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NOTE

from:	Presidency
to:	Delegations
Subject:	Proposal for a Directive of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC

Delegations will find attached a revised compromise proposal by the Presidency with regard to the above-mentioned Commission proposal.

Encl.

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 (AIFM) which manage and/or market such funds in the Union.

Article 2

Scope

1. Subject to the exceptions set forth herein, this Directive shall apply to:
 - (i) all EU AIFM, which manage one or more alternative investment funds (AIF) irrespective of whether the AIF is an EU AIF or a non-EU AIF;
 - (ii) all non-EU AIFM, which manage one or more EU AIF; and
 - (iii) all non-EU AIFM, which market one or more AIF in the European Union, irrespective of whether the AIF is an EU AIF or a non-EU AIF.

In this regard, it is 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 or under trust law, under statute or has any other legal form;
- (c) what the legal structure is.

2. The Directive shall not apply to the following entities:
- (a) holding companies;
 - (b) institutions which are covered by Directive 2003/41/EC of the European Parliament and the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (IORP), including, where applicable, the authorised entities responsible for managing IORP and acting on their behalf referred to in Article 2(1) of that Directive or the appointed investment managers pursuant to Article 19(1) of the same Directive, insofar as they do not manage AIF;
 - (c) supranational institutions, such as the World Bank, the IMF, the ECB, the EIB, [the European development finance institutions (DFIs) and bilateral development banks,] the EIF, other supranational institutions and similar international organisations, in case such institutions or organisations manage one or several AIF in so far as those AIF 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 saving schemes;
 - (g) securitisation special purpose entities.
3. Member States shall take the necessary steps to ensure that AIFM referred to in paragraph 1 comply with the applicable requirements of this Directive on an ongoing basis.

Article 3

Exemptions

1. This Directive shall not apply to AIFM insofar as they manage one or more AIF 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 itself is an AIF.

2. For the following AIFM, the application of the Directive shall be limited to the provisions set forth in paragraphs 3 and 4 below:
 - (a) AIFM 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 AIF 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) AIFM 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 AIF whose assets under management, in total do not exceed a threshold of EUR [500] million when the portfolio of AIF consists of AIF that are not leveraged 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 AIFM referred to in paragraph 2 shall at least:
 - (a) be subject to a registration with the competent authorities of its home Member State;
 - (b) at the time of registration identify itself and the AIF managed by it to the competent authorities of its home Member State;
 - (c) at the time of registration provide information on the investment strategies of the AIF managed by it to the competent authorities of its home Member State;
 - (d) provide regularly the competent authorities of its home Member State with information on the main instruments in which they are trading and on the principal exposures and most important concentrations of AIF they manage in order to enable the competent authorities to effectively monitor systemic risk, and
 - (e) notify the competent authorities of its home Member State in the event that they no longer comply with the conditions referred to in paragraph 2.

Paragraphs 2 and 3 of this Article shall apply without prejudice to the stricter rules adopted by Member States with respect to AIFM falling under one of the exemptions set forth in paragraph 2.

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

4. AIFM referred to in paragraph 2 do not benefit from any of the rights granted under this Directive, unless the AIFM chooses to opt-in under this Directive in which case the entire Directive, subject to the exceptions set forth herein, shall be applicable to those AIFM.
5. The Commission shall, in accordance with the regulatory procedure referred to in [Article 57(2) - *Implementing measures*]¹, adopt implementing measures with a view to specifying:
 - (a) how to calculate the thresholds referred to in paragraph 2 and to treat AIFM 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;
 - (b) the procedures for AIFM which choose to opt-in under this Directive in accordance with paragraph 4.
6. The Commission shall adopt by means of delegated acts, in accordance with [Article 54, and subject to the conditions laid down in Articles 55 and 56 - *delegation to COM*], measures specifying:
 - (a) the obligations to register for the entities set forth in paragraph 2 and to provide information in order to effectively monitor systemic risk as set forth in paragraph 3, and
 - (b) the obligations to notify competent authorities referred to in paragraph 3.

¹ *To avoid confusion, a description of any of the Chapters and/or Articles referred to, is added. These descriptions will be removed as soon as the cross references are final.*

Article 4
Definitions

[to be updated during discussions on the contents of the Directive]

1. For the purpose of this Directive, the following definitions shall apply, unless specifically provided otherwise in this Directive:
 - (a) '*Activities related to the assets of AIF*' means performing 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 it has invested in.
 - (b) '*AIF*' or '*alternative investment fund*' means any collective investment undertaking, including investment compartments thereof,
 - (i) which raises 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) which does not require authorisation pursuant to Article 5 of 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);
 - (c) '*AIFM*' or '*manager of alternative investment funds*' means any legal person whose regular business is managing one or more AIF;
 - (d) '*Branch*' means a place of business which, in case of an AIFM, is a part of the AIFM, which has no legal personality and which, in case of an AIFM, 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 a third country shall be regarded as a single branch;

- (e) '*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.
- (f) '*Close links*' means a situation in which two or more natural or legal persons are linked by :
 - (i) participation, which means the ownership, direct or by way of control, of 20% or more of the voting rights or capital of an undertaking,
 - (ii) control, which means the relationship between a parent undertaking and a subsidiary, in all the cases referred to in Article 1(1) and (2) of Seventh Council Directive 83/349/EEC of 13 June 1983, or a similar relationship between any natural or legal person and an undertaking, any subsidiary undertaking of a subsidiary undertaking also being considered a subsidiary of the parent undertaking which is at the head of those undertakings.

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

- (g) '*Competent authorities*' means the national authorities of Member States, which are empowered by law or regulation to supervise AIFM;
- (h) '*Competent authorities of a depositary*' means
 - (i) if the depositary is a credit institution authorised under Directive 2006/48/EC, the competent authorities as defined in Article 4(4) of that Directive;
 - (ii) if the depositary is an investment firm authorised under Directive 2004/39/EC, the competent authorities as defined in Article 4(1)(22) of that Directive;
 - (iii) if the depositary is a legal person referred to in point (c) of the first subparagraph of Article 21(3), the national authorities of its home Member State which are empowered by law or regulation to supervise such legal persons;

- (iv) if the depositary is an entity referred to in the third subparagraph of Article 21(3), the national authorities of the Member State in which this entity has its registered office and which are empowered by law or regulation to supervise such entity or, as the case may be, the official body competent to register or supervise such entity pursuant to the rules of professional conduct applicable to it;
- (v) if the depositary is appointed as depositary for a non-EU AIF in accordance with paragraph (b) of Article 21(5), and is not any of the entities referred to above, the relevant national authorities of the third country where the depositary has its registered office;
- (i) '*Competent authorities of an EU AIF*' means the national authorities of a Member State which are empowered by law or regulation to supervise AIF;
- (j) '*Control*' means control as defined in Article 1 of the Seventh Council Directive 83/349/EEC of 13 June 1983;
- (k) '*Established*' means
 - (i) for AIFM, 'having its registered office in';
 - (ii) for AIF, 'being authorised or registered in', or, as the case may be if it is not authorised or registered, 'having its registered office in';
 - (iii) for depositaries, 'having its registered office or branch in';
 - (iv) for legal representatives, 'having its registered office or branch in'.
- (l) '*EU AIF*' means
 - (i) any AIF which is authorised or registered in a Member State of the European Union under the applicable national law; and
 - (ii) any AIF which is not authorised or registered in a Member State, but has its registered office and/or head office in a Member State of the European Union;
- (m) '*EU AIFM*' means any AIFM which has its registered office in a Member State of the European Union;

- (n) '*Feeder AIF*' means an AIF which:
- (i) invests at least 85 % of its assets in shares or units of another AIF (the master AIF); or
 - (ii) invests at least 85% of its assets in more than one master AIF where those master AIF have identical investment strategies; or
 - (iii) has otherwise an exposure of at least 85% of its assets to one or more such master AIF.
- (o) '*Financial instrument*' means an instrument as specified in Annex I Section C of Directive 2004/39/EC;
- (p) '*Initial capital*' means the funds as referred to in Article 57(a) and (b) of 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 (recast);
- (q) '*Issuer*' means any issuer within the meaning of Article 2(1)(d) of 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 and amending Directive 2001/34/EC which has its registered office in the European Union, and whose shares are admitted to trading on a regulated market within the meaning of Article 4(1), point 14, of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC;
- (r) ' *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 or associated companies in order to contribute to their long term value and which is either:

- (i) a company whose shares are admitted to trading on a European regulated market and which is operating for its own account; 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 is evidenced in the company's annual report or other official documents.
- (s) *'Home Member State of an 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 not authorised or registered in a Member State, the Member State in which the AIF has its registered office and/or head office;
- (t) *'Home Member State of an AIFM'* means the Member State in which the AIFM has its registered office;²
- (u) *'Host Member State of an AIFM'* means, as the case may be,
- (i) The Member State, other than the home Member State, within the territory of which an EU AIFM markets shares or units of an EU AIF; or
 - (ii) The Member State, other than the home Member State, within the territory of which an EU AIFM manages EU AIF; or
 - (iii) The Member State, other than the home Member State, within the territory of which an EU AIFM markets shares or units of a non-EU AIF; or
 - (iv) The Member State, other than the Member State of reference, within the territory of which a non-EU AIFM manages EU AIF; or
 - (v) The Member State, other than the Member State of reference, within the territory of which a non-EU AIFM markets shares or units of an EU AIF; or
 - (vi) The Member State, other than the Member State of reference, within the territory of which a non-EU AIFM markets shares or units of a non-EU AIF.

² For non-EU AIFM, all references to 'home Member State of the AIFM' in this Directive shall be read as the 'Member State of reference'. This shall be clarified in the third country chapter.

- (v) ***'Legal representative'*** means any natural or legal person having its registered office in the European Union who, explicitly designated by a non-EU AIFM, acts on behalf of such non-EU AIFM and may be addressed by authorities, clients, bodies and counterparties to the non-EU AIFM in the European Union instead of the non-EU AIFM with regard to the latter's obligations under this Directive.
- (w) *'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;
- (x) *'Managing AIF'* means providing at least investment management services referred to in point 1(a) [or] (b) of Annex I to one or more AIF;
- (y) *'Marketing'* means any direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares in an AIF it manages to or with investors domiciled in the Union;
- (z) *'Master AIF'* means any AIF in which another AIF invests or has an exposure in accordance with what is set forth in point [(n)] above.
- (aa) *'Member State of reference'* means the Member State of reference for a non-EU AIFM [as determined in accordance with Article [37 paragraph 4 - *Authorisation of non-EU AIFM*];
- (ab) *'Non-EU AIF'* means any AIF which is not an EU AIF;
- (ac) *'Non-EU AIFM'* means any AIFM which is not an EU AIFM;
- (ad) *'Non-listed company'* means any company which has its registered office in the European Union whose shares are not admitted to trading on a regulated market within the meaning of Article 4(1), point 14, of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC;

- (ae) ‘*Own funds*’ means own funds as referred to in Title V, Chapter 2, Section 1 of 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 (recast);
- (af) ‘*Parent undertaking*’ means a parent undertaking as defined in Articles 1 and 2 of the Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54(3)(g) of the Treaty on consolidated accounts;
- (ag) ‘*Prime broker*’ means a credit institution, a regulated investment firm or an other entity subject to prudential regulation and ongoing supervision, offering one or more 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.
- (ah) ‘*Professional investor*’ means any investor which is considered to be a professional client or may be treated as a professional client on request within the meaning of Annex II of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC;
- (ai) ‘*Qualifying holding*’ means any direct or indirect holding in an AIFM which represents 10% or more of the capital or of the voting rights, as set out in Articles 9 and 10 of 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 and amending Directive 2001/34/EC, taking into account the conditions regarding aggregation thereof laid down in Article 12(4) and (5) of that Directive, or which makes it possible to exercise a significant influence over the management of the AIFM in which that holding subsists;

- (aj) '*Representatives of employees*' means representatives of employees as defined by Article 2(e) of Directive 2002/14 of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community;
- (ak) '*Retail investor*' means any investor who is not a professional investor;
- (al) '*Subsidiary*' means a subsidiary undertaking as defined in Articles 1 and 2 of the Seventh Council Directive 83/349/EEC of 13 June 1983, including any subsidiary of a subsidiary undertaking of an ultimate parent undertaking;
- (am) '*Supervisory authorities of a non-EU AIF*' means the national authorities of a third country which are empowered by law or regulation to supervise AIF;
- (an) '*Supervisory authorities of a non-EU AIFM*' means the national authorities of a third country which are empowered by law or regulation to supervise AIFM;
- (ao) '*Securitisation special purpose entity*' means, for the purpose of [paragraph 2(g) of Article 2 *-scope*], an entity 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 (ECB/2008/30) and other activities which are appropriate to accomplish that purpose;
- (ap) '*UCITS*' means an undertaking for collective investment in transferable securities authorised in accordance with Article 5 of 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).

2. For the purposes of point (ae) of paragraph 1 [*own funds*], 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 (recast) shall apply mutatis mutandis.

3. The Commission shall adopt by means of delegated acts, in accordance with [Article 54, and subject to the conditions laid down in Articles 55 and 56 - *delegation to COM*], measures specifying the methods of leverage, including any financial and/or legal structures involving third parties, as defined in point (w) of paragraph 1 [*leverage*].
4. The Commission shall adopt, in accordance with the regulatory procedure referred to in [Article 57(2) - *implementing measures*], implementing measures specifying how leverage shall be calculated.
5. ESMA shall adopt draft implementing technical standards to determine, where relevant in the application of this Directive and to ensure a uniform conditions of application, the types of AIFM.

Power is conferred on the Commission to adopt the draft implementing technical standards referred to in the first subparagraph in accordance with Article 7e of Regulation (EU) No .../2010 [ESMA].

Article 5
Determination of 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 the requirements of the 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; 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 externally appointed 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, insofar 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, despite such steps referred to in paragraph 2, the non-compliance persists, and insofar it concerns an EU AIFM or an EU AIF, the competent authorities of the home Member State of the AIFM shall require that it resigns as AIFM of that AIF. In that case the AIF may no longer be marketed in the European Union. If it concerns a non-EU AIFM managing a non-EU AIF, the AIF may no longer be marketed in the European 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.

CHAPTER II
AUTHORISATION OF AIFM

Article 6

Conditions for taking up activities as AIFM

1. Member States shall ensure that no AIFM manages one or more AIF unless it has been authorised in accordance with this Directive.

An AIFM authorised in accordance with this Directive has to comply with the conditions for authorisation established in this Directive at all times.

2. Member States shall require that no externally appointed AIFM shall engage in activities other than those referred to in Annex I of this Directive and the additional management of UCITS subject to authorisation under 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).
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 externally appointed 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 of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision, in accordance with mandates given by investors on a discretionary, client-by-client basis;

- (b) as non-core services:
 - (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 one or more financial instruments.

