential regulation, including minimum capital requirements, and supervision which have the same effect as Union law and are effectively enforced;

(c) the third country where the depositary is established is not identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849 of the European Parliament and the Council[42] ~~listed as a Non-Cooperative Country and Territory by FATF~~;

(d) the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and, in so far as different, the home Member State of the AIFM, have signed an agreement with the third country where the depositary is established which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements and that third country is not mentioned in Annex I to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes;

(e) the depositary shall by contract be liable to the AIF or to the investors of the AIF, consistently with paragraphs 12 and 13, and shall expressly agree to comply with paragraph 11.

By way of derogation from the introductory wording of the first subparagraph, the conditions in points (c) and (d) of that subparagraph shall apply at the time of the depositary's appointment. If a third country where a depositary is established is identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849, as referred to in the first subparagraph, point (c), or is added to Annex I to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes, as referred to in the first subparagraph, point (d), after the time of the appointment of the depositary, a new depositary shall be appointed within an appropriate period, taking due account of the interests of investors. That period shall be no longer than two years.

Where a competent authority of another Member State disagrees with the assessment made on the application of points (a), (c) or (e) of the first subparagraph by the competent authorities of the home Member State of the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

On the basis of the criteria referred to in point (b) of paragraph 17, the Commission shall adopt implementing acts, stating that prudential regulation and supervision of a third country have the same effect as Union law and are effectively enforced. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 59(2).

7. The depositary shall in general ensure that the AIF's cash flows are properly monitored, and shall in particular ensure that all payments made by or on behalf of investors upon the subscription of units or shares of an AIF have been received and that all cash of the AIF has been booked in cash accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF or in the name of the depositary acting on behalf of the AIF at an entity referred to in points (a), (b) and (c) of Article 18(1) of Directive 2006/73/EC, or another entity of the same nature, in the relevant market where cash accounts are required provided that such entity is subject to effective prudential regulation and supervision which

[42] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141,5.6.2015, p. 73).

have the same effect as Union law and are effectively enforced and in accordance with the principles set out in Article 16 of Directive 2006/73/EC.

Where the cash accounts are opened in the name of the depositary acting on behalf of the AIF, no cash of the entity referred to in the first subparagraph and none of the depositary's own cash shall be booked on such accounts.

8. The assets of the AIF or the AIFM acting on behalf of the AIF shall be entrusted to the depositary for safe-keeping, as follows:

(a) for financial instruments that can be held in custody:

(i) the depositary shall hold in custody all financial instruments that can be registered in a financial instruments account opened in the depositary's books and all financial instruments that can be physically delivered to the depositary;

(ii) for that purpose, the depositary shall ensure that all those financial instruments that can be registered in a financial instruments account opened in the depositary's books are registered in the depositary's books within segregated accounts in accordance with the principles set out in Article 16 of Directive 2006/73/EC, opened in the name of the AIF or the AIFM acting on behalf of the AIF, so that they can be clearly identified as belonging to the AIF in accordance with the applicable law at all times;

(b) for other assets:

(i) the depositary shall verify the ownership of the AIF or the AIFM acting on behalf of the AIF of such assets and shall maintain a record of those assets for which it is satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership of such assets;

(ii) the assessment whether the AIF or the AIFM acting on behalf of the AIF holds the ownership shall be based on information or documents provided by the AIF or the AIFM and, where available, on external evidence;

(iii) the depositary shall keep its record up-to-date.

9. In addition to the tasks referred to in paragraphs 7 and 8, the depositary shall:

(a) ensure that the sale, issue, re-purchase, redemption and cancellation of units or shares of the AIF are carried out in accordance with the applicable national law and the AIF rules or instruments of incorporation;

(b) ensure that the value of the units or shares of the AIF is calculated in accordance with the applicable national law, the AIF rules or instruments of incorporation and the procedures laid down in Article 19;

(c) carry out the instructions of the AIFM, unless they conflict with the applicable national law or the AIF rules or instruments of incorporation;

(d) ensure that in transactions involving the AIF's assets any consideration is remitted to the AIF within the usual time limits;

(e) ensure that an AIF's income is applied in accordance with the applicable national law and the AIF rules or instruments of incorporation.

10. In the context of their respective roles, the AIFM and the depositary shall act honestly, fairly, professionally, independently and in the interest of the AIF and the investors of the AIF.

A depositary shall not carry out activities with regard to the AIF or the AIFM on behalf of the AIF that may create conflicts of interest between the AIF, the investors in the AIF, the AIFM and itself, unless the depositary has functionally and hierarchically separated the performance of its depositary tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

The assets referred to in paragraph 8 shall not be reused by the depositary without the prior consent of the AIF or the AIFM acting on behalf of the AIF.

11. The depositary shall not delegate to third parties its functions as described in this Article, save for those referred to in paragraph 8.

The depositary may delegate to third parties the functions referred to in paragraph 8 subject to the following conditions:

(a) the tasks are not delegated with the intention of avoiding the requirements of this Directive;

(b) the depositary can demonstrate that there is an objective reason for the delegation;

(c) the depositary has exercised all due skill, care and diligence in the selection and ~~the~~ appointment of any third party to whom it ~~wants~~ intends to delegate parts of its tasks, except where that third party is a central securities depository acting in the capacity of an investor CSD as defined in the delegated act adopted pursuant to Articles 29(3) and 48(10) of Regulation (EU) No 909/2014, and ~~keeps~~ continues to exercis~~ing~~e all due skill, care and diligence in the periodic review and ongoing monitoring of any third party to whom it has delegated parts of its tasks and of the arrangements of the third party in respect of the matters delegated to it; and

(d) the depositary ensures that the third party meets the following conditions at all times during the performance of the tasks delegated to it:

(i) the third party has the structures and the expertise that are adequate and proportionate to the nature and complexity of the assets of the AIF or the AIFM acting on behalf of the AIF which have been entrusted to it;

(ii) for custody tasks referred to in point (a) of paragraph 8, the third party is subject to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned and the third party is subject to an external periodic audit to ensure that the financial instruments are in its possession;

(iii) the third party segregates the assets of the depositary's clients from its own assets and from the assets of the depositary in such a way that they can at any time be clearly identified as belonging to clients of a particular depositary;

(iv) the third party does not make use of the assets without the prior consent of the AIF or the AIFM acting on behalf of the AIF and prior notification to the depositary; and

(v) the third party complies with the general obligations and prohibitions set out in paragraphs 8 and 10.

Notwithstanding point (d)(ii) of the second subparagraph, where the law of a third country requires that certain financial instruments be held in custody by a local entity and no local entities satisfy the delegation requirements laid down in that point, the depositary may delegate its functions to such a local entity only to the extent required by the law of the third country and only for as long as there are no local entities that satisfy the delegation requirements, subject to the following requirements:

(a) the investors of the relevant AIF must be duly informed that such delegation is required due to legal constraints in the law of the third country and of the circumstances justifying the delegation, prior to their investment; and

(b) the AIF, or the AIFM on behalf of the AIF, must instruct the depositary to delegate the custody of such financial instruments to such local entity.

The third party may, in turn, sub-delegate those functions, subject to the same requirements. In such a case, paragraph 13 shall apply *mutatis mutandis* to the relevant parties.

For the purposes of this ~~paragraph~~Article, the provision of services by a central securities depository acting in the capacity of an issuer CSD as defined in the delegated act adopted pursuant to Articles 29(3) and 48(10) of Regulation (EU) No 909/2014 ~~as specified by Directive 98/26/EC by securities settlement systems as designated for the purposes of that Directive or the provision of similar services by third-country securities settlement systems~~ shall not be considered a delegation of the depositary's~~its~~ custody functions. For the purposes of this Article, the provision of services by a central securities depository acting in the capacity of an investor CSD as defined in that delegated act shall be considered a delegation of the depositary's custody functions.

12. The depositary shall be liable to the AIF or to the investors of the AIF, for the loss by the depositary or a third party to whom the custody of financial instruments held in custody in accordance with point (a) of paragraph 8 has been delegated.

In the case of such a loss of a financial instrument held in custody, the depositary shall return a financial instrument of identical type or the corresponding amount to the AIF or the AIFM acting on behalf of the AIF without undue delay. The depositary shall not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.

The depositary shall also be liable to the AIF, or to the investors of the AIF, for all other losses suffered by them as a result of the depositary's negligent or intentional failure to properly fulfil its obligations pursuant to this Directive.

13. The depositary's liability shall not be affected by any delegation referred to in paragraph 11.

Notwithstanding the first subparagraph of this paragraph, in case of a loss of financial instruments held in custody by a third party pursuant to paragraph 11, the depositary may discharge itself of liability if it can prove that:

(a) all requirements for the delegation of its custody tasks set out in the second subparagraph of paragraph 11 are met;

(b) a written contract between the depositary and the third party expressly transfers the liability of the depositary to that third party and makes it possible for the AIF or the AIFM acting on behalf of the AIF to make a claim against the third party in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf; and

(c) a written contract between the depositary and the AIF or the AIFM acting on behalf of the AIF, expressly allows a discharge of the depositary's liability and establishes the objective reason to contract such a discharge.

14. Further, where the law of a third country requires that certain financial instruments are held in custody by a local entity and there are no local entities that satisfy the delegation requirements laid down in point (d)(ii) of paragraph 11, the depositary can discharge itself of liability provided that the following conditions are met:

(a) the rules or instruments of incorporation of the AIF concerned expressly allow for such a discharge under the conditions set out in this paragraph;

(b) the investors of the relevant AIF have been duly informed of that discharge and of the circumstances justifying the discharge prior to their investment;

(c) the AIF or the AIFM on behalf of the AIF instructed the depositary to delegate the custody of such financial instruments to a local entity;

(d) there is a written contract between the depositary and the AIF or the AIFM acting on behalf of the AIF, which expressly allows such a discharge; and

(e) there is a written contract between the depositary and the third party that expressly transfers the liability of the depositary to that local entity and makes it possible for the AIF or the AIFM acting on behalf of the AIF to make a claim against that local entity in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf.

15. Liability to the investors of the AIF may be invoked directly or indirectly through the AIFM, depending on the legal nature of the relationship between the depositary, the AIFM and the investors.

16. The depositary shall make available to its competent authorities, to the competent authorities of the AIF and to the competent authorities of the AIFM, on request, ~~all~~any information ~~which~~that it has obtained while performing its duties~~and that may be necessary for the competent authorities of the AIF or the AIFM~~.

Where ~~If~~ the competent authorities of the AIF or the AIFM are different from those of the depositary~~,~~;

(a) the competent authorities of the depositary shall share without delay with the competent authorities of the AIF and the AIFM ~~the~~any information relevant for the exercise of those authorities' supervisory powers~~received without delay with the competent authorities of the AIF and the AIFM~~; and

(b) the competent authorities of the AIF or the AIFM shall share without delay with the competent authorities of the depositary any information relevant for the exercise of those authorities' supervisory powers.

17. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying:

(a) the particulars that need to be included in the written contract referred to in paragraph 2;

(b) general criteria for assessing whether the prudential regulation and supervision of third countries as referred to in point (b) of paragraph 6 have the same effect as Union law and are effectively enforced;

(c) the conditions for performing the depositary functions pursuant to paragraphs 7, 8 and 9, including:

(i) the type of financial instruments to be included in the scope of the depositary's custody duties in accordance with point (a) of paragraph 8;

(ii) the conditions subject to which the depositary is able to exercise its custody duties over financial instruments registered with a central securities depositoary; and

(iii) the conditions subject to which the depositary is to safekeep the financial instruments issued in a nominative form and registered with an issuer or a registrar, in accordance with point (b) of paragraph 8;

(d) the due diligence duties of depositaries pursuant to point (c) of paragraph 11;

(e) the segregation obligation pursuant to point (d)(iii) of paragraph 11;

(f) the conditions subject to which and circumstances in which financial instruments held in custody are to be considered as lost;

(g) what is to be understood by external events beyond reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary pursuant to paragraph 12;

(h) the conditions subject to which and circumstances in which there is an objective reason to contract a discharge pursuant to paragraph 13.

CHAPTER IV

TRANSPARENCY REQUIREMENTS

Article 22

Annual report

1. An AIFM shall, for each of the EU AIFs it manages and for each of the AIFs it markets in the Union, make available an annual report for each financial year no later than 6 months following the end of the financial year. The annual report shall be provided to investors on request. The annual report shall be made available to the competent authorities of the home Member State of the AIFM, and, where applicable, the home Member State of the AIF.

Where the AIF is required to make public an annual financial report in accordance with Directive 2004/109/EC only such additional information referred to in paragraph 2 needs to be provided to investors on request, either separately or as an additional part of the annual financial report. In the latter case the annual financial report shall be made public no later than 4 months following the end of the financial year.

2. The annual report shall at least contain the following:

(a) a balance-sheet or a statement of assets and liabilities;

(b) an income and expenditure account for the financial year;

(c) a report on the activities of the financial year;

(d) any material changes in the information listed in Article 23 during the financial year covered by the report;

(e) the total amount of remuneration for the financial year, split into fixed and variable remuneration, paid by the AIFM to its staff, and number of beneficiaries, and, where relevant, carried interest paid by the AIF;

(f) the aggregate amount of remuneration broken down by senior management and members of staff of the AIFM whose actions have a material impact on the risk profile of the AIF.

3. The accounting information given in the annual report shall be prepared in accordance with the accounting standards of the home Member State of the AIF or in accordance with the accounting standards of the third country where the AIF is established and with the accounting rules laid down in the AIF rules or instruments of incorporation.

The accounting information given in the annual report shall be audited by one or more persons empowered by law to audit accounts in accordance with Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts[43]. The auditor's report, including any qualifications, shall be reproduced in full in the annual report.

By way of derogation from the second subparagraph, Member States may permit AIFMs marketing non-EU AIFs to subject the annual reports of those AIFs to an audit meeting international auditing standards in force in the country where the AIF has its registered office.

4. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying the content and format of the annual report. Those measures shall be adapted to the type of AIF to which they apply.

Article 23

Disclosure to investors

1. AIFMs shall for each of the EU AIFs that they manage and for each of the AIFs that they market in the Union make available to AIF investors, in accordance with the AIF rules or instruments of incorporation, the following information before they invest in the AIF, as well as any material changes thereof:

(a) the name of the AIF, a description of the investment strategy and objectives of the AIF, information on where any master AIF is established and where the underlying funds are established if the AIF is a fund of funds, a description of the types of assets in which the AIF may invest, the techniques it may employ and all associated risks, any applicable investment restrictions, the circumstances in which the AIF may use leverage, the types and sources of leverage permitted and the associated risks, any restrictions on the use of leverage and any collateral and asset reuse arrangements, and the maximum level of leverage which the AIFM are entitled to employ on behalf of the AIF;

(b) a description of the procedures by which the AIF may change its investment strategy or investment policy, or both;

(c) a description of the main legal implications of the contractual relationship entered into for the purpose of investment, including information on jurisdiction, on the applicable law and on the existence or not of any legal instruments providing for the recognition and enforcement of judgments in the territory where the AIF is established;

(d) the identity of the AIFM, the AIF's depositary, auditor and any other service providers and a description of their duties and the investors' rights;

(e) a description of how the AIFM is complying with the requirements of Article 9(7);

[43] OJ L 157, 9.6.2006, p. 87.

(f) a description of any delegated management function as referred to in Annex I by the AIFM and of any safe-keeping function delegated by the depositary, the identification of the delegate and any conflicts of interest that may arise from such delegations;

(g) a description of the AIF's valuation procedure and of the pricing methodology for valuing assets, including the methods used in valuing hard-to-value assets in accordance with Article 19;

(h) a description of the AIF's liquidity risk management, including the redemption rights, both in normal and in exceptional circumstances, of~~and~~ the existing redemption arrangements with investors, and of the possibility of, and conditions for, using liquidity management tools selected in accordance with Article 16(2b);

(i) a description of all fees, charges and expenses and of the maximum amounts thereof which are directly or indirectly borne by investors;

(ia) a list of fees, charges and expenses that are borne by the AIFM in connection with the operation of the AIF and that are to be directly or indirectly allocated to the AIF.

(j) a description of how the AIFM ensures a fair treatment of investors and, whenever an investor obtains preferential treatment or the right to obtain preferential treatment, a description of that preferential treatment, the type of investors who obtain such preferential treatment and, where relevant, their legal or economic links with the AIF or AIFM;

(k) the latest annual report referred to in Article 22;

(l) the procedure and conditions for the issue and sale of units or shares;

(m) the latest net asset value of the AIF or the latest market price of the unit or share of the AIF, in accordance with Article 19;

(n) where available, the historical performance of the AIF;

(o) the identity of the prime broker and a description of any material arrangements of the AIF with its prime brokers and the way the conflicts of interest in relation thereto are managed and the provision in the contract with the depositary on the possibility of transfer and reuse of AIF assets, and information about any transfer of liability to the prime broker that may exist;

(p) a description of how and when the information required under paragraphs 4 and 5 will be disclosed.

2. The AIFM shall inform the investors before they invest in the AIF of any arrangement made by the depositary to contractually discharge itself of liability in accordance with Article 21(13). The AIFM shall also inform investors of any changes with respect to depositary liability without delay.

3. Where the AIF is required to publish a prospectus in accordance with Directive 2003/71/EC or in accordance with national law, only such information referred to in paragraphs 1 and 2 which is in addition to that contained in the prospectus needs to be disclosed separately or as additional information in the prospectus.

4. AIFMs shall, for each of the EU AIFs that they manage and for each of the AIFs that they market in the Union, periodically disclose to investors:

(a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;

(b) any new arrangements for managing the liquidity of the AIF;

(c) the current risk profile of the AIF and the risk management systems employed by the AIFM to manage those risks;.

(d) the composition of the loan origination portfolio;

(e) on an annual basis, all fees, charges and expenses that were directly or indirectly borne by investors;

(f) on an annual basis, any parent undertaking, subsidiary or special purpose vehicle utilised in relation to the AIF's investments by or on behalf of the AIFM.

5. AIFMs managing EU AIFs employing leverage or marketing in the Union AIFs employing leverage shall, for each such AIF disclose, on a regular basis:

(a) any changes to the maximum level of leverage which the AIFM may employ on behalf of the AIF as well as any right of the reuse of collateral or any guarantee granted under the leveraging arrangement;

(b) the total amount of leverage employed by that AIF.

6. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying the disclosure obligations of AIFMs referred to in paragraphs 4 and 5, including the frequency of the disclosure referred to in paragraph 5. Those measures shall be adapted to the type of AIFM to which they apply.

7. In order to ensure the uniform application of the rules relating to the name of the AIF, ESMA shall by 16 April 2026 develop guidelines to specify the circumstances in which the name of an AIF is unfair, unclear or misleading. Those guidelines shall take into account relevant sectoral legislation. Sectoral legislation setting standards for fund names or marketing of funds takes precedence over those guidelines.

Article 24

Reporting obligations to competent authorities

1. An AIFM shall regularly report to the competent authorities of its home Member State on the principal markets and instruments in which it trades on behalf of the AIFs it manages.

It The AIFM shall, in respect of each AIF it manages, provide information on the main instruments in which it is trading, on markets of which it is a member or where it actively trades, and on the principal exposures and assets of each AIF. That information shall include identifiers that are necessary to connect the data provided on assets, AIFs and AIFMs to other supervisory or publicly available data sources. and most important concentrations of each of the AIFs it manages.

2. An AIFM shall, for each of the EU AIFs it manages and for each of the AIFs it markets in the Union, provide the following to the competent authorities of its home Member State:

(a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;

(b) any new arrangements for managing the liquidity of the AIF;

(c) the current risk profile of the AIF, including and the risk management systems employed by the AIFM to manage the market risk, liquidity risk, counterparty risk, and other risks including operational risk, and the total amount of leverage employed by the AIF;

(d) information regarding delegation arrangements concerning portfolio management or risk management functions as follows:~~on the main categories of assets in which the AIF invested~~

(i) information on the delegates, specifying their name and domicile or registered office or branch, whether they have any close links with the AIFM, whether they are authorised or regulated entities for the purposes of asset management, their supervisory authority, where relevant, and including the identifiers of the delegates that are necessary to connect the information provided to other supervisory or publicly available data sources;

(ii) the number of full-time equivalent human resources employed by the AIFM for performing day-to-day portfolio management or risk management tasks within that AIFM;

(iii) a list and description of the activities concerning portfolio management and risk management functions which are delegated;

(iv) where the portfolio management function is delegated, the amount and percentage of the AIF's assets which are subject to delegation arrangements concerning the portfolio management function;

(v) the number of full-time equivalent human resources employed by the AIFM to monitor the delegation arrangements;

(vi) the number and dates of the periodic due diligence reviews carried out by the AIFM to monitor the delegated activity, a list of issues identified and, where relevant, of the measures adopted to address those issues and the date by which those measures are to be implemented;

(vii) where sub-delegation arrangements are in place, the information required under points (i), (iii) and (iv) in respect of the sub-delegates and the activities related to the portfolio management and risk management functions that are sub-delegated;

~~(i)~~(viii) the commencement and expiry dates of the delegation and sub-delegation arrangements; ~~and~~

(e) the results of the stress tests performed in accordance with point (b) of Article 15(3) and the second subparagraph of Article 16(1);~~.~~

(f) the list of Member States in which the units or shares of the AIF are actually marketed by the AIFM or by a distributor which is acting on behalf of that AIFM.

3. The AIFM shall, on request, provide the following documents to the competent authorities of its home Member State:

(a) an annual report of each EU AIF managed by the AIFM and of each AIF marketed by it in the Union, for each financial year, in accordance with Article 22(1);

(b) for the end of each quarter a detailed list of all AIFs which the AIFM manages.

4. An AIFM managing AIFs employing leverage on a substantial basis shall make available information about the overall level of leverage employed by each AIF it manages, a break-down between leverage arising from borrowing of cash or securities and leverage embedded in financial derivatives and

the extent to which the AIF's assets have been reused under leveraging arrangements to the competent authorities of its home Member State.

That information shall include the identity of the five largest sources of borrowed cash or securities for each of the AIFs managed by the AIFM, and the amounts of leverage received from each of those sources for each of those AIFs.

For non-EU AIFMs, the reporting obligations referred to in this paragraph are limited to EU AIFs managed by them and non-EU AIFs marketed by them in the Union.

5. Where necessary for the effective monitoring of systemic risk, the competent authorities of the home Member State may require information in addition to that described in this Article, on a periodic as well as on an ad-hoc basis. The competent authorities shall inform ESMA about the additional information requirements.

In exceptional circumstances, and where required in order to ensure the stability and integrity of the financial system, or to promote long-term sustainable growth, ESMA after consulting the ESRB may request the competent authorities of the home Member State of the AIFM to impose additional reporting requirements.

5a. ESMA shall develop draft regulatory technical standards specifying:

(a) the details of the information to be reported in accordance with paragraph 1 and with paragraph 2, points (a), (b), (c), (e) and (f);

(b) the appropriate level of standardisation of the information to be reported in accordance with paragraph 2, point (d);

(c) the reporting frequency and timing.

When developing the draft regulatory technical standards referred to in the first subparagraph, point (b), ESMA shall not introduce reporting obligations in addition to those set out in paragraph 2, point (d).

When developing the draft regulatory technical standards referred to in the first subparagraph, points (a) and (b), ESMA shall take into consideration other reporting requirements to which the AIFMs are subject, international developments and standards, and the findings of the report issued in accordance with Article 69-a(2).

ESMA shall submit those draft regulatory technical standards to the Commission by 16 April 2027.

Power is delegated to the Commission to supplement this Directive by adopting the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.:

5b. ESMA shall develop draft implementing technical standards specifying:

(a) the format and data standards for the reports referred to in paragraphs 1 and 2;

(b) the identifiers that are necessary to connect the data on assets, AIFMs and AIFs in the reports referred to in paragraphs 1 and 2 to other supervisory or publicly available data sources;

(c) the methods and arrangements for submitting the reports referred to in paragraphs 1 and 2 of this Article, including methods and arrangements to improve data standardisation and efficient sharing and use of data already reported in any Union reporting framework by any relevant competent authority, at Union or national level, taking into account the findings of the report issued in accordance with Article 69-a(2);

(d) the template, including the minimum additional reporting requirements, to be used by AIFMs in exceptional circumstances as referred to in paragraph 5, second subparagraph.

ESMA shall submit those draft implementing technical standards to the Commission by 16 April 2027.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

6. The Commission shall adopt~~, by means of~~ delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58~~,~~ to supplement this Directive by~~measures~~ specifying~~:~~ when leverage is to be considered to be employed on a substantial basis for the purposes of paragraph 4 of this Article.