5. AIFM shall not be authorised under this Directive to provide only the services referred to in paragraph 4, or to provide non-core services referred to in point (b) of paragraph 4 without being authorised for the services referred to in point (a) of paragraph 4, or to provide only the activities referred to in point 2 of Annex I of this Directive.
6. Article 2(2) and Articles 12, 13 and 19 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC shall apply to the provision of the services referred to in paragraph 4 of this Article by AIFM.
7. Member States shall require that the AIFM provides the competent authorities of the home Member State of the AIFM with the information they require to monitor compliance with the conditions referred to in this Directive on a continuous basis.
8. 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 amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC 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 (recast) are not be required to obtain an authorisation under this Directive in order to provide investment services such as individual portfolio management in respect of AIF. However, investment firms can only provide investment services in respect of AIF, if and to the extent the units or shares thereof can be marketed in accordance with this Directive.

Article 7

Application for authorisation

1. Member States shall require that AIFM have to apply for authorisation at the competent authorities of the home Member State of the AIFM.

2. Member States shall require that an AIFM applying for an authorisation shall provide the following information relating to the AIFM to the competent authorities of its home Member State:
 - (a) Information on the persons effectively conducting the business of the AIFM;
 - (b) Information on the identities of the AIFM shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and of 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 - *Authorisation*, III - *Operating conditions*, IV - *Transparency requirements*], and where applicable, [V - *AIFM managing specific types of AIF*, VI - *EU AIFM managing/marketing EU AIF*, VII - *Third country rules* and VIII - *Retail marketing*];

- (d) Information on the remuneration policies and practices pursuant to [Article 13 - *Remuneration*];
- (e) Information on arrangements made for the delegation and sub delegation to third parties of functions as referred to in [Article 20 - *delegation*].

3. Member States shall require that an AIFM applying for an authorisation shall further provide the following information on the AIF 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 fund and the AIFM's policy as regards the use of leverage, and the risk profiles and other characteristics of the AIF it manages or intends to manage, including information about the Member States or third countries in which they 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 fund 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 - *depositaries*] for each AIF the AIFM intends to manage;
- (e) Any additional information referred to in [Article 23(1) - *disclosure to investors*] for each AIF the AIFM manages or intends to manage.

4. Where a management company is authorised pursuant to 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) and applies for authorisation as an AIFM under this

Directive, the competent authorities should not require the management company to provide information or documents which the management company already provided when applying for authorisation under Directive 2009/65/EC, provided that such information or documents is still up to date.

5. The competent authorities shall inform ESMA on a quarterly basis of authorisations granted or withdrawn in accordance with this Chapter IV.

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

6. 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.

Power is delegated to the Commission to adopt the draft regulatory technical standards referred to in the first subparagraph in accordance with Articles 7 to 7d of Regulation (EU) No .../2010 [ESMA].

7. 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 in the first subparagraph of paragraph 6.

Power is conferred on the Commission to adopt the draft implementing technical standards referred to in the fourth subparagraph in accordance with Article 7e of Regulation (EU) No .../2010 [ESMA].

Article 8

Conditions for granting the authorisation

1. The competent authorities of the home Member State of an AIFM shall not grant an authorisation unless the following conditions are met:
 - (a) The relevant competent authorities are satisfied that the AIFM will be able to fulfil the conditions of this Directive;
 - (b) The AIFM has sufficient initial capital and own funds in accordance with the requirements of [Article 9 - *Initial capital*];
 - (c) The persons who effectively conduct the business of an AIFM are of sufficiently good repute and are sufficiently experienced also in relation to the investment strategies pursued by the AIF managed by the AIFM, the names of those persons and of every person succeeding them in office being communicated forthwith to the competent authorities of the home Member State of the AIFM and the conduct of the business of an AIFM being decided by at least two persons meeting such conditions;
 - (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.

The authorisation shall be valid for all Member States.

2. The relevant competent authorities of the other Member States involved shall be consulted beforehand in relation to the authorisation of any AIFM which is one of the following:

- (a) a subsidiary of another AIFM, a management company authorised under 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) (hereinafter referred to as a UCITS management company), an investment firm, a credit institution or an insurance undertaking authorised in another Member State;
 - (b) a subsidiary of the parent undertaking of another AIFM, a UCITS management company, an investment firm, a credit institution or an insurance undertaking authorised in another Member State; or
 - (c) a company controlled by the same natural or legal persons as 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 one or more 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 AIF 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 three 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 [Articles 7(2)(a) to (d) and 7(3)(a) and (b)-*Application for authorisation*].

AIFM may start managing AIF with investment strategies described in the application in accordance with [Article 7(3)(a)] in their home Member State as soon as the authorisation is granted, but not earlier than one month after having submitted any missing information referred to in [Articles 7(2)(e) and 7(3)(c) to (e)].

6. In order to ensure consistent harmonisation of this Article, ESMA may develop draft regulatory technical standards to
- a) specify the requirements applicable to the AIFM under paragraph 3;
 - b) specify the requirements applicable to shareholders and members with qualifying holdings referred to in paragraph 1(d), as well as to specify obstacles which may prevent effective exercise of the supervisory functions of the competent authorities.

Power is delegated to the Commission to adopt the draft regulatory technical standards referred to in points (a) and (b) in accordance with Articles 7 to 7d of Regulation [ESMA].

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 one or more AIF, the AIFM shall have an initial capital of at least EUR 125 000, taking into account the following paragraphs.
3. Where the value of the portfolios of AIF 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 must not, however, exceed EUR 10 million.
4. For the purpose of paragraph 3, AIF managed by the AIFM, including AIF for which the AIFM has delegated one or more functions in accordance with [Article 20 - *delegation*] but excluding AIF portfolios that the AIFM is managing under delegation, shall be deemed to be the portfolios of the AIFM.
5. Irrespective of the amount of the requirements set out in paragraph 3, the own funds of the AIFM shall never be less than the amount required under Article 21 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 (recast).
6. Member States may authorise AIFM 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 the AIFM may carry out pursuant to this Directive, both internally managed AIF and externally appointed AIFM shall:
 - (a) either have additional own funds which are appropriate to cover potential liability risks arising from professional negligence; or
 - (b) hold an appropriate 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 paragraph 7(a), 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 54, and subject to the conditions laid down in Articles 55 and 56 - *delegation to COM*], measures specifying:
 - (a) the risks the additional own funds or the professional indemnity insurance referred to in paragraph 7 must cover;
 - (b) the conditions for determining the appropriateness of additional own funds or the coverage of the professional indemnity insurance referred to in paragraph 7;
 - (c) the manner of determining ongoing adjustments of the additional own funds or of the coverage of the professional indemnity insurance referred to in paragraph 7.

10. With the exception of paragraphs 7 and 8 and their implementing measures by means of delegated acts, this Article shall not apply to AIFM which are also authorised as management companies under 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).

Article 10

Changes in the scope of the authorisation

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

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

Article 11

Withdrawal of the authorisation

The competent authorities of the home Member States 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 six months, unless the Member State concerned has provided for authorisation to lapse in such cases;
- (b) has obtained the authorisation by making false statements or by any other irregular means;
- (c) no longer fulfils the conditions under which authorisation was granted;

- (d) no longer complies with 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 (recast) if its authorisation also covers the discretionary portfolio management service referred to in [paragraph 4(a) of Article 6 - *Conditions for taking up activities*] 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 AIFM

SECTION 1 : GENERAL PRINCIPLES

Article 12

General principles

1. Member States shall ensure that AIFM comply with the following on an ongoing basis.

The AIFM shall:

- (a) act honestly, with due skill, care and diligence and fairly in conducting its activities;
- (b) act in the best interests of the AIF or the investors of the AIF it manages and the integrity of the market;
- (c) have and employ effectively the resources and procedures that are necessary for the proper performance of its business activities;
- (d) take all necessary steps to avoid conflicts of interests and, when they cannot be avoided, ensure that the AIF it manages are fairly treated;
- (e) comply with all regulatory requirements applicable to the conduct of its business activities so as to promote the best interests of the AIF or the investors of the AIF it manages and the integrity of the market;
- (f) treat all AIF investors fairly.

No investor in an AIF may obtain a preferential treatment, unless this 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 [paragraph 4(a) of Article 6 - *Conditions for taking up activities*] shall:

- (a) not be permitted to invest all or a part of the client's portfolio in units or shares of the AIF it manages, unless it receives prior general approval from the client;
 - (b) with regard to the services referred to in [paragraph 4 of Article 6] be subject to the provisions laid down in Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes.
3. The Commission shall adopt by means of delegated acts, in accordance with [Article 54, and subject to the conditions laid down in Articles 55 and 56 - *delegation to COM*], measures specifying the criteria to be used by the relevant competent authorities to assess whether AIFM comply with their obligations under paragraph 1.

Article 13

Remuneration

1. Member States shall require AIFM to have remuneration policies and practices for those categories of staff, including senior management, whose professional activities have a material impact on the risk profiles of AIF 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, fund rules or instruments of incorporation of the AIF it manages.

The AIFM shall determine the remuneration policies and practices in accordance with what is set forth in Annex II.

2. ESMA shall ensure the existence of guidelines on sound remuneration policies which comply with the principles set out in Annex II. The guidelines shall take into account the principles on sound remuneration policies set out in the Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector, the size of the AIFM and the size of AIF they manage, their internal organisation and the nature, the scope and the complexity of their activities. ESMA shall cooperate closely with the European Banking Authority (EBA) established by Regulation (EU) no .../2010 of the European Parliament and of the Council of [...] establishing a European Supervisory Authority (European Banking Authority).

Article 14

Conflicts of interest

1. Member States shall require AIFM to take all reasonable steps to identify conflicts of interest that arise in the course of managing one or more AIF between
 - (a) the AIFM, including their managers, employees or any person directly or indirectly linked to the AIFM by control, and the AIF managed by the AIFM or the investors of this AIF or;
 - (b) one AIF or the investors of this AIF and another AIF or the investors of this AIF, or
 - (c) the AIF or the investors of the AIF and another client of the AIFM;
 - (d) the AIF or the investors of the AIF and a UCITS managed by the AIFM or the investors of such UCITS;
 - (e) two of the AIFM's clients.

AIFM 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 from adversely affecting the interests of the AIF and its investors.

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

2. Where organisational arrangements made by the AIFM to manage 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.
3. Where the AIFM 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. The contract shall provide that the depositary be informed of the contract.

AIFM 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 54, and subject to the conditions laid down in Articles 55 and 56 - *delegation to COM*], measures specifying:
 - (a) the types of conflicts of interests as referred to in paragraph 1;
 - (b) specifying the reasonable steps AIFM are expected to take in terms of structures and organizational and administrative procedures in order to identify, prevent, manage, monitor and disclose conflicts of interest.

Article 15
Risk management

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

The functional and hierarchical separation of the functions of risk management in accordance with subparagraph 1 shall be reviewed by the competent authorities of the home Member State of the AIFM in line with the principle of proportionality, in the understanding that the AIFM must 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. The AIFM 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 can be exposed.

The AIFM shall review the risk management systems with appropriate frequency, no less than once a year, and adapt it, whenever necessary.

3. The AIFM 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 to 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.
4. The AIFM shall set a maximum level of leverage which the AIFM may employ on behalf of each AIF it manages as well as extent of the right of the re-use of collateral or guarantee that could be granted under the leveraging arrangement, taking into account, inter alia:
- (a) the type of AIF;
 - (b) their strategy;
 - (c) the sources of their leverage;
 - (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 one counterparty;
 - (f) the extent to which the leverage is collateralised;
 - (g) the assets liability ratio;
 - (h) the scale, nature and extent of the AIFM's activity in the markets concerned.
5. The Commission shall adopt by means of delegated acts, in accordance with [Article 54, and subject to the conditions laid down in Articles 55 and 56 - *delegation to COM*], measures specifying:
- (a) the risk management systems to be employed by AIFM as a function of the risks which the AIFM incurs on behalf of the AIF that it manages;
 - (b) the appropriate frequency of review of the risk management system;
 - (c) how the risk management function shall be functionally and hierarchically separated from the operating units, including the portfolio management function;
 - (d) specific safeguards against conflicts of interest referred to in subparagraph 2 of paragraph 1;
 - (e) the requirements referred to in paragraph 3.

Article 16
Liquidity management

1. The AIFM shall for each AIF it manages, that is not an unleveraged closed-ended AIF, employ an appropriate liquidity management system and adopt procedures which enable it 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.

The AIFM shall regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable it to assess the liquidity risk of the AIF and monitor the liquidity risk of the AIF accordingly.

2. The AIFM shall ensure that for each AIF it manages the investment strategy, the liquidity profile and the redemption policy are consistent.
3. The Commission shall adopt by means of delegated acts, in accordance with [Article 54, and subject to the conditions laid down in Articles 55 and 56 - *delegation to COM*], measures specifying
 - (a) the liquidity management systems and procedures,
 - (b) the alignment of the investment strategy, liquidity profile and redemption policy set out in paragraph 2.

Article 17

Investment in securitisation positions

1. In order to ensure cross-sectoral consistency and to remove misalignment between the interest of firms that repackage loans into tradable securities and originators within the meaning of Article 4(41) of 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 (recast), and AIFM that invest in these securities or other financial instruments on behalf of one or more AIF, the Commission shall adopt by means of delegated acts, in accordance with [Article 54, and subject to the conditions laid down in Articles 55 and 56 *delegation to COM*], measures laying down the requirements in the following areas :
 - (a) the requirements that need to be met by the originator in order for an AIFM to be allowed to invest in securities or other financial instruments of this type issued after 1 January 2011 on behalf of one or more AIF, including requirements that ensure that the originator retains a net economic interest of not less than 5 per cent.
 - (b) qualitative requirements that must be met by AIFM which invest in these securities or other financial instruments on behalf of one or more AIF.

SECTION 2 : ORGANISATIONAL REQUIREMENTS

Article 18

General principles

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

In particular, the competent authorities of the home Member State of the AIFM, having regard also to the nature of the AIF 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 AIF 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 AIF managed by the AIFM are invested according to the fund rules or the instruments of incorporation and the legal provisions in force.

2. The Commission shall adopt by means of delegated acts, in accordance with [Article 54, and subject to the conditions laid down in Articles 55 and 56 - *delegation to COM*], measures specifying the procedures and arrangements as referred to under paragraph 1.

Article 19

Valuation

1. The AIFM shall ensure that, for each AIF that it manages, 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 and the applicable national and AIF rules.

2. The rules applicable to the valuation of assets and the calculation of the net asset value per share or unit of the AIF shall be laid down in the law of the country where the AIF has its registered office and/or in the AIF rules or instruments of incorporation.
3. The AIFM shall also ensure that the net asset value per share or unit of AIF 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 share or unit are calculated at least once a year.

If the AIF is of the open-ended type, such valuations and calculations shall also be carried out at a frequency which both is appropriate to the assets held by the fund 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 are informed of the valuations and calculations in the way set forth in the relevant AIF's rules or instruments of incorporation.

4. The AIFM shall ensure that the valuation function is either performed by:
 - (a) an independent external valuer, being a legal or natural person separate from the AIF, the AIFM and from any other persons with close links to the AIF or the AIFM; or
 - (b) the AIFM itself, provided that the valuation task is functionally separated 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 cannot 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 and disclosed to the investors of the AIF.

5. When an external valuer is performing the valuation function, the AIFM shall be able to demonstrate that:
 - (a) the external valuer is subject to mandatory professional registration recognized by law or to legal or regulatory provisions or rules of professional conduct; and
 - (b) the external valuer can furnish sufficient professional guarantees to be able to effectively perform the relevant valuation function in accordance with paragraphs 1, 2 and 3;
 - (c) the appointment of the external valuer complies with the requirements of [Article 20 (1) - *delegation*] and their implementing measures by means of delegated acts.
6. The appointed external valuer may not delegate the valuation function to a third party.
7. The AIFM 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, if the conditions laid down in paragraph 5 are not or no longer met.
8. The valuation shall be performed impartially and with all due skill, care and diligence.
9. When 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, an auditor.

10. The AIFM is responsible for the proper valuation of AIF assets, the calculation of the net asset value and the publication of that net asset value. Therefore, in no case shall the AIFM's liability towards the AIF and its investors be affected by the fact that the AIFM has appointed an external valuer.

However, notwithstanding the above 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 54, and subject to the conditions laid down in Articles 55 and 56 - *delegation to COM*], measures specifying:
- (a) the criteria concerning the procedures for the proper valuation of the assets and the calculation of the net asset value per share or unit;
 - (b) the professional guarantees the external valuer must be able to furnish to effectively perform the valuation function;
 - (c) the frequency of valuation carried out by open-ended funds which is both appropriate to the assets held by the fund and its issuance and redemption policy.

SECTION 3 : DELEGATION OF AIFM FUNCTIONS

Article 20 *Delegation*

1. AIFM which intend to delegate to third parties the task of carrying out on their behalf one or more of their functions shall notify the competent authorities of their home Member State before the delegation arrangements become effective.

The following conditions have to be complied with:

- (a) the AIFM must be able to justify its entire delegation structure with objective reasons;
- (b) the delegatee must dispose of sufficient resources to perform the respective tasks and the persons who effectively conduct the business must be of sufficiently good repute and sufficiently experienced;
- (c) where the delegation concerns the portfolio management or the risk management, the mandate must be given only to undertakings which are authorised or registered for the purpose of asset management and subject to supervision. Where this condition cannot be satisfied, delegation may only be given on the condition of prior approval by the competent authorities of the home Member State of the AIFM;
- (d) where the delegation concerns the portfolio management or the risk management and is given to a third-country undertaking, in addition to the requirements in point (c), co-operation between the competent authorities of the home Member State of the AIFM and the supervisory authority of the undertaking shall be ensured;
- (e) the delegation shall not prevent the effectiveness of supervision of the AIFM, and in particular, it 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 delegatee is qualified and capable of undertaking the functions 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 delegatee and to withdraw the delegation with immediate effect when this is in the interest of investors.

No delegation of portfolio management or risk management shall be given to

- (i) the depositary or to a delegatee of the depositary, or
- (ii) 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 and disclosed to the investors of the AIF.

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

- 2. In no case shall the AIFM's liability towards the AIF and its investors be affected by the fact that the AIFM has delegated functions to a third party, or by any further sub-delegation, nor shall the AIFM delegate its functions to the extent that, in essence, it can no longer be considered to be the manager of the AIF and to the extent that it becomes a letter-box entity.
- 3. The third party may sub-delegate any of the functions delegated to it as long as the following conditions are fulfilled:
 - (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 forth in paragraph 1 points (a) to (f), in the understanding that all references to the 'delegatee' shall be read as references to the 'sub-delegatee'.

No sub-delegation of portfolio management or risk management shall be given to

- (i) the depositary or to a delegatee of the depositary, or
- (ii) any other undertaking 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 and disclosed to the investors of the AIF.

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

4. Where the sub-delegatee further delegates any of the functions delegated to it, the conditions set forth in paragraph 3 shall apply mutatis mutandis.
5. The Commission shall adopt by means of delegated acts, in accordance with [Article 54, and subject to the conditions laid down in Articles 55 and 56 - *delegation to COM*], measures specifying:
 - (a) the conditions for fulfilling the requirements set out in paragraphs 1 and 3;
 - (b) the conditions under which the manager has delegated its functions to the extent that it becomes a letter-box entity and could no longer be considered to be the manager of the AIF as set out in paragraph 2.

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 the provisions set forth below.
2. The appointment of the depositary shall be evidenced by a contract in writing. The contract shall, among others, 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 either:
 - (a) a credit institution having its registered office in the European Union and authorised in accordance with 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 (recast), or
 - (b) an investment firm having its registered office in the European Union, subject to capital adequacy requirements according to Article 20 (1) 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 including capital requirement for operational risks and authorised in accordance with Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial

instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, and which also provide the ancillary service of safe-keeping and administration of financial instruments for the account of clients in accordance with Section B(1) of Annex I to that Directive; 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) other categories of institutions which are subject to prudential regulation and ongoing supervision and which, at the date of entry into force of this Directive pursuant to Article 55, belongs to those categories determined by Member States to be eligible to be depositaries under Article 23 (3) of 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).

For non-EU AIF only, and without prejudice to what is set forth in paragraph 5(b), the depositary can also be a credit institution or any other entity of the same nature as the entities set forth in subparagraph (a) as long as such entity is subject to effective prudential regulation and supervision of the same effect as the provisions laid down in European Union law and which are effectively enforced.

In addition to the provisions of the first and second subparagraph, Member States may allow that for AIF (i) which have no redemption rights exercisable during the period of five years from the date of the initial investments and (ii) 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 7 [or generally invest in issuers or non-listed companies in order to acquire control over such companies in accordance with what is set forth in [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 recognized by law or to legal or regulatory provisions or rules of professional conduct and which can furnish sufficient financial and professional guarantees to be able to effectively perform the relevant depositary functions and meet the commitments inherent to those functions.

4. In order to avoid conflict of interests between the depositary, the AIFM and/or the AIF and/or its investors:
 - (a) an AIFM is not allowed to act as depositary;
 - (b) a prime broker acting as counterparty to an AIF is not allowed to act as depositary for this 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 and disclosed to the investors of the AIF. Delegation by the depositary to such prime broker of its custody tasks in accordance with paragraph 10 is allowed if the relevant conditions are met.

5. The depositary shall be located as follows:
 - (a) For EU AIF, the depositary shall be [established] in the home Member State of the AIF;
 - (b) For non-EU AIF, the depositary shall be [established] in the third country where the AIF is [established], or in the home Member State of the AIFM managing the AIF, or, as the case may be, in the Member State of reference of the AIFM managing the AIF.

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

- (i) the competent authorities of the Member States in which the shares or units of the third country AIF are intended to be marketed, and, insofar different, of the home Member State of the AIFM, have signed cooperation and exchange of information arrangements with the competent authorities of the depositary;
- (ii) in the third country where the depositary is [established] depositaries are subject to effective prudential regulation (including minimum capital requirements) and supervision which are to the same effect as the provisions laid down in European Union law and are effectively enforced;
- (iii) the third country where the depositary is [established] is not listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing;
- (iv) the Member States in which the shares or units of the third country AIF are intended to be marketed, and, insofar different, of 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 and ensures an effective exchange of information in tax matters **including** multilateral tax agreements.
- (v) the depositary shall by contract be liable to the AIF, or, as the case may be, to the investors of the AIF, consistently with the paragraphs 11 and 12 of this Article and shall explicitly agree to comply with paragraph 10 of this Article.

[Where a competent authority of another Member State disagrees with the assessment made on the application of points (i) to (v) of subparagraph (b) 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 11 of Regulation (EU) No .../2010 [ESMA].]

In order to ensure a uniform application of this provision, ESMA shall determine draft implementing technical standards establishing when depositaries being [established] in a third country are subject to effective prudential regulation (including minimum capital requirements) and supervision which are to the same effect as the provisions laid down in European Union law and are effectively enforced.

Power is conferred on the Commission to adopt the draft implementing technical standards referred to in the subparagraph above in accordance with Article 7e of Regulation (EU) No .../2010 [ESMA].

6. 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 shares or units of an AIF have been received and that all cash of the AIF has been booked in one or more 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 Article 18 (1) (a) to (c) 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, or an other entity of the same nature as the entity referred to in Article 18 (1) (a) to (c) of that Commission Directive 2006/73/EC in the relevant market where cash accounts are required as long as such entity is subject to effective prudential regulation and supervision of the same effect as the provisions laid down in European Union law and which are effectively being enforced, and in accordance with the principles set forth 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.

In case the cash accounts are opened in the name of the depositary acting on behalf of the AIF, the entity referred to in the first subparagraph segregates the cash of the depositary's clients from its own cash and from the depositary's cash in such a way that the cash can at any time be clearly identified as belonging to the clients of a given depositary.

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

(a) *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 this 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 forth 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, opened in the name of the AIF or, as the case may be, the AIFM acting on behalf of the AIF, so that they can at all times be clearly identified as belonging to the AIF in accordance with the applicable law.

(b) *Other assets*

- (i) For all other assets of the AIF, the depositary shall verify the ownership of the AIF, or, as the case may be, 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, as the case may be, the AIFM acting on behalf of the AIF, holds the ownership of such assets;
- (ii) The assessment whether the AIF, or, as the case may be, 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 this record up to date.

8. In addition to the tasks referred to in paragraph 6 and 7, the depositary shall:

- (a) ensure that the sale, issue, re-purchase, redemption and cancellation of shares or units 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 shares or units of the AIF is calculated in accordance with the applicable national law and the AIF rules or instruments of incorporation and procedures laid down in [Article 18 - *Valuation*];

- (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 it 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.

9. 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 may not carry out activities with regard to the AIF or, as the case may be, the AIFM on behalf of the AIF that may create conflicts of interest between the AIF, its investors, the AIFM and the relevant entity acting as a depositary, 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 and disclosed to the investors of the AIF.

The assets referred to in paragraph 7 may not be re-used by the depositary without the prior consent of the AIF or, as the case may be, the AIFM acting on behalf of the AIF.

10. The depositary may not delegate to third parties any of its functions as described in this Article, other than those referred to in paragraph 7.

The depositary may only delegate to third parties the functions referred to in paragraph 7, provided that:

- (a) the tasks are not delegated with the intention to avoid the requirements of this Directive, and

- (b) the depositary can demonstrate that there is an objective reason for the delegation;
and
- (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 to delegate parts of its tasks, and shall keep exercising 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 has ensured that the third party fulfils the following conditions and on an ongoing basis ensures that it will remain to fulfil such conditions during the performance of the tasks delegated to it:
 - (i) it 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 in accordance with paragraph 7;
 - (ii) as far as the delegation of custody tasks referred to in point (a) of paragraph 7 are concerned, it is subject to effective prudential regulation (including minimum capital requirements) and supervision in the jurisdiction concerned;
 - (iii) as far as the delegation of custody tasks referred to in point (a) of paragraph 7 are concerned, it is subject to external periodic audit to ensure that the financial instruments are in its possession;
 - (iv) it 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 given depositary;
 - (v) it may not make use of the assets without the prior consent of the AIF or, as the case may be, the AIFM acting on behalf of the AIF, and a prior information of the depositary; and
 - (vi) it complies with the general obligations and prohibitions set forth in paragraph 7 and 9.

The third party may in turn sub-delegate these tasks, provided that the same conditions are met. In such case, paragraph 12 shall apply mutatis mutandis to the relevant parties.

For purposes of this paragraph, the provision of services as specified by 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 by securities settlement systems as designated for the purposes of that Directive 98/26/EC or the provision of similar services by non-European securities settlement systems shall not be considered a delegation of its custody functions.

11. The depositary shall be liable to the AIF, or, as the case may be, to the investors of the AIF, for the loss of financial instruments held in custody according to point (a) of paragraph 7.

In the case of such a loss of a financial instrument held in custody, the depositary shall return a financial instrument of the identical type or the corresponding amount to the AIF or, as the case may be, 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 [unforeseeable]external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary [to be deployed by a depositary in the due performance of its obligations as a depositary].

The depositary shall also be liable to the AIF, or, as the case may be, 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 perform its obligations pursuant to this Directive.

12. The depositary's liability shall not be affected by any delegation referred to in paragraph 10.

However, in case of a loss of financial instruments held in custody by a third party pursuant to paragraph 10, provided that there is a written contract between the depositary and the AIF, or, as the case may be, the AIFM acting on behalf of the AIF, which expressly allows such a discharge and establishes the objective reason to contract such a discharge, the depositary can discharge itself of its liability if it can prove:

- (i) that all requirements for the delegation of its custody tasks, as set forth in paragraph 10 (a) to (d), are met, and
- (ii) that there is a written contract between the depositary and the third party that explicitly transfers the liability of the depositary to that third party and makes it possible for the AIF, or as the case may be, 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.

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 paragraph 10 (a) to (d), the depositary can discharge itself of its liability provided that the following conditions are fulfilled:

- (i) 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, and
- (ii) there is a written contract between the depositary and the AIF, or, as the case may be, the AIFM acting on behalf of the AIF, which expressly allows such a discharge; and
- (iii) the investors of the relevant AIF have been duly informed of this discharge and the circumstances justifying the discharge prior to their investment.

13. 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.

14. The depositary shall make available on request to its competent authorities all information which it has obtained while undertaking its duties and that may be necessary for the competent authorities of the AIF or the AIFM. If the competent authorities of the AIF or the AIFM are different from those of the depositary, the competent authorities of the depositary shall share the information received without delay with the competent authorities of the AIF and the AIFM.
15. The Commission shall adopt by means of delegated acts, in accordance with [Article 54, and subject to the conditions laid down in Articles 55 and 56 - *delegation to COM*], measures specifying:
- (a) the particulars that need to be included in the standard agreement as referred to in paragraph 2;
 - (b) general criteria for assessing whether the prudential regulation and supervision of third countries as referred to in the second subparagraph of paragraph 2 and in paragraph 5 (b) (ii) are to the same effect as the provisions laid down in European Union law and are effectively enforced;
 - (c) the conditions for performing the depositary functions pursuant to paragraphs 6, 7 and 8, including:
 - the type of financial instruments that shall be included in the scope of the depositary's custody duties according to point (a) of paragraph 7;
 - the conditions upon which the depositary may exercise its custody duties over financial instruments registered with a central depositary; and
 - the conditions upon which the depositary shall safe keep according to point (b) of paragraph 7 the financial instruments issued in a nominative form and registered with an issuer or a registrar;
 - (d) the due diligence duties of depositaries pursuant to paragraph 10 (c);
 - (e) the segregation obligation set forth in paragraph 10 (d) (iv):

- (f) the conditions and circumstances under which financial instruments held in custody shall be considered as lost;
- (g) what is to be understood by [unforeseeable] external events beyond reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary [to be deployed by a depositary in the due performance of its obligations as a depositary] pursuant to paragraph 11;
- (h) the conditions and circumstances under which there is an objective reason to contract a discharge pursuant to paragraph 12.