~~(a) when leverage is to be considered to be employed on a substantial basis for the purposes of paragraph 4; and~~

~~(b) the obligations to report and provide information provided for in this Article.~~

~~Those measures shall take into account the need to avoid an excessive administrative burden on competent authorities.~~

CHAPTER V

AIFMs MANAGING SPECIFIC TYPES OF AIF

SECTION 1

AIFMs managing leveraged AIFs

Article 25

Use of information by competent authorities, supervisory cooperation and limits to leverage

1. Member States shall ensure that the competent authorities of the home Member State of the AIFM use the information to be gathered under Article 24 for the purposes of identifying the extent to which the use of leverage contributes to the build-up of systemic risk in the financial system, risks of disorderly markets or risks to the long-term growth of the economy.

2. The competent authorities of the home Member State of the AIFM shall ensure that all information gathered under Article 24 in respect of all AIFMs that they supervise and the information gathered under Article 7 is made available to other relevant competent authorities~~ of other relevant Member States~~, ESMA, EBA, the European Supervisory Authority (European Insurance and Occupational Pensions Authority) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council[44] (known collectively as 'European Supervisory Authorities' or 'ESAs') and the ESRB, whenever necessary for the purpose of carrying out their duties, by means of the procedures set out in Article 50~~ on supervisory cooperation~~.

The competent authorities of the home Member State of the AIFM shall ensure that all information gathered under Article 24 in respect of all AIFMs that they supervise is made available, for statistical purposes only, to the ESCB, by means of the procedures set out in Article 50.

The competent authorities of the home Member State of the AIFM~~They~~ shall, without delay,~~ also~~ provide information by means of th~~os~~e procedures set out in Article 50, and bilaterally to the competent authorities of other Member States directly concerned, if an AIFM under their responsibility, or an AIF managed by

[44] Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).

that AIFM, could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions in other Member States, or to the stability of the financial system in another Member State.

3. The AIFM shall demonstrate that the leverage limits set by it for each AIF it manages are reasonable and that it complies with those limits at all times. The competent authorities shall assess the risks that the use of leverage by an AIFM with respect to the AIFs it manages could entail, and, where deemed necessary in order to ensure the stability and integrity of the financial system, the competent authorities of the home Member State of the AIFM, after having notified ESMA, the ESRB and the competent authorities of the relevant AIF, shall impose limits to the level of leverage that an AIFM are entitled to employ or other restrictions on the management of the AIF with respect to the AIFs under its management to limit the extent to which the use of leverage contributes to the build up of systemic risk in the financial system or risks of disorderly markets. The competent authorities of the home Member State of the AIFM shall duly inform ESMA, the ESRB and the competent authorities of the AIF, of actions taken in this respect, through the procedures set out in Article 50.

4. The notification referred to in paragraph 3 shall be made not less than 10 working days before the proposed measure is intended to take effect or to be renewed. The notification shall include details of the proposed measure, the reasons for the measure and when the measure is intended to take effect. In exceptional circumstances, the competent authorities of the home Member State of the AIFM may decide that the proposed measure takes effect within the period referred to in the first sentence.

5. ESMA shall perform a facilitation and coordination role, and, in particular, shall try to ensure that a consistent approach is taken by competent authorities, in relation to measures proposed by competent authorities under paragraph 3.

6. After receiving the notification referred to in paragraph 3, ESMA shall issue advice to the competent authorities of the home Member State of the AIFM about the measure that is proposed or taken. The advice may, in particular, address whether the conditions for taking action appear to be met, whether the measures are appropriate and the duration of the measures.

7. On the basis of the information received in accordance with paragraph 2, and after taking into account any advice of the ESRB, ESMA may determine that the leverage employed by an AIFM, or by a group of AIFMs, poses a substantial risk to the stability and integrity of the financial system and may issue advice to competent authorities specifying the remedial measures to be taken, including limits to the level of leverage, which that AIFM, or that group of AIFMs, are entitled to employ. ESMA shall immediately inform the competent authorities concerned, the ESRB and the Commission of any such determination.

8. If a competent authority proposes to take action contrary to ESMA's advice referred to in paragraph 6 or 7 it shall inform ESMA, stating its reasons. ESMA may publish the fact that a competent authority does not comply or intend to comply with its advice. ESMA may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority for not complying with its advice. The competent authorities concerned shall receive advance notice about such a publication.

9. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures setting out principles specifying the circumstances in which competent authorities apply the provisions set out in paragraph 3, taking into account different strategies of AIFs, different market conditions in which AIFs operate and possible pro-cyclical effects of applying those provisions.

SECTION 2

Obligations for AIFMs managing AIFs which acquire control of non-listed companies and issuers

Article 26

Scope

1. This Section shall apply to the following:

(a) AIFMs managing one or more AIFs which either individually or jointly on the basis of an agreement aimed at acquiring control, acquire control of a non-listed company in accordance with paragraph 5;

(b) AIFMs cooperating with one or more other AIFMs on the basis of an agreement pursuant to which the AIFs managed by those AIFMs jointly, acquire control of a non-listed company in accordance with paragraph 5.

2. This Section shall not apply where the non-listed companies concerned are:

(a) small and medium-sized enterprises within the meaning of Article 2(1) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises[45]; or

(b) special purpose vehicles with the purpose of purchasing, holding or administrating real estate.

3. Without prejudice to paragraphs 1 and 2 of this Article, Article 27(1) shall also apply to AIFMs managing AIFs that acquire a non-controlling participation in a non-listed company.

4. Article 28(1), (2) and (3) and Article 30 shall apply also to AIFMs managing AIFs that acquire control over issuers. For the purposes of those Articles, paragraphs 1 and 2 of this Article shall apply *mutatis mutandis*.

5. For the purpose of this Section, for non-listed companies, control shall mean more than 50 % of the voting rights of the companies.

When calculating the percentage of voting rights held by the relevant AIF, in addition to the voting rights held directly by the relevant AIF, the voting rights of the following shall be taken into account, subject to control as referred to in the first subparagraph being established:

(a) an undertaking controlled by the AIF; and

(b) a natural or legal person acting in its own name but on behalf of the AIF or on behalf of an undertaking controlled by the AIF.

The percentage of voting rights shall be calculated on the basis of all the shares to which voting rights are attached even if the exercise thereof is suspended.

Notwithstanding point (i) of Article 4(1), for the purpose of Article 28(1), (2) and (3) and Article 30 in regard to issuers control shall be determined in accordance with Article 5(3) of Directive 2004/25/EC.

6. This Section shall apply subject to the conditions and restrictions set out in Article 6 of Directive 2002/14/EC.

7. This Section shall apply without prejudice to any stricter rules adopted by Member States with respect to the acquisition of holdings in issuers and non-listed companies in their territories.

[45] OJ L 124, 20.5.2003, p. 36.

Article 27

Notification of the acquisition of major holdings and control of non-listed companies

1. Member States shall require that when an AIF acquires, disposes of or holds shares of a non-listed company, the AIFM managing such an AIF notify the competent authorities of its home Member State of the proportion of voting rights of the non-listed company held by the AIF any time when that proportion reaches, exceeds or falls below the thresholds of 10 %, 20 %, 30 %, 50 % and 75 %.

2. Member States shall require that when an AIF acquires, individually or jointly, control over a non-listed company pursuant to Article 26(1), in conjunction with paragraph 5 of that Article, the AIFM managing such an AIF notify the following of the acquisition of control by the AIF:

(a) the non-listed company;

(b) the shareholders of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the AIFM has or can obtain access; and

(c) the competent authorities of the home Member State of the AIFM.

3. The notification required under paragraph 2 shall contain the following additional information:

(a) the resulting situation in terms of voting rights;

(b) the conditions subject to which control was acquired, including information about the identity of the different shareholders involved, any natural person or legal entity entitled to exercise voting rights on their behalf and, if applicable, the chain of undertakings through which voting rights are effectively held;

(c) the date on which control was acquired.

4. In its notification to the non-listed company, the AIFM shall request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the acquisition of control by the AIF managed by the AIFM and of the information referred to in paragraph 3. The AIFM shall use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with this Article.

5. The notifications referred to in paragraphs 1, 2 and 3 shall be made as soon as possible, but no later than 10 working days after the date on which the AIF has reached, exceeded or fallen below the relevant threshold or has acquired control over the non-listed company.

Article 28

Disclosure in case of acquisition of control

1. Member States shall require that when an AIF acquires, individually or jointly, control of a non-listed company or an issuer pursuant to Article 26(1), in conjunction with paragraph 5 of that Article, the AIFM managing such AIF shall make the information referred to in paragraph 2 of this Article available to:

(a) the company concerned;

(b) the shareholders of the company of which the identities and addresses are available to the AIFM or can be made available by the company or through a register to which the AIFM has or can obtain access; and

(c) the competent authorities of the home Member State of the AIFM.

Member States may require that the information referred to in paragraph 2 is also made available to the competent authorities of the non-listed company which the Member States may designate to that effect.

2. The AIFM shall make available:

(a) the identity of the AIFMs which either individually or in agreement with other AIFMs manage the AIFs that have acquired control;

(b) the policy for preventing and managing conflicts of interest, in particular between the AIFM, the AIF and the company, including information about the specific safeguards established to ensure that any agreement between the AIFM and/or the AIF and the company is concluded at arm's length; and

(c) the policy for external and internal communication relating to the company in particular as regards employees.

3. In its notification to the company pursuant to point (a) of paragraph 1, the AIFM shall request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the information referred to in paragraph 1. The AIFM shall use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with this Article.

4. Member States shall require that when an AIF acquires, individually or jointly, control of a non-listed company pursuant to Article 26(1), in conjunction with paragraph 5 of that Article, the AIFM managing such AIF ensure that the AIF, or the AIFM acting on behalf of the AIF, disclose its intentions with regard to the future business of the non-listed company and the likely repercussions on employment, including any material change in the conditions of employment, to:

(a) the non-listed company; and

(b) the shareholders of the non-listed company of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the AIFM has or can obtain access.

In addition, the AIFM managing the relevant AIF shall request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information set out in the first subparagraph to the employees' representatives or, where there are none, the employees themselves, of the non-listed company.

5. Member States shall require that when an AIF acquires control of a non-listed company pursuant to Article 26(1), in conjunction with paragraph 5 of that Article, the AIFM managing such an AIF provide the competent authorities of its home Member State and the AIF's investors with information on the financing of the acquisition.

Article 29

Specific provisions regarding the annual report of AIFs exercising control of non-listed companies

1. Member States shall require that when an AIF acquires, individually or jointly, control of a non-listed company pursuant to Article 26(1), in conjunction with paragraph 5 of that Article, the AIFM managing such an AIF shall either:

(a) request and use its best efforts to ensure that the annual report of the non-listed company drawn up in accordance with paragraph 2 is made available by the board of directors of the company to the employees' representatives or, where there are none, to the employees themselves within the period such annual report has to be drawn up in accordance with the national applicable law; or

(b) for each such AIF include in the annual report provided for in Article 22 the information referred to in paragraph 2 relating to the relevant non-listed company.

2. The additional information to be included in the annual report of the company or the AIF, in accordance with paragraph 1, shall include at least a fair review of the development of the company's business representing the situation at the end of the period covered by the annual report. The report shall also give an indication of:

(a) any important events that have occurred since the end of the financial year;

(b) the company's likely future development; and

(c) the information concerning acquisitions of own shares prescribed by Article 22(2) of Council Directive 77/91/EEC[46].

3. The AIFM managing the relevant AIF shall either:

(a) request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information referred to in point (b) of paragraph 1 relating to the company concerned to the employees' representatives of the company concerned or, where there are none, to the employees themselves within the period referred to in Article 22(1); or

(b) make available the information referred to in point (a) of paragraph 1 to the investors of the AIF, in so far as already available, within the period referred to in Article 22(1) and, in any event, no later than the date on which the annual report of the non-listed company is drawn up in accordance with the national applicable law.

Article 30

Asset stripping

1. Member States shall require that when an AIF, individually or jointly, acquires control of a non-listed company or an issuer pursuant to Article 26(1), in conjunction with paragraph 5 of that Article, the AIFM managing such an AIF shall for a period of 24 months following the acquisition of control of the company by the AIF:

(a) not be allowed to facilitate, support or instruct any distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in paragraph 2;

(b) in so far as the AIFM is authorised to vote on behalf of the AIF at the meetings of the governing bodies of the company, not vote in favour of a distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in paragraph 2; and

(c) in any event use its best efforts to prevent distributions, capital reductions, share redemptions and/or the acquisition of own shares by the company as described in paragraph 2.

2. The obligations imposed on AIFMs pursuant to paragraph 1 shall relate to the following:

(a) any distribution to shareholders made when on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the

[46] OJ L 26, 31.1.1977, p. 1.

subscribed capital plus those reserves which may be not distributed under the law or the statutes, on the understanding that where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of subscribed capital;

(b) any distribution to shareholders the amount of which would exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes;

(c) to the extent that acquisitions of own shares are permitted, the acquisitions by the company, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, that would have the effect of reducing the net assets below the amount mentioned in point (a).

3. For the purposes of paragraph 2:

(a) the term 'distribution' referred to in points (a) and (b) of paragraph 2 shall include, in particular, the payment of dividends and of interest relating to shares;

(b) the provisions on capital reductions shall not apply on a reduction in the subscribed capital, the purpose of which is to offset losses incurred or to include sums of money in a non-distributable reserve provided that, following that operation, the amount of such reserve is not more than 10 % of the reduced subscribed capital; and

(c) the restriction set out in point (c) of paragraph 2 shall be subject to points (b) to (h) of Article 20(1) of Directive 77/91/EEC.

CHAPTER VI

RIGHTS OF EU AIFMs TO MARKET AND MANAGE EU AIFs IN THE UNION

Article 30a

Conditions for pre-marketing in the Union by an EU AIFM

1. Member States shall ensure that an authorised EU AIFM may engage in pre-marketing in the Union, except where the information presented to potential professional investors:

(a) is sufficient to allow investors to commit to acquiring units or shares of a particular AIF;

(b) amounts to subscription forms or similar documents whether in a draft or a final form; or

(c) amounts to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in a final form.

Where a draft prospectus or offering documents are provided, they shall not contain information sufficient to allow investors to take an investment decision and shall clearly state that:

(a) they do not constitute an offer or an invitation to subscribe to units or shares of an AIF; and

(b) the information presented therein should not be relied upon because it is incomplete and may be subject to change.

Member States shall ensure that an EU AIFM is not required to notify the competent authorities of the content or of the addressees of pre-marketing, or to fulfil any conditions or requirements other than those set out in this Article, before it engages in pre-marketing.

2. EU AIFMs shall ensure that investors do not acquire units or shares in an AIF through pre-marketing and that investors contacted as part of pre-marketing may only acquire units or shares in that AIF through marketing permitted under Article 31 or 32.

Any subscription by professional investors, within 18 months of the EU AIFM having begun pre-marketing, to units or shares of an AIF referred to in the information provided in the context of pre-marketing, or of an AIF established as a result of the pre-marketing, shall be considered to be the result of marketing and shall be subject to the applicable notification procedures referred to in Articles 31 and 32.

Member States shall ensure that an EU AIFM sends, within two weeks of it having begun pre-marketing, an informal letter, in paper form or by electronic means, to the competent authorities of its home Member State. That letter shall specify the Member States in which and the periods during which the pre-marketing is taking or has taken place, a brief description of the pre-marketing including information on the investment strategies presented and, where relevant, a list of the AIFs and compartments of AIFs which are or were the subject of pre-marketing. The competent authorities of the home Member State of the EU AIFM shall promptly inform the competent authorities of the Member States in which the EU AIFM is or was engaged in pre-marketing. The competent authorities of the Member State in which pre-marketing is taking or has taken place may request the competent authorities of the home Member State of the EU AIFM to provide further information on the pre-marketing that is taking or has taken place on its territory.

3. A third party shall only engage in pre-marketing on behalf of an authorised EU AIFM where it is authorised as an investment firm in accordance with Directive 2014/65/EU of the European Parliament and of the Council[47], as a credit institution in accordance with Directive 2013/36/EU of the European Parliament and of the Council[48], as a UCITS management company in accordance with Directive 2009/65/EC, as an AIFM in accordance with this Directive, or acts as a tied agent in accordance with Directive 2014/65/EU. Such a third party shall be subject to the conditions set out in this Article.

4. An EU AIFM shall ensure that pre-marketing is adequately documented.

Article 31

Marketing of units or shares of EU AIFs in the home Member State of the AIFM

1. Member States shall ensure that an authorised EU AIFM may market units or shares of any EU AIF that it manages to professional investors in the home Member State of the AIFM as soon as the conditions laid down in this Article are met.

Where the EU AIF is a feeder AIF the right to market referred to in the first subparagraph is subject to the condition that the master AIF is also an EU AIF which is managed by an authorised EU AIFM.

2. The AIFM shall submit a notification to the competent authorities of its home Member State in respect of each EU AIF that it intends to market.

That notification shall comprise the documentation and information set out in Annex III.

3. Within 20 working days following receipt of a complete notification file pursuant to paragraph 2, the competent authorities of the home Member State of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 2. The competent authorities

[47] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

[48] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

of the home Member State of the AIFM shall prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Directive or the AIFM otherwise does not or will not comply with this Directive. In the case of a positive decision, the AIFM may start marketing the AIF in its home Member State from the date of the notification by the competent authorities to that effect.

In so far as they are different, the competent authorities of the home Member State of the AIFM shall also inform the competent authorities of the AIF that the AIFM may start marketing units or shares of the AIF.

4. In the event of a material change to any of the particulars communicated in accordance with paragraph 2, the AIFM shall give written notice of that change to the competent authorities of its home Member State at least 1 month before implementing the change as regards any changes planned by the AIFM, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive or the AIFM would otherwise no longer comply with this Directive, the relevant competent authorities shall inform the AIFM without undue delay that it is not to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with this Directive or the AIFM otherwise no longer complies with this Directive, the competent authorities of the home Member State of the AIFM shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF.

5. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine:

(a) the form and content of a model for the notification letter referred to in paragraph 2; and

(b) the form of the written notice referred to in paragraph 4.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

6. Without prejudice to Article 43(1), Member States shall require that AIFs managed and marketed by AIFMs be marketed only to professional investors.

Article 32

Marketing of units or shares of EU AIFs in Member States other than in the home Member State of the AIFM

1. Member States shall ensure that an authorised EU AIFM may market units or shares of an EU AIF that it manages to professional investors in another Member State than the home Member State of the AIFM as soon as the conditions laid down in this Article are met.

Where the EU AIF is a feeder AIF the right to market referred to in the first subparagraph is subject to the condition that the master AIF is also an EU AIF and is managed by an authorised EU AIFM.

2. The AIFM shall submit a notification to the competent authorities of its home Member State in respect of each EU AIF that it intends to market.

That notification shall comprise the documentation and information set out in Annex IV.

3. The competent authorities of the home Member State of the AIFM shall, no later than 20 working days after the date of receipt of the complete notification file referred to in paragraph 2, transmit the complete notification file to the competent authorities of the Member States where it is intended that the AIF be marketed. Such transmission shall occur only if the AIFM's management of the AIF complies with and will continue to comply with this Directive and if the AIFM otherwise complies with this Directive.

The competent authorities of the home Member State of the AIFM shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

4. Upon transmission of the notification file, the competent authorities of the home Member State of the AIFM shall, without delay, notify the AIFM about the transmission. The AIFM may start marketing the AIF in the host Member State of the AIFM as of the date of that notification.

In so far as they are different, the competent authorities of the home Member State of the AIFM shall also inform the competent authorities of the AIF that the AIFM may start marketing the units or shares of the AIF in the host Member State of the AIFM.

5. Arrangements referred to in point (h) of Annex IV shall be subject to the laws and supervision of the host Member State of the AIFM.

6. Member States shall ensure that the notification letter by the AIFM referred to in paragraph 2 and the statement referred to in paragraph 3 are provided in a language customary in the sphere of international finance.

Member States shall ensure that electronic transmission and filing of the documents referred to in paragraph 3 are accepted by their competent authorities.

7. In the event of a material change to any of the particulars communicated in accordance with paragraph 2, the AIFM shall give written notice of that change to the competent authorities of its home Member State at least 1 month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive or the AIFM would otherwise no longer comply with this Directive, the relevant competent authorities of the home Member State of the AIFM shall inform the AIFM within 15 working days of receipt of all the information referred to in the first subparagraph that it is not to implement the change. In that case, the competent authorities of the home Member State of the AIFM shall notify the competent authorities of the host Member State of the AIFM accordingly.

If a planned change is implemented notwithstanding the first and second subparagraphs, or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with this Directive or the AIFM otherwise would no longer comply with this Directive, the competent authorities of the home Member State of the AIFM shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF and shall notify the competent authorities of the host Member State of the AIFM accordingly without undue delay.

If the changes do not affect the compliance of the AIFM's management of the AIF with this Directive, or the compliance by the AIFM with this Directive otherwise, the competent authorities of the home Member State of the AIFM shall within one month inform the competent authorities of the host Member State of the AIFM of those changes.

8. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine:

(a) the form and content of a model for the notification letter referred to in paragraph 2;

(b) the form and content of a model for the statement referred to in paragraph 3;

(c) the form of the transmission referred to in paragraph 3; and

(d) the form of the written notice referred to in paragraph 7.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

9. Without prejudice to Article 43(1), Member States shall require that the AIFs managed and marketed by the AIFM be marketed only to professional investors.

Article 32a

De-notification of arrangements made for the marketing of units or shares of some or all EU AIFs in the Member States other than in the home Member State of the AIFM

1. Member States shall ensure that an EU AIFM may de-notify arrangements made for marketing as regards units or shares of some or all of its AIFs in a Member State in respect of which it has made a notification in accordance with Article 32, where all the following conditions are fulfilled:

(a) except in the case of closed-ended AIFs and funds regulated by Regulation (EU) 2015/760 of the European Parliament and of the Council[49], a blanket offer is made to repurchase or redeem, free of any charges or deductions, all such AIF units or shares held by investors in that Member State, is publicly available for at least 30 working days, and is addressed, directly or through financial intermediaries, individually to all investors in that Member State whose identity is known;

(b) the intention to terminate arrangements made for marketing units or shares of some or all of its AIFs in that Member State is made public by means of a publicly available medium, including by electronic means, which is customary for marketing AIFs and suitable for a typical AIF investor;

(c) any contractual arrangements with financial intermediaries or delegates are modified or terminated with effect from the date of de-notification in order to prevent any new or further, direct or indirect, offering or placement of the units or shares identified in the notification referred to in paragraph 2.

As of the date referred to in point (c) of the first subparagraph, the AIFM shall cease any new or further, direct or indirect, offering or placement of units or shares of the AIF it manages in the Member State in respect of which it has submitted a notification in accordance with paragraph 2.

2. The AIFM shall submit a notification to the competent authorities of its home Member State containing the information referred to in points (a), (b) and (c) of the first subparagraph of paragraph 1.

3. The competent authorities of the home Member State of the AIFM shall verify whether the notification submitted by the AIFM in accordance with paragraph 2 is complete. The competent authorities of the home Member State of the AIFM shall, no later than 15 working days from the receipt of a complete notification, transmit that notification to the competent authorities of the Member State identified in the notification referred to in paragraph 2, and to ESMA.

Upon transmission of the notification pursuant to the first subparagraph, the competent authorities of the home Member State of the AIFM shall promptly notify the AIFM of that transmission.

For a period of 36 months from the date referred to in point (c) of the first subparagraph of paragraph 1, the AIFM shall not engage in pre-marketing of units or shares of the EU AIFs referred to in the notification, or in respect of similar investment strategies or investment ideas, in the Member State identified in the notification referred to in paragraph 2.

4. The AIFM shall provide investors who remain invested in the EU AIF as well as the competent authorities of the home Member State of the AIFM with the information required under Articles 22 and 23.

[49] Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98).

5. The competent authorities of the home Member State of the AIFM shall transmit to the competent authorities of the Member State identified in the notification referred to in paragraph 2, information on any changes to the documentation and information referred to in points (b) to (f) of Annex IV.

6. The competent authorities of the Member State identified in the notification referred to in paragraph 2 of this Article shall have the same rights and obligations as the competent authorities of the host Member State of the AIFM as set out in in Article 45.

7. Without prejudice to other supervisory powers referred to in Article 45(3), as from the date of transmission under paragraph 5 of this Article, the competent authorities of the Member State identified in the notification referred to in paragraph 2 of this Article, shall not require the AIFM concerned to demonstrate compliance with national laws, regulations and administrative provisions governing marketing requirements as referred to in Article 5 of Regulation (EU) 2019/1156 of the European Parliament and of the Council[50].

8. Member States shall allow for the use of any electronic or other distance communication means for the purposes of paragraph 4.

Article 33

Conditions for managing EU AIFs established in other Member States and for providing services in other Member States

1. Member States shall ensure that an authorised EU AIFM may, directly or by establishing a branch:

(a) manage EU AIFs established in another Member State, provided that the AIFM is authorised to manage that type of AIF;

(b) provide in another Member State the services referred to in Article 6(4) for which it has been authorised.

2. An AIFM intending to provide the activities and services referred to in paragraph 1 for the first time shall communicate the following information to the competent authorities of its home Member State:

(a) the Member State in which it intends to manage AIFs directly or to establish a branch, and/or to provide the services referred to in Article 6(4);

(b) a programme of operations stating in particular the services which it intends to perform and/or identifying the AIFs that it intends to manage.