CHAPTER IV TRANSPARENCY REQUIREMENTS

Article 22

Annual report

1. An AIFM shall, for each of the EU AIF it manages and for each of the AIF it markets in the European Union, make available an annual report for each financial year no later than six 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 points (a) to (f) of 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 four 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 changes in the information listed in [Article 23 -*Disclosure to investors*] 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 members, and number of beneficiaries, and, where relevant, carried interests 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, as the case may be, in accordance with the accounting standards of the third country where the AIF has its registered office and with the accounting rules laid down in the fund rules or in the instruments of incorporation of the AIF.

The accounting information given in 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, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC. 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 AIFM marketing non-EU AIF to subject the annual reports of those AIF 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 54, and subject to the conditions laid down in Articles 55 and 56 - *delegation to COM*], measures specifying the content and format of the annual report. These measures shall be adapted to the type of AIF to which they apply.

Article 23

Disclosure to investors

1. AIFM shall for each of the EU AIF it manages and for each of the AIF it markets in the European Union make available to AIF investors, in a way as set forth in the AIF's fund rules or articles of association, the following information before they invest in the AIF, as well as any changes thereof:
 - (a) a description of the investment strategy and objectives of the AIF, information on where any master AIF is [established], information on where the underlying funds are [established] if the AIF is a fund of fund, the types of assets which the AIF may invest in and of the techniques it may employ and of 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 to the use of leverage and of any collateral and asset re-use arrangements, and information on the maximum level of leverage which the AIFM may 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, applicable law and on the existence, or not, of any legal instruments providing for the recognition and enforcement of judgments on 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) - *Initial capital and own funds*];

- (f) a description of any delegated management function as referred to in Annex 1 by the AIFM and of any safekeeping function delegated by the depositary, the identification of the delegatee 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, according to [Article 19 - *valuation*];
- (h) a description of the AIF's liquidity risk management, including the redemption rights both in normal and exceptional circumstances, existing redemption arrangements with investors;
- (i) a description of all fees, charges and expenses and of the maximum amounts thereof which are directly or indirectly borne by investors;
- (j) how the AIFM ensures a fair treatment of investors and, whenever an investor obtains a preferential treatment or the right to obtain preferential treatment, a description of that preferential treatment, the type of investors who obtain such preferential treatment as well as, where relevant, their legal or economic links with the AIF or AIFM;
- (k) the latest annual report referred to in [Article 22 - *annual report*];
- (l) the procedure and conditions of 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, according to [Article 19 - *valuation*];
- (n) where available, the historical performance of the AIF;
- (o) the identity of the prime broker and a description of any material arrangement of the AIF with its prime brokers and the way the conflicts of interests in relation thereof are managed and, as the case may be, the provision in the contract with the depositary on the possibility of transfer and reuse of AIF assets, and about any transfer of liability to the prime broker that may exist;
- (p) how and when the information required by 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 the liability in accordance with [Article 21(12) - *depositaries*]. 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 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 and amending Directive 2001/34/EC or in accordance with national law, only such information referred to in paragraph 1 and paragraph 2 which is in addition to that contained in the prospectus need to be disclosed separately or as additional information in the prospectus.
4. AIFM shall for each of the EU AIF it manages and for each of the AIF it markets in the European Union shall 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 these risks.
5. AIFM managing one or more EU AIF employing leverage or marketing in the European Union one or more AIF 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 re-use 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 54, and subject to the conditions laid down in Articles 55 and 56 - *delegation to COM*], measures specifying the disclosure obligations of AIFM referred to in paragraphs 4 and 5, including the frequency of the disclosure set forth in paragraph 5. These measures shall be adapted to the type of AIFM to which they apply.

Article 24

Reporting obligations to competent authorities

1. 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 AIF it manages.

It shall provide aggregated information on the main instruments in which it is trading, markets of which it is a member or where it actively trades, and on the principal exposures and most important concentrations of each of the AIF it manages.

2. An AIFM shall provide for each of the EU AIF it manages and for each of the AIF it markets in the European Union 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 actual risk profile of the AIF and the risk management tools employed by the AIFM to manage the market risk, liquidity risk, counterparty risk and other risks including operational risk;

- (d) the main categories of assets in which the AIF invested;
- (e) the results of the stress tests performed according to [Article 15(3)(b) - *risk management*] and [Article 16(1) - *liquidity management*] second subparagraph.

3. The AIFM shall provide on request 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, as the case may be, for each AIF marketed in the European Union, for each financial year, according to [Article 22(1) - *annual report*];
- (b) a detailed list of all AIF which the AIFM manages for the end of each quarter.

4. AIFM managing one or more AIF 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 their 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 AIF managed by the AIFM, and the amounts of leverage received from each of those entities for each of the AIF managed by the AIFM.

For the non-EU AIFM, the reporting obligations set forth in this paragraph are limited to the EU AIF managed by them and the non-EU AIF marketed by them in the European 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 may request the competent authorities of the home Member State to impose additional reporting requirements.

6. The Commission shall adopt by means of delegated acts, in accordance with [Article 54, and subject to the conditions laid down in Articles 55 and 56 - *delegation to COM*], measures specifying:
- (a) for the purposes of paragraph 4, when leverage is considered to be employed on a substantial basis;
 - (b) the obligations to report and provide information referred to in paragraphs 1 through 5.

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

CHAPTER V
AIFM MANAGING SPECIFIC TYPES OF AIF

SECTION 1 : AIFM MANAGING LEVERAGED AIF

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 - *reporting obligations*] 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 or risks of disorderly markets or risks to the long term growth of the economy.
2. The competent authorities of the home Member States of the AIFM shall ensure that all information gathered under [Article 24 - *reporting obligations*], in respect of all AIFM that they supervise [and the information gathered under [Article 7 - *authorisation*], is made available to competent authorities of other relevant Member States, ESMA and the ESRB through the procedures set out in [Article 46 - *cooperation*] on supervisory co-operation. They shall, without delay, also provide information through this mechanism, and bilaterally to the competent authorities of other Member States directly concerned, if an AIFM under their responsibility, or AIF managed by this AIFM could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institution in other Member States.
3. The AIFM must demonstrate that the leverage limits for each AIF it manages are reasonable and that it complies at all times with the leverage limits set by it. Competent authorities shall assess the risks that the use of leverage by an AIFM with respect to the AIF it manages could entail, and when it is 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, as the case may be, the competent authorities of the relevant AIF, shall impose limits to the level of leverage that an AIFM may employ or other restrictions on the management of the AIF with respect to the AIF 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 and the ESRB and, as the case may be, the competent authorities of the AIF, of actions taken in this respect, through the procedures set out in [Article [48] on supervisory co-operation.

4. The notification referred to in paragraph 3 shall be made not less than ten 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 authority may decide that the proposed measure takes effect within that period.
5. ESMA shall perform a facilitation and coordination role, and in particular try to ensure that consistent approach is taken by competent authorities, in relation to measures proposed by competent authorities under paragraph 3.
6. After receiving notification referred to in paragraph 4, ESMA shall issue advice to the competent authority about the measure that is proposed or taken. The advice may in particular address whether the conditions for taking action appear to be satisfied, whether the measures are appropriate and the duration of the measures.
7. On the basis of the information received according to paragraph 2, and after taking into account the advice of the ESRB, ESMA may determine that the leverage employed by an AIFM, or by a group of AIFM, 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, can 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 the ESMA advice referred to in paragraphs 6 or 7 it shall inform ESMA, stating its reasons. ESMA shall 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 the advice. The competent authority shall receive advanced notice about such a publication.
9. The Commission shall adopt by means of delegated acts, in accordance with [Article 54, and subject to the conditions laid down in Articles 55 and 56 - *delegation to COM*], measures setting out principles specifying the circumstances in which competent authorities exercise the provisions in paragraph 3, taking into account different strategies of AIF, different market conditions in which AIF operate and possible pro-cyclical effects following from exercising the provisions.

SECTION 2 : OBLIGATIONS FOR AIFM MANAGING AIF WHICH ACQUIRE CONTROL OF NON LISTED
COMPANIES AND ISSUERS

Article 26

Scope

1. Section 2 of Chapter V shall apply to the following:
 - (a) AIFM managing one or more AIF 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 below;
 - (b) AIFM cooperating with one or more other AIFM on the basis of an agreement pursuant to which the AIF managed by these AIFM jointly, acquire control of a non-listed company in accordance with paragraph 5 below.

2. Section 2 of Chapter V shall not apply where the non-listed companies concerned are:
 - (i) small and medium enterprises within the meaning of article 2(1) of the annex of Commission Recommendation 2003/361/EC, concerning the definition of micro, small and medium sized enterprises; or
 - (ii) special purpose vehicles with the purpose of purchasing, holding or administrating real estate.

3. Without prejudice to the previous paragraphs, [paragraph 1 of Article 27 - *notification*] shall also apply to AIFM managing AIF that acquire a non-controlling participation in a non-listed company.

4. [Paragraph 1 and 2 of Article 28 - *Disclosure*] and [Article 30 - *asset stripping*] shall apply also with regard to issuers. For the purposes of that Article, the first, second and third paragraph of this Article shall apply *mutatis mutandis*.

5. For the purpose of this Section, control shall mean more than 50% of the voting rights of the company for non-listed companies, and control as defined in Article 5(3) of Directive 2004/25/EC of the European Parliament and of the Council of 21 april 2004 on takeover bids for issuers.

When calculating the percentage of voting rights held by the relevant AIF, not only the voting rights held directly by the relevant AIF shall be taken into account, but also the voting rights of (i) any undertaking controlled by the AIF and (ii) those of any natural or legal person acting in its own name but on behalf of the AIF or of any undertaking controlled by the AIF, whereby control by the over such undertakings shall be established on the basis of what is set forth in the first subparagraph.

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.

6. This Section shall apply subject to the conditions and restrictions relating to Article 6 of 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 Union.
7. This Section shall apply without prejudice to the stricter rules adopted by Member States with respect to the acquisition of holdings in issuers and non-listed companies in their territories.

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 or holds shares of a non-listed company, the AIFM managing this AIF notifies 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 paragraph 1 juncto paragraph 5 of Article 26, the AIFM managing such AIF shall notify
 - (i) the non-listed company,
 - (ii) 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 get access, and
 - (iii) the competent authorities of the home Member State of the AIFM, of the acquisition of control by the AIF.

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 under which control has been reached, 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 reached.

4. In its notification to the non-listed company, the AIFM shall request the board of directors of the company to inform the representatives of employees or, where there are no such representatives, 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 above. The AIFM shall use its best efforts to ensure that the representatives of employees or, where there are no such representatives, the employees themselves, are duly informed by the board of directors in accordance with what is set forth above.

5. The notifications referred to in paragraphs 1 to 3 above shall be made as soon as possible, but not later than ten working days the first of which being the day on which the AIF has reached, exceeded or fallen below the relevant threshold, or, as the case may be, 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 paragraph 1 juncto paragraph 5 of Article 26, the AIFM managing such AIF shall make the information set out in the second subparagraph available to
 - (i) the company concerned,
 - (ii) 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 a register to which the AIFM has or can get access to, and
 - (iii) the competent authorities of the home Member State of the AIFM.Member States may require that the information set out in the second subparagraph is also made available to the national competent authorities of the non-listed company they designate to that effect.

The AIFM shall make available:

- (a) The identity of the AIFM which either individually or in agreement with other AIFM manage(s) the AIF that has/have reached control;
 - (b) The policy for preventing and managing conflicts of interests, in particular between the AIFM, the AIF and the company, and including information about the specific safeguards established to ensure that any agreement between the AIFM and/or the AIF and the company shall be at arms length;
 - (c) The policy for external and internal communication relating to the company in particular as regards employees.
2. In its notification to the company pursuant to paragraph 1(i) above, the AIFM shall request the board of directors of the company to inform the representatives of employees or, where there are no such representatives, the employees themselves, without undue delay of the information referred to in paragraph 1 above. The AIFM shall use its best efforts to ensure that the representatives of employees or, where there are no such representatives, the employees themselves, are duly informed by the board of directors in accordance with what is set forth above.
3. Member States shall require that when an AIF acquires, individually or jointly, control of a non-listed company pursuant to paragraph 1 juncto paragraph 5 of Article 26, the AIFM managing such AIF shall ensure that the AIF, or the AIFM acting on behalf of the AIF, makes available 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
 - (i) the non-listed company, and
 - (ii) 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 a register to which the AIFM has or can get access to.

In addition, the AIFM managing the relevant AIF shall request and use its best efforts to make sure that the board of the non-listed company makes available the information set forth in the first subparagraph to the representatives of employees of the non-listed company.

4. Member States shall require that when an AIF reaches a position to exercise control of a non-listed company pursuant to paragraph 1 juncto paragraph 5 of Article 26, the AIFM managing such AIF shall provide the competent authorities of its home Member State and the investors of the AIF with information on the financing of the acquisition.

Article 29

Specific provisions regarding the annual report of AIF 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 paragraph 1 juncto paragraph 5 of Article 26, the AIFM managing such AIF shall
 - (i) either request and use its best efforts to make sure that the annual report of the non-listed company is drawn up in accordance with paragraph 2 is made available by the board of the company to all representatives of employees or, where there are no such representatives, to the employees themselves within the period such annual report has to be drawn up in accordance with the national applicable law; or
 - (ii) for each such AIF include in the annual report provided for in [Article 22 - *Annual report*] the information relating to the relevant non-listed company referred to in paragraph 2.

2. The additional information to be included in the annual report of the company, or, as the case may be, the AIF, in accordance with paragraph 1, must 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;
 - (c) the information concerning acquisitions of own shares prescribed by Article 22 (2) of Directive 77/91/EEC.