3. If the AIFM intends to establish a branch, it shall provide the following information in addition to that referred to in paragraph 2:

(a) the organisational structure of the branch;

(b) the address in the home Member State of the AIF from which documents may be obtained;

(c) the names and contact details of the persons responsible for the management of the branch.

4. The competent authorities of the home Member State of the AIFM shall, within 1 month of receiving the complete documentation in accordance with paragraph 2 or within 2 months of receiving the complete documentation in accordance with paragraph 3, transmit the complete documentation to the competent authorities of the host Member State of the AIFM. Such transmission shall occur only if the

[50] Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014 (OJ L 188, 12.7.2019, p. 55).

AIFM's management of the AIF complies, and will continue to comply, with this Directive and the AIFM otherwise complies with this Directive.

The competent authorities of the home Member State of the AIFM shall enclose a statement to the effect that the AIFM concerned is authorised by them.

The competent authorities of the home Member State of the AIFM shall immediately notify the AIFM about the transmission.

Upon receipt of the transmission notification the AIFM may start to provide its services in its host Member State.

5. The host Member State of the AIFM shall not impose any additional requirements on the AIFM concerned in respect of the matters covered by this Directive.

6. In the event of a change to any of the information communicated in accordance with paragraph 2, and, where relevant, paragraph 3, an AIFM shall give written notice of that change to the competent authorities of its home Member State at least 1 month before implementing planned changes, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive or the AIFM would otherwise no longer comply with this Directive, the relevant competent authorities of the home Member State of the AIFM shall inform the AIFM within 15 working days of receipt of all the information referred to in the first subparagraph that it is not to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with this Directive or the AIFM otherwise would no longer comply with this Directive, the competent authorities of the home Member State of the AIFM shall take all due measures in accordance with Article 46 and shall notify accordingly the competent authorities of the host Member State of the AIFM without undue delay.

If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with this Directive, or the compliance by the AIFM with this Directive otherwise, the competent authorities of the home Member State of the AIFM shall, without undue delay, inform the competent authorities of the host Member States of the AIFM of those changes.

7. In order to ensure consistent harmonisation of this Article, ESMA may develop draft regulatory technical standards to specify the information to be notified in accordance with paragraphs 2 and 3.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

8. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to establish standard forms, templates and procedures for the transmission of information in accordance with paragraphs 2 and 3.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

CHAPTER VII

SPECIFIC RULES IN RELATION TO THIRD COUNTRIES

Article 34

Conditions for EU AIFMs which manage non-EU AIFs which are not marketed in Member States

1. Member States shall ensure that an authorised EU AIFM may manage non-EU AIFs which are not marketed in the Union provided that:

(a) the AIFM complies with all the requirements established in this Directive except for Article 21 and 22 in respect of those AIFs; and

(b) appropriate cooperation arrangements are in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information that allows competent authorities of the home Member State of the AIFM to carry out their duties in accordance with this Directive.

2. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

3. In order to ensure uniform application of this Article, ESMA shall develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 1.

Article 35

Conditions for the marketing in the Union with a passport of a non-EU AIF managed by an EU AIFM

1. Member States shall ensure that an authorised EU AIFM may market to professional investors in the Union units or shares of non-EU AIFs it manages and of EU feeder AIFs that do not fulfil the requirements referred to in the second subparagraph of Article 31(1) as soon as the conditions laid down in this Article are met.

2. AIFMs shall comply with all the requirements established in this Directive, with the exception of Chapter VI. In addition the following conditions shall be met:

(a) appropriate cooperation arrangements must be in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information, taking into account Article 50(4), that allows the competent authorities to carry out their duties in accordance with this Directive;

(b) the third country where the non-EU AIF is established is not identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849~~listed as a Non-Cooperative Country and Territory by FATF~~;

(c) the third country where the non-EU AIF is established has signed an agreement with the home Member State of the authorised AIFM and with each other Member State in which the units or shares of the non-EU AIF are intended to be marketed, which fully complies with the standards laid down in Article 26 of the

OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements, and that third country is not mentioned in Annex I to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes.

Where a competent authority of another Member State disagrees with the assessment made on the application of points (a) and (b) of the first subparagraph by the competent authorities of the home Member State of the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

3. If an AIFM intends to market units or shares of non-EU AIFs in its home Member State, the AIFM shall submit a notification to the competent authorities of its home Member State in respect of each non-EU AIF that it intends to market.

That notification shall comprise the documentation and information set out in Annex III.

4. No later than 20 working days after receipt of a complete notification pursuant to paragraph 3, the competent authorities of the home Member State of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 3 in its territory. The competent authorities of the home Member State of the AIFM shall prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Directive or the AIFM otherwise does not or will not comply with this Directive. In the case of a positive decision, the AIFM may start marketing the AIF in its home Member State as of the date of the notification by the competent authorities to that effect.

The competent authorities of the home Member State of the AIFM shall also inform ESMA that the AIFM may start marketing the units or shares of the AIF in the home Member State of the AIFM.

5. If an AIFM intends to market units or shares of non-EU AIFs in a Member State other than its home Member State, the AIFM shall submit a notification to the competent authorities of its home Member State in respect of each non-EU AIF that it intends to market.

That notification shall comprise the documentation and information set out in Annex IV.

6. The competent authorities of the home Member State of the AIFM shall, no later than 20 working days after the date of receipt of the complete notification file referred to in paragraph 5, transmit that complete notification file to the competent authorities of the Member State where the AIF is intended to be marketed. Such transmission will occur only if the AIFM's management of the AIF complies and will continue to comply with this Directive and that the AIFM otherwise complies with this Directive.

The competent authorities of the home Member State of the AIFM shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

7. Upon transmission of the notification file, the competent authorities of the home Member State of the AIFM shall, without delay, notify the AIFM about the transmission. The AIFM may start marketing the AIF in the relevant host Member States of the AIFM as of the date of that notification by the competent authorities.

The competent authorities of the home Member State of the AIFM shall also inform ESMA that the AIFM may start marketing the units or shares of the AIF in the host Member States of the AIFM.

8. Arrangements referred to in point (h) of Annex IV shall be subject to the laws and supervision of the host Member States of the AIFM.

9. Member States shall ensure that the notification letter of the AIFM referred to in paragraph 5 and the statement referred to in paragraph 6 are provided in a language customary in the sphere of international finance.

Member States shall ensure that electronic transmission and filing of the documents referred to in paragraph 6 are accepted by their competent authorities.

10. In the event of a material change to any of the particulars communicated in accordance with paragraph 3 or 5, the AIFM shall give written notice of that change to the competent authorities of its home Member State, at least 1 month before implementing a planned change, or immediately after an unplanned change has occurred.

If pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive or the AIFM would no longer comply with this Directive, the competent authorities of the home Member State of the AIFM shall inform the AIFM without undue delay that it is not to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs, or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with this Directive or the AIFM otherwise would no longer comply with this Directive, the competent authorities of the home Member State of the AIFM shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF.

If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with this Directive, or the compliance by the AIFM with this Directive otherwise, the competent authorities of the home Member State of the AIFM shall, without delay, inform ESMA in so far as the changes concern the termination of the marketing of certain AIFs or additional AIFs marketed and, if applicable, the competent authorities of the host Member States of the AIFM of those changes.

11. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in point (a) of paragraph 2 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

12. In order to ensure uniform application of this Article, ESMA may develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in point (a) of paragraph 2.

13. ESMA shall develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in point (a) of paragraph 2 so as to ensure that both the competent authorities of the home and the host Member States receive sufficient information in order to be able to exercise their supervisory and investigatory powers under this Directive.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Article 10 to 14 of Regulation (EU) No 1095/2010.

14. In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to specify the procedures for coordination and exchange of information between the competent authority of the home Member State and the competent authorities of the host Member States of the AIFM.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

15. In case a competent authority rejects a request to exchange information in accordance with the regulatory technical standards referred to in paragraph 14, the competent authorities concerned may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

16. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine:

(a) the form and content of a model for the notification letter referred to in paragraph 3;

(b) the form and content of a model for the notification letter referred to in paragraph 5;

(c) the form and content of a model for the statement referred to in paragraph 6;

(d) the form of the transmission referred to in paragraph 6;

(e) the form of the written notice referred to in paragraph 10.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

17. Without prejudice to Article 43(1), Member States shall require that the AIFs managed and marketed by the AIFM be marketed only to professional investors.

Article 36

Conditions for the marketing in Member States without a passport of non-EU AIFs managed by an EU AIFM

1. Without prejudice to Article 35, Member States may allow an authorised EU AIFM to market to professional investors, in their territory only, units or shares of non-EU AIFs it manages and of EU feeder AIFs that do not fulfil the requirements referred to in the second subparagraph of Article 31(1), provided that:

(a) the AIFM complies with all the requirements established in this Directive with the exception of Article 21. That AIFM shall however ensure that one or more entities are appointed to carry out the duties referred to in Article 21(7), (8) and (9). The AIFM shall not perform those functions. The AIFM shall provide its supervisory authorities with information about the identity of those entities responsible for carrying out the duties referred to in Article 21(7), (8) and (9);

(b) appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows the competent authorities of the home Member State of the AIFM to carry out their duties in accordance with this Directive;

(c) the third country where the non-EU AIF is established is not identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849;~~listed as a Non-Cooperative Country and Territory by FATF.~~

(d) the third country where the non-EU AIF is established has signed an agreement with the home Member State of the authorised AIFM and with each other Member State in which the units or shares of the non-EU AIF are intended to be marketed which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements, and that third country is not mentioned in Annex I to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes.

2. Member States may impose stricter rules on the AIFM in respect of the marketing of units or shares of non-EU AIFs to investors in their territory for the purpose of this Article.

3. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

4. In order to ensure uniform application of this Article, ESMA shall develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 1.

Article 37

Authorisation of non-EU AIFMs intending to manage EU AIFs and/or market AIFs managed by them in the Union in accordance with Article 39 or 40

1. Member States shall require that non-EU AIFMs intending to manage EU AIFs and/or to market AIFs managed by them in the Union in accordance with Article 39 or 40 acquire prior authorisation by the competent authorities of their Member State of reference in accordance with this Article.

2. A non-EU AIFM intending to obtain prior authorisation as referred to in paragraph 1 shall comply with this Directive, with the exception of Chapter VI. If and to the extent that compliance with a provision of this Directive is incompatible with compliance with the law to which the non-EU AIFM and/or the non-EU AIF marketed in the Union is subject, there shall be no obligation on the AIFM to comply with that provision of this Directive if it can demonstrate that:

(a) it is impossible to combine such compliance with compliance with a mandatory provision in the law to which the non-EU AIFM and/or the non-EU AIF marketed in the Union is subject;

(b) the law to which the non-EU AIFM and/or the non-EU AIF is subject provides for an equivalent rule having the same regulatory purpose and offering the same level of protection to the investors of the relevant AIF; and

(c) the non-EU AIFM and/or the non-EU AIF complies with the equivalent rule referred to in point (b).

3. A non-EU AIFM intending to obtain prior authorisation as referred to in paragraph 1 shall have a legal representative established in its Member State of reference. The legal representative shall be the contact point of the AIFM in the Union and any official correspondence between the competent authorities and the AIFM and between the EU investors of the relevant AIF and the AIFM as set out in this Directive shall take place through that legal representative. The legal representative shall perform the compliance function relating to the management and marketing activities performed by the AIFM under this Directive together with the AIFM.

4. The Member State of reference of a non-EU AIFM shall be determined as follows:

(a) if the non-EU AIFM intends to manage only one EU AIF, or several EU AIFs established in the same Member State, and does not intend to market any AIF in accordance with Article 39 or 40 in the Union, the home Member State of that or those AIFs is deemed to be the Member State of reference and the competent authorities of this Member State will be competent for the authorisation procedure and for the supervision of the AIFM;

(b) if the non-EU AIFM intends to manage several EU AIFs established in different Member States and does not intend to market any AIF in accordance with Article 39 or 40 in the Union, the Member State of reference is either:

(i) the Member State where most of the AIFs are established; or

(ii) the Member State where the largest amount of assets is being managed;

(c) if the non-EU AIFM intends to market only one EU AIF in only one Member State, the Member State of reference is determined as follows:

(i) if the AIF is authorised or registered in a Member State, the home Member State of the AIF or the Member State where the AIFM intends to market the AIF;

(ii) if the AIF is not authorised or registered in a Member State, the Member State where the AIFM intends to market the AIF;

(d) if the non-EU AIFM intends to market only one non-EU AIF in only one Member State, the Member State of reference is that Member State;

(e) if the non-EU AIFM intends to market only one EU AIF, but in different Member States, the Member State of reference is determined as follows:

(i) if the AIF is authorised or registered in a Member State, the home Member State of the AIF or one of the Member States where the AIFM intends to develop effective marketing; or

(ii) if the AIF is not authorised or registered in a Member State, one of the Member States where the AIFM intends to develop effective marketing;

(f) if the non-EU AIFM intends to market only one non-EU AIF, but in different Member States, the Member State of reference is one of those Member States;

(g) if the non-EU AIFM intends to market several EU AIFs in the Union, the Member State of reference is determined as follows:

(i) in so far as those AIFs are all registered or authorised in the same Member State, the home Member State of those AIFs or the Member State where the AIFM intends to develop effective marketing for most of those AIFs;

(ii) in so far as those AIFs are not all registered or authorised in the same Member State, the Member State where the AIFM intends to develop effective marketing for most of those AIFs;

(h) if the non-EU AIFM intends to market several EU and non-EU AIFs, or several non-EU AIFs in the Union, the Member State of reference is the Member State where it intends to develop effective marketing for most of those AIFs.

In accordance with the criteria set out in points (b), (c)(i), (e), (f), and (g)(i) of the first subparagraph, more than one Member State of reference is possible. In such cases, Member States shall require that the non-EU AIFM intending to manage EU AIFs without marketing them and/or market AIFs managed by it in the Union in accordance with Article 39 or 40 submit a request to the competent authorities of all of the Member States that are possible Member States of reference in accordance with the criteria set out in those points, to determine its Member State of reference from among them. Those competent authorities shall jointly decide the Member State of reference for the non-EU AIFM, within 1 month of receipt of such

request. The competent authorities of the Member State that is appointed as Member State of reference shall, without undue delay, inform the non-EU AIFM of that appointment. If the non-EU AIFM is not duly informed of the decision made by the relevant competent authorities within 7 days of the decision or if the relevant competent authorities have not made a decision within the 1-month period, the non-EU AIFM may itself choose its Member State of reference based on the criteria set out in this paragraph.

The AIFM shall be able to prove its intention to develop effective marketing in a particular Member State by disclosure of its marketing strategy to the competent authorities of the Member State indicated by it.

5. Member States shall require that a non-EU AIFM intending to manage EU AIFs without marketing them and/or to market AIFs managed by it in the Union in accordance with Article 39 or 40 submit a request for authorisation to its Member State of reference.

After receiving the application for authorisation, the competent authorities shall assess whether the determination by the AIFM as regards its Member State of reference complies with the criteria laid down in paragraph 4. If the competent authorities consider that this is not the case, they shall refuse the authorisation request of the non-EU AIFM explaining the reasons for their refusal. If the competent authorities consider that the criteria of paragraph 4 have been complied with, they shall notify ESMA, requesting advice on their assessment. In their notification to ESMA, the competent authorities shall provide ESMA with the justification by the AIFM of its assessment regarding the Member State of reference and with information on the marketing strategy of the AIFM.

Within 1 month of having received the notification referred to in the second subparagraph, ESMA shall issue advice to the relevant competent authorities about their assessment on the Member State of reference in accordance with the criteria set out in paragraph 4. ESMA shall issue a negative advice only if it considers that the criteria set out in paragraph 4 have not been complied with.

The term referred to in Article 8(5) shall be suspended during ESMA's deliberation in accordance with this paragraph.

If the competent authorities propose to grant authorisation contrary to ESMA's advice referred to in the third subparagraph they shall inform ESMA, stating their reasons. ESMA shall publish the fact that the competent authorities do not comply or intend to comply with its advice. ESMA may also decide, on a case-by-case basis, to publish the reasons provided by the competent authorities for not complying with that advice. The competent authorities shall receive advance notice about such a publication.

If the competent authorities propose to grant authorisation contrary to ESMA's advice referred to in the third subparagraph and the AIFM intends to market units or shares of AIFs managed by it in Member States other than the Member State of reference, the competent authorities of the Member State of reference shall also inform the competent authorities of those Member States thereof, stating their reasons. In so far as applicable, the competent authorities of the Member State of reference shall also inform the competent authorities of the home Member States of the AIFs managed by the AIFM thereof, stating their reasons.

6. Where a competent authority of a Member State disagrees with the determination of the Member State of reference by the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

7. Without prejudice to paragraph 8, no authorisation shall be granted unless the following additional conditions are met:

(a) the Member State of reference is indicated by the AIFM in accordance with the criteria set out in paragraph 4 and supported by the disclosure of the marketing strategy, and the procedure set out in paragraph 5 has been followed by the relevant competent authorities;

(b) the AIFM has appointed a legal representative established in the Member State of reference;

(c) the legal representative shall, together with the AIFM, be the contact person of the non-EU AIFM for the investors of the relevant AIFs, for ESMA and for the competent authorities as regards the activities for which the AIFM is authorised in the Union and shall at least be sufficiently equipped to perform the compliance function pursuant to this Directive;

(d) appropriate cooperation arrangements are in place between the competent authorities of the Member State of reference, the competent authorities of the home Member State of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established in order to ensure at least an efficient exchange of information that allows the competent authorities to carry out their duties in accordance with this Directive;

(e) the third country where the non-EU AIFM is established is not identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849~~listed as a Non-Cooperative Country and Territory by FATF~~;

(f) the third country where the non-EU AIFM is established has signed an agreement with the Member State of reference, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements, and that third country is not mentioned in Annex I to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes;

(g) the effective exercise by the competent authorities of their supervisory functions under this Directive is neither prevented by the laws, regulations or administrative provisions of a third country governing the AIFM, nor by limitations in the supervisory and investigatory powers of that third country's supervisory authorities.

If the third country where the non-EU AIFM is established is identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849, as referred to in the first subparagraph, point (e), or is added to Annex I to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes, as referred to in the first subparagraph, point (f), after the time of authorisation of the non-EU AIFM, the non-EU AIFM shall, within an appropriate period, take such measures as are necessary to rectify the situation in respect of the AIFs that it manages, taking due account of the interests of investors. That period shall be no longer than two years.

Where a competent authority of another Member State disagrees with the assessment made on the application of points (a) to (e) and (g) of this paragraph by the competent authorities of the Member State of reference of the AIFM, the competent authorities concerned may refer the matter to the ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

Where a competent authority of an EU AIF does not enter into the required cooperation arrangements as set out in point (d) of the first subparagraph within a reasonable period of time, the competent authorities of the Member State of reference may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

8. The authorisation shall be given in accordance with Chapter II which shall apply *mutatis mutandis* subject to the following criteria:

(a) the information referred to in Article 7(2) shall be supplemented by:

(i) a justification by the AIFM of its assessment regarding the Member State of reference in accordance with the criteria set out in paragraph 4 with information on the marketing strategy;

(ii) a list of the provisions of this Directive for which compliance by the AIFM is impossible as compliance by the AIFM with those provisions is, in accordance with paragraph 2, incompatible with compliance with a mandatory provision in the law to which the non-EU AIFM or the non-EU AIF marketed in the Union is subject;

(iii) written evidence based on the regulatory technical standards developed by ESMA that the relevant third country law provides for a rule equivalent to the provisions for which compliance is impossible, which has the same regulatory purpose and offers the same level of protection to the investors of the relevant AIFs and that the AIFM complies with that equivalent rule; such written evidence being supported by a legal opinion on the existence of the relevant incompatible mandatory provision in the law of the third country and including a description of the regulatory purpose and the nature of the investor protection pursued by it; and

(iv) the name of the legal representative of the AIFM and the place where it is established;

(b) the information referred to in Article 7(3) may be limited to the EU AIFs the AIFM intends to manage and to those AIFs managed by the AIFM that it intends to market in the Union with a passport;

(c) point (a) of Article 8(1) shall be without prejudice to paragraph 2 of this Article;

(d) point (e) of Article 8(1) shall not apply;

(e) the second subparagraph of Article 8(5) shall be read as including a reference to 'the information referred to in point (a) of Article 37(8)'.

Where a competent authority of another Member State disagrees with the authorisation granted by the competent authorities of the Member State of reference of the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

9. In case the competent authorities of the Member State of reference consider that the AIFM may rely on paragraph 2 to be exempted from compliance with certain provisions of this Directive, they shall, without undue delay, notify ESMA thereof. They shall support this assessment by the information provided by the AIFM in accordance with points (a)(ii) and (iii) of paragraph 8.

Within 1 month of receipt of the notification referred to in the first subparagraph, ESMA shall issue advice to the competent authorities about the application of the exemption for compliance with this Directive caused by the incompatibility in accordance with paragraph 2. The advice may, in particular, address whether the conditions for such exemption appear to be met based on the information provided by the AIFM in accordance with points (a)(ii) and (iii) of paragraph 8 and on the regulatory technical standards on equivalence. ESMA shall seek to build a common European supervisory culture and consistent supervisory practices and ensure consistent approaches among competent authorities in relation to the application of this paragraph.

The term referred to in Article 8(5) shall be suspended during the ESMA review in accordance with this paragraph.

If the competent authorities of the Member State of reference propose to grant authorisation contrary to ESMA's advice referred to in the second subparagraph they shall inform ESMA, stating their reasons. ESMA shall publish the fact that the competent authorities do not comply or intend to comply with that advice. ESMA may also decide, on a case-by-case basis, to publish the reasons provided by the competent authorities for not complying with that advice. The competent authorities concerned shall receive advance notice of such publication.

If the competent authorities propose to grant authorisation contrary to the ESMA advice referred to in the second subparagraph and the AIFM intends to market units or shares of AIFs managed by it in Member States other than the Member State of reference, the competent authorities of the Member State of reference shall also inform the competent authorities of those Member States thereof, stating their reasons.

Where a competent authority of another Member State disagrees with the assessment made on the application of this paragraph by the competent authorities of the Member State of reference of the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

10. The competent authorities of the Member State of reference shall, without undue delay, inform ESMA of the outcome of the initial authorisation process, about any changes in the authorisation of the AIFM and any withdrawal of authorisation.

The competent authorities shall inform ESMA about the applications for authorisation that they have rejected, providing data about the AIFM having asked for authorisation and the reasons for the rejection. ESMA shall keep a central register of those data, which shall be at the disposal of competent authorities, on request. Competent authorities shall treat this information as confidential.

11. The determination of the Member State of reference shall not be affected by the further business development of the AIFM in the Union. However, where the AIFM changes its marketing strategy within 2 years of its initial authorisation, and that change would have affected the determination of the Member State of reference if the modified marketing strategy had been the initial marketing strategy, the AIFM shall notify the competent authorities of the original Member State of reference of the change before implementing it and indicate its Member State of reference in accordance with the criteria set out in paragraph 4 and based on the new strategy. The AIFM shall justify its assessment by disclosing its new marketing strategy to its original Member State of reference. At the same time the AIFM shall provide information on its legal representative, including its name and the place where it is established. The legal representative shall be established in the new Member State of reference.

The original Member State of reference shall assess whether the determination of the AIFM in accordance with the first subparagraph is correct and shall notify ESMA thereof. ESMA shall issue advice on the assessment made by the competent authorities. In their notification to ESMA, the competent authorities shall provide the AIFM's justification of its assessment regarding the Member State of reference and information on the AIFM's new marketing strategy.

Within 1 month of receipt of the notification referred to in the second subparagraph, ESMA shall issue advice to the relevant competent authorities about their assessment. ESMA shall issue a negative advice only where it considers that the criteria set out in paragraph 4 have not been complied with.

After receipt of ESMA's advice in accordance with the third subparagraph, the competent authorities of the original Member State of reference shall inform the non-EU AIFM, its original legal representative and ESMA of their decision.

Where the competent authorities of the original Member State of reference agree with the assessment made by the AIFM, they shall also inform the competent authorities of the new Member State of reference of the change. The original Member State of reference shall, without undue delay, transfer a copy of the authorisation and the supervision file relating to the AIFM to the new Member State of reference. From

the date of transmission of the authorisation and supervision file, the competent authorities of the new Member State of reference shall be competent for authorising and supervising the AIFM.

Where the competent authorities' final assessment is contrary to ESMA's advice referred to in the third subparagraph:

(a) the competent authorities shall inform ESMA thereof, stating reasons. ESMA shall publish the fact that the competent authorities do not comply, or intend not to comply, with its advice. ESMA may also decide, on a case-by-case basis, to publish the reasons for non-compliance provided by the competent authorities. The competent authorities concerned shall receive advance notice of such publication;

(b) where the AIFM markets units or shares of AIFs managed by it in Member States other than the original Member State of reference, the competent authorities of the original Member State of reference shall inform the competent authorities of those other Member States thereof, stating reasons. Where applicable, the competent authorities of the Member State of reference shall also inform the competent authorities of the home Member States of the AIFs managed by the AIFM thereof, stating reasons.

12. Where it appears from the actual course of the business development of the AIFM in the Union within 2 years after its authorisation that the marketing strategy as presented by the AIFM at the time of its authorisation was not followed, the AIFM made false statements in relation thereto or the AIFM has failed to comply with paragraph 11 when changing its marketing strategy, the competent authorities of the original Member State of reference shall request that the AIFM indicate the Member State of reference based on its actual marketing strategy. The procedure set out in paragraph 11 shall apply *mutatis mutandis*. If the AIFM does not comply with the competent authorities' request, they shall withdraw its authorisation.

Where the AIFM changes its marketing strategy after the period referred to in paragraph 11 and intends to change its Member State of reference on the basis of its new marketing strategy, it may submit a request to change its Member State of reference to the competent authorities of the original Member State of reference. The procedure referred to in paragraph 11 shall apply *mutatis mutandis*.

Where a competent authority of a Member State disagrees with the assessment made on the determination of the Member State of reference under paragraph 11 or under this paragraph, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

13. Any disputes arising between the competent authorities of the Member State of reference of the AIFM and the AIFM shall be settled in accordance with the law of and subject to the jurisdiction of the Member State of reference.

Any disputes between the AIFM or the AIF and EU investors of the relevant AIF shall be settled in accordance with the law of and subject to the jurisdiction of a Member State.

14. The Commission shall adopt implementing acts with a view to specifying the procedure to be followed by the possible Member States of reference when determining the Member State of reference from among those Member States in accordance with the second subparagraph of paragraph 4. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 59(2).

15. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in point (d) of paragraph 7 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

16. In order to ensure uniform application of this Article, ESMA may develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in point (d) of paragraph 7.

17. ESMA shall develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in point (d) of paragraph 7 so as to ensure that the competent authorities of the Member State of reference and the competent authorities of the host Member States receive sufficient information in order to be able to exercise their supervisory and investigatory powers under this Directive.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

18. In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to specify the procedures for coordination and exchange of information between the competent authority of the Member State of reference and the competent authorities of the host Member States of the AIFM.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

19. In case a competent authority rejects a request to exchange information in accordance with the regulatory technical standards referred to in paragraph 17, the competent authorities concerned may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

20. In accordance with Article 29 of Regulation (EU) No 1095/2010, ESMA shall promote an effective bilateral and multilateral exchange of information between the competent authorities of the Member State of reference of the non-EU AIFM and the competent authorities of the host Member States of the AIFM concerned, with full respect for the applicable confidentiality and data protection provisions provided for in the relevant Union legislation.

21. In accordance with Article 31 of Regulation (EU) No 1095/2010, ESMA shall fulfil a general coordination role between the competent authority of the Member State of reference of the non-EU AIFM and the competent authorities of the host Member States of the AIFM concerned. In particular, ESMA may:

(a) facilitate the exchange of information between the competent authorities concerned;

(b) determine the scope of the information that the competent authority of the Member State of reference must provide to the competent authorities of the host Member States concerned;

(c) take all appropriate measures in case of developments which may jeopardise the functioning of the financial markets with a view to facilitating the coordination of actions undertaken by the competent authority of the Member State of reference and the competent authorities of the host Member States in relation to non-EU AIFMs.

22. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine the form and content of the request referred to in the second subparagraph of paragraph 12.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

23. In order to ensure the uniform application of this Article, ESMA shall develop draft regulatory technical standards on the following:

(a) the manner in which an AIFM must comply with the requirements laid down in this Directive, taking into account that the AIFM is established in a third country and, in particular, the presentation of the information required in Articles 22 to 24;

(b) the conditions under which the law to which a non-EU AIFM or a non-EU AIF is subject is considered to provide for an equivalent rule having the same regulatory purpose and offering the same level of protection to the relevant investors.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Article 10 to 14 of Regulation (EU) No 1095/2010.

Article 38

Peer review of authorisation and supervision of non-EU AIFMs

1. ESMA shall, on an annual basis, conduct a peer review analysis of the supervisory activities of the competent authorities in relation to the authorisation and the supervision of non-EU AIFMs under Articles 37, 39, 40 and 41, to further enhance consistency in supervisory outcomes, in accordance with Article 30 of Regulation (EU) No 1095/2010.

2. By 22 July 2013, ESMA shall develop methods to allow for objective assessment and comparison between the authorities reviewed.

3. In particular, the peer review analysis shall include an assessment of:

(a) the degree of convergence in supervisory practices achieved in the authorisation and supervision of non-EU AIFMs;

(b) the extent to which the supervisory practice achieves the objectives set out in this Directive;

(c) the effectiveness and the degree of convergence achieved with regard to the enforcement of this Directive and its implementing measures and the regulatory and implementing technical standards developed by ESMA pursuant to this Directive, including administrative measures and penalties imposed against non-EU AIFMs where this Directive has not been complied with.

4. On the basis of the conclusions of the peer review, ESMA may issue guidelines and recommendations pursuant to Article 16 of Regulation (EU) No 1095/2010, with a view to establishing consistent, efficient and effective supervisory practices of non-EU AIFMs.

5. The competent authorities shall make every effort to comply with those guidelines and recommendations.

6. Within 2 months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or intend to comply, it shall inform ESMA, stating its reasons.

7. ESMA shall publish the fact that a competent authority does not comply or intend to comply with that guideline or recommendation. ESMA may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority for not complying with that guideline or recommendation. The competent authority shall receive advance notice of such a publication.

8. In the report referred to in Article 43(5) of Regulation (EU) No 1095/2010, ESMA shall inform the European Parliament, the Council and the Commission of the guidelines and recommendations issued pursuant to this Article, stating which competent authorities have not complied with them, and outlining how ESMA intends to ensure that those competent authorities comply with its recommendations and guidelines in the future.

9. The Commission shall duly take those reports into account in its review of this Directive in accordance with Article 69 and in any subsequent evaluation that it conducts.

10. ESMA shall make the best practices that can be identified from peer reviews publicly available. In addition, all other results of peer reviews may be made public, subject to the agreement of the competent authority being the subject of the peer review.

Article 39

Conditions for the marketing in the Union with a passport of EU AIFs managed by a non-EU AIFM

1. Member States shall ensure that a duly authorised non-EU AIFM may market the units or shares of an EU AIF it manages to professional investors in the Union with a passport as soon as the conditions laid down in this Article are met.

2. In case the AIFM intends to market units or shares of the EU AIF in its Member State of reference, the AIFM shall submit a notification to the competent authorities of its Member State of reference in respect of each EU AIF that it intends to market.

That notification shall comprise the documentation and information set out in Annex III.

3. No later than 20 working days after receipt of a complete notification pursuant to paragraph 2, the competent authorities of the Member State of reference of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 2 in its territory. The competent authorities of the Member State of reference of the AIFM may prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Directive or if the AIFM otherwise does not or will not comply with this Directive. In the case of a positive decision, the AIFM may start marketing the AIF in its Member State of reference as of the date of the notification by the competent authorities to that effect.

The competent authorities of the Member State of reference of the AIFM shall also inform ESMA and the competent authorities of the AIF that the AIFM may start marketing units or shares of the AIF in the Member State of reference of the AIFM.

4. In case the AIFM intends to market units or shares of the EU AIF in Member States other than its Member State of reference, the AIFM shall submit a notification to the competent authorities of its Member State of reference in respect of each EU AIF that it intends to market.

That notification shall comprise the documentation and information set out in Annex IV.

5. The competent authorities of the Member State of reference shall, no later than 20 working days after the date of receipt of the complete notification file referred to in paragraph 4, transmit the complete notification file to the competent authorities of the Member States where the units or shares of the AIF are intended to be marketed. Such transmission shall be effected only if the AIFM's management of the AIF complies and will continue to comply with this Directive and if the AIFM otherwise complies with this Directive.

The competent authorities of the Member State of reference of the AIFM shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

6. Upon transmission of the notification file, the competent authorities of the Member State of reference of the AIFM shall, without delay, notify the AIFM about the transmission. The AIFM may start marketing the AIF in the relevant host Member States as of the date of that notification.

The competent authorities of the Member State of reference of the AIFM shall also inform ESMA and the competent authorities of the AIF that the AIFM may start marketing the units or shares of the AIF in the host Member States of the AIFM.

7. The arrangements referred to in point (h) of Annex IV shall be subject to the laws and supervision of the host Member States of the AIFM.

8. Member States shall ensure that the notification letter by the AIFM referred to in paragraph 4 and the statement referred to in paragraph 5 are provided in a language customary in the sphere of international finance.

Member States shall ensure that electronic transmission and filing of the documents referred to in paragraph 6 are accepted by their competent authorities.

9. In the event of a material change to any of the particulars communicated in accordance with paragraph 2 and/or 4, the AIFM shall give written notice of that change to the competent authorities of its Member State of reference at least 1 month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive or the AIFM would otherwise no longer comply with this Directive, the competent authorities of the Member State of reference of the AIFM shall inform the AIFM, without undue delay, that it is not to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with this Directive or the AIFM otherwise no longer complies with this Directive, the competent authorities of the Member State reference of the AIFM shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF.

If the changes are acceptable because they do not affect compliance of the AIFM's management of the AIF with this Directive, or compliance by the AIFM with this Directive otherwise, the competent authorities of the Member State of reference shall, without delay, inform ESMA in so far as the changes concern the termination of the marketing of certain AIFs or additional AIFs being marketed and, in so far as applicable, the competent authorities of the host Member States of those changes.

10. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine:

(a) the form and content of a model for the notification letter referred to in paragraphs 2 and 4;

(b) the form and content of a model for the statement referred to in paragraph 5;

(c) the form of the transmission referred to in paragraph 5; and

(d) the form of the written notice referred to in paragraph 9.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

11. Without prejudice to Article 43(1), Member States shall require that the AIFs managed and marketed by the AIFM be marketed only to professional investors.

Article 40

Conditions for the marketing in the Union with a passport of non-EU AIFs managed by a non-EU AIFM

1. Member States shall ensure that a duly authorised non-EU AIFM may market units or shares of a non-EU AIF it manages to professional investors in the Union with a passport as soon as the conditions laid down in this Article are met.

2. In addition to the requirements in this Directive in relation to EU-AIFMs, for non-EU AIFMs the following conditions shall be met:

(a) appropriate cooperation arrangements are in place between the competent authorities of the Member State of reference and the supervisory authority of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information that allows the competent authorities to carry out their duties in accordance with this Directive;

(b) the third country where the non-EU AIF is established is not identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849~~listed as a Non-Cooperative Country and Territory by FATF~~;

(c) the third country where the non-EU AIF is established has signed an agreement with the Member State of reference and with each other Member State in which the units or shares of the non-EU AIF are intended to be marketed which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements, and that third country is not mentioned in Annex I to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes.

Where a competent authority of another Member State disagrees with the assessment made on the application of points (a) and (b) of the first subparagraph by the competent authorities of the Member State of reference of the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

3. The AIFM shall submit a notification to the competent authorities of its Member State of reference in respect of each non-EU AIF that it intends to market in its Member State of reference.

That notification shall comprise the documentation and information set out in Annex III.

4. No later than 20 working days after receipt of a complete notification pursuant to paragraph 3, the competent authorities of the Member State of reference of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 3 in its territory. The competent authorities of the Member State of reference of the AIFM may prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Directive or the AIFM otherwise does not or will not comply with this Directive. In the case of a positive decision, the AIFM may start marketing the AIF in its Member State of reference from the date of the notification by the competent authorities to that effect.

The competent authorities of the Member State of reference of the AIFM shall also inform ESMA that the AIFM may start marketing units or shares of the AIF in the Member State of reference of the AIFM.

5. If the AIFM intends to market the units or shares of a non-EU AIF also in Member States other than its Member State of reference, the AIFM shall submit a notification to the competent authorities of its Member State of reference in respect of each non-EU AIF that it intends to market.

That notification shall comprise the documentation and information set out in Annex IV.

6. The competent authorities of the Member State of reference shall, no later than 20 working days after the date of receipt of the complete notification file referred to in paragraph 5, transmit the complete notification file to the competent authorities of the Member States where the units or shares of the AIF are intended to be marketed. Such transmission shall occur only if the AIFM's management of the AIF complies and will continue to comply with this Directive and that in general the AIFM complies with this Directive.

The competent authorities of the Member State of reference of the AIFM shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

7. Upon transmission of the notification file, the competent authorities of the Member State of reference of the AIFM shall, without delay, notify the AIFM of the transmission. The AIFM may start marketing the AIF in the relevant host Member States of the AIFM as of the date of that notification.

The competent authorities of the Member State of reference of the AIFM shall also inform ESMA that the AIFM may start marketing the units or shares of the AIF in the host Member States of the AIFM.

8. Arrangements referred to in point (h) of Annex IV shall be subject to the laws and supervision of the host Member States of the AIFM, in so far as those Member States are different than the Member State of reference.

9. Member States shall ensure that the notification letter by the AIFM referred to in paragraph 5 and the statement referred to in paragraph 6 are provided in a language customary in the sphere of international finance.

Member States shall ensure that electronic transmission and filing of the documents referred to in paragraph 6 are accepted by their competent authorities.

10. In the event of a material change to any of the particulars communicated in accordance with paragraph 3 or 5, the AIFM shall give written notice of that change to the competent authorities of the Member State of reference at least 1 month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive, or the AIFM would otherwise no longer comply with this Directive, the competent authorities of the Member State of reference of the AIFM shall inform the AIFM, without undue delay, that it is not to implement the change.

If the planned change is implemented notwithstanding the first and second subparagraphs, or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with this Directive or the AIFM otherwise no longer complies with this Directive, the competent authorities of the Member State of reference of the AIFM shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF.

If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with this Directive or the compliance by the AIFM with this Directive otherwise, the competent authorities of the Member State of reference shall, without delay, inform ESMA in so far as the changes concern the termination of the marketing of certain AIFs or additional AIFs being marketed and, in so far as applicable, the competent authorities of the host Member States of the AIFM of those changes.

11. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in point (a) of paragraph 2 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

12. In order to ensure uniform application of this Article, ESMA may develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in point (a) of paragraph 2.

13. ESMA shall develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in point (a) of paragraph 2 so as to ensure that the competent authorities of the Member State of reference and the competent authorities of the host Member States receive sufficient information in order to be able to exercise their supervisory and investigatory powers under this Directive.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

14. In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to specify the procedures for coordination and exchange of information between the competent authority of the Member State of reference and the competent authorities of the host Member States of the AIFM.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

15. In case a competent authority rejects a request to exchange information in accordance with the regulatory technical standards referred to in paragraph 14, the competent authorities concerned may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

16. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine:

(a) the form and content of a model for the notification letter referred to in paragraphs 3 and 5;

(b) the form and content of a model for the statement referred to in paragraph 6;

(c) the form of the transmission referred to in paragraph 6; and

(d) the form of the written notice referred to in paragraph 10.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

17. Without prejudice to Article 43(1), Member States shall require that the AIFs managed and marketed by the AIFM be marketed only to professional investors.

Article 41

Conditions for managing AIFs established in Member States other than the Member State of reference by non-EU AIFMs

1. Member States shall ensure that an authorised non-EU AIFM may manage EU AIFs established in a Member State other than its Member State of reference either directly or via the establishment of a branch, provided that the AIFM is authorised to manage that type of AIF.

2. Any non-EU AIFM intending to manage EU AIFs established in another Member State than its Member State of reference for the first time shall communicate the following information to the competent authorities of its Member State of reference:

(a) the Member State in which it intends to manage AIFs directly or establish a branch;

(b) a programme of operations stating in particular the services which it intends to perform and identifying the AIFs it intends to manage.

3. If the non-EU AIFM intends to establish a branch, it shall provide,

in addition to the information requested in paragraph 2, the following information:

(a) the organisational structure of the branch;

(b) the address in the home Member State of the AIF from which documents may be obtained;

(c) the names and contact details of persons responsible for the management of the branch.

4. The competent authorities of the Member State of reference shall, within 1 month of receiving the complete documentation in accordance with paragraph 2 or within 2 months of receiving the complete documentation in accordance with paragraph 3, transmit that documentation to the competent authorities of the host Member States of the AIFM. Such transmission shall occur only if the AIFM's management of the AIF complies and will continue to comply with this Directive and the AIFM otherwise complies with this Directive.

The competent authorities of the Member State of reference shall enclose a statement to the effect that the AIFM concerned is authorised by them.

The competent authorities of the Member State of reference shall immediately notify the AIFM about the transmission. Upon receipt of the transmission notification the AIFM may start to provide its services in the host Member States of the AIFM.

The competent authorities of the Member State of reference shall also inform ESMA that the AIFM may start managing the AIF in the host Member States of the AIFM.

5. The host Member States of the AIFM shall not impose any additional requirements on the AIFM concerned in respect of the matters covered by this Directive.

6. In the event of a change to any of the information communicated in accordance with paragraph 2 and, if relevant, paragraph 3, an AIFM shall give written notice of that change to the competent authorities of its Member State of reference at least 1 month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive or the AIFM would otherwise no longer comply with this Directive, the competent authorities of the Member State of reference shall inform the AIFM without undue delay that it is not to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with this Directive or the AIFM otherwise no longer complies with this Directive, the competent authorities of the Member State of reference shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF.

If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with this Directive or the compliance by the AIFM with this Directive otherwise, the competent authorities of the Member State of reference shall without undue delay inform the competent authorities of the host Member States of the AIFM of those changes.

7. In order to ensure consistent harmonisation of this Article, ESMA may develop draft regulatory technical standards to specify the information to be notified in accordance with paragraphs 2 and 3.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

8. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to establish standard forms, templates and procedures for the transmission of information in accordance with paragraphs 2 and 3.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

Article 42

Conditions for the marketing in Member States without a passport of AIFs managed by a non-EU AIFM

1. Without prejudice to Articles 37, 39 and 40, Member States may allow non-EU AIFMs to market to professional investors, in their territory only, units or shares of AIFs they manage subject at least to the following conditions:

(a) the non-EU AIFM complies with Articles 22, 23 and 24 in respect of each AIF marketed by it pursuant to this Article and with Articles 26 to 30 where an AIF marketed by it pursuant to this Article falls within the scope of Article 26(1). Competent authorities and AIF investors referred to in those Articles shall be deemed those of the Member States where the AIFs are marketed;

(b) appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the Member States where the AIFs are marketed, in so far as applicable, the competent authorities of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, in so far as applicable, the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows competent authorities of the relevant Member States to carry out their duties in accordance with this Directive;

(c) the third country where the non-EU AIFM or the non-EU AIF is established is not identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849;~~listed as a Non-Cooperative Country and Territory by FATF.~~

(d) the third country where the non-EU AIFM or non-EU AIF is established has signed an agreement with the Member State in which the units or shares of the non-EU AIF are intended to be marketed which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements, and that third country is not mentioned in Annex I to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes.

Where a competent authority of an EU AIF does not enter into the required cooperation arrangements as set out in point (b) of the first subparagraph within a reasonable period of time, the competent authorities of the Member State where the AIF is intended to be marketed may refer the matter to ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

2. Member States may impose stricter rules on the non-EU AIFM in respect of the marketing of units or shares of AIFs to investors in their territory for the purpose of this Article.

3. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

4. In order to ensure uniform application of this Article, ESMA shall develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 1.

CHAPTER VIII

MARKETING TO RETAIL INVESTORS

Article 43

Marketing of AIFs by AIFMs to retail investors

1. Without prejudice to other instruments of Union law, Member States may allow AIFMs to market to retail investors in their territory units or shares of AIFs they manage in accordance with this Directive, irrespective of whether such AIFs are marketed on a domestic or cross-border basis or whether they are EU or non-EU AIFs.

In such cases, Member States may impose stricter requirements on the AIFM or the AIF than the requirements applicable to the AIFs marketed to professional investors in their territory in accordance with this Directive. However, Member States shall not impose stricter or additional requirements on EU AIFs established in another Member State and marketed on a cross-border basis than on AIFs marketed domestically.

2. Member States that permit the marketing of AIFs to retail investors in their territory shall, by 22 July 2014, inform the Commission and ESMA of:

(a) the types of AIF which AIFMs may market to retail investors in their territory;

(b) any additional requirements that the Member State imposes for the marketing of AIFs to retail investors.

Member States shall also inform the Commission and ESMA of any subsequent changes with regard to the first subparagraph.

3. Member States shall ensure that an authorised EU AIFM is able to market units or shares of an EU AIF which invests predominantly in the shares of a particular company, to employees of that company or of its affiliated entities within the framework of employee savings schemes or employee participation schemes, on a domestic or cross-border basis.

Where such an AIF is marketed to employees on a cross-border basis, the Member State where the marketing takes place shall not impose any requirements in addition to those applicable in the home Member State of the AIF.

Article 43a

Facilities available to retail investors

1. Without prejudice to Article 26 of Regulation (EU) 2015/760, Member States shall ensure that an AIFM makes available, in each Member State where it intends to market units or shares of an AIF to retail investors, facilities to perform the following tasks:

(a) process investors' subscription, payment, repurchase and redemption orders relating to the units or shares of the AIF, in accordance with the conditions set out in the AIF's documents;

(b) provide investors with information on how orders referred to in point (a) can be made and how repurchase and redemption proceeds are paid;

(c) facilitate the handling of information relating to the exercise of investors' rights arising from their investment in the AIF in the Member State where the AIF is marketed;

(d) make the information and documents required pursuant to Articles 22 and 23 available to investors for the purposes of inspection and obtaining copies thereof;

(e) provide investors with information relevant to the tasks that the facilities perform in a durable medium as defined in point (m) of Article 2(1) of Directive 2009/65/EC; and

(f) act as a contact point for communicating with the competent authorities.

2. Member States shall not require an AIFM to have a physical presence in the host Member State or to appoint a third party for the purposes of paragraph 1.

3. The AIFM shall ensure that the facilities to perform the tasks referred to in paragraph 1, including electronically, are provided:

(a) in the official language or one of the official languages of the Member State where the AIF is marketed or in a language approved by the competent authorities of that Member State;

(b) by the AIFM itself, by a third party which is subject to regulation and supervision governing the tasks to be performed, or by both.

For the purposes of point (b), where the tasks are to be performed by a third party, the appointment of that third party shall be evidenced by a written contract, which specifies which of the tasks referred to in paragraph 1 are not to be performed by the AIFM and that the third party will receive all the relevant information and documents from the AIFM.

CHAPTER IX

COMPETENT AUTHORITIES

SECTION 1

Designation, powers and redress procedures

Article 44

Designation of competent authorities

Member States shall designate the competent authorities which are to carry out the duties provided for in this Directive.

They shall inform ESMA and the Commission thereof, indicating any division of duties.

The competent authorities shall be public authorities.

Member States shall require that their competent authorities establish the appropriate methods to monitor that AIFMs comply with their obligations under this Directive, where relevant on the basis of guidelines developed by ESMA.

Article 45

Responsibility of competent authorities in Member States

1. The prudential supervision of an AIFM shall be the responsibility of the competent authorities of the home Member State of the AIFM, whether the AIFM manages and/or markets AIFs in another Member State or not, without prejudice to those provisions of this Directive which confer the responsibility for supervision on the competent authorities of the host Member State of the AIFM.

2. The supervision of an AIFM's compliance with Articles 12 and 14 shall be the responsibility of the competent authorities of the host Member State of the AIFM where the AIFM manages and/or markets AIFs through a branch in that Member State.

3. The competent authorities of the host Member State of the AIFM may require an AIFM managing or marketing AIFs in its territory, whether or not through a branch, to provide the information necessary for the supervision of the AIFM's compliance with the applicable rules for which those competent authorities are responsible.

Those requirements shall not be more stringent than those which the host Member State of the AIFM imposes on AIFMs for which it is the home Member State for the monitoring of their compliance with the same rules.

4. Where the competent authorities of the host Member State of the AIFM ascertain that an AIFM managing and/or marketing AIFs in its territory, whether or not through a branch, is in breach of one of the rules in relation to which they have responsibility for supervising compliance, those authorities shall require the AIFM concerned to put an end to that breach and inform the competent authorities of the home Member State thereof.

5. If the AIFM concerned refuses to provide the competent authorities of its host Member State with information falling under their responsibility, or fails to take the necessary steps to put an end to the breach referred to in paragraph 4, the competent authorities of its host Member State shall inform the competent authorities of its home Member State thereof. The competent authorities of the home Member State of the AIFM shall, at the earliest opportunity:

(a) take all appropriate measures to ensure that the AIFM concerned provides the information requested by the competent authorities of its host Member State pursuant to paragraph 3, or puts an end to the breach referred to in paragraph 4;

(b) request the necessary information from the relevant supervisory authorities in third countries.