3. The AIFM managing the relevant AIF shall
 - (i) request and use its best efforts to make sure that the board of the non-listed company makes available the information relating to the company concerned as referred to in paragraph 1(ii) above to all representatives of employees of the relevant company within the period referred to in [Article 22 (1) - *Annual report*]; or, as the case may be,
 - (ii) make available the information referred to in paragraph 1(i) above to the investors of the AIF, insofar already available, within the period referred to in [Article 22 (1) - *Annual report*] and in any event not later than the date when the annual report of the non-listed company has been 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 paragraph 1 juncto paragraph 5 of Article 26, the AIFM managing such AIF shall before the end of the period expiring 24 months following the acquisition of control of the company by the AIF:

- (i) 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 below; and
- (ii) insofar the AIFM is authorised to vote on behalf of the AIF at 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 below; and
- (iii) 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 below.

2. The obligations imposed on the AIFM 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 subscribed capital plus those reserves which may be not distributed under the law or the statutes, in 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 paragraph (a);

in the understanding that (i) the expression “distribution” used in subparagraphs (a) and (b) includes in particular the payment of dividends and of interest relating to shares, (ii) the provisions on capital reductions do not apply on a reduction in the subscribed capital whose purpose it is to offset losses incurred or to include sums of money in a non-distributable reserve provided that, following this operation, the amount of such reserve is not more than 10 % of the reduced subscribed capital, and (iii) that the restriction in accordance with subparagraph (c) shall be subject to the exceptions and conditions laid down in Article 20 (1) (b) to (h) of the Second Company Law Directive.

CHAPTER VI
RIGHTS OF EU AIFM TO MARKET AND MANAGE EU AIF IN THE EUROPEAN
UNION

Article 31

Marketing of shares or units of EU AIF in the home Member State of the AIFM

1. Member States shall ensure that an authorised EU AIFM may market shares or units 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 the documentation and information as set forth in Annex III A

3. No later than twenty working days after receipt of a complete notification file pursuant to paragraph 2, 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 of the home Member State of the AIFM may only prevent the marketing of the AIF if the AIFM's management of the AIF is not or will not be in accordance with one or more provisions of this Directive or in general the AIFM will not or does not comply with one or more provisions of this Directive . In 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 confirming that the AIFM may start marketing the AIF.

Insofar they are different, the competent authorities of the home Member State of the AIFM shall also inform the competent authorities of the home Member State of the AIF that the AIFM may start marketing shares or units of the AIF.

4. In the event of a material change in 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 one month before implementing the change for any changes planned by the AIFM, or, as the case may be, immediately after the change took place for any unplanned facts triggering a change.

If pursuant to a planned change, the AIFM's management of the AIF would no longer be in accordance with one or more provisions of this Directive, or, in general the AIFM would no longer comply with one or more provisions of this Directive, the relevant competent authorities shall inform the AIFM without undue delay that it cannot implement the change.

If the planned change is implemented notwithstanding the above, or, if an unplanned fact triggering a change has taken place pursuant to which the AIFM's management of the AIF would no longer be in accordance with one or more provisions of this Directive, or, in general the AIFM would no longer comply with one or more provisions of this Directive, the competent authorities of the home Member State of the AIFM shall take all due regulatory measures in accordance with [Article 44 - *powers of competent authorities*], including if necessary the explicit 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 standard model of the notification letter referred to in paragraph 2;
 - (b) the form of the written notice referred to in paragraph 4.

Power is conferred on the Commission to adopt the draft implementing technical standards referred to in the first subparagraph in accordance with Article 7e of Regulation (EU) No .../2010 [ESMA].

6. Without prejudice to [Article 41(1) - *retail marketing*], Member States shall require that the AIF managed and marketed by the AIFM are only marketed to professional investors.

Article 32

Marketing of shares or units of EU AIF in other Member States than in the home Member State of the AIFM

1. Member States shall ensure that an authorised EU AIFM may market shares or units 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 as set forth in Annex III B.

3. The competent authorities of the home Member State of the AIFM shall, no later than twenty 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 State(s) where the AIF is proposed to be marketed. Such transmission shall only occur if the AIFM's management of the AIF is and will be in accordance with the provisions of this Directive and that in general the AIFM complies with the provisions of this Directive.

The competent authorities of the home Member State of the AIFM shall enclose an attestation that the AIFM concerned is authorised to manage AIF with that 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(s) of the AIFM as of the date of that notification.

Insofar they are different, the competent authorities of the home Member State of the AIFM shall also inform the competent authorities of the home Member State of the AIF that the AIFM may start marketing the shares or units of the AIF in the host Member State(s) of the AIFM.

5. Arrangements referred to in point (h) of Annex III B shall be subject to the laws and supervision of the host Member State(s) of the AIFM.
6. Member States shall ensure that the notification letter by the AIFM referred to in paragraph 2 and the attestation 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 is accepted by their competent authorities.

7. In the event of a material change in 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 one month before implementing the change for any changes planned by the AIFM, or, as the case may be, immediately after the change took place for any unplanned facts triggering a change.

If pursuant to the planned change, the AIFM's management of the AIF would no longer be in accordance with one or more provisions of this Directive, or, in general the AIFM would no longer comply with one or more provisions of this Directive, the relevant competent authorities shall inform the AIFM without undue delay that it cannot implement the change.

If the planned change is implemented notwithstanding the above, or, if an unplanned fact triggering a change has taken place pursuant to which the AIFM's management of the AIF would no longer be in accordance with one or more provisions of this Directive, or, in general the AIFM would no longer comply with one or more provisions of this Directive, the competent authorities of the home Member State of the AIFM shall take all due regulatory measures in accordance with [Article 44 - *powers of competent authorities*], including if necessary the explicit prohibition of marketing of the AIF.

If the changes are acceptable, *i.e.* if they do not influence the AIFM's management of the AIF being in accordance with the provisions of this Directive, or, in general the compliance by the AIFM with the provisions of this Directive, the competent authorities of the home Member State of the AIFM shall without delay inform the competent authorities of the host Member State(s) 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 standard model of the notification letter referred to in paragraph 2;
 - (b) the form and content of a standard model of attestation referred to in paragraph 3;
 - (c) the form of the transmission referred to in paragraph 3;
 - (d) the form of the written notice referred to in paragraph 7.

Power is conferred on the Commission to adopt the draft implementing technical standards referred to in the first subparagraph in accordance with Article 7e of Regulation (EU) No .../2010 [ESMA].

9. Without prejudice to [Article 41(1) - *retail marketing*], Member States shall require that the AIF managed and marketed by the AIFM are only marketed to professional investors.

Article 33

Conditions for providing management services in other Member States

1. Member States shall ensure that an authorised EU AIFM may manage EU AIF [established] in another Member State either directly or via the establishment of a branch, provided that the AIFM is authorised to manage that type of AIF.
2. Any AIFM wishing to manage EU AIF [established] in another Member State 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 provide management services directly or establish a branch;
 - (b) a programme of operations stating in particular the services which it intends to perform and identifying the AIF it intends to manage.
3. If the AIFM intends to establish a branch, it shall provide, in addition to 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 of persons responsible for the management of the branch.
4. The competent authorities of the home Member State of the AIFM shall, within [twenty working days] of receiving the complete documentation received in accordance with paragraphs 2 and, as the case may be, 3, transmit this complete documentation to the competent authorities of the host Member State of the AIFM.

The competent authorities of the home Member State of the AIFM shall enclose an attestation 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 the host Member State of the AIFM.

Insofar they are different, the competent authorities of the home Member State of the AIFM shall also inform the competent authorities of the home Member State of the AIF that the AIFM may start managing the shares or units of the AIF in the host Member State(s) of the AIFM.

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 in any of the particulars communicated in accordance with paragraph 2, and, as the case may be, paragraph 3, an AIFM shall give written notice of that change to the competent authorities of its home Member State at least one month before implementing the change for any changes planned by the AIFM, or, as the case may be, immediately after the change took place for any unplanned facts triggering a change.

If pursuant to the planned change, the AIFM's management of the AIF would no longer be in accordance with one or more provisions of this Directive, or, in general the AIFM would no longer comply with one or more provisions of this Directive, the relevant competent authorities shall inform the AIFM without undue delay that it cannot implement the change.

If the planned change is implemented notwithstanding the above, or, if an unplanned fact triggering a change has taken place pursuant to which the AIFM's management of the AIF would no longer be in accordance with one or more provisions of this Directive, or, in general the AIFM would no longer comply with one or more provisions of this Directive, the competent authorities of the home Member State of the AIFM shall take all due regulatory measures in accordance with [Article 44 - *powers of competent authorities*], including if necessary the explicit prohibition of marketing of the AIF.

If the changes are acceptable, *i.e.* if they do not influence the AIFM's management of the AIF being in accordance with the provisions of this Directive, or, in general the compliance by the AIFM with the provisions of this Directive, the competent authorities of the home Member State of the AIFM shall without undue delay inform the competent authorities of the host Member State(s) 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 draft regulatory technical standards referred to in the first subparagraph in accordance with Articles 7 to 7d of Regulation (EU) No .../2010 [ESMA].

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 draft implementing technical standards referred to in the third subparagraph in accordance with Article 7e of Regulation (EU) No .../2010 [ESMA].

CHAPTER VII

SPECIFIC RULES IN RELATION TO THIRD COUNTRIES

Article 34

Conditions for EU AIFM which manage non-EU AIF which are not marketed in Member States

1. Member States shall ensure that an authorised EU AIFM may manage non-EU AIF which are not marketed in the European Union provided that:
 - (a) The AIFM complies with all the requirements established in this Directive except for [Article 21 - *depository*] and [Article 22 - *annual report*] in respect of those AIF; and,
 - (b) Appropriate cooperation arrangements 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 competent authorities of the home Member State of the AIFM to carry out their duties according to this Directive.
2. The Commission shall adopt by means of delegated acts, in accordance with Article 54 and subject to the conditions set forth in Articles 55 and 56, 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 European 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 European Union shares or units of the non-EU AIF they manage and of EU feeder AIF that do not fulfil the requirements referred to in the [second subparagraph of paragraph 1 of Article 31] as soon as the conditions laid down in this Article are met.

2. The AIFM must comply with all the requirements established in this Directive, with the exception of [Chapter VI - **EU AIFM/EU AIF**]. In addition the following conditions apply:
 - (a) Appropriate cooperation arrangements in line with international standards are in place between the competent authorities of the home Member State of the AIFM[, the host Member States 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 to carry out their duties according to this Directive.
 - (b) The third country where the non-EU AIF is [established] is not listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing.
 - (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 shares or units of the non-EU AIF are proposed to be marketed, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention and ensures an effective exchange of information in tax matters, including multilateral tax agreements.

- (d) [The third country where the non-EU AIF is [established] grants authorised EU AIFM effective market access, at least comparable to the access granted by the European Union to the non-EU AIFM established in that third country.]

Where a competent authority of another Member State disagrees with the assessment made on the application of points (a) to (d) of this paragraph 2 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 11 of Regulation (EU) No .../2010 [*ESMA*].

3. In case the AIFM intends to market shares or units of the non-EU AIF 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 as set forth in Annex III A.

4. No later than twenty 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 may only prevent the marketing of the AIF if the AIFM's management of the AIF is not or will not be in accordance with one or more provisions of this Directive, or, in general the AIFM will not or does not comply with one or more provisions of this Directive. In 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 confirming that the AIFM may start marketing the AIF.

The competent authorities of the home Member State of the AIFM shall also inform ESMA that the AIFM may start marketing shares or units of the AIF in the home Member State of the AIFM.

5. In case the AIFM intends to market shares or units of the non-EU AIF in one or more Member State(s) 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 as set forth in Annex III B.

6. The competent authorities of the home Member State of the AIFM shall, no later than twenty working days after the date of receipt of the complete notification file referred to in paragraph 5, transmit this complete notification file to the competent authorities of the Member State where the AIF is proposed to be marketed. Such transmission will only occur if the AIFM's management of the AIF is and will be in accordance with the provisions of this Directive and that in general the AIFM complies with the provisions of this Directive.

The competent authorities of the home Member State of the AIFM shall enclose an attestation that the AIFM concerned is authorised to manage AIF with that 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 State(s) 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 shares or units of the AIF in the host Member State(s) of the AIFM.

8. Arrangements referred to in point (h) of Annex III B shall be subject to the laws and supervision of the host Member State(s) of the AIFM.

9. Member States shall ensure that the notification letter of the AIFM referred to in paragraph 5 and the attestation 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 is accepted by their competent authorities.

10. In the event of a material change in any of the particulars communicated in accordance with paragraph 3 and/or 5, the AIFM shall give written notice of that change to the competent authorities of its home Member State, at least one month before implementing the change for any changes planned by the AIFM, or, as the case may be, immediately after the change took place for any unplanned facts triggering a change.

If pursuant to a planned change, the AIFM's management of the AIF would no longer be in accordance with one or more provisions of this Directive, or, in general the AIFM would no longer comply with one or more provisions of this Directive, the relevant competent authorities shall inform the AIFM without undue delay that it cannot implement the change.

If the planned change is implemented notwithstanding the above, or, if an unplanned fact triggering a change has taken place pursuant to which the AIFM's management of the AIF would no longer be in accordance with one or more provisions of this Directive, or, in general the AIFM would no longer comply with one or more provisions of this Directive, the competent authorities of the home Member State of the AIFM shall take all due regulatory measures in accordance with [Article 44 - *powers of competent authorities*], including if necessary the explicit prohibition of marketing of the AIF.

If the changes are acceptable, *i.e.* if they do not influence the AIFM's management of the AIF being in accordance with the provisions of this Directive, or, in general the compliance by the AIFM with the provisions of this Directive, the competent authorities of the home Member State of the AIFM shall without delay inform ESMA and, insofar applicable, the competent authorities of the host Member State(s) of the AIFM of those changes.

11. [The Commission shall adopt by means of delegated acts, in accordance with Articles 54 and subject to the conditions set forth in Articles 53 and 56,]
 - (a) [measures regarding the cooperation arrangements referred to in paragraph 2(a) in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries;]
 - (b) general criteria for assessing whether third countries grant EU AIFM effective market access comparable to the access granted by the European Union to non-EU AIFM [established] those third countries, as referred to in paragraph 2(d).]

12. [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 2(a).]

13. 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 standard model of the notification letter referred to in paragraph 3;
 - (b) the form and content of a standard model of the notification letter referred to in paragraph 5;
 - (c) the form and content of a standard model of attestation 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 draft implementing technical standards referred to in the first subparagraph in accordance with Article 7e of Regulation (EU) No .../2010 [ESMA].

14. Without prejudice to [Article 41(1) - *retail marketing*], Member States shall require that the AIF managed and marketed by the AIFM are only marketed to professional investors.

Article 36

Conditions for the marketing in Member States without a passport of non-EU AIF managed by an EU AIFM

1. Until at least [five] years the date laid down in [the first subparagraph of paragraph 1 of Article 63 - *transposition*] and without prejudice to Article 35, Member States may allow an authorised EU AIFM to market to professional investors, on their territory only, shares or units of non-EU AIF they manage and of EU feeder AIF that do not fulfil the requirements referred to in the second subparagraph of paragraph 1 of Article 31, provided that:
 - (a) The AIFM complies with all the requirements established in this Directive with the exception of [Article 21 - *Depositaries*]. Those AIFM shall however ensure that one or more entities are appointed to carry out the duties referred to in [paragraphs 6, 7 and 8 of Article 21 - *depository functions*]. 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 paragraph [paragraphs 6,7 and 8 of Article 21 - *depository functions*].
 - (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 competent authorities of the home Member State of the AIFM to carry out their duties according to this Directive.

The transitional period set forth in the first subparagraph of paragraph 1 shall be extended at least as long as the review by the Commission in accordance with Article [64 - *Review*] has not been concluded by the presentation of the report in accordance with paragraph 4 of that Article.

In case the report concludes that the passport regime set forth in Article [35] has no negative effects [as regards among others, without being limited hereto, investor protection, market disruption, competition and supervision of systemic risk,] the transitional period set forth in the first subparagraph of paragraph 1 shall end automatically [*period*] after the presentation of the report. As from that date the Member States shall ensure that only Article [35] shall apply for the marketing of non-EU AIF by EU AIFM in the European Union and that this Article [36] shall no longer be applicable. If the report concludes that the passport regime set forth in Article [35] does not work appropriately, the transitional period set forth in the first subparagraph of paragraph 1 shall be extended without limitation unless it is terminated pursuant to a revision of the Directive.

2. Member States may impose stricter rules on the AIFM in respect of the the marketing of units or shares of AIF to investors on their territory for the purpose of this Article.
3. The Commission shall adopt by means of delegated acts, in accordance with Article 54 and subject to the conditions set forth in Articles 55 and 56 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 AIFM wishing to manage EU AIF without marketing them and/or market AIF managed by it in the European Union in accordance with [Article 38 or 39]

1. Member States shall require that non-EU AIFM wishing to manage EU AIF without marketing them and/or to market AIF managed by it in the territory of the European Union in accordance with [Article 38 or 39] must acquire a prior authorisation by the competent authorities of their Member State of reference in accordance with the provisions set forth below.

2. A non-EU AIFM wishing to obtain authorisation to manage EU AIF without marketing them and/or market AIF managed by it in the European Union [Article 38 or 39], must comply with all provisions of this Directive, with the exception of [Chapter VI - **EU AIFM/EU AIF**] in the understanding that:
 - (i) all references in the Directive to 'the competent authorities of the home Member State of the AIFM' shall be read as references to 'the competent authorities of the Member State of reference of the AIFM', and
 - (ii) 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 and/or, as the case may be, the non-EU AIF marketed in the European Union, is submitted, the AIFM must not comply with that provision of the Directive if it can demonstrate that (i) 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 and/or, as the case may be, the non- EU AIF marketed in the European Union, is submitted, (ii) the law to which the non-EU AIFM and/or the non-EU AIF is submitted 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 (iii) the non-EU AIFM and/or the non-EU AIF complies with that equivalent rule.

3. A non-EU AIFM wishing to obtain authorisation to manage EU AIF without marketing them and/or to market AIF managed by it in the European Union [Article 38 or 39], must have a single legal representative established in its Member State of reference. The legal representative shall be the contact point of the AIFM in the European 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 forth in this Directive shall take place through this 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:

[Alternative suggestion: in case there remains a choice to be made as regards the Member State of reference, no choice to be made by the AIFM, but by the competent authorities of the relevant Member States - text proposal to be provided if support for this idea.]

- (a) If the non-EU AIFM intends to manage only one EU AIF, or several EU AIF established in the same Member State and does not intend to market any AIF [in accordance with Article 38 or 39] in the European Union, the home Member State of that or those AIF 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 AIFM intends to manage several EU AIF established in different Member States and does not intend to market any AIF [in accordance with Article 38 or 39] in the European Union, the Member State of reference will either be, at the choice of the AIFM,
- (i) the Member State where most of the AIF 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 of the European Union, the Member State of reference will be:
 - (i) insofar the AIF is authorised or registered in a Member State, the home Member State of the AIF;
 - (ii) insofar 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 of the European Union, the Member State of reference will be that Member State.
- (e) If the AIFM intends to market only one EU AIF, but in different Member States, the Member State of reference shall be:
 - (i) insofar the AIF is authorised or registered in a Member State, the home Member State of the AIF;
 - (ii) insofar the AIF (a) is not authorised or registered in a Member State and (b) shall also be marketed by the AIFM in the home Member State of that AIF, the home Member State of the AIF; or
 - (iii) insofar the AIF (a) is not authorised or registered in a Member State and (b) no marketing will take place in the home Member State of the AIF, at the choice of the AIFM, one of the Member States where the AIFM intends to develop effective marketing.
- (f) If the AIFM intends to market only one non-EU AIF, but in different Member States, the AIFM must choose its Member State of reference among those Member States.
- (g) If the AIFM intends to market several EU AIF in the European Union, the Member State of reference shall be:
 - (i) insofar those AIF are all registered or authorised in the same Member State, the home Member State of those AIF;
 - (ii) insofar those AIF 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 AIF.

- (h) If the AIFM intends to market several EU and non-EU AIF, or several non-EU AIF in the European Union, it must choose the Member State where it intends to develop effective marketing for most of those AIF as its Member State of reference.

The AIFM must be able to prove its intention to develop effective marketing in any given Member State by disclosure of its marketing strategy to the competent authorities of the Member State as indicated by it.

5. Member States shall require that the non-EU AIFM wishing to manage EU AIF without marketing them and/or market AIF managed by it in the European Union in accordance with [Article 38 or 39] shall submit a request for authorisation to its Member State of reference.

When receiving the application for authorisation, the competent authorities shall assess whether the determination by the AIFM as regards its Member State of reference respects the criteria laid down in paragraph 4. If the competent authorities consider that this is not the case, it shall refuse the authorisation request of the non-EU AIFM explaining the reasons for their refusal. On the contrary, if the competent authorities consider that the criteria of paragraph 4 have been respected, they shall notify ESMA of this fact and shall ask ESMA to issue an advise on the assessment made by them. 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 [*term to be included*] after having received the notification referred to in subparagraph 2, ESMA shall issue advice to the relevant competent authorities about their assessment on the Member State of reference in accordance with the criteria set forth in paragraph 4. ESMA can only issue a negative advise in case it considers that the criteria of paragraph 4 have not been respected.

The term set forth in [Article 8, paragraph 5 - *conditions for granting the authorisation*] shall be suspended during the ESMA review in accordance with this paragraph.

If the competent authorities propose to grant authorisation contrary to the ESMA advice referred to in subparagraph 3 it shall inform ESMA, stating its reasons. ESMA shall 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 that advice. The competent authority shall receive advanced notice about such a publication.

If the competent authorities propose to grant authorisation contrary to the ESMA advice referred to in subparagraph 3 and the AIFM intends to market shares or units of AIF managed by it on the territory of other Member States 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 its reasons. Insofar applicable, the competent authorities of the Member State of reference shall also inform the competent authorities of the home Member States of the AIF managed by the AIFM thereof, stating its 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 11 of Regulation (EU) No .../2010 [*ESMA*].
7. Without prejudice to what is set forth in paragraph 8, no authorisation shall be given unless the following additional conditions are met:

- (a) The Member State of reference is indicated by the AIFM in accordance with the criteria of paragraph 4 and supported by the disclosure of the marketing strategy, and the procedure set forth in paragraph 5 has been followed by the relevant competent authorities;
- (b) The AIFM has appointed a single legal representative established in its Member State of reference;
- (c) The single legal representative shall, next to the AIFM itself, be the sole contact person of the non-EU AIFM for the investors of the relevant AIF, for ESMA and for the competent authorities as regards the activities for which the AIFM is authorised in the European Union and shall at least be sufficiently equipped to perform the compliance function pursuant to this Directive;
- (d) Appropriate cooperation arrangements in line with international standards are in place between the competent authorities of the Member State of reference[, the host Member States of the AIFM] and the supervisory authorities of the third country where the non-EU AIFM is [established] in order to ensure an efficient exchange of information that allows the competent authorities to carry out their duties according to this Directive.
- (e) The third country where the non-EU AIFM is [established] is not listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing.
- (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 and ensures an effective exchange of information in tax matters, including multilateral tax agreements;
- (g) [The third country where the non-EU AIFM is [established] grants authorised EU AIFM effective market access, at least comparable to the access granted by the European Union to the non-EU AIFM established in that third country.]
- (h) The effective exercise by the competent authorities of their supervisory functions under this Directive is not prevented by the laws, regulations or administrative provisions of a third country governing the AIFM.

Where a competent authority of another Member State disagrees with the assessment made on the application of the points (a) to (h) of this paragraph 7 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 11 of Regulation (EU) No .../2010 [ESMA].

8. The authorisation shall take place in accordance with the provisions of [Chapter IV **authorisation**] which shall apply mutatis mutandis in the understanding that:
- (i) the information referred to in paragraph 2 of Article 7 shall be supplemented by:
 - (a) a justification by the AIFM of its assessment regarding the Member State of reference in accordance with the criteria set forth in paragraph 4 with information on the marketing strategy;
 - (b) a list of those provisions of the Directive for which compliance by the AIFM is impossible as compliance by the AIFM with these provisions is, in accordance with what is set forth in paragraph 2(ii) of this Article, incompatible with compliance with a provision in the law to which the non-EU AIFM and/or, as the case may be, the non-EU AIF marketed in the European Union, is submitted; and
 - (c) written evidence based on the technical standards developed by ESMA that (i) 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 AIF and that (ii) the AIFM complies with that equivalent rule; such written evidence being supported by a legal opinion on the existence of the relevant incompatible 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

- (d) identification and location of the single legal representative of the AIFM;
- (ii) the information referred to in paragraph 3 of Article 7 may be limited to the EU AIF the AIFM intends to manage, and, as the case may be, to those AIF managed by the AIFM that it intends to market in the European Union with a passport;
- (iii) the condition of paragraph 1(a) of Article 8 shall be without prejudice to what is set forth in paragraph 2(ii) of this Article 37;
- (iv) the condition of paragraph 1(e) of Article 8 shall not apply;
- (v) the second subparagraph of paragraph 5 of Article 8 shall be supplemented with: "the information provided in accordance with paragraph 13(i) of Article 37".

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 inform ESMA thereof. They shall support this assessment by the information provided by the AIFM in accordance with paragraph 8(i)(b) and 8(i)(c).

Within [*term to be included*] after having received the notification referred to in subparagraph 1, ESMA shall issue advice to the competent authorities about the application of the exemption for compliance with the Directive caused by the incompatibility in accordance with what is set forth in paragraph 2. The advice may in particular address whether the conditions for such exemption appear to be satisfied based on the information provided by the AIFM in accordance with paragraph 8(i)(b) and 8(i)(c) and on the 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 set forth in [Article 8, paragraph 5 - *conditions for granting the authorisation*] shall be suspended during the ESMA review in accordance with this paragraph.

If the competent authorities propose to grant authorisation contrary to the ESMA advice referred to in subparagraph 2 it shall inform ESMA, stating its reasons. ESMA shall publish the fact that a competent authority does 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 authority for not complying with that advice. The competent authority shall receive advanced notice about such a publication.

If the competent authorities propose to grant authorisation contrary to the ESMA advice referred to in subparagraph 2 and the AIFM intends to market shares or units of AIF managed by it on the territory of other Member States 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 its reasons.

Where a competent authority of another Member State disagrees with the assessment made on the application of this paragraph 9 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 11 of Regulation (EU) No .../2010 [*ESMA*].

10. The competent authorities of the Member State of reference shall without undue delay inform ESMA on the outcome of the initial authorisation process, about any changes in the authorisation of the AIFM and any withdrawal of authorisation.
11. In principle, the Member State of reference will not be affected by the further business development of the AIFM in Europe. However, under the circumstances set forth below, the Member State of reference must, or as the case may be, may, be changed:

- (a) If the AIFM changes its marketing strategy within two years after its initial authorisation, and this change would have affected the determination of the Member State of the reference if the modified marketing strategy had been the initial marketing strategy, the AIFM will notify the competent authorities of the initial Member State of reference of this change before implementing it and indicate its Member State of reference in accordance with the criteria set forth in paragraph 4 and based on the new strategy. The AIFM will justify its assessment by disclosing its new marketing strategy to its initial Member State of reference. At the same time the AIFM will provide information on who its new legal representative, which has to be established in the new Member State of reference, would be after the change. Such information should include at least the identity and the location of such new representative.

The initial Member State of reference shall assess whether the determination of the AIFM in accordance with subparagraph 1 of point (a) is correct and shall notify ESMA of their assessment thereof. ESMA shall issue an advise on the assessment made by the competent authorities. 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 new marketing strategy of the AIFM.

Within [*term to be included*] after having received the notification referred to in subparagraph 2 of point (a), ESMA shall issue advice to the relevant competent authorities about their assessment. ESMA can only issue a negative advise in case it considers that the criteria of paragraph 4 have not been respected.

After having received the advise of ESMA, the competent authorities of the initial Member State of reference shall inform the non-EU AIFM, its original legal representative and ESMA of their decision.

If the competent authorities of the initial Member State of reference agree with the assessment made by the AIFM, they will then also inform the competent authorities of the new Member State of reference of the change. The initial Member State of reference shall without undue delay transfer a copy of the authorisation and supervision file of the AIFM to the new Member State of reference. As from the transmission of the authorisation and supervision file, the competent authorities of the new Member State will be competent for the authorisation procedure and for the supervision of the AIFM.

If the competent authorities' final assessment is contrary to the ESMA advice referred to in subparagraph 3 of point (a) they shall inform ESMA thereof, stating its reasons. ESMA shall 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 that advice. The competent authority shall receive advanced notice about such a publication.

If the competent authorities' final assessment is contrary to the ESMA advice referred to in subparagraph 3 of point (a) and the AIFM markets shares or units of AIF managed by it on the territory of other Member States than the initial Member State of reference, the competent authorities of the initial Member State of reference shall also inform the competent authorities of those Member States thereof, stating its reasons. Insofar applicable, the competent authorities of the Member State of reference shall also inform the competent authorities of the home Member States of the AIF managed by the AIFM thereof, stating its reasons.

- (b) If it appears from the actual course of the business development of the AIFM in the European Union within two years after its authorisation that the marketing strategy as presented by the AIFM at the time of its authorisation was untrue or that the

AIFM made false statements about it, or, if the AIFM changes its marketing strategy without complying with what is set forth point (a), the competent authorities of the initial Member State of reference shall request the AIFM to indicate the correct Member State of reference based on the actual marketing strategy. The procedure set forth in point (a) shall apply mutatis mutandis. If the AIFM does not comply with the request of the competent authorities, they shall withdraw its authorisation.