The nature of the measures referred to in point (a) shall be communicated to the competent authorities of the host Member State of the AIFM.

6. If, despite the measures taken by the competent authorities of the home Member State of the AIFM pursuant to paragraph 5 or because such measures prove to be inadequate or are not available in the Member State in question, the AIFM continues to refuse to provide the information requested by the competent authorities of its host Member State pursuant to paragraph 3, or persists in breaching the legal or regulatory provisions, referred to in paragraph 4, in force in its host Member State, the competent authorities of the host Member State of the AIFM may, after informing the competent authorities of the home Member State of the AIFM, take appropriate measures, including those laid down in Articles 46 and 48, to prevent or penalise further irregularities and, in so far as necessary, to prevent that AIFM from initiating any further transactions in its host Member State. Where the function carried out in the host Member State of the AIFM is the management of AIFs, the host Member State may require the AIFM to cease managing those AIFs.

7. Where the competent authorities of the host Member State of the AIFM have clear and demonstrable grounds for believing that the AIFM is in breach of the obligations arising from rules in relation to which they have no responsibility for supervising compliance, they shall refer those findings to the competent authorities of the home Member State of the AIFM which shall take appropriate measures, including, if necessary, request additional information from the relevant supervisory authorities in third countries.

8. If despite the measures taken by the competent authorities of the home Member State of the AIFM or because such measures prove to be inadequate, or because the home Member State of the AIFM fails to act within a reasonable timeframe, the AIFM persists in acting in a manner that is clearly prejudicial to the interests of the investors of the relevant AIF, the financial stability or the integrity of the market in the host Member State of the AIFM, the competent authorities of the host Member State of the AIFM may, after informing the competent authorities of the home Member State of the AIFM, take all appropriate measures needed in order to protect the investors of the relevant AIF, the financial stability and the integrity of the market in the host Member State, including the possibility of preventing the AIFM concerned to further market the units or shares of the relevant AIF in the host Member State.

9. The procedure laid down in paragraphs 7 and 8 shall also apply in the event that the competent authorities of the host Member State have clear and demonstrable grounds for disagreement with the authorisation of a non-EU AIFM by the Member State of reference.

10. Where the competent authorities concerned disagree on any of the measures taken by a competent authority pursuant to paragraphs 4 to 9, they may bring the matter to the attention of ESMA, which may act in accordance with the powers conferred to it under Article 19 of Regulation (EU) No 1095/2010.

11. Where applicable, ESMA shall facilitate the negotiation and conclusion of the cooperation arrangements required by this Directive between the competent authorities of the Member States and the supervisory authorities of third countries.

Article 46

Powers of competent authorities

1. Competent authorities shall be given all supervisory and investigatory powers that are necessary for the exercise of their functions. Such powers shall be exercised in any of the following ways:

(a) directly;

(b) in collaboration with other authorities;

(c) under their responsibility by delegation to entities to which tasks have been delegated;

(d) by application to the competent judicial authorities.

2. The competent authorities shall have the power to:

(a) have access to any document in any form and to receive a copy of it;

(b) require information from any person related to the activities of the AIFM or the AIF and if necessary to summon and question a person with a view to obtaining information;

(c) carry out on-site inspections with or without prior announcements;

(d) require existing telephone and existing data traffic records;

(e) require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Directive;

(f) request the freezing or the sequestration of assets;

(g) request the temporary prohibition of professional activity;

(h) require authorised AIFM, depositaries or auditors to provide information;

(i) adopt any type of measure to ensure that AIFMs or depositaries continue to comply with the requirements of this Directive applicable to them;

(j) in the interest of investors, in exceptional circumstances and after consulting the AIFM, require AIFMs to activate or deactivate the liquidity management tool referred to in Annex V, point 1, where there are risks to investor protection or financial stability that, on a reasonable and balanced view, necessitate such activation or deactivation;~~require the suspension of the issue, repurchase or redemption of units in the interest of the unit-holders or of the public;~~

(k) withdraw the authorisation granted to an AIFM or a depositary;

(l) refer matters for criminal prosecution;

(m) request that auditors or experts carry out verifications or investigations.

3. Where the competent authority of the Member State of reference considers that an authorised non-EU AIFM is in breach of its obligations under this Directive, it shall notify ESMA, setting out full reasons as soon as possible.

4. Member States shall ensure that the competent authorities have the powers necessary to take all measures required in order to ensure the orderly functioning of markets in those cases where the activity of one or more AIFs in the market for a financial instrument could jeopardise the orderly functioning of that market.

Article 47

Powers and competences of ESMA

1. ESMA may develop and regularly review guidelines for the competent authorities of the Member States on the exercise of their authorisation powers and on the reporting obligations by the competent authorities imposed by this Directive.

ESMA shall further have the powers necessary, including those enumerated in Article 48(3), to carry out the tasks attributed to it by this Directive.

2. The obligation of professional secrecy shall apply to all persons who work or who have worked for ESMA, ~~and~~ for the competent authorities or for any other person to whom ESMA has delegated tasks, including auditors and experts contracted by ESMA. Information covered by professional secrecy shall not be disclosed to another person or authority except where such disclosure is necessary for legal proceedings or for cases covered by taxation law.

3. All ~~the~~ information exchanged under this Directive between ~~ESMA~~, the competent authorities, the ESAs ~~EBA, the European Supervisory Authority (European Insurance and Occupational Pensions Authority) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council~~[51] and the ESRB shall be considered confidential, except where:

(a) ESMA or the competent authority or other authority or body concerned states at the time of communication that such information may be disclosed; ~~or where~~

~~3.~~(b) such disclosure is necessary for legal proceedings~~.~~, or

[51] ~~(OJ L 331, 15.12.2010, p. 48).~~

(c) the information disclosed is used in a summary or in an aggregate form in which individual financial market participants cannot be identified.

Paragraph 2, and the first subparagraph of this paragraph, shall not preclude the exchange of information between competent authorities and tax authorities that are located in the same Member State. Where the information originates in another Member State, it shall only be disclosed in accordance with the first sentence of this subparagraph with the express agreement of the competent authorities which have disclosed it.

4. In accordance with Article 9 of Regulation (EU) No 1095/2010, ESMA may, where all the conditions in paragraph 5 are met, request the competent authority or competent authorities to take any of the following measures, as appropriate:

(a) prohibit the marketing in the Union of units or shares of AIFs managed by non-EU AIFMs or of non-EU AIFs managed by EU AIFMs without the authorisation required in Article 37 or without the notification required in Articles 35, 39 and 40 or without being allowed to do so by the relevant Member States in accordance with Article 42;

(b) impose restrictions on non-EU AIFMs relating to the management of an AIF in case of excessive concentration of risk in a specific market on a cross-border basis;

(c) impose restrictions on non-EU AIFMs relating to the management of an AIF where its activities potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions.

(d) in the interest of investors, in exceptional circumstances and after consulting the AIFM, require non-EU AIFMs that are marketing in the Union AIFs that they manage or EU AIFMs managing non-EU AIFs to activate or deactivate the liquidity management tool referred to in Annex V, point 1, where there are risks to investor protection or financial stability that, on a reasonable and balanced view, necessitate such activation or deactivation.

5. ESMA may take a decision under paragraph 4 and subject to the requirements set out in paragraph 6 if both of the following conditions are met:

(a) a substantial threat exists, originating or aggravated by the activities of AIFMs, to the orderly functioning and integrity of the financial market or to the stability of the whole or a part of the financial system in the Union and there are cross border implications; and

(b) the relevant competent authority or competent authorities have not taken measures to address the threat or the measures that have been taken do not sufficiently address the threat.

6. The measures taken by the competent authority or competent authorities pursuant to paragraph 4 shall:

(a) effectively address the threat to the orderly functioning and the integrity of the financial market or to the stability of the whole or a part of the financial system in the Union or significantly improve the ability of competent authorities to monitor the threat;

(b) not create a risk of regulatory arbitrage;

(c) not have a detrimental effect on the efficiency of the financial markets, including reducing liquidity in those markets or creating uncertainty for market participants, in a way that is disproportionate to the benefits of the measures.

7. Before requesting the competent authority to take or renew any measure referred to in paragraph 4, ESMA shall consult, where appropriate, the ESRB and other relevant authorities.

8. ESMA shall notify the competent authorities of the Member State of reference of the non-EU AIFM and the competent authorities of the host Member States of the non-EU AIFM concerned of the decision to request the competent authority or competent authorities to impose or renew any measure referred to in paragraph 4. The notification shall at least specify the following details:

(a) the AIFM and the activities to which the measures apply and their duration;

(b) the reasons why ESMA is of the opinion that it is necessary to impose the measures in accordance with the conditions and requirements set out in this Article, including the evidence in support of those reasons.

9. ESMA shall review its measures referred to in paragraph 4 at appropriate intervals and in any event at least every 3 months. If a measure is not renewed after that 3-month period, it shall automatically expire. Paragraphs 5 to 8 shall apply to a renewal of measures.

10. The competent authorities of the Member State of reference of the non-EU AIFM concerned may request ESMA to reconsider its decision. The procedure set out in the second subparagraph of Article 44(1) of Regulation (EU) No 1095/2010 shall apply.

Article 48

Administrative penalties

1. Member States shall lay down the rules on measures and penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that those rules are enforced. Without prejudice to the procedures for the withdrawal of authorisation or to the right of Member States to impose criminal penalties, Member States shall ensure, in accordance with their national law, that the appropriate administrative measures can be taken or administrative penalties be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that those measures are effective, proportionate and dissuasive.

2. Member States shall provide that the competent authorities may disclose to the public any measure or penalty that will be imposed for infringement of the provisions adopted in the implementation of this Directive, unless such disclosure would seriously jeopardise the financial markets, be detrimental to the interests of the investors or cause disproportionate damage to the parties involved.

3. ESMA shall draw up an annual report on the application of administrative measures and imposition of penalties in the case of breaches of the provisions adopted in the implementation of this Directive in the different Member States. Competent authorities shall provide ESMA with the necessary information for that purpose.

Article 49

Right of appeal

1. The competent authorities shall give written reasons for any decision to refuse or withdraw authorisation of AIFMs to manage and/or market AIFs, or any negative decision taken in the implementation of the measures adopted in application of this Directive, and communicate them to applicants.

2. Member States shall provide that any decision taken under laws, regulations or administrative provisions adopted in accordance with this Directive is properly reasoned and is the subject of the right of appeal to the courts.

That right to appeal to the courts shall apply also where, in respect of an application for authorisation which provides all the information required, no decision is taken within 6 months of the submission of the application.

SECTION 2

Cooperation between different competent authorities

Article 50

Obligation to cooperate

1. The competent authorities of the Member States shall cooperate with each other and with ESMA and the ESRB whenever necessary for the purpose of carrying out their duties under this Directive or of exercising their powers under this Directive or under national law.

2. Member States shall facilitate the cooperation provided for in this Section.

3. Competent authorities shall use their powers for the purpose of cooperation, even in cases where the conduct under investigation does not constitute an infringement of any regulation in force in their own Member State.

4. The competent authorities of the Member States shall immediately supply one another and ESMA with the information required for the purposes of carrying out their duties under this Directive.

The competent authorities of the home Member State shall forward a copy of the relevant cooperation arrangements entered into by them in accordance with Article 35, 37 and/or 40 to the host Member States of the AIFM concerned. The competent authorities of the home Member State shall, in accordance with procedures relating to the applicable regulatory technical standards referred to in Article 35(14), Article 37(17) or Article 40(14), forward the information received from third-country supervisory authorities in accordance with cooperation arrangements with such supervisory authorities in respect of an AIFM, or, where relevant, pursuant to Article 45(6) or (7), to the competent authorities of host Member State of the AIFM concerned.

Where a competent authority of a host Member State considers that the contents of the cooperation arrangement entered into by the home Member State of the AIFM concerned in accordance with Article 35, 37 and/or 40 does not comply with what is required pursuant to the applicable regulatory technical standards, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

5. Where the competent authorities of one Member State have ~~clear and demonstrable~~reasonable grounds to suspect that acts contrary to this Directive are being or have been carried out by an AIFM not subject to the supervision of those competent authorities, they shall notify ESMA and the competent authorities of the home and host Member States of the AIFM concerned thereof in as specific a manner as possible. The recipient competent authorities shall take appropriate action and~~,~~ shall inform ESMA and the notifying competent authorities of the outcome of that action and, to the extent possible, of significant interim developments. This paragraph shall be without prejudice to the competences of the notifying competent authority.

5a. Where the competent authorities of the home Member State of an AIFM exercise powers pursuant to Article 46(2), point (j), they shall notify the competent authorities of the host Member State of the AIFM, ESMA and, if there are potential risks to the stability and integrity of the financial system, the ESRB thereof.

5b. The competent authorities of the host Member State of an AIFM may request the competent authorities of the home Member State of the AIFM to exercise powers pursuant to Article 46(2), point (j), specifying the reasons for the request and informing ESMA and, if there are potential risks to the stability and integrity of the financial system, the ESRB thereof.

5c. Where the competent authorities of the home Member State of the AIFM do not agree with the request referred to in paragraph 5b, they shall inform the competent authorities of the host Member State of the AIFM, ESMA and, where the ESRB was informed of that request pursuant to paragraph 5b, the ESRB thereof, stating the reasons for the disagreement.

5d. On the basis of the information received pursuant to paragraphs 5b and 5c, ESMA shall issue without undue delay an opinion to the competent authorities of the home Member State of the AIFM on the exercise of powers pursuant to Article 46(2), point (j). ESMA shall communicate that opinion to the competent authorities of the host Member State of the AIFM.

5e. Where the competent authorities of the home Member State of the AIFM do not act in accordance with ESMA's opinion referred to in paragraph 5d, or do not intend to comply with that opinion, they shall inform ESMA and the competent authorities of the host Member State of the AIFM thereof, stating the reasons for their non-compliance or intention not to comply. In the event of a serious threat to investor protection, to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union, and unless such publication conflicts with the legitimate interests of the AIF's unit-holders or shareholders or of the public, ESMA may publish the fact that the competent authorities of the home Member State of the AIFM do not comply or do not intend to comply with its opinion, together with the reasons provided by those competent authorities for their non-compliance or intention not to comply. ESMA shall analyse whether the benefits of publication would outweigh the amplification of the threats to investor protection, to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union resulting from that publication and shall give the competent authorities of the home Member State of the AIFM advance notice of such publication.

5f. The competent authorities of the host Member State of an AIFM may, where they have reasonable grounds for doing so, request the competent authorities of the home Member State of the AIFM to exercise, without delay, powers pursuant to Article 46(2), other than point (j) of that paragraph, specifying the reasons for their request in as specific a manner as possible and informing ESMA and, if there are potential risks to the stability and integrity of the financial system, the ESRB thereof.

The competent authorities of the home Member State of the AIFM shall, without undue delay, inform the competent authorities of the host Member State of the AIFM, ESMA and, if there are potential risks to stability and integrity of the financial system, the ESRB, of the powers exercised and of their findings.

5g. Where a Member State has exercised the derogation allowing the appointment of a depositary established in another Member State as set out in Article 21(5a), and where the competent authorities of the home Member State of an AIF or, where the AIF is not regulated, the competent authorities of the home Member State of the AIFM that manages the AIF, have reasonable grounds to suspect that acts contrary to this Directive are being or have been carried out by a depositary not subject to the supervision of those competent authorities, those competent authorities shall without delay notify ESMA and the competent authorities of the depositary concerned thereof in as specific a manner as possible. The recipient competent authorities shall take appropriate action and shall inform ESMA and the notifying competent authorities of the outcome of that action. This paragraph shall be without prejudice to the competences of the notifying competent authorities.

5h. ESMA may request the competent authorities to submit, without undue delay, explanations to ESMA in relation to specific cases which raise a serious threat to investor protection, to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union.

6. In order to ensure the uniform application of this Directive concerning the exchange of information, ESMA may develop draft implementing technical standards to determine the ~~conditions of application with regard to the~~ procedures for the exchange of information between relevant competent authorities, ~~and between the competent authorities and ESMA~~the ESAs, the ESRB, and members of the ESCB, subject to the applicable provisions of this Directive.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

7. By 16 April 2026, ESMA shall develop guidelines providing indications to guide the competent authorities in their exercise of the powers set out in Article 46(2), point (j), and indications as to the situations that might lead to the requests referred to in paragraphs 5b and 5f being put forward. When developing those guidelines, ESMA shall consider the potential implications of such supervisory intervention for investor protection and financial stability in another Member State or in the Union. Those guidelines shall recognise that the primary responsibility for liquidity risk management remains with AIFMs.

Article 51

Transfer and retention of personal data

1. With regard to transfer of personal data between competent authorities, competent authorities shall apply Directive 95/46/EC. With regard to transfer of personal data by ESMA to the competent authorities of a Member State or of a third country, ESMA shall comply with Regulation (EC) No 45/2001.

2. Data shall be retained for a maximum period of 5 years.

Article 52

Disclosure of information to third countries

1. The competent authority of a Member State may transfer to a third country data and the analysis of data on a case-by-case basis where the conditions laid down in Article 25 or 26 of Directive 95/46/EC are met and where the competent authority of the Member State is satisfied that the transfer is necessary for the purpose of this Directive. The third country shall not transfer the data to another third country without the express written authorisation of the competent authority of the Member State.

2. The competent authority of a Member State shall only disclose information received from a competent authority of another Member State to a supervisory authority of a third country where the competent authority of the Member State concerned has obtained express agreement of the competent authority which transmitted the information and, where applicable, the information is disclosed solely for the purposes for which that competent authority gave its agreement.

Article 53

Exchange of information relating to the potential systemic consequences of AIFM activity

1. The competent authorities of the Member States responsible for the authorisation and/or supervision of AIFMs under this Directive shall communicate information to the competent authorities of other Member States where this is relevant for monitoring and responding to the potential implications of the activities of individual AIFMs or AIFMs collectively for the stability of systemically relevant financial institutions and the orderly functioning of markets on which AIFMs are active. ESMA and the ESRB shall also be informed and shall forward this information to the competent authorities of the other Member States.

2. Subject to the conditions laid down in Article 35 of Regulation (EU) No 1095/2010, aggregated information relating to the activities of AIFMs under their responsibility shall be communicated by the competent authorities of the AIFM to ESMA and the ESRB.

3. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying the content of the information to be exchanged pursuant to paragraph 1.

4. The Commission shall adopt implementing acts specifying the modalities and frequency of the information to be exchanged pursuant to paragraph 1. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 59(2).

Article 54

Cooperation in supervisory activities

1. The competent authorities of one Member State may request the cooperation of the competent authorities of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation in the territory of the latter within the framework of their powers pursuant to this Directive.

Where the competent authorities receive a request with respect to an on-the-spot verification or an investigation, it shall perform one of the following:

(a) carry out the verification or investigation itself;

(b) allow the requesting authority to carry out the verification or investigation;

(c) allow auditors or experts to carry out the verification or investigation.

2. In the case referred to in point (a) of paragraph 1 the competent authority of the Member State which has requested cooperation may ask that members of its own personnel assist the personnel carrying out the verification or investigation. The verification or investigation shall, however, be the subject of the overall control of the Member State on whose territory it is conducted.

In the case referred to in point (b) of paragraph 1 the competent authority of the Member State on whose territory the verification or investigation is carried out may request that members of its own personnel assist the personnel carrying out the verification or investigation.

3. Competent authorities may refuse to exchange information or to act on a request for cooperation in carrying out an investigation or on-the-spot verification only in the following cases:

(a) the investigation, on-the-spot verification or exchange of information might adversely affect the sovereignty, security or public order of the Member State addressed;

(b) judicial proceedings have already been initiated in respect of the same actions and the same persons before the authorities of the Member State addressed;

(c) final judgment has already been delivered in the Member State addressed in respect of the same persons and the same actions.

The competent authorities shall inform the requesting competent authorities of any decision taken under the first subparagraph, stating the reasons therefor.

4. In order to ensure uniform application of this Article, ESMA may develop draft implementing technical standards to establish common procedures for competent authorities to cooperate in on-the-spot verifications and investigations.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

Article 55

Dispute settlement

In case of disagreement between competent authorities of Member States on an assessment, action or omission of one competent authority in areas where this Directive requires cooperation or coordination between competent authorities from more than one Member State, competent authorities may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

CHAPTER X

TRANSITIONAL AND FINAL PROVISIONS

Article 56

Exercise of the delegation

1. The powers to adopt delegated acts referred to in Articles 3, 4, 9, 12, 14 to 25, 34 to 37, 40, 42, 53, 67 and 68 shall be conferred on the Commission for a period of 4 years from 21 July 2011. The Commission shall draw up a report in respect of the delegated powers no later than 6 months before the end of the 4-year period. The delegation of power shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes it in accordance with Article 57.

2. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

3. The powers to adopt delegated acts are conferred on the Commission subject to the conditions of Articles 57 and 58.

Article 57

Revocation of the delegation

1. The delegation of power referred to in Articles 3, 4, 9, 12, 14 to 25, 34 to 37, 40, 42, 53, 67 and 68 may be revoked at any time by the European Parliament or by the Council.

2. The institution which has commenced an internal procedure for deciding whether to revoke the delegation of power shall endeavour to inform the other institution and the Commission within a reasonable time before the final decision is taken, indicating the delegated power which could be subject to revocation and the possible reasons for a revocation.

3. The decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the *Official Journal of the European Union*.

Article 58

Objections to delegated acts

1. The European Parliament and the Council may object to a delegated act within a period of 3 months from the date of notification. At the initiative of the European Parliament or the Council that period shall be extended by 3 months.

2. If, on expiry of the period referred to in paragraph 1, neither the European Parliament nor the Council has objected to the delegated act it shall be published in the *Official Journal of the European Union* and shall enter into force at the date stated therein.

The delegated act may be published in the *Official Journal of the European Union* and enter into force before the expiry of that period if, upon a justified request by the Commission, the European Parliament and the Council have both informed the Commission of their intention not to raise objections.

3. If either the European Parliament or the Council objects to the adopted delegated act within the period referred to in paragraph 1, it shall not enter into force. In accordance with Article 296 TFEU, the institution which objects shall state the reasons for objecting to the delegated act.

Article 59

Implementing measures

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC[52]. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Article 60

Disclosure of derogations

Where a Member State makes use of a derogation or option provided by Article~~s~~ 6 or~~,~~ 9, Article 15(4g) or Article 21, 22, 28 or~~,~~ 43~~ and Article 61(5)~~, it shall inform the Commission thereof as well as of any subsequent changes. The Commission shall make the information public on a website or by other easily accessible means.

Article 61

Transitional provisions

1. AIFMs performing activities under this Directive before 22 July 2013 shall take all necessary measures to comply with national law stemming from this Directive and shall submit an application for authorisation within 1 year of that date.

2. Articles 31, 32 and 33 shall not apply to the marketing of units or shares of AIFs that are subject to a current offer to the public under a prospectus that has been drawn up and published in accordance with Directive 2003/71/EC before 22 July 2013 for the duration of validity of that prospectus.

3. AIFMs in so far as they manage AIFs of the closed-ended type before 22 July 2013 which do not make any additional investments after 22 July 2013 may however continue to manage such AIFs without authorisation under this Directive.

4. AIFMs in so far as they manage AIFs of the closed-ended type whose subscription period for investors has closed prior to the entry into force of this Directive and are constituted for a period of time which expires at the latest 3 years after 22 July 2013, may, however, continue to manage such AIFs without needing to comply with this Directive except for Article 22 and, where relevant, Articles 26 to 30, or to submit an application for authorisation under this Directive.

5. [*deleted*]~~The competent authorities of the home Member State of an AIF or in case where the AIF is not regulated the competent authorities of the home Member State of an AIFM may allow institutions referred to in point (a) of Article 21(3) and established in another Member State to be appointed as a depositary until 22 July 2017. This provision shall be without prejudice to the full application of Article 21, with the exception of point (a) of paragraph 5 of that Article on the place where the depositary is to be established.~~

[52] OJ L 191, 13.7.2001, p. 45.

6. AIFMs managing AIFs that originate loans and that were constituted before 15 April 2024 shall be deemed to comply with Article 15(4a) to (4d) and Article 16(2a) until 16 April 2029.

Until 16 April 2029, where the notional value of the loans originated by an AIF to any single borrower, or the leverage of an AIF, is above the limits referred to in Article 15(4a) and (4b) respectively, AIFMs managing those AIFs shall not increase that value or that leverage. Where the notional value of the loans originated by an AIF to any single borrower, or the leverage of an AIF, is below the limits referred to in Article 15(4a) and (4b) respectively, AIFMs managing those AIFs shall not increase that value or that leverage above those limits.

AIFMs managing AIFs that originate loans, that were constituted before 15 April 2024 and that do not raise additional capital after 15 April 2024 shall be deemed to comply with Article 15(4a) to (4d) and Article 16(2a) in respect of those AIFs.

Notwithstanding the first, second and third subparagraphs of this paragraph, an AIFM managing AIFs that originate loans and that were constituted before 15 April 2024 may choose to be subject to Article 15(4a) to (4d) and Article 16(2a), provided that the competent authorities of the home Member State of the AIFM are notified thereof.