- (c) If the AIFM changes its marketing strategy after the period set forth in point (a), and it wants to change its Member State of reference based on the new marketing strategy, the AIFM may submit a request to change its Member State of reference to the competent authorities of the initial Member State of reference. The procedure set forth in point (a) 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, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 11 of Regulation (EU) No .../2010 [ESMA].]

- 12. 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 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.

- 13. [The Commission shall adopt by means of delegated acts, in accordance with Articles 54 and subject to the conditions set forth in Articles 55 and 56,],
 - (a) [measures regarding the cooperation arrangements referred to in paragraph 7(d) in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries;]

- (b) general criteria for assessing whether third countries grant EU AIFM effective market access comparable to the access granted by the European Union to non-EU AIFM [established] the third country of the AIFM, as referred to in paragraph 7(g).]
14. [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 7(d).]
15. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine the form and the request referred to in paragraph 16(c).
16. 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 the AIFM should comply with the requirements laid down in this Directive, taking into account that the AIFM is [established] in a third country. In particular, the presentation of the information required in [Articles 22 to 24 - *annual report, disclosure and reporting*].]
 - b) Under which conditions the law to which a non-EU AIFM or a non-EU AIF is submitted 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 conferred on the Commission to adopt the draft regulatory technical standards referred to in the first subparagraph in accordance with Article 7 to 7d of Regulation (EU) No .../2010 [ESMA].

Article 38

Conditions for the marketing in the European Union with a passport of EU AIF managed by a non-EU AIFM

1. Member States shall ensure that a duly authorised non-EU AIFM may market the shares or units of an EU AIF it manages to professional investors in the European Union with a passport as soon as the conditions laid down in this Article are met.
2. The AIFM must comply with all the requirements established in this Directive, with the exception of [Chapter VI - *EU AIFM / EU AIF*].
3. In case the AIFM intends to market shares or units 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 as set forth in Annex III A.

4. No later than twenty 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 4 in its territory. The competent authorities of the Member State of reference of the AIFM may only prevent the marketing of the AIF if the AIFM's management of the AIF is not or will not be in accordance with one or more provisions of this Directive, or, in general the AIFM will not or does not comply with one or more provisions of this Directive. In 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 confirming that the AIFM may start marketing the AIF.

The competent authorities of the Member State of reference of the AIFM shall also inform ESMA that the AIFM may start marketing shares or units of the AIF in the Member State of reference of the AIFM.

5. In case the AIFM intends to market shares or units of the EU AIF in other Member States 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 as set forth in Annex III B.

6. The competent authorities of the Member State of reference shall, no later than twenty 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 proposed to be marketed. Such transmission will only occur if the AIFM's management of the AIF is and will be in accordance with the provisions of this Directive and that in general the AIFM complies with the provisions of this Directive.

The competent authorities of the Member State of reference of the AIFM shall enclose an attestation that the AIFM concerned is authorised to manage AIF with that 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 about the transmission. The AIFM may start marketing the AIF in the relevant host Member State(s) 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 shares or units of the AIF in the host Member State(s) of the AIFM.

8. Arrangements referred to in point (h) of Annex III B shall be subject to the laws and supervision of the host Member State(s) of the AIFM.
9. Member States shall ensure that the notification letter by the AIFM referred to in paragraph 5 and the attestation 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 is accepted by their competent authorities.

10. In the event of a material change in any of the particulars communicated in accordance with paragraph 3 and/or 5, the AIFM shall give written notice of that change to the competent authorities of the Member State of reference at least one month before implementing the change for any changes planned by the AIFM, or, as the case may be, immediately after the change took place for any unplanned facts triggering a change.

If pursuant to the planned change, the AIFM's management of the AIF would no longer be in accordance with one or more provisions of this Directive, or, in general the AIFM would no longer comply with one or more provisions of this Directive, the relevant competent authorities shall inform the AIFM without undue delay that it cannot implement the change.

If the planned change is implemented notwithstanding the above, or, if an unplanned fact triggering a change has taken place pursuant to which the AIFM's management of the AIF would no longer be in accordance with one or more provisions of this Directive, or, in general the AIFM would no longer comply with one or more provisions of this Directive, the competent authorities of the Member State reference of the AIFM shall take all due regulatory measures in accordance with [Article 44 - *powers of competent authorities*], including if necessary the explicit prohibition of marketing of the AIF.

If the changes are acceptable, *i.e.* if they do not influence the AIFM's management of the AIF being in accordance with the provisions of this Directive, or, in general the compliance by the AIFM with the provisions of this Directive, the the competent authorities of the Member State of reference shall without delay inform ESMA and, insofar applicable, the competent authorities of the host Member State(s) of those changes.

11. 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 standard model of the notification letter referred to in paragraph 3 and 5;
 - (b) the form and content of a standard model of attestation referred to in paragraph 6;
 - (c) the form of the transmission referred to in paragraph 6;
 - (d) the form of the written notice referred to in paragraph 10.

Power is conferred on the Commission to adopt the draft implementing technical standards referred to in the first subparagraph in accordance with Article 7e of Regulation (EU) No .../2010 [*ESMA*].

12. Without prejudice to [Article 41(1) - *retail marketing*], Member States shall require that the AIF managed and marketed by the AIFM are only marketed to professional investors.

Article 39

Conditions for the marketing in the European Union with a passport of non-EU AIF managed by a non-EU AIFM

1. Member States shall ensure that a duly authorised non-EU AIFM may market shares or units of a non-EU AIF it manages to professional investors in the European Union with a passport as soon as the conditions laid down in this Article are met.
2. The AIFM must comply with all the requirements established in this Directive. In addition the following conditions apply:
 - (a) Appropriate cooperation arrangements in line with international standards are in place between the competent authorities of the Member State of reference[, the competent authorities of the host Member States] and the supervisory authority 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 Member State of reference to carry out their duties according to this Directive.
 - (b) The third country where the non-EU AIF is [established] is not listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing.
 - (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 shares or units of the non-EU AIF are proposed to be marketed, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention and ensures an effective exchange of information in tax mattersn including and multilateral tax agreements.
 - (d) [The third country where the non-EU AIF is [established] grant the authorised EU AIFM effective market access, at least comparable to the access granted by the European Union to the non-EU AIFM [established] those third countries.]

Where a competent authority of another Member State disagrees with the assessment made on the application of points (a) to (d) of this paragraph 2 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 11 of Regulation (EU) No .../2010 [*ESMA*].

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 as set forth in Annex III A.

4. No later than twenty 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 only prevent the marketing of the AIF if the AIFM's management of the AIF is not or will not be in accordance with one or more provisions of this Directive, or, in general the AIFM will not or does not comply with one or more provisions of this Directive. In 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 confirming that the AIFM may start marketing the AIF.

The competent authorities of the Member State of reference of the AIFM shall also inform ESMA that the AIFM may start marketing shares or units of the AIF in the Member State of reference of the AIFM.

5. In case the AIFM intends to market the units or shares of non-EU AIF also in other Member States 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 as set forth in Annex III B.

6. The competent authorities of the Member State of reference shall, no later than twenty 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 proposed to be marketed. Such transmission will only occur if the AIFM's management of the AIF is and will be in accordance with the provisions of this Directive and that in general the AIFM complies with the provisions of this Directive.

The competent authorities of the Member State of reference of the AIFM shall enclose an attestation that the AIFM concerned is authorised to manage AIF with that 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 about the transmission. The AIFM may start marketing the AIF in the relevant host Member State(s) 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 shares or units of the AIF in the host Member State(s) of the AIFM.

8. Arrangements referred to in point (h) of Annex III B shall be subject to the laws and supervision of the host Member States of the AIFM, insofar these 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 attestation 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 is accepted by their competent authorities.

10. In the event of a material change in any of the particulars communicated in accordance with paragraph 3 and/or 5, the AIFM shall give written notice of that change to the competent authorities of the Member State of reference at least one month before implementing the change for any changes planned by the AIFM, or, as the case may be, immediately after the change took place for any unplanned facts triggering a change.

If pursuant to the planned change, the AIFM's management of the AIF would no longer be in accordance with one or more provisions of this Directive, or, in general the AIFM would no longer comply with one or more provisions of this Directive, the relevant competent authorities shall inform the AIFM without undue delay that it cannot implement the change.

If the planned change is implemented notwithstanding the above, or, if an unplanned fact triggering a change has taken place pursuant to which the AIFM's management of the AIF would no longer be in accordance with one or more provisions of this Directive, or, in general the AIFM would no longer comply with one or more provisions of this Directive, the competent authorities of the Member State of reference of the AIFM shall take all due regulatory measures in accordance with [Article 44 - *powers of competent authorities*], including if necessary the explicit prohibition of marketing of the AIF.

If the changes are acceptable, i.e. if they do not influence the AIFM's management of the AIF being in accordance with the provisions of this Directive, or, in general the compliance by the AIFM with the provisions of this Directive, the competent authorities of the Member State of reference shall without delay inform ESMA and, insofar applicable, the competent authorities of the host Member State(s) of the AIFM of those changes.

11. [The Commission shall adopt by means of delegated acts, in accordance with [Article 54 and subject to the conditions set forth in Articles 55 and 56,]
 - (a) [measures regarding the cooperation arrangements referred to in paragraph 2(a) in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries;]
 - 'b- general criteria for assessing whether third countries grant authorised EU AIFM effective market access comparable to the access granted by the European Union to non-EU AIFM [established] in those third countries, as referred to in paragraph 2(d).]
12. 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 2(a).
13. 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 standard model of the notification letter referred to in paragraph 3 and 5;
 - (b) the form and content of a standard model of attestation referred to in paragraph 6;
 - (c) the form of the transmission referred to in paragraph 6;
 - (d) the form of the written notice referred to in paragraph 10.

Power is conferred on the Commission to adopt the draft implementing technical standards referred to in the first subparagraph in accordance with Article 7e of Regulation (EU) No .../2010 [ESMA].

14. Without prejudice to [Article 41(1) - *retail marketing*], Member States shall require that the AIF managed and marketed by the AIFM are only marketed to professional investors.

Article 40

Conditions for the marketing in Member States without a passport of AIF managed by a non-EU AIFM

1. Until at least [five] years after the date laid down in [the first subparagraph of paragraph 1 of Article 63 - *transposition*] and without prejudice to Articles 37, 38 and 39, Member States may allow non-EU AIFM to market to professional investors, on their territory only, shares or units of AIF they manage subject at least to the following rules:
 - (a) Compliance with [Article 22, 23, 24 - *transparency*] in respect of each AIF marketed by the AIFM pursuant to this Article and with [Section 2 of Chapter V - *private equity*] of the Directive where an AIF marketed by it pursuant to this Article falls under the description of Article 26 paragraph 1. Competent authorities and AIF investors referred to in these articles shall be deemed those of Member States where AIF 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 State where the AIF are marketed, insofar applicable, the home Member State of the AIF and the supervisory authorities of the third country where the non-EU AIFM 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 according to this Directive.

The transitional period set forth in the first subparagraph of paragraph 1 shall be extended at least as long as the review by the Commission in accordance with Article [64 - *Review*] has not been concluded by the presentation of the report in accordance with paragraph 4 of that Article.

In case the report concludes that the passport regime set forth in Articles 37, 38 and 39 has no negative effects [as regards among others, without being limited hereto, investor protection, market disruption, competition and supervision of systemic risk,], the transitional period set forth in the first subparagraph of paragraph 1 shall end automatically [*period*] after the presentation of the report. As from that date the Member States shall ensure that only Articles 37, 38 and 39 shall apply for the marketing of non-EU AIF by EU AIFM in the European Union and that this Article 40 shall no longer be applicable. If the report concludes that the passport regime set forth in Articles 37, 38 and 39 does not work appropriately, the transitional period set forth in the first subparagraph of paragraph 1 shall be extended without limitation unless it is terminated pursuant to a revision of the Directive.

2. Member States may impose stricter rules on the AIFM in respect of the marketing of units or shares of AIF to investors on their territory for the purpose of this Article.
3. The Commission shall adopt by means of delegated acts, in accordance with Article 54 and subject to the conditions set forth in Articles 55 and 56, 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 41

Marketing of AIF by AIFM to retail investors

1. Without prejudice to other instruments of European Union law, Member States may allow AIFM to market to retail investors on their territory shares or units of AIF they manage in accordance with this Directive, irrespective of whether AIF are marketed on a domestic or cross-border basis or whether they are EU or non-EU AIF.

In such cases, Member States may impose stricter requirements on the AIFM or the AIF than the requirements applicable to the AIF marketed to professional investors on their territory in accordance with this Directive. However, Member States may not impose stricter or additional requirements on EU AIF [established] in another Member State and marketed on a cross-border basis than on AIF marketed domestically.

2. Member States that permit the marketing of AIF to retail investors on their territory, shall, within one year of the date referred to in [Article 63 - *transposition*] inform the Commission and ESMA of:
 - (a) the types of AIF which AIFM may market to retail investors on their territory;
 - (b) any additional requirements that the Member State imposes for the marketing of AIF to retail investors.

Member States shall also inform the Commission and ESMA of any subsequent changes with regard to the first subparagraph.

CHAPTER IX

COMPETENT AUTHORITIES

SECTION 1 : DESIGNATION, POWERS AND REDRESS PROCEDURES

Article 42

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 from its competent authorities to establish the appropriate methods to monitor that AIFM comply with their obligations under this Directive where relevant on the basis of guidelines set by ESMA.

Article 43

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 AIF in another Member State or not, without prejudice to those provisions of this Directive which confer responsibility to the competent authorities of the host Member State of the AIFM.

2. The supervision of compliance with [Articles 12 and 13 - *general principles on conduct of business and conflicts of interest*] shall be the responsibility of the competent authorities of the host Member State of the AIFM when an AIFM manages and/or markets AIF through a branch within the territory of that Member State.

3. The competent authorities of the host Member State of the AIFM may require the AIFM managing or marketing AIF in the host Member State of the AIFM, whether this is done through a branch or not, to provide the information necessary for the monitoring of their compliance with the rules under the responsibility of the host Member State of the AIFM that apply to them.

Those requirements shall not be more stringent than those which the same Member State imposes on AIFM for which that Member State is the home Member State for the monitoring of their compliance with the same standards.

4. Where the competent authorities of the host Member State of the AIFM ascertain that an AIFM managing and/or marketing AIF in their territory, whether this is done through a branch or not, is in breach of one of the rules under their responsibility, 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 its 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 accordingly. The competent authorities of the home Member State of the AIFM shall, at the earliest opportunity, 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. The nature of those measures 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 the same paragraph, 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 44 and 46 - *powers and administrative penalties*], to prevent or penalise further irregularities and, insofar as necessary, to prevent that AIFM from initiating any further transactions within its territory. Where the function carried out in the host Member State of the AIFM is the management of AIF, the host Member State may require the AIFM to cease managing those AIF.
7. Where the competent authorities of the host Member State of an AIFM have clear and demonstrable grounds for believing that such AIFM, the units or shares of which are marketed within the territory of such Member State, is in breach of the obligations arising from the provisions adopted pursuant to this Directive which do not confer powers on the competent authorities of the host Member State of the AIFM, they shall refer those findings to the competent authorities of the home Member State of the AIFM which shall take appropriate measures.
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 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 investors, including the possibility of preventing the AIFM concerned to further market the units or shares of the relevant AIF within the territory of the home Member State.

9. Where the competent authorities concerned disagree on any of the measures taken by a competent authority pursuant to paragraphs 5, 6, 7, 8 and 9 above, they may bring the matter to the attention of ESMA, which may act in accordance with the powers conferred to it under Article 11 of Regulation (EU) no.../2010 [ESMA].
10. 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 44

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 following powers:
 - (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 AIFM or depositaries continue to comply with the requirements of this Directive applicable to them;
 - (j) 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) allow auditors or experts to 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 give notice of that fact in a specific manner to ESMA 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 AIF in the market for a financial instrument could jeopardise the orderly functioning of that market.

Article 45

Powers and competences of ESMA

1. ESMA shall have the powers necessary 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.

3. All the information exchanged under this Directive between ESMA, the competent authorities, the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Systemic Risk Board shall be considered confidential, except where 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 such disclosure is necessary for legal proceedings.

Article 46

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 sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions 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 these measures are effective, proportionate and dissuasive.

2. Member States shall provide that the competent authorities may disclose to the public any measure or sanction 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 produce an annual report on the application of administrative measures and imposition of sanctions in 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 this purpose.

Article 47

Right of appeal

1. The competent authorities shall give written reasons for any decision to refuse or withdraw authorisation of AIFM to manage and/or market AIF, 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 six months of the submission of the application.

SECTION 2 : CO-OPERATION BETWEEN DIFFERENT COMPETENT AUTHORITIES

Article 48

Obligation to co-operate

1. The competent authorities of the Member States shall co-operate with each other and with the 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 co-operation provided for in this section.
3. Competent authorities shall use their powers for the purpose of co-operation, even in cases where the conduct under investigation does not constitute an infringement of any regulation in force in that 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.
5. Where the competent authorities of one Member State have clear and demonstrable grounds to suspect that acts contrary to the provisions of this Directive, are being or have been carried out by an AIFM not subject to supervision of those competent authorities, it 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 authorities shall take appropriate action, 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.

6. In order to ensure uniform application of the provisions in 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 exchange of information between competent authorities and between the competent authorities and ESMA.

Power is conferred on the Commission to adopt the draft implementing technical standards referred to in the first subparagraph in accordance with Article 7e of Regulation (EU) No .../2010 [ESMA].

Article 49

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 five years.

Article 50

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 when the conditions laid down in Article 25 or 26 of Directive 95/46/EC are fulfilled and only on a case-by-case basis. The competent authority of the Member State shall be 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 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 competent 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 51

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 AIFM 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 AIFM or AIFM collectively for the stability of systemically relevant financial institutions and the orderly functioning of markets on which AIFM are active. The ESRB and the ESMA 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 15 of Regulation .../.../EC, aggregated information relating to the activities of AIFM 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 54, and subject to the conditions laid down in Articles 55 and 56 - *delegation to COM*], measures specifying the content of the information to be exchanged pursuant to paragraph 1.

4. The Commission shall, in accordance with the regulatory procedure referred to in [Article 57(2) - *implementing measures*] adopt implementing measures specifying the modalities and frequency of the information to be exchanged pursuant to paragraph 1.

Article 52

Co-operation in supervisory activities

1. The competent authorities of one Member State, may request the co-operation of the competent authorities of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation on 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 paragraph 1(a) the competent authority of the Member State which has requested co-operation, 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 paragraph 1(b) 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 co-operation in carrying out an investigation or on-the-spot verification only in the following cases:

- (a) an 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 therefore.

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 draft implementing technical standards referred to in the first subparagraph in accordance with Article 7e of Regulation (EU) No .../2010 [ESMA].

Article [53]

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 11 of Regulation (EU) No .../2010 [ESMA].

CHAPTER X TRANSITIONAL AND FINAL PROVISIONS

Article 54

Exercise of the delegation³

1. The powers to adopt delegated acts referred to in Articles [*cross references to be checked upon finalisation of the text* 3, 4, 9, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 28, [29], [34, 35, 36; [37], [39], 40] and 51] shall be conferred on the Commission for an indeterminate period of time.
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 laid down in [Articles 55 and 56].

Article 55

Revocation of the delegation

1. The delegation of power referred to in Articles [*cross references to be checked upon finalisation of the text* 3, 4, 9, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 28, [29], [34, 35, 36; [37], [39], 40] and 51] may be revoked 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 inform the other legislator and the Commission at the latest one month before the final decision is taken, stating the delegated powers which could be subject to revocation and the reasons for a revocation.

³ *Articles 52, 53 and 54 to be aligned in accordance with inter-institutional agreements re. delegated acts.*

3. The decision of revocation shall put an end to the delegation of the powers 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 56

Objections to delegated acts

1. The European Parliament and the Council may object to the delegated act within a period of two months from the date of notification. At the initiative of the European Parliament or the Council this period shall be extended by one month.
2. If, on expiry of that period, 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 the European Parliament and the Council have both informed the Commission of their intention not to raise objections.

3. If the European Parliament or the Council objects to the adopted delegated act, it shall not enter into force. The institution which objects shall state the reasons for objecting to the delegated act.

Article 57

Implementing measures

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC of 6 June 2001 establishing the European Securities Committee 26.

2. [Where reference is made to this paragraph, Articles 5 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission shall apply, having regard to the provisions of Article 8 thereof.]

[The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.]

Article 58

Disclosure of derogations

Where a Member State makes use of a derogation or option provided by [cross references to be checked upon finalisation of the text Articles 6, 9, 21, 22, 41 and 57] of this Directive it shall inform the Commission thereof as well as of any subsequent changes. The Commission shall make the information public on a web-site or other easily accessible means.

Article 59

Transitional provision

1. EU AIFM managing and/or marketing AIF before [date article 63] shall adopt all necessary measures to comply with this Directive and shall submit an application for authorisation within one year of that date.
2. Non-EU AIFM managing EU AIF and/or marketing AIF in the European Union before [date article 63] shall adopt all the necessary measures to comply with this Directive within one year of that date.
3. Articles 31 to 33 and Article 35 of this Directive shall not apply to the marketing of shares or units of AIF 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 [date article 63] as long as this prospectus is valid.

4. AIFM insofar as they manage AIF of the closed-ended type before [date article 63] which do not make any additional investments after [date article 63] may however continue to manage such AIF without authorisation under this Directive until [one year after the date of article 63].
5. The competent authorities of the home Member State of the AIF or in case where the AIF is not regulated the competent authorities of the home Member State of the AIFM may allow institutions referred to in [Article 21(3)(a) - depositaries] and [established] in another Member State to be appointed as a depositary until 4 years after the date of implementation of this Directive. This provision shall be without prejudice to the full application of Article 21, with the exception of paragraph 5(a) of that Article on location of the depositary.

Article 60

Amendment of Directive 2003/41/EC

Directive 2003/41/EC shall be amended as follows:

- (a) Article 2(2)(b) shall be replaced by the following:

"(b) institutions which are covered by Directive 73/239/EEC), Directive 85/611/EEC, Directive 93/22/EEC, Directive 2000/12/EC, Directive 2002/83/EC and .../.../EC [AIFM Directive];"

- (b) Article 19(1) shall be replaced by the following:

"1. Member States shall not restrict institutions from appointing, for the management of the investment portfolio, investment managers established in another Member State and duly authorised for this activity, in accordance with Directives 85/611/EEC, 93/22/EEC, 2000/12/EC, 2002/83/EC and .../.../EC [AIFM Directive], as well as those referred to in Article 2(1) of this Directive."

Article 61
Amendment of Directive 2009/65/EC

Directive 2009/65/EC shall be amended as follows:

- (a) The following new Article 50a shall be inserted:

"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 these 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 per cent;
- (b) qualitative requirements that must be met by UCITS which invest in these securities or other financial instruments."

- (b) Article 112(2) shall be amended as follows:

"The power to adopt the delegated acts referred to in Articles 12, 14, 23, 33, 43, 50a, 51, 60, 61, 62, 64, 75, 78, 81, 95 and 111 shall be conferred on the Commission for a period of four

years from ...* [date of entry into force of the amending Directive]. The Commission shall draw up a report in respect of delegated powers at the latest six months before the end of the four-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 64c."

(c) Article 112a (1) shall be amended as follows:

"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 62

Amendment of Regulation (EU) no.../2010 [ESMA]

In Regulation (EU) no.../2010 [ESMA] paragraph 2 of Article 1 shall be amended as follows:

[*inclusion of reference to AIFM Directive*]

Article 63

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by *2 years after the entry into force of this Directive* at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt the provisions referred to in the first subparagraph, these provisions shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication.

2. 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 64

Review

1. Three years after the date laid down in [the first subparagraph of paragraph 1 of Article 56 - *transposition*], the Commission shall , on the basis of public consultation and in the light of the discussions with competent authorities, review the application and the scope of this Directive. The review should analyse the experience acquired in applying the Directive, its impact on investors, AIF or AIFM, both within and outside the Union, and in how far the objectives of the Directive have been achieved and, if necessary, propose appropriate amendments. That examination shall include a general survey of the functioning of the rules in this Directive and the experience acquired in applying them, including:
 - (i) the marketing by EU AIFM of non-EU AIF in the Member States taking place through national regimes;
 - (ii) the marketing of AIF in the Member States by non-EU AIFM taking place through national regimes;
 - (iii) the management and marketing by AIFM authorised in accordance with this Directive of AIF in the European Union taking place through the passport regimes set forth in this Directive;
 - (iv) the marketing of AIF in the European Union by or on behalf of persons other than AIFM;
 - (v) the investment into AIF by or on behalf of European professional investors;
 - (vi) the impact of the depositary rules in Article 21 on the depositary market in the Union ;
 - (vii) the impact of the transparency and reporting requirements in Articles 22 to 24, 28 and 29 on the assessment of systemic risk.

When reviewing marketing and/or management of AIF referred to in points (i) to (iii) of the first subparagraph, the Commission shall analyse whether or not the transition period referred in Article 36 and 40 can be terminated and propose appropriate amendments taking into account the objectives of the Directive and potential impacts on investors, AIF or AIFM, both within and outside the Union.

2. To that end, Member States shall provide the Commission annually with information on the AIFM that are managing and/or marketing AIF under their supervision, either under the application of the passport regime set forth in this Directive, or under their national regimes, with an indication of the date on which the European passport regime has been transposed in their jurisdiction.

ESMA shall provide the Commission with information on all the non-EU AIFM that are have been authorised or requested authorisation in accordance with [Article 37 **authorisation**].

The information referred to in the first and second subparagraph of paragraph 2 shall include:

- (i) information on where the AIFM concerned are established;
- (ii) insofar applicable, identification of the EU AIF managed and/or marketed by them;
- (iii) insofar applicable, identification of the non-EU AIF managed by EU AIFM but not marketed in the European Union;
- (iv) insofar applicable, identification of the non-EU AIF marketed in the European Union;
- (v) information on the applicable regime under which the relevant AIFM are performing their activities (national or European); and
- (vi) any other information relevant to the understanding of how the management and the marketing of AIF by AIFM in the European Union operates in practice.

3. This review shall also take due account of developments at international level and discussions with third countries and international organisations.
4. [The Commission shall submit a report to the European Parliament and the Council together with appropriate proposals.]

Article 65

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 66

Addressees

This Directive is addressed to the Member States.

ANNEX I

1. Investment management functions which an AIFM must at least perform when managing an AIF:
 - (a) portfolio management;
 - (b) risk management.

2. Other functions an AIFM may additionally provide in the course of the collective management of an AIF:
 - (a) Administration:
 - (aa) legal and fund management accounting services;
 - (bb) customer inquiries;
 - (cc) valuation and pricing (including tax returns);
 - (dd) regulatory compliance monitoring;
 - (ee) maintenance of unit-/shareholder register;
 - (ff) distribution of income;
 - (gg) unit/shares issues and redemptions;
 - (hh) contract settlements (including certificate dispatch);
 - (ii) record keeping;
 - (b) Marketing;
 - (c) Activities related to the assets of AIF.

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 their risk profile or the risk profiles of AIF they manage, AIFM 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, fund rules or instruments of incorporation of the AIF it manages;
 - (b) the remuneration policy is in line with the business strategy, objectives, values and interests of the AIFM and the AIF it manages or the investors of the AIF, and includes measures to avoid conflicts of interest;
 - (c) the management body in its supervisory function of the AIFM 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 members engaged in 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 AIF 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 AIF it manages and their investment risks;
- (i) guaranteed variable remuneration is exceptional and 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; 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 instruments of incorporation or fund rules, a substantial portion, which is at least 50 % of any variable remuneration shall consist 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 AIF accounts only for a limited share of the total portfolio managed by the AIFM, in which case the minimum of 50% shall not apply.

These instruments are subject to an appropriate retention policy designed to align incentives with the interests of the AIFM and the AIF it manages and the investors of the AIF.

Member States or their competent authorities may place restrictions on the types and designs of these 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 (m) and the portion of the variable remuneration component not deferred.

- (n) a substantial portion, which is 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. This period should be at least three to five year 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 is generally 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 AIF it manages. If the employee leaves the AIFM before retirement, discretionary pension benefits should be held by the AIFM for a period of five years in the form of instruments as defined in point (l). In case of an employee reaching retirement, discretionary pension benefits should be paid to the employee in the form of instruments defined in point (l) subject to a five year retention period;
- (q) staff members 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 the 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 shares or units of the AIF, made to the benefits of those categories staff, including senior management, whose professional activities have a material impact on their risk profile or the risk profiles of the AIFs they manage.

3. AIFM that are significant in terms of their size or the size of the AIF 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.

ANNEX III A

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 AIF it intends to market and information on where the AIF 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) - *disclosure to investors*] 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 III B

INFORMATION TO BE PROVIDED IN CASE OF INTENDED MARKETING IN OTHER MEMBER STATES THAN THE HOME MEMBER STATE OF THE AIFM

- (a) a notification letter, including a programme of operations identifying the AIF it intends to market and information on where the AIF 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) - *disclosure to investors*] for each AIF the AIFM intends to market.
- (g) the indication of the Member State(s) in which it intends to market the shares or units of the AIF to professional investors;
- (h) information made on arrangements made for the marketing of AIF and, where relevant, information on the arrangements established to prevent shares or units 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.