Where AIFs originate loans before 15 April 2024, AIFMs may continue to manage such AIFs without complying with Article 15(3), point (d), and Article 15(4e), (4f), (4g), (4h) and (4i) in respect of those loans.

Article 62

[*Deleted*]

Article 63

Amendments to Directive 2009/65/EC

Directive 2009/65/EC is amended as follows:

(1) the following Article is inserted:

'*Article 50a*

In order to ensure cross-sectoral consistency and to remove misalignment between the interest of firms that repackage loans into tradable securities and other financial instruments (originators) and UCITS that invest in those securities or other financial instruments, the Commission shall adopt, by means of delegated acts in accordance with Article 112a and subject to conditions of Articles 112b and 112c, measures laying down the requirements in the following areas:

(a) the requirements that need to be met by the originator in order for a UCITS to be allowed to invest in securities or other financial instruments of this type issued after 1 January 2011, including requirements that ensure that the originator retains a net economic interest of not less than 5 %;

(b) qualitative requirements that must be met by UCITS which invest in those securities or other financial instruments.';

(2) Article 112(2) is replaced by the following:

'2. The power to adopt the delegated acts referred to in Articles 12, 14, 23, 33, 43, 51, 60, 61, 62, 64, 75, 78, 81, 95 and 111 shall be conferred on the Commission for a period of 4 years from 4 January 2011. The power to adopt the delegated acts referred to in Article 50a shall be conferred on the Commission for a period of 4 years from 21 July 2011. The Commission shall draw up a report in respect of delegated powers at the latest 6 months before the end of the 4-year period. The delegation of power shall be automatically extended for periods of an identical

duration, unless the European Parliament or the Council revokes them in accordance with Article 112a.';

(3) `Article 112a(1) is replaced by the following:

'1. The delegation of power referred to in Articles 12, 14, 23, 33, 43, 50a, 51, 60, 61, 62, 64, 75, 78, 81, 95 and 111 may be revoked at any time by the European Parliament or by the Council.'.

Article 64

Amendment to Regulation (EC) No 1060/2009

In Regulation (EC) No 1060/2009, the first paragraph of Article 4(1) is replaced by the following:

'1. Credit institutions as defined in Directive 2006/48/EC, investment firms as defined in Directive 2004/39/EC, insurance undertakings subject to the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the take-up and pursuit of the business of direct insurance other than life assurance[53], assurance undertakings as defined in Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance[54], reinsurance undertakings as defined in Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance[55], UCITS as defined in Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)[56], institutions for occupational retirement provision as defined in Directive 2003/41/EC and alternative investment funds as defined in Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers[57] may use credit ratings for regulatory purposes only if they are issued by credit rating agencies established in the Union and registered in accordance with this Regulation.

Article 65

Amendment to Regulation (EU) No 1095/2010

In Article 1(2) of Regulation (EU) No 1095/2010, the words 'any future legislation in the area of Alternative Investment Fund Managers (AIFM)' are replaced by the words 'Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers[58]

Article 66

Transposition

1. By 22 July 2013, Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

2. Member States shall apply the laws, regulations and administrative provisions referred to in paragraph 1 from 22 July 2013.

[53] OJ L 228, 16.8.1973, p. 3.

[54] OJ L 345, 19.12.2002, p. 1.

[55] OJ L 323, 9.12.2005, p. 1.

[56] OJ L 302, 17.11.2009, p. 32.

[57] OJ L 174, 1.7.2011, p. 1.

[58] OJ L 174, 1.7.2011, p. 1.'.

3. Notwithstanding paragraph 2, Member States shall apply the laws, regulations and administrative provisions necessary to comply with Article 35 and Articles 37 to 41 in accordance with the delegated act adopted by the Commission pursuant to Article 67(6) and from the date specified therein.

4. Member States shall ensure that the laws, regulations and administrative provisions adopted by them in compliance with Articles 36 and 42 cease to apply in accordance with the delegated act adopted by the Commission pursuant to Article 68(6) and on the date specified therein.

5. When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication.

6. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 67

Delegated act on the application of Article 35 and Articles 37 to 41

1. By 22 July 2015, ESMA shall issue to, the European Parliament, the Council and the Commission:

(a) an opinion on the functioning of the passport for EU AIFMs managing and/or marketing EU AIFs pursuant to Articles 32 and 33 and on the functioning of the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States pursuant to the applicable national regimes set out in Articles 36 and 42; and

(b) advice on the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the rules set out in Article 35 and Articles 37 to 41.

2. ESMA shall base its opinion and advice on the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States, inter alia, on:

(a) as regards the functioning of the passport for EU AIFMs managing and/or marketing EU AIFs:

(i) the use made of the passport;

(ii) the problems encountered regarding:

– effective cooperation among competent authorities,

– effective functioning of the notification system, — investor protection,

– mediation by ESMA, including the number of cases and the effectiveness of the mediation;

(iii) the effectiveness of the collection and sharing of information in relation to the monitoring of systemic risks by national competent authorities, ESMA and ESRB;

(b) as regards the functioning of the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the applicable national regimes:

(i) compliance of EU AIFMs with all the requirements established in this Directive with the exception of Article 21;

(ii) compliance of non-EU AIFMs with Articles 22, 23 and 24 in respect of each AIF marketed by the AIFM and, where relevant, with Articles 26 to 30;

(iii) existence and effectiveness of cooperation arrangements for the purpose of systemic risk oversight and in line with international standards between the competent authorities of the Member State where the AIFs are marketed, in so far as applicable, the competent authorities of the home Member State of the EU AIF and the supervisory authorities of the third country where the non-EU AIFM is established and, in so far as applicable, the supervisory authorities of the third country where the non-EU AIF is established;

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

(v) any features of a third-country regulatory and supervisory framework which might prevent the effective exercise by the competent authorities of their supervisory functions under this Directive;

(c) as regards the functioning of both systems, the potential market disruptions and distortions in competition (level playing field) or any general or specific difficulties which EU AIFMs encounter in establishing themselves or marketing AIFs they manage in any third country.

3. To that end, as from the entry into force of the national laws, regulations and administrative provisions necessary to comply with this Directive and until the issuance of the opinion of ESMA referred to in point (a) of paragraph 1, the competent authorities of the Member States shall, quarterly, provide ESMA with information on the AIFMs that are managing and/or marketing AIFs under their supervision, either under the application of the passport regime provided for in this Directive or under their national regimes, and with information needed for the assessment of the elements referred to in paragraph 2.

4. Where ESMA considers that there are no significant obstacles regarding investor protection, market disruption, competition and the monitoring of systemic risk, impeding the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the rules set out in Article 35 and Articles 37 to 41, it shall issue positive advice in this regard.

5. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying the contents of the information to be provided pursuant to paragraph 2.

6. The Commission shall adopt a delegated act within 3 months after having received positive advice and an opinion from ESMA, and taking into account the criteria listed in paragraph 2 and the objectives of this Directive, such as those relating to the internal market, investor protection and the effective monitoring of systemic risk, in accordance with Article 56 and subject to the conditions of Articles 57 and 58, specifying the date when the rules set out in Article 35 and Articles 37 to 41 become applicable in all Member States.

If there is objection to the delegated act referred to in the first subparagraph in accordance with Article 58, the Commission shall re-adopt the delegated act pursuant to which the rules set out in Article 35 and Articles 37 to 41 shall become applicable in all Member States, in accordance with Article 56 and subject to the conditions of Articles 57 and 58, at a later stage which seems appropriate to it, taking into account

the criteria listed in paragraph 2 and the objectives of this Directive, such as those relating to the internal market, investor protection and the effective monitoring of systemic risk.

7. If ESMA has not issued its advice within the time limit referred to in paragraph 1, the Commission shall request the advice to be provided within a new time limit.

Article 68

Delegated act on the termination of the application of Articles 36 and 42

1. 3 years after the entry into force of the delegated act referred to in Article 67(6) pursuant to which the rules set out in Article 35 and Articles 37 to 41 have become applicable in all Member States, ESMA shall issue to the European Parliament, the Council and the Commission:

(a) an opinion on the functioning of the passport for EU AIFMs marketing non-EU AIFs in the Union pursuant to Article 35 and for non-EU AIFMs managing and/or marketing AIFs in the Union pursuant to Articles 37 to 41, and on the functioning of the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States pursuant to the applicable national regimes as set out in Articles 36 and 42; and

(b) advice on the termination of the existence of the national regimes set out in Articles 36 and 42 in parallel with the existence of the passport in accordance with the rules set out in Article 35 and Articles 37 to 41.

2. ESMA shall base its opinion and advice on the termination of the existence of the national regimes set out in Articles 36 and 42 inter alia:

(a) as regards the functioning of the passport for EU AIFMs marketing non-EU AIFs in the Union and for non-EU AIFMs managing and/or marketing AIFs in the Union:

(i) the use made of the passport;

(ii) the problems encountered regarding:

- effective cooperation among competent authorities,
- effective functioning of the notification system,
- the indication of the Member State of reference,
- the effective exercise by the competent authorities of their supervisory functions being prevented by the laws, regulations or administrative provisions of a third country governing AIFMs, or by limitations in the supervisory and investigatory powers of the third country supervisory authorities,
- investor protection,
- investor access in the Union,
- the impact on developing countries,
- mediation by ESMA, including the number of cases and the effectiveness of the mediation;

(iii) the negotiation, conclusion, existence and effectiveness of the required cooperation arrangements;

(iv) the effectiveness of the collection and sharing of information in relation to the monitoring of systemic risks by national competent authorities, ESMA and the ESRB;

(v) results of peer reviews referred to in Article 38;

(b) as regards the functioning of the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the applicable national regimes:

(i) compliance of EU AIFMs with all the requirements established in this Directive with the exception of Article 21;

(ii) compliance of non-EU AIFMs with Articles 22, 23 and 24 in respect of each AIF marketed by the AIFM and, where relevant, with Articles 26 to 30;

(iii) existence and effectiveness of cooperation arrangements for the purpose of systemic risk oversight and in line with international standards between the competent authorities of the Member State where the AIFs are marketed, in so far as applicable, the competent authorities of the home Member State of the EU AIF concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, in so far as applicable, the supervisory authorities of the third country where the non-EU AIF is established;

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

(v) any features of a third country regulatory and supervisory framework which might prevent the effective exercise by the competent authorities of the Union of their supervisory functions under this Directive;

(c) as regards the functioning of both systems, the potential market disruptions and distortions in competition (level playing field) and any potential negative effect on investor access or investment in or for the benefit of developing countries;

(d) a quantitative assessment identifying the number of third-country jurisdictions in which there is established an AIFM that is marketing an AIF in a Member State either under the application of the passport regime referred to in Article 40 or under the national regimes referred to in Article 42.

3. To that end, as from the entry into force of the delegated act referred to in Article 67(6) and until the issuance of the ESMA opinion referred to in point (a) of paragraph 1 of this Article, the competent authorities shall, quarterly, provide ESMA with information on the AIFMs that are managing and/or marketing AIFs under their supervision, either under the application of the passport regime provided for in this Directive, or under their national regimes.

4. If ESMA considers that there are no significant obstacles regarding investor protection, market disruption, competition or the monitoring of systemic risk, impeding the termination of the national regimes pursuant to Articles 36 and 42 and making the passport for the marketing of non-EU AIFs by EU AIFMs in the Union and the management and/or marketing of AIFs by non-EU AIFM in the Union in accordance with the rules set out in Article 35 and Articles 37 to 41 the sole possible regime for such activities by the relevant AIFMs in the Union, it shall issue positive advice in this regard.

5. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying the contents of the information to be provided pursuant to paragraph 2.

6. The Commission shall adopt a delegated act within 3 months after having received positive advice and an opinion from ESMA and taking into account the criteria listed in paragraph 2 and the objectives of this Directive, such as those relating to the internal market, investor protection and the effective monitoring of systemic risk, in accordance with Article 56 and subject to the conditions of Articles 57 and 58, specifying the date when the national regimes set out in Articles 36 and 42 are to be terminated and the passport regime provided for in Article 35 and Articles 37 to 41 shall become the sole and mandatory regime applicable in all Member States.

If there is objection to the delegated act referred to in the first subparagraph in accordance with Article 58, the Commission shall re-adopt the delegated act pursuant to which the national regimes set out in Articles 36 and 42 are to be terminated and the passport regime provided for in Article 35 and Articles 37 to 41 shall become the sole and mandatory regime applicable in all Member States, in accordance with Article 56 and subject to the conditions of Articles 57 and 58, at a later stage which seems appropriate to it, taking into account the criteria listed in paragraph 2 and the objectives of this Directive, such as those relating to the internal market, investor protection and the effective monitoring of systemic risk.

7. If ESMA has not issued its advice within the time limit referred to in paragraph 1, the Commission shall request the advice to be provided within a new time limit.

Article 69

Review

1. By 22 July 2017, the Commission shall, on the basis of public consultation and in the light of the discussions with competent authorities, start a review on the application and the scope of this Directive. That review shall analyse the experience acquired in applying this Directive, its impact on investors, AIFs or AIFMs, in the Union and in third countries, and the degree to which the objectives of this Directive have been achieved. The Commission shall, if necessary, propose appropriate amendments. The review shall include a general survey of the functioning of the rules in this Directive and the experience acquired in applying them, including:

(a) the marketing by EU AIFMs of non-EU AIFs in the Member States taking place through national regimes;

(b) the marketing of AIFs in the Member States by non-EU AIFMs taking place through national regimes;

(c) the management and marketing of AIFs in the Union by AIFMs authorised in accordance with this Directive taking place through the passport regime provided for in this Directive;

(d) the marketing of AIFs in the Union by or on behalf of persons or entities other than AIFMs;

(e) the investment into AIFs by or on behalf of European professional investors;

(f) the impact of the depositary rules set out in Article 21 on the depositary market in the Union;

(g) the impact of the transparency and reporting requirements set out in Articles 22 to 24, 28 and 29 on the assessment of systemic risk;

(h) the potential adverse impact on retail investors;

(i) the impact of this Directive on the operation and viability of the private equity and venture capital funds;

(j) the impact of this Directive on the investor access in the Union;

(k) the impact of this Directive on investment in or for the benefit of developing countries;

(l) the impact of this Directive on the protection of non-listed companies or issuers provided by Articles 26 to 30 of this Directive and on the level playing field between AIFs and other investors after the acquisition of major holdings in or control over such non-listed companies or issuers.

When reviewing marketing and/or management of AIFs referred to in points (a), (b) and (c) of the first subparagraph, the Commission shall analyse the appropriateness of entrusting ESMA with further supervisory responsibilities in this area.

2. For the purposes of the review referred to in paragraph 1, Member States shall provide the Commission annually with information on the AIFMs that are managing and/or marketing AIFs under their supervision, either under the passport regime provided for in this Directive, or under their national regimes, with an indication of the date on which the passport regime has been transposed and, if relevant, applied, in their jurisdiction.

ESMA shall provide the Commission with information on all the non-EU AIFMs that have been authorised or have requested authorisation in accordance with Article 37.

The information referred to in the first and second subparagraphs shall include:

(a) information on where the AIFMs concerned are established;

(b) if applicable, identification of the EU AIFs managed and/or marketed by them;

(c) if applicable, identification of the non-EU AIFs managed by EU AIFMs but not marketed in the Union;

(d) if applicable, identification of the non-EU AIFs marketed in the Union;

(e) information on the applicable regime, whether national or Union, under which the relevant AIFMs are performing their activities; and

(f) any other information relevant to the understanding of how the management and the marketing of AIFs by AIFMs in the Union operates in practice.

3. The review referred to in paragraph 1 shall take due account of developments at international level and discussions with third countries and international organisations.

4. After finalising its review, the Commission shall, without undue delay, submit a report to the European Parliament and the Council. If appropriate, the Commission shall make proposals, including amendments to this Directive, taking into account the objectives of this Directive and its effects on investor protection, market disruption and competition, the monitoring of systemic risk and potential impacts on investors, AIFs or AIFMs in the Union and in third countries.

Article 69a

Assessment of the passport regime

Before the entry into force of the delegated acts referred to in Article 67(6) pursuant to which the rules set out in Article 35 and Articles 37 to 41 become applicable, the Commission shall submit a report to the European Parliament and to the Council, taking into account the result of an assessment of the passport

regime provided in this Directive including the extension of that regime to non-EU AIFMs. That report shall be accompanied, where appropriate, by a legislative proposal.

Article 69-a

Other review

1. By 16 April 2029 and following the report produced by ESMA in accordance with Article 7(8), the Commission shall initiate a review of the functioning of the rules laid down in this Directive and the experience acquired in applying them. That review shall include an assessment of the following aspects:

(a) the impact on financial stability of the availability and activation of liquidity management tools by AIFMs;

(b) the effectiveness of the AIFM authorisation requirements in Articles 7 and 8 as regards the delegation regime laid down in Article 20 of this Directive, in particular with regard to preventing the creation of letterbox entities in the Union;

(c) the appropriateness of the requirements applicable to AIFMs managing AIFs which originate loans laid down in Article 15 and Article 16(2a) and (2f);

(d) the functioning of the derogation allowing the appointment of a depositary established in another Member State as set out in Article 21(5a) and the potential benefits and risks, including the impact on investor protection, on financial stability, on supervisory efficiency and on the availability of market choices, of amending the scope of that derogation, in line with the objectives of the capital markets union;

(e) the appropriateness of the requirements applicable to AIFMs managing an AIF at the initiative of a third party as laid down in Article 14(2a) and the need for additional safeguards to prevent circumvention of those requirements, and, in particular, whether the provisions of this Directive on conflicts of interest are effective and appropriate in order to identify, manage, monitor and, where applicable, disclose conflicts of interest arising from the relationship between the AIFM and the third-party initiator;

(f) the appropriateness and impact on investor protection of the appointment of at least one non-executive or independent director to the governing body of the AIFM, where it manages AIFs marketed to retail investors.

2. By 16 April 2026, ESMA shall submit to the Commission a report regarding the development of the integrated collection of supervisory data, which shall focus on how to:

(a) reduce areas of duplication and inconsistencies between the reporting frameworks in the asset-management sector and other sectors of the financial industry; and

(b) improve data standardisation and efficient sharing and use of data already reported within any Union reporting framework by any relevant competent authority, at Union or national level.

3. When preparing the report referred to in paragraph 2, ESMA shall work in close cooperation with the European Central Bank, the other ESAs and the competent authorities.

4. Following the review referred to in paragraph 1, and after consulting ESMA, the Commission shall submit a report to the European Parliament and to the Council presenting the conclusions of that review.

Article 70

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 71

Addressees

This Directive is addressed to the Member States.

ANNEXES

ANNEX I

1. Investment management functions which an AIFM shall at least perform when managing an AIF:

   (a) portfolio management;

   (b) risk management.

2. Other functions that an AIFM may additionally perform in the course of the collective management of an AIF:

   (a) Administration:

      (i) legal and fund management accounting services;

      (ii) customer inquiries;

      (iii) valuation and pricing, including tax returns;

      (iv) regulatory compliance monitoring;

      (v) maintenance of unit-/shareholder register;

      (vi) distribution of income;

      (vii) unit/shares issues and redemptions;

      (viii) contract settlements, including certificate dispatch;

      (ix) record keeping;

   (b) Marketing;

   (c) Activities related to the assets of AIFs, namely services necessary to meet the fiduciary duties of the AIFM, facilities management, real estate administration activities, advice to undertakings on capital structure, industrial strategy and related matters, advice and services relating to mergers and the purchase of undertakings and other services connected to the management of the AIF and the companies and other assets in which it has invested;

   (d) Originating loans on behalf of an AIF;

   ~~(d)~~(e) Servicing securitisation special purpose entities.

ANNEX II

REMUNERATION POLICY

1. When establishing and applying the total remuneration policies, inclusive of salaries and discretionary pension benefits, for those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profiles of the AIFMs or of AIFs they manage, AIFMs shall comply with the following principles in a way and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities:

   (a) the remuneration policy is consistent with and promotes sound and effective risk management and does not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the AIFs they manage;

   (b) the remuneration policy is in line with the business strategy, objectives, values and interests of the AIFM and the AIFs it manages or the investors of such AIFs, and includes measures to avoid conflicts of interest;

   (c) the management body of the AIFM, in its supervisory function, adopts and periodically reviews the general principles of the remuneration policy and is responsible for its implementation;

   (d) the implementation of the remuneration policy is, at least annually, subject to central and independent internal review for compliance with policies and procedures for remuneration adopted by the management body in its supervisory function;

   (e) staff engaged in control functions are compensated in accordance with the achievement of the objectives linked to their functions, independent of the performance of the business areas they control;

   (f) the remuneration of the senior officers in the risk management and compliance functions is directly overseen by the remuneration committee;

   (g) where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of the performance of the individual and of the business unit or AIF concerned and of the overall results of the AIFM, and when assessing individual performance, financial as well as non-financial criteria are taken into account;

   (h) the assessment of performance is set in a multi-year framework appropriate to the life-cycle of the AIFs managed by the AIFM in order to ensure that the assessment process is based on longer term performance and that the actual payment of performance-based components of remuneration is spread over a period which takes account of the redemption policy of the AIFs it manages and their investment risks;

   (i) guaranteed variable remuneration is exceptional, occurs only in the context of hiring new staff and is limited to the first year;

   (j) fixed and variable components of total remuneration are appropriately balanced and the fixed component represents a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy, on variable remuneration components, including the possibility to pay no variable remuneration component;

   (k) payments related to the early termination of a contract reflect performance achieved over time and are designed in a way that does not reward failure;

(l) the measurement of performance used to calculate variable remuneration components or pools of variable remuneration components includes a comprehensive adjustment mechanism to integrate all relevant types of current and future risks;

(m) subject to the legal structure of the AIF and its rules or instruments of incorporation, a substantial portion, and in any event at least 50 % of any variable remuneration consists of units or shares of the AIF concerned, or equivalent ownership interests, or share-linked instruments or equivalent non-cash instruments, unless the management of AIFs accounts for less than 50 % of the total portfolio managed by the AIFM, in which case the minimum of 50 % does not apply.

The instruments referred to in this point shall be subject to an appropriate retention policy designed to align incentives with the interests of the AIFM and the AIFs it manages and the investors of such AIFs. Member States or their competent authorities may place restrictions on the types and designs of those instruments or ban certain instruments as appropriate. This point shall be applied to both the portion of the variable remuneration component deferred in line with point (n) and the portion of the variable remuneration component not deferred;

(n) a substantial portion, and in any event at least 40 %, of the variable remuneration component, is deferred over a period which is appropriate in view of the life cycle and redemption policy of the AIF concerned and is correctly aligned with the nature of the risks of the AIF in question.

The period referred to in this point shall be at least three to 5 years unless the life cycle of the AIF concerned is shorter; remuneration payable under deferral arrangements vests no faster than on a pro-rata basis; in the case of a variable remuneration component of a particularly high amount, at least 60 % of the amount is deferred;

(o) the variable remuneration, including the deferred portion, is paid or vests only if it is sustainable according to the financial situation of the AIFM as a whole, and justified according to the performance of the business unit, the AIF and the individual concerned.

The total variable remuneration shall generally be considerably contracted where subdued or negative financial performance of the AIFM or of the AIF concerned occurs, taking into account both current compensation and reductions in payouts of amounts previously earned, including through malus or clawback arrangements;

(p) the pension policy is in line with the business strategy, objectives, values and long-term interests of the AIFM and the AIFs it manages.

If the employee leaves the AIFM before retirement, discretionary pension benefits shall be held by the AIFM for a period of 5 years in the form of instruments defined in point (m). In the case of an employee reaching retirement, discretionary pension benefits shall be paid to the employee in the form of instruments defined in point (m), subject to a 5 year retention period;

(q) staff are required to undertake not to use personal hedging strategies or remuneration and liability-related insurance to undermine the risk alignment effects embedded in their remuneration arrangements;

(r) variable remuneration is not paid through vehicles or methods that facilitate the avoidance of the requirements of this Directive.

2. The principles set out in paragraph 1 shall apply to remuneration of any type paid by the AIFM, to any amount paid directly by the AIF itself, including carried interest, and to any transfer of units or shares of the AIF, made to the benefits of those categories of staff, including senior

management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile or the risk profiles of the AIF that they manage.

3. AIFMs that are significant in terms of their size or the size of the AIFs they manage, their internal organisation and the nature, the scope and the complexity of their activities shall establish a remuneration committee. The remuneration committee shall be constituted in a way that enables it to exercise competent and independent judgment on remuneration policies and practices and the incentives created for managing risk.

   The remuneration committee shall be responsible for the preparation of decisions regarding remuneration, including those which have implications for the risk and risk management of the AIFM or the AIF concerned and which are to be taken by the management body in its supervisory function. The remuneration committee shall be chaired by a member of the management body who does not perform any executive functions in the AIFM concerned. The members of the remuneration committee shall be members of the management body who do not perform any executive functions in the AIFM concerned.

ANNEX III

DOCUMENTATION AND INFORMATION TO BE PROVIDED IN CASE OF INTENDED MARKETING IN THE HOME MEMBER STATE OF THE AIFM

(a) A notification letter, including a programme of operations identifying the AIFs the AIFM intends to market and information on where the AIFs are established;

(b) the AIF rules or instruments of incorporation;

(c) identification of the depositary of the AIF;

(d) a description of, or any information on, the AIF available to investors;

(e) information on where the master AIF is established if the AIF is a feeder AIF;

(f) any additional information referred to in Article 23(1) for each AIF the AIFM intends to market;

(g) where relevant, information on the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF.

ANNEX IV

DOCUMENTATION AND INFORMATION TO BE PROVIDED IN THE CASE OF INTENDED MARKETING IN MEMBER STATES OTHER THAN THE HOME MEMBER STATE OF THE AIFM

(a) A notification letter, including a programme of operations identifying the AIFs the AIFM intends to market and information on where the AIFs are established;

(b) the AIF rules or instruments of incorporation;

(c) identification of the depositary of the AIF;

(d) a description of, or any information on, the AIF available to investors;

(e) information on where the master AIF is established if the AIF is a feeder AIF;

(f) any additional information referred to in Article 23(1) for each AIF the AIFM intends to market;

(g) the indication of the Member State in which it intends to market the units or shares of the AIF to professional investors;

(h) information about arrangements made for the marketing of AIFs and, where relevant, information on the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF;

(i) the details necessary, including the address, for the invoicing or for the communication of any applicable regulatory fees or charges by the competent authorities of the host Member State;

(j) information on the facilities for performing the tasks referred to in Article 43a.

ANNEX V

LIQUIDITY MANAGEMENT TOOLS AVAILABLE TO AIFMs MANAGING OPEN-ENDED AIFs

1. Suspension of subscriptions, repurchases and redemptions: suspension of subscriptions, repurchases and redemptions means temporarily disallowing the subscription, repurchase and redemption of the fund's units or shares.

2. Redemption gate: a redemption gate means a temporary and partial restriction of the right of unit-holders or shareholders to redeem their units or shares, so that investors can only redeem a certain portion of their units or shares.

3. Extension of notice periods: the extension of notice periods means extending the period of notice that unit-holders or shareholders must give to fund managers, beyond a minimum period which is appropriate to the fund, when redeeming their units or shares.

4. Redemption fee: redemption fee means a fee, within a predetermined range that takes account of the cost of liquidity, that is paid to the fund by unit-holders or shareholders when redeeming units or shares, and that ensures that unit-holders or shareholders who remain in the fund are not unfairly disadvantaged.

5. Swing pricing: swing pricing means a pre-determined mechanism by which the net asset value of the units or shares of an investment fund is adjusted by the application of a factor ('swing factor') that reflects the cost of liquidity.

6. Dual pricing: dual pricing means a pre-determined mechanism by which the subscription, repurchase and redemption prices of the units or shares of an investment fund are set by adjusting the net asset value per unit or share by a factor that reflects the cost of liquidity.

7. Anti-dilution levy: anti-dilution levy means a fee that is paid to the fund by a unit-holder or shareholder at the time of a subscription, repurchase or redemption of units or shares, that compensates the fund for the cost of liquidity incurred because of the size of that transaction, and that ensures that other unit-holders or shareholders are not unfairly disadvantaged.

8. Redemption in kind: redemption in kind means transferring assets held by the fund, instead of cash, to meet redemption requests of unit-holders or shareholders.

9. Side pockets: side pockets means separating certain assets, whose economic or legal features have changed significantly or become uncertain due to exceptional circumstances, from the other assets of the fund.

The following recitals from CBDF are included for information:

RECITALS

Cross-Border Distribution of Funds Directive

Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings

Whereas:

(1) Common objectives of Directive 2009/65/EC of the European Parliament and of the Council[59] and Directive 2011/61/EU of the European Parliament and of the Council[60] include ensuring a level playing field among collective investment undertakings and removing restrictions to the free movement of units and shares of collective investment undertakings in the Union, at the same time ensuring more uniform protection for investors. While those objectives have been largely achieved, certain barriers still hamper the ability of fund managers to fully benefit from the internal market.

(2) This Directive is complemented by Regulation (EU) 2019/1156 of the European Parliament and of the Council[61]. That Regulation lays down additional rules and procedures concerning undertakings for collective investment in transferable securities (UCITS) and alternative investment fund managers (AIFMs). That Regulation and this Directive should collectively further coordinate the conditions for fund managers operating in the internal market and facilitate cross-border distribution of the funds they manage.

(3) It is necessary to fill in the regulatory gap and align the procedure for notifying competent authorities of changes regarding UCITS with the notification procedure laid down in Directive 2011/61/EU.

(4) Regulation (EU) 2019/1156 further strengthens the principles applicable to marketing communications governed by Directive 2009/65/EC and extends the application of those principles to AIFMs, thereby resulting in a high standard of investor protection, regardless of the type of investor. The corresponding provisions of Directive 2009/65/EC relating to marketing communications and accessibility of national laws and regulations relevant to the arrangement of marketing units of UCITS are therefore no longer necessary and should be deleted.

(5) The provisions of Directive 2009/65/EC which require UCITS to provide facilities to investors, as implemented by certain national legal systems, have proven to be burdensome. In addition, local facilities are rarely used by investors in the manner intended by that Directive. The preferred

[59] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

[60] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

[61] Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014 (see page 55 of this Official Journal).

method of contact has shifted to direct interaction between investors and fund managers, either electronically or by telephone, whereas payments and redemptions are executed through other channels. While those local facilities are currently used for administrative purposes such as cross-border recovery of regulatory fees, such issues should be addressed via other means including cooperation between competent authorities. Consequently, rules should be established which modernise and specify the requirements for providing facilities to retail investors, and Member States should not require a local physical presence for the provision of such facilities. In any case, those rules should ensure that investors have access to the information to which they are entitled.

(6) In order to ensure the consistent treatment of retail investors, it is necessary that the requirements relating to facilities be also applied to AIFMs where Member States allow them to market units or shares of alternative investment funds (AIFs) to retail investors in their territories.

(7) The absence of clear and uniform conditions for the discontinuation of marketing of units or shares of a UCITS or an AIF in a host Member State creates economic and legal uncertainty for fund managers. Therefore, Directives 2009/65/EC and 2011/61/EU should set out clear conditions under which de-notification of the arrangements made for marketing as regards some or all of the units or shares could take place. Those conditions should balance, on the one hand, the ability of collective investment undertakings or their managers to terminate their arrangements made for marketing of their shares or units when the established conditions are met and, on the other hand, the interests of investors in such undertakings.

(8) The possibility to cease marketing UCITS or AIFs in a particular Member State should neither come at a cost to investors nor diminish their safeguards under Directive 2009/65/EC or Directive 2011/61/EU, in particular with regard to their right to accurate information on the continued activities of those funds.

(9) There are cases where an AIFM wishing to test investor appetite for a particular investment idea or investment strategy is faced with diverging treatment of pre-marketing in different national legal systems. The definition of pre-marketing and the conditions under which it is permitted vary considerably between those Member States in which it is permitted, whereas in other Member States there is no concept of pre-marketing at all. To address those divergences, a harmonised definition of pre-marketing should be provided and the conditions under which an EU AIFM can engage in pre-marketing should be established.

(10) For pre-marketing to be recognised as such under Directive 2011/61/EU, it should be addressed to potential professional investors and concern an investment idea or investment strategy in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with that Directive. Accordingly, during the course of pre-marketing, it should not be possible for investors to subscribe to the units or shares of an AIF and the distribution of subscription forms or similar documents to potential professional investors, whether in draft or final form, should not be permitted. EU AIFMs should ensure that investors do not acquire units or shares in an AIF through pre-marketing and that investors contacted as part of pre-marketing can only acquire units or shares in that AIF through marketing permitted under Directive 2011/61/EU.

Any subscription by professional investors, within 18 months of the EU AIFM having begun pre-marketing, to units or shares of an AIF referred to in the information provided in the context of

pre-marketing, or of an AIF established as a result of the pre-marketing, should be considered to be the result of marketing and should be subject to the applicable notification procedures referred to in Directive 2011/61/EU. To ensure that national competent authorities can exercise control over pre-marketing in their Member State, an EU AIFM should send, within two weeks of having begun pre-marketing, an informal letter, in paper form or by electronic means, to the competent authorities of its home Member State, specifying inter alia in which Member States it is or has engaged in pre-marketing, the periods during which the pre-marketing is taking or has taken place and including, where relevant, a list of its AIFs and compartments of AIFs which are or were the subject of pre-marketing. The competent authorities of the home Member State of the EU AIFM should promptly inform the competent authorities of the Member States in which the EU AIFM is or has engaged in pre-marketing thereof.

(11) EU AIFMs should ensure that their pre-marketing is adequately documented.

(12) National laws, regulations and administrative provisions necessary to comply with Directive 2011/61/EU and, in particular, with harmonised rules on pre-marketing, should not in any way disadvantage EU AIFMs vis-à-vis non-EU AIFMs. This concerns both the current situation in which non-EU AIFMs do not have passporting rights, and a situation in which the provisions on such passporting in Directive 2011/61/EU become applicable.

(13) In order to ensure legal certainty, it is necessary to synchronise the application dates of national laws, regulations and administrative provisions implementing this Directive and Regulation (EU) 2019/1156 with regard to relevant provisions on marketing communications and pre-marketing.

(14) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents[62], Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

[62] OJ C 369, 17.12.2011, p. 14.

The following recitals (covering both the AIFMD and UCITS forthcoming amendments) are included for information:

RECITALS

AIFMD II

Directive (EU) 2024/927 of the European Parliament and of the Council of 13 March 2024 amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, the provision of depositary and custody services and loan origination by alternative investment funds

Whereas:

(1) In accordance with Directive 2011/61/EU of the European Parliament and of the Council[63] the Commission has reviewed the application and the scope of that Directive and concluded that the objectives of integrating the Union market for alternative investment funds (AIFs), ensuring a high level of investor protection and protecting financial stability have, for the most part, been met. However, in its review the Commission also concluded that there is a need to harmonise the rules for the managers of alternative investment funds (AIFMs) managing AIFs which originate loans, as well as a need to clarify the standards applicable to AIFMs that delegate their functions to third parties, to ensure equal treatment of entities providing custody services ('custodians'), to improve cross-border access to depositary services, to optimise supervisory data collection and to facilitate the use of liquidity management tools across the Union. Therefore, amendments are necessary to address those needs in order to improve the functioning of Directive 2011/61/EU.

(2) A robust delegation regime, the equal treatment of custodians, coherent supervisory reporting, in particular through the removal of duplications and redundant requirements, and a harmonised approach to the use of liquidity management tools are equally necessary for the management of undertakings for collective investment in transferable securities (UCITS). Therefore, it is also appropriate to amend Directive 2009/65/EC of the European Parliament and of the Council[64], which lays down rules regarding the authorisation and operation of UCITS and their management companies in the areas of delegation, asset safekeeping, supervisory reporting and liquidity risk management.

(3) The Union market for AIFs reached EUR 6,8 trillion in net asset value at the end of 2022. Professional investors account for approximately 86 % of the net asset value of AIFs managed or marketed by authorised AIFMs and by sub-threshold AIFMs, i.e., the AIFMs referred to in Article 3(2) of Directive 2011/61/EU, in the Union. The Union market for AIFs provides over EUR 250 billion to Union businesses in private credit, and Union investors are responsible for 30 % of the global capital allocated to the whole industry. The size of the aggregated Union market for AIFs has continued to expand, increasing by over 15 % between 2020 and 2022, and AIFs accounted for one third of the fund industry of the European Economic Area at the end of 2020. Nonetheless, there is still room for the industry to grow by providing institutional investors with greater choice and enhancing the competitiveness of the capital markets union.

(4) To increase the efficiency of the activities of AIFMs, the list of ancillary services set out in Article 6(4) of Directive 2011/61/EU should be extended to include the tasks carried out by an administrator in accordance with Regulation (EU) 2016/1011 of the European Parliament and of

[63] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

[64] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32)

the Council[65] ('administration of benchmarks') and credit servicing activities in accordance with Directive (EU) 2021/2167 of the European Parliament and of the Council[66]. For the sake of completeness, it should be clarified that, when undertaking the tasks carried out by such an administrator or when providing credit servicing activities, the AIFM should be subject to Regulation (EU) 2016/1011 and Directive (EU) 2021/2167 respectively.

(5) In order to enhance legal certainty, it should be clarified that the management of AIFs can also comprise the activities of originating loans on behalf of an AIF and of servicing securitisation special purpose entities.

(6) In order to enhance legal certainty for AIFMs and UCITS management companies regarding the services they can provide to third parties, it should be clarified that AIFMs and UCITS management companies are allowed to perform for the benefit of third parties the same functions and activities that they already perform in relation to the AIFs and UCITS they manage, provided that any potential conflict of interest created by the provision of that function or activity to third parties is appropriately managed. Such functions and activities include, for example, corporate services such as human resources and information technology (IT), as well as IT services for portfolio management and risk management. That possibility would also support the international competitiveness of EU AIFMs and UCITS management companies by enabling economies of scale and would help diversify revenue sources.

(7) To ensure legal certainty, it should be clarified that AIFMs providing ancillary services involving financial instruments are subject to the rules laid down in Directive 2014/65/EU of the European Parliament and of the Council[67]. With regard to assets which are not financial instruments, AIFMs should be required to comply with the requirements of Directive 2011/61/EU.

(8) To ensure the uniform application of the requirements laid down in Directive 2011/61/EU regarding the necessary human resources of AIFMs, it is necessary to clarify that, at the time of the application for authorisation, an AIFM should provide the competent authorities with information about the human and technical resources that it employs to carry out its functions and, where applicable, to supervise its delegates. At least two natural persons who, on a full-time basis, either are employed by the AIFM or are executive members or members of the governing body of the AIFM, and who are domiciled, in the sense of having their habitual residence in the Union, should be appointed to conduct the business of the AIFM. Regardless of that statutory minimum, more resources might be necessary depending on the size and complexity of the AIFM and the AIFs it manages.

(9) Some Member States have requirements in national law or industry standards concerning the degree of independence of one or more members of the governing body of an AIFM or of the management body of a UCITS management company or of an investment company. It is appropriate to encourage AIFMs managing AIFs marketed to retail investors and UCITS management companies and investment companies to appoint as a member of their governing body or management body at least one independent or non-executive director, where possible under national law or under the industry standards of the home Member State of the AIFM, UCITS management company or investment company, in order to protect the interests of the AIFs and UCITS and of the investors in the AIFs that the AIFM manages or in the UCITS. In making that appointment, the AIFM, UCITS management company or investment company needs to ensure

[65] Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29.6.2016, p. 1)

[66] Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU (OJ L 438, 8.12.2021, p. 1).

[67] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

that that director is independent in character and in judgement and has sufficient expertise and experience to be able to assess whether the AIFM, UCITS management company or investment company is managing the AIFs or UCITS in the best interests of investors.

(10) The marketing of AIFs is not always conducted by the AIFM directly but by one or several distributors either on behalf of the AIFM or on their own behalf. In particular, there could be cases where an independent financial advisor markets an AIF without the AIFM's knowledge. Most fund distributors are subject to regulatory requirements pursuant to Directive 2014/65/EU or Directive (EU) 2016/97 of the European Parliament and of the Council[68], which define the scope and extent of their responsibilities towards their own clients. Directive 2011/61/EU should therefore acknowledge the diversity of distribution arrangements and distinguish between, on the one hand, arrangements whereby a distributor acts on behalf of the AIFM, which should be considered to be delegation arrangements, and, on the other hand, arrangements whereby a distributor acts on its own behalf when it markets the AIF under Directive 2014/65/EU or through life-insurance based investment products in accordance with Directive (EU) 2016/97, in which case the provisions of Directive 2011/61/EU regarding delegation should not apply, irrespective of any distribution agreement between the AIFM and the distributor.

(11) Delegation can allow for the efficient management of investment portfolios and for sourcing the necessary expertise in a particular geographic market or asset class. However, it is important that supervisors have updated information on the main elements of delegation arrangements. To develop a reliable overview of delegation activities in the Union, AIFMs should regularly provide competent authorities with information on delegation arrangements which involve the delegation of collective or discretionary portfolio management functions or of risk management functions. AIFMs should therefore, in respect of each AIF they manage, report information on the delegates, a list and description of the delegated activities, the amount and percentage of the assets of the managed AIFs that are subject to delegation arrangements concerning the portfolio management function, a description of how the AIFM oversees, monitors and controls the delegate, information on the sub-delegation arrangements and the date of commencement and expiry of the delegation and sub-delegation arrangements. For the sake of clarity, it should be specified that the data collected on the amount and percentage of the assets of the managed AIFs that are subject to delegation arrangements concerning the portfolio management function are for the purpose of providing a greater overview of the operation of delegation, and are not on their own an evidential indicator for determining the adequacy of substance or risk management arrangements, or the effectiveness of oversight or control arrangements at the level of the manager. Such information should be communicated to the competent authorities as part of the supervisory reporting regime governed by Directive 2011/61/EU.

(12) To ensure the uniform application of Directive 2011/61/EU, it should be clarified that the delegation rules laid down therein apply to all functions listed in Annex I to that Directive and to the list of ancillary services set out in Article 6(4) of that Directive.

(13) Investment funds providing loans can be a source of alternative financing for the real economy. Such funds can provide critical funding for Union small and medium-sized enterprises, for which traditional lending sources are more difficult to access. However, diverging national regulatory approaches can give rise to regulatory arbitrage and varying levels of investor protection, thereby hindering the establishment of an efficient internal market for loan origination by AIFs. Directive 2011/61/EU should recognise the right of AIFs to originate loans. Common rules should also be laid down to establish an efficient internal market for loan origination by AIFs, to ensure a uniform level of investor protection in the Union, to make it possible for AIFs to develop their activities by originating loans in all Member States and to facilitate access to finance by Union companies, a

[68] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (OJ L 26, 2.2.2016, p. 19).

key objective of the capital markets union as set out in the Commission's communication of 24 September 2020 entitled 'A Capital Markets Union for people and businesses – new action plan'. However, given the fast-growing private credit market, it is necessary to address the potential micro-prudential and macro-prudential risks that loan origination by AIFs could pose and spread to the broader financial system. The rules applicable to AIFMs managing AIFs which originate loans should be harmonised in order to improve risk management across the financial market and increase transparency for investors. For the sake of clarity, the provisions laid down in this Directive that are applicable to AIFMs that manage AIFs that originate loans should not prevent Member States from laying down national product frameworks that define certain categories of AIFs with more restrictive rules.

(14) Loan origination is not always conducted directly by the AIF. There can be cases where an AIF grants a loan indirectly through a third party or special purpose vehicle that grants the loan for or on behalf of the AIF, or for or on behalf of the AIFM in respect of the AIF, prior to gaining exposure to the loan. In order to avoid circumvention of Directive 2011/61/EU, where that AIF or AIFM is involved in structuring the loan, or defining or pre-agreeing its characteristics, such cases should be considered to be loan-originating activities and should be subject to that Directive.

(15) AIFs granting loans to consumers are subject to the requirements of other instruments of Union law applicable to consumer lending, including Directive 2008/48/EC of the European Parliament and of the Council[69] and Directive (EU) 2021/2167. Those instruments of Union law provide for the basic protection of borrowers at Union level. However, and for overriding reasons of public interest, Member States should be able to prohibit loan origination by AIFs to consumers in their territory.

(16) To support the professional management of AIFs and to mitigate risks to financial stability, AIFMs that manage AIFs that engage in loan origination, regardless of whether those AIFs meet the definition of loan-originating AIFs, should have effective policies, procedures and processes for the granting of loans. They should also implement effective policies, procedures and processes for assessing credit risk and administering and monitoring their credit portfolio where the AIFs that they manage engage in loan origination, including where those AIFs gain exposure to loans through third parties. Those policies, procedures and processes should be proportionate to the extent of the loan origination and should be reviewed regularly.

(17) To contain the risk of interconnectedness among loan-originating AIFs and other financial market participants, AIFMs of those AIFs should, where a borrower is a financial institution, be required to diversify their risk and subject their exposure to specific limits.

(18) To ensure the stability and integrity of the financial system and to introduce proportionate safeguards, loan-originating AIFs should be subject to a leverage limit that varies depending on whether they are of an open-ended or closed-ended type. The risk to financial stability is greater for open-ended AIFs, which can be subject to high levels of redemptions. In line with the objective of preserving financial stability, the leverage limit should not depend on whether a loan-originating AIF is marketed to professional and retail investors or only to professional investors. The commitment method provides a comprehensive and robust framework for calculating leverage in accordance with international standards, and in particular for taking into account the synthetic leverage created by derivatives. Those leverage limits should not prevent the competent authorities of the home Member State of the AIFM from imposing stricter leverage limits where it is deemed necessary in order to ensure the stability and integrity of the financial system.

(19) In order to limit conflicts of interest, AIFMs and their staff should not receive loans from any AIFs that they manage. Similarly, the AIF's depositary and the depositary's delegate, the AIFM's

[69] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66).

delegate and its staff, and entities within the same group as the AIFM, should be prohibited from receiving loans from the AIF concerned.

(20) To avert moral hazard and maintain the general credit quality of loans originated by AIFs, such loans should be subject to risk retention requirements when transferred to third parties. With the same objective, AIFMs should be prohibited from managing an AIF that originates loans with the sole purpose of selling them to third parties ('originate-to-distribute strategy'), regardless of whether that AIF meets the definition of a loan-originating AIF. Loans should be granted for the sole purpose of investing the capital raised by the AIF in accordance with its investment strategy and regulatory constraints. However, the AIFM should be able to implement that investment strategy in the best interests of the AIF's investors. That means that derogations from the risk retention rules are necessary and should cover cases where the retention of part of the loan is not compatible with the implementation of the AIF's investment strategy or with the regulatory requirements, including product requirements, imposed on the AIF and its AIFM. Those cases include situations where retaining part of the loan would result in the AIF exceeding its investment or diversification limits or breaching regulatory requirements, such as restrictive measures adopted under Article 215 of the Treaty on the Functioning of the European Union (TFEU), or where the AIF is entering liquidation, or where the borrower's situation has changed, for example in the event of merger or of default of the borrower if the AIF's investment strategy is not to manage distressed assets, or where the AIF's asset allocation is changed, resulting in the AIF no longer pursuing exposure to a specific sector or to a specific asset class. An AIFM should, at the request of the competent authorities of its home Member State, justify its decision to make use of such a derogation from the risk retention rules, and should be required to comply on an ongoing basis with the overarching principle of a prohibition on originate-to-distribute strategies.

(21) Long-term, illiquid loans held by an AIF could create liquidity mismatches if the AIF's open-ended structure allows investors to redeem their units or shares frequently. It is therefore necessary to mitigate the risks related to maturity transformation by imposing a closed-ended structure for loan-originating AIFs. It should however be possible for loan-originating AIFs to operate as open-ended provided that certain requirements are fulfilled, including a liquidity management system that minimises liquidity mismatches, ensures the fair treatment of investors and is under the supervision of the competent authorities of the home Member State of the AIFM. In order to ensure consistent criteria for the determination by the competent authorities of whether a loan-originating AIF can maintain an open-ended structure, the European Supervisory Authority (European Securities and Markets Authority) (ESMA) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council[70] should develop draft regulatory technical standards to establish those criteria, taking due account of the nature, liquidity profile and exposures of loan-originating AIFs.

(22) It should be clarified that where an AIF which originates loans, or an AIFM, in relation to the lending activities of AIFs that it manages, is subject to the requirements laid down in Directive 2011/61/EU and to the requirements laid down in Regulations (EU) No 345/2013[71], (EU) No 346/2013[72] and (EU) 2015/760[73] of the European Parliament and of the Council, the specific product requirements laid down in Chapter II of Regulation (EU) No 345/2013, Chapter II of

[70] Regulation (EU) No 1095/2010 of the European Parliament and of the council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2020, p. 84).

[71] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1).

[72] Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18).

[73] Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98).

Regulation (EU) No 346/2013 and Regulation (EU) 2015/760 should take precedence over the more general rules set out in Directive 2011/61/EU.

(23) Due to the potentially illiquid and long-term nature of the assets of AIFs that originate loans, AIFMs might experience difficulty in complying with changes to regulatory requirements introduced during the lifecycle of the AIFs that they manage without affecting the trust and confidence of their investors. It is therefore necessary to apply transitional provisions to certain requirements for AIFs constituted before the adoption of this Directive. However, such AIFs and AIFMs should also be able to choose to be subject to those rules provided that the competent authorities of the home Member State of the AIFM are notified accordingly. In addition, the rules applicable to loan origination and to loan-originating AIFs, with the exception of leverage and investment limits and the obligation for loan-originating AIFs to operate as closed-ended, should only apply in respect of loans originated after the entry into force of this Directive.

(24) To support market monitoring by the supervisory authorities, information gathering and sharing through supervisory reporting should be improved. Duplicative reporting requirements that exist under Union and national law, in particular Regulations (EU) No 600/2014[74] and (EU) 2019/834[75] of the European Parliament and of the Council and Regulations (EU) No 1011/2012[76] and (EU) No 1073/2013[77] of the European Central Bank, could be eliminated to improve efficiency and reduce administrative burdens for AIFMs. The European Supervisory Authority (European Banking Authority) (EBA) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council[78], the European Supervisory Authority (European Insurance and Occupational Pensions Authority) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council[79], ESMA (known collectively as 'European Supervisory Authorities' or 'ESAs') and the European Central Bank (ECB), with the support of competent authorities, where necessary, should assess the data needs of the different supervisory authorities so that the changes to the supervisory reporting template for AIFMs are effective.

(25) To reduce duplicative reporting and related reporting burdens for AIFMs and to ensure an efficient reuse of data by authorities, data reported by AIFMs to competent authorities should be made available to other relevant competent authorities, the ESAs and the European Systemic Risk Board (ESRB), as set out in the Recommendation of the European Systemic Risk Board of 7 December 2017[80], whenever necessary for the purpose of carrying out their duties, as well as to the members of the European System of Central Banks (ESCB) for statistical purposes only.

(26) In preparation for future changes to the supervisory reporting obligations, the scope of the data that can be required from AIFMs should be widened by removing limitations on that scope which focus on major trades and exposures or counterparties and by adding other categories of data to

[74] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

[75] Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (OJ L 141, 28.5.2019, p. 42).

[76] Regulation (EU) No 1011/2012 of the European Central Bank of 17 October 2012 concerning statistics on holdings of securities (OJ L 305, 1.11.2012, p. 6).

[77] Regulation (EU) No 1073/2013 of the European Central Bank of 18 October 2013 concerning statistics on the assets and liabilities of investment funds (OJ L 297, 7.11.2013, p. 73).

[78] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

[79] Regulation (EU) No 1094/2010 of e European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).

[80] Recommendation of the European Systemic Risk Board of 7 December 2017 on liquidity and leverage risks in investment funds (ESRB/2017/6) (OJ C 151, 30.4.2018, p. 1).

be supplied to the competent authorities. If ESMA determines that a full portfolio disclosure to supervisors on a periodic basis is warranted, the provisions of Directive 2011/61/EU should accommodate the necessary broadening of the reporting scope.

(27) In order to ensure the consistent harmonisation of supervisory reporting obligations, power should be delegated to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 to set out the contents, forms and procedures to standardise the supervisory reporting process by AIFMs, thus replacing the reporting template laid down in the delegated act adopted pursuant to Article 24 of Directive 2011/61/EU, as well as the reporting frequency and timing. As regards information to be reported on delegation arrangements, the regulatory technical standards should remain limited to setting out the appropriate level of standardisation of the information to be reported. The regulatory technical standards should not add any elements that are not provided for in Directive 2011/61/EU.

(28) To standardise the supervisory reporting process, the Commission should be empowered to adopt implementing technical standards developed by ESMA as regards the format, data standards and methods and arrangements for reporting by AIFMs. The Commission should adopt those implementing technical standards by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1095/2010.

(29) In order to ensure a more effective response to liquidity pressures in times of market stress and to better protect investors, rules should be laid down in Directive 2011/61/EU to implement the Recommendation of the ESRB of 7 December 2017.

(30) To enable AIFMs of open-ended AIFs established in any Member State to deal with redemption pressures under stressed market conditions, AIFMs should be required to select and include in the AIF rules or instruments of incorporation at least two liquidity management tools from the harmonised list set out in Annex V, points 2 to 8, to Directive 2011/61/EU. By way of derogation, where an AIFM manages an AIF that is authorised as a money market fund in accordance with Regulation (EU) 2017/1131 of the European Parliament and of the Council[81], the AIFM should be able to decide to select only one liquidity management tool from that list. Those liquidity management tools should be appropriate to the investment strategy, the liquidity profile and the redemption policy of the AIF. AIFMs should activate such liquidity management tools where necessary to safeguard the interests of the AIF's investors. In addition, AIFMs of open-ended AIFs should always have the possibility of temporarily suspending subscriptions, repurchases and redemptions or of activating side pockets, in exceptional circumstances and where justified having regard to the interests of the AIF's investors. Where an AIFM takes a decision to suspend subscriptions, repurchases and redemptions, it should without undue delay notify the competent authorities of its home Member State. Where an AIFM decides to activate or deactivate side pockets, it should notify the competent authorities of its home Member State within a reasonable timeframe prior to the activation or deactivation of that liquidity management tool. An AIFM should also notify the competent authorities of its home Member State where it activates or deactivates any other liquidity management tool in a manner that is not in the ordinary course of business as envisaged in the AIF rules or instruments of incorporation. That would allow supervisory authorities to better handle potential spill-overs of liquidity tensions into the wider market.

(31) In particular, and to strengthen investor protection, it should be specified that the use of redemption in kind is not suitable for retail investors and should therefore only be activated to meet redemption requests of professional investors. At the same time, risks of inequality of

[81] Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds (OJ L 169, 30.6.2017, p. 8).

treatment between redeeming investors and other unit-holders or shareholders should be addressed.

(32) To be able to make an investment decision in line with their risk appetite and liquidity needs, investors should be informed of the conditions for the use of liquidity management tools.

(33) In order to ensure consistent harmonisation in the area of liquidity risk management by AIFMs of open-ended funds and to facilitate market and supervisory convergence, power should be delegated to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 to specify the characteristics of the liquidity management tools set out in Annex V to Directive 2011/61/EU, taking due account of the diversity of investment strategies and of underlying assets of AIFs. Those regulatory technical standards should be adopted on the basis of a draft developed by ESMA and should not restrict the ability of AIFMs to use any appropriate liquidity management tool for all asset classes, jurisdictions and market conditions. In order to ensure a uniform level of investor protection in the Union, ESMA should develop guidelines on the selection and calibration of liquidity management tools by AIFMs. Those guidelines should recognise that the primary responsibility for liquidity risk management remains with AIFMs.

(34) Depositaries play an important role in safeguarding the interests of investors and should be able to perform their duties regardless of the type of the custodian that safekeeps the AIFs' assets. Therefore, where they provide custody services to AIFs, it is necessary to include central securities depositories (CSDs) in the custody chain in order to ensure that, in all cases, there is a stable information flow between the custodian of an AIF's asset and the depositary. To avoid unnecessary work, the depositaries should not perform ex ante due diligence where they intend to delegate custody to CSDs.

(35) In order to improve supervisory cooperation and effectiveness, the competent authorities of the host Member State of an AIFM should be able to address a reasoned request to the competent authorities of the home Member State of that AIFM to take supervisory action against it.

(36) To improve supervisory cooperation, ESMA should be able to request that a competent authority present a case before ESMA where that case has cross-border implications and might affect investor protection or financial stability. ESMA's analyses of such cases would give other competent authorities a better understanding of the discussed issues, contribute to preventing similar instances in the future and protect the integrity of the market for AIFs.

(37) To support supervisory convergence in the area of delegation, ESMA should receive more complete information on the application of this Directive, including in the area of appropriate oversight and control of delegation arrangements, in all Member States. To that end, it should draw on reporting obligations to competent authorities, and on the exercise in the area of delegation of its supervisory convergence powers, before the next reviews of Directives 2009/65/EC and 2011/61/EU take place. ESMA should provide a report that analyses market practices regarding delegation, and compliance with the rules on delegation, as well as substance requirements such as those relating to the human and technical resources that AIFMs, management companies and their delegates employ for the purpose of carrying out their functions.

(38) Regulation (EU) 2019/2088 of the European Parliament and of the Council[82] lays down harmonised rules for financial market participants and financial advisers on transparency with regard to the integration of sustainability risks and the consideration of adverse sustainability impacts in their processes and the provision of sustainability-related information with regard to financial products. It is important to take a horizontal approach to transparency rules on

[82] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (OJ L 317, 9.12.2019, p. 1).

sustainability for financial market participants and financial advisers. AIFs and UCITS can make an important contribution to the objectives of the capital markets union. The growth of the market for AIFs and UCITS also needs to be consistent with other objectives of the Union and should therefore be steered towards the promotion of sustainable growth. AIFMs and UCITS management companies should be able to demonstrate that they comply on an ongoing basis with their obligations under Regulation (EU) 2019/2088. Consequently, AIFMs and UCITS management companies should integrate environmental, social and governance (ESG) parameters into the governance and risk management rules used to support their investment decisions. AIFMs and UCITS management companies should also apply governance and risk-management rules to their investment decisions and to their assessment of relevant risks, including environmental, social and governance risks. That is even more important where AIFMs and UCITS management companies make claims as to the sustainable investment policies of the AIFs and UCITS that they manage. Those investment decisions and risk assessments should be made in the best interests of the investors of the AIFs and UCITS. ESMA should update its guidelines on sound remuneration policies under Directives 2011/61/EU and 2009/65/EC as regards aligning incentives with ESG risks in remuneration policies.

(39) The marketing of UCITS is not always conducted by the management company directly but by one or several distributors either on behalf of the management company or on their own behalf. In particular, there could be cases where an independent financial advisor markets a UCITS without the management company's knowledge. Most fund distributors are subject to regulatory requirements pursuant to Directive 2014/65/EU or (EU) 2016/97, which define the scope and extent of their responsibilities towards their own clients. Directive 2009/65/EC should therefore acknowledge the diversity of distribution arrangements and distinguish between, on the one hand, arrangements whereby a distributor acts on behalf of the management company, which should be considered to be delegation arrangements, and, on the other hand, arrangements whereby a distributor acts on its own behalf, when it markets the UCITS under Directive 2014/65/EU or through life-insurance based investment products in accordance with Directive (EU) 2016/97, in which case the provisions of Directive 2009/65/EC regarding delegation should not apply, irrespective of any distribution agreement between the management company and the distributor.

(40) Some concentrated markets lack a competitive supply of depositary services. To address that shortage, which can lead to increased costs for AIFMs and a less efficient market for AIFs, Member States should be able to permit their competent authorities to allow the appointment of a depositary established in another Member State. That possibility should only be used when the conditions laid down in this Directive are fulfilled and with the prior approval of the competent authorities of the AIF. Since the decision to allow the appointment of a depositary established in another Member State should not be automatic, even when those conditions are fulfilled, the competent authorities should take that decision only after carrying out a case-by-case assessment of the lack of relevant depositary services in the home Member State of the AIF having regard to the investment strategy of that AIF.

(41) As part of its review of Directive 2011/61/EU, the Commission should carry out an assessment of the functioning of the derogation allowing the appointment of a depositary established in another Member State and of the potential benefits and risks, including the impact on investor protection, on financial stability, on supervisory efficiency and on the availability of market choices, of amending the scope of that derogation, in line with the objectives of the capital markets union.

(42) Opening up the possibility of appointing a depositary established in another Member State should be accompanied by increased supervisory reach. Therefore, the depositary should be required to cooperate not only with its competent authorities but also with the competent authorities of the AIF for which the depositary has been appointed and the competent authorities of the home Member State of the AIFM that manages the AIF, if those competent authorities are located in a different Member State than that of the depositary.

(43) In order to better protect investors, the information flow from AIFMs to AIF investors should be increased. To allow AIF investors to better track the AIF's expenses, AIFMs should identify fees, charges and expenses that are borne by the AIFM and that are subsequently directly or indirectly allocated to the AIF or to any of its investments. AIFMs should periodically report on all such fees, charges and expenses. AIFMs should also be required to report to investors on the composition of the originated loan portfolio.

(44) To increase market transparency and employ effectively the available AIF market data, ESMA should be permitted to disclose the market data at its disposal in an aggregate or summary form and the confidentiality standard should therefore be relaxed to permit such data use.

(45) The requirements for third-country entities with access to the internal market should be aligned to the standards laid down in Directive (EU) 2015/849 of the European Parliament and of the Council[83]. They should also be aligned to the standards set out in the common action undertaken by the Member States as regards non-cooperative jurisdictions for tax purposes, reflected in the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes. In particular, non-EU AIFs, non-EU AIFMs that are active in individual Member States and depositaries established in a third country should not be located in a high-risk third country pursuant to Directive (EU) 2015/849, nor in a third country that is deemed non-cooperative in tax matters, subject in certain cases to a grace period where a country is later identified as a high-risk third country pursuant to that Directive or is added to the EU list of non-cooperative jurisdictions for tax purposes. The requirements should also ensure the appropriate and effective exchange of information in tax matters in line with international standards such as those laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital.

(46) Directive 2009/65/EC should ensure that the conditions for UCITS management companies are comparable to those for AIFMs, where there is no reason to maintain regulatory differences for UCITS and AIFMs. That would be the case for the delegation regime, the regulatory treatment of custodians, the supervisory reporting requirements, and the availability and use of liquidity management tools.

(47) To ensure the uniform application of the substance requirements for UCITS management companies, it should be clarified that at the time of the application for authorisation, a management company should provide the competent authorities with information about the human and technical resources that it employs to carry out its functions and, where applicable, to supervise its delegates. At least two natural persons who, on a full-time basis, either are employed by the management company or are executive members or members of the management body of the management company, and who are domiciled, in the sense of having their habitual residence, in the Union, should be appointed to conduct the business of the management company. Regardless of that statutory minimum, more resources might be necessary depending on the size and complexity of the management company and the UCITS it manages.

(48) To align the legal frameworks of Directives 2009/65/EC and 2011/61/EU with regard to delegation, UCITS management companies should be required to justify to the competent authorities the delegation of their functions and to provide objective reasons for the delegation.

(49) Delegation can allow for the efficient management of investment portfolios and for sourcing the necessary expertise in a particular geographic market or asset class. However, it is important that supervisors have updated information on the main elements of delegation arrangements. To develop a reliable overview of delegation activities in the Union, management companies should

[83] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

regularly provide competent authorities with information on delegation arrangements which involve the delegation of collective or discretionary portfolio management functions or of risk management functions. Management companies should therefore, in respect of each UCITS they manage, report information on the delegates, a list and description of the delegated activities, the amount and percentage of the assets of the managed UCITS that are subject to delegation arrangements concerning the portfolio management function, a description of how the management company oversees, monitors and controls the delegate, information on the sub-delegation arrangements and the date of commencement and expiry of the delegation and sub-delegation arrangements. For the sake of clarity, it should be specified that the data collected on the amount and percentage of the assets of the managed UCITS that are subject to delegation arrangements concerning the portfolio management function are for the purpose of providing a greater overview of the operation of delegation, and are not on their own an evidential indicator for determining the adequacy of substance or risk management arrangements, or the effectiveness of oversight or control arrangements at the level of the manager. Such information should be communicated to the competent authorities as part of the supervisory reporting regime governed by Directive 2009/65/EC.

(50) To ensure the uniform application of Directive 2009/65/EC, it should be clarified that the delegation rules laid down therein apply to all functions listed in Annex II to that Directive and to the list of ancillary services set out in Article 6(3) of that Directive.

(51) In order to further align the rules on delegation applicable to AIFMs and UCITS and to achieve a more uniform application of Directives 2011/61/EU and 2009/65/EC, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of specifying the conditions for delegation from a UCITS management company to a third party and the conditions under which a UCITS management company can be deemed to be a letter-box entity and therefore can no longer be considered to be the manager of the UCITS. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making[84]. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

(52) This Directive should implement the Recommendation of the ESRB of 7 December 2017 to harmonise liquidity management tools and their use by the managers of open-ended funds, which include UCITS, to enable a more effective response to liquidity pressures in times of market stress and better protection of investors.

(53) To enable UCITS established in any Member State to deal with redemption pressures under stressed market conditions, they should be required to select and include in their rules or instruments of incorporation at least two liquidity management tools from the harmonised list set out in Annex IIA, points 2 to 8, to Directive 2009/65/EC. By way of derogation, a UCITS that is authorised as a money market fund in accordance with Regulation (EU) 2017/1131 should be able to decide to select only one liquidity management tool from that list. Those liquidity management tools should be appropriate to the investment strategy, the liquidity profile and the redemption policy of the UCITS. UCITS should activate such liquidity management tools where necessary to safeguard the interests of the UCITS' investors. In addition, UCITS should always have the possibility of temporarily suspending subscriptions, repurchases and redemptions or of activating side pockets, in exceptional circumstances and where justified having regard to the interests of the UCITS' investors. Where a UCITS takes a decision to suspend subscriptions,

[84] OJ L 123, 12.5.2016, p. 1.

repurchases and redemptions, it should without undue delay notify the competent authorities of its home Member State. Where a UCITS decides to activate or deactivate side pockets, it should notify the competent authorities of its home Member State within a reasonable timeframe prior to the activation or deactivation of that liquidity management tool. The UCITS should also notify the competent authorities of its home Member State where it activates or deactivates any other liquidity management tool in a manner that is not in the ordinary course of business as envisaged in the fund rules or the instruments of incorporation of the UCITS. That would allow supervisory authorities to better handle potential spill-overs of liquidity tensions into the wider market.

(54) In particular, and to strengthen investor protection, it should be specified that the use of redemption in kind is not suitable for retail investors and should therefore only be activated to meet redemption requests of professional investors. At the same time, risks of inequality of treatment between redeeming investors and other unit-holders should be addressed.

(55) To be able to make an investment decision in line with their risk appetite and liquidity needs, UCITS investors should be informed of the conditions for the use of liquidity management tools.

(56) In order to ensure consistent harmonisation in the area of liquidity risk management by UCITS and to facilitate market and supervisory convergence, power should be delegated to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 to specify the characteristics of the liquidity management tools set out in Annex IIA to Directive 2009/65/EC, taking due account of the diversity of investment strategies and of underlying assets of UCITS. Those regulatory technical standards should be adopted on the basis of a draft developed by ESMA and should not restrict the ability of UCITS to use any appropriate liquidity management tool for all asset classes, jurisdictions and market conditions. In order to ensure a uniform level of investor protection in the Union, ESMA should develop guidelines on the selection and calibration of liquidity management tools by management companies. Those guidelines should recognise that the primary responsibility for liquidity risk management remains with UCITS.

(57) To support market monitoring by the supervisory authorities, information gathering and sharing through supervisory reporting should be improved by subjecting UCITS to supervisory reporting obligations. Duplicative reporting requirements that exist under Union and national law, in particular Regulations (EU) No 600/2014 and (EU) 2019/834 and Regulations (EU) No 1011/2012 and (EU) No 1073/2013, could be eliminated to improve efficiency and reduce administrative burdens for management companies. The ESAs and the ECB, with the support of competent authorities, where necessary, should assess the data needs of the different supervisory authorities, so as to ensure that the information to be reported under the supervisory reporting template for UCITS is sufficient.

(58) To reduce duplicative reporting and related reporting burdens for UCITS and to ensure an efficient reuse of data by authorities, data reported by UCITS to competent authorities should be made available to other relevant competent authorities, ESMA, the other ESAs and the ESRB, whenever necessary for the purpose of carrying out their duties, as well as to the members of the ESCB for statistical purposes only.

(59) In order to ensure the consistent harmonisation of supervisory reporting obligations, power should be delegated to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU in accordance with Articles 10 to 14 and Article 15 of Regulation (EU) No 1095/2010 to set out the contents, forms and procedures to standardise the supervisory reporting process by management companies, as well as the reporting frequency and timing. As regards information to be reported on delegation arrangements, the regulatory technical standards should remain limited to setting out the appropriate level of standardisation of the information to be reported. Those regulatory technical standards should be adopted on the basis

of a draft developed by ESMA. The regulatory technical standards should not add any elements that are not provided for in Directive 2009/65/EC.

(60) To standardise the supervisory reporting process the Commission should be empowered to adopt implementing technical standards developed by ESMA as regards the format, data standards and methods and arrangements for reporting by management companies. The Commission should adopt those implementing technical standards by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1095/2010.

(61) To ensure investor protection, and in particular to ensure that in all cases there is a stable information flow between the custodian of the UCITS' asset and the depositary, the depositary regime should be extended to include CSDs in the custody chain where they provide custody services to UCITS. To avoid unnecessary work, the depositaries should not perform ex ante due diligence where they intend to delegate custody to CSDs.

(62) In order to improve supervisory cooperation and effectiveness, the competent authorities of the UCITS host Member State should be able to address a reasoned request to the competent authority of the UCITS home Member State to take supervisory action against that UCITS.

(63) To improve supervisory cooperation, ESMA should be able to request that a competent authority present a case before ESMA where that case has cross-border implications and might affect investor protection or financial stability. ESMA's analyses of such cases would give other competent authorities a better understanding of the discussed issues, contribute to preventing similar instances in the future and protect the integrity of the UCITS market.

(64) Notwithstanding the secrecy rules applicable at present, information exchanges between competent authorities and tax authorities should be improved. Such exchanges should comply with national law, and, where the information originates in another Member State, it should only be disclosed with the express agreement of the competent authority which has disclosed it.

(65) Directives 2011/61/EU and 2009/65/EC require AIFMs and UCITS management companies to act with due skill, care and diligence in the best interests of the investment funds they manage and of their investors. Member States should therefore require AIFMs and UCITS management companies to act honestly and fairly as regards the fees and costs charged to investors. In 2020, ESMA developed a supervisory briefing to promote convergence on the supervision of costs in AIFs and UCITS and to develop a set of criteria to support competent authorities in assessing the notion of undue costs and in supervising the obligation to prevent undue costs from being charged to investors. Those criteria are intended to provide guidance to competent authorities, while promoting supervisory convergence in the context of the capital markets union. However, due to the lack of a clear definition of undue costs, at present, divergent market and supervisory practices exist as to what industry and supervisors perceive as undue costs, and evidence has shown a disparity in the costs charged in different Member States and in the costs charged to retail investors as compared to professional investors. The proposed amendments to Directives 2011/61/EU and 2009/65/EC, in the context of the Union's retail investment strategy, intend to tackle that issue, by requiring fund managers to establish a sound pricing process, which should comprise the identification, analysis and review of costs charged, directly or indirectly, to investment funds or their unit-holders, and by introducing a requirement to compensate investors where undue costs have been charged. ESMA should submit a report to the European Parliament, the Council and the Commission assessing the level of, reasons for, and differences in, the costs charged to retail investors, including differences resulting from the nature of the AIFs and UCITS concerned, and analysing whether the criteria set out in its supervisory briefing are to be complemented with regard to the notion of undue costs. In order to support the competent authorities in the supervision of costs, and ESMA in its analysis of cost-related issues, the competent authorities should collect cost data to be shared with ESMA on a one-time basis. That data collection would increase ESMA's expertise in the area of cost reporting with a view to

providing the European Parliament, the Council, the Commission and the competent authorities with technical advice on the collection of cost data in the context of the Union's retail investment strategy. On the basis of that report, ESMA should carry out activities under Article 29 of Regulation (EU) No 1095/2010 to help develop a common understanding of the notion of undue costs.

(66) The name of an AIF and of a UCITS is a distinctive element that influences investors' choices and gives a first impression of the fund's investment strategy and objectives. Although the name of an AIF and of a UCITS already forms part of the pre-contractual information provided to investors, it is useful to underline the importance of the name by specifically emphasising that it constitutes essential pre-contractual information in the key investor information and prospectus that should be provided to retail investors before they invest in that AIF and to investors before they invest in that UCITS. In accordance with Directive (EU) 2021/2261 of the European Parliament and of the Council[85], as of 1 January 2023, UCITS marketed to retail investors are subject to the requirements of Regulation (EU) No 1286/2014 of the European Parliament and of the Council[86]. Since that date, the obligation of a UCITS management company or investment company to prepare a key investor information document has been replaced by the obligation to prepare a key information document in accordance with Regulation (EU) No 1286/2014. In addition, AIFMs managing AIFs that are marketed to retail investors are also subject to the requirements of that Regulation. Accordingly, where AIFs and UCITS are marketed to retail investors, AIFMs and UCITS are required to include in the key information document the name of the fund and to ensure that such information is accurate, fair and clear and does not convey a misleading or confusing message that would wrongly entice investors. It is therefore essential to emphasise that the name of an AIF or UCITS is considered as important as any other pre-contractual document and subject to equal standards of fairness and transparency. In order to ensure a high and uniform level of investor protection in the Union, ESMA should develop guidelines to specify situations where the name of an AIF or UCITS could be unfair, unclear or misleading to the investor. Sectoral legislation setting standards for fund names or marketing of funds takes precedence over those guidelines.

(67) In carrying out its functions under Directives 2009/65/EC and 2011/61/EU, ESMA should take a risk-based approach.

(68) On 9 August 2022, the ECB delivered an opinion[87],

[85] Directive (EU) 2021/2261 of the European Parliament and of the Council of 15 December 2021 amending Directive 2009/65/EC as regards the use of key information documents by management companies of undertakings for collective investment in transferable securities (UCITS) (OJ L 455, 20.12.2021, p. 15).

[86] Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (OJ L 352, 9.12.2014, p. 1).

[87] OJ C 379, 3.10.2011, p. 1.